



INSIGHT

FIVE SURGICAL STRIKES ON THE TREATIES OF THE EUROPEAN UNION[‡]

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ABSTRACT: If there is not to be a Convention to revise the Treaty of Lisbon, here is a proposal to amend some key articles in order to strengthen the democratic legitimacy of the EU, to make its decision making more agile, and to enhance its capacity to act.

KEYWORDS: EU treaty revision - QMV passerelle - electoral reform - enlargement - democratic legitimacy - decision making.

I. INTRODUCTION

The European Parliament has called for another Convention to embark on a general revision of the EU treaties. Drawing somewhat on the conclusions of the recent Conference on the Future of Europe, it submitted its formal proposal to the Council in June 2022.¹ The Council is now in breach of its treaty obligation to transfer the Parliament's proposed amendments to the European Council (Article 48(2) TEU). But although the Parliament is well within its rights to take the Council before the European Court of Justice for failure to act, it does not do so. Instead, it winds itself up in a protracted effort to draft a more comprehensive catalogue of treaty changes.² A plenary vote is scheduled for July 2023.³

[‡] An Unusual *Insight*: A short premise by the Board of Editors. *This is an unusual Insight. It does not look at the existing law of the Union but rather at its possible and auspicious development. It does not address only the scholarly world, but also the much wider circle of persons interested in the future of the Union. In spite of this feature, or perhaps by virtue of this, it constitutes a valuable contribution to the brief of the European Papers. Therefore, we encourage our readership to comment, critically if necessary, upon the proposals put forward by Andrew Duff, in their single parts or in its whole. Plausible comments will be published in a special collection.*

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¹ Resolution on the call for a Convention for the revision of the Treaties, 2022/2705(RSP), 9 June 2022.

² Proposals for the amendment of the Treaties, 2022/2051(INL) (Rapporteur Guy Verhofstadt).

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One may be forgiven, however, for doubting that a Convention will happen. Parliament itself struggles to be coherent; the Commission is mute; and the Council is divided. Beyond the Parliament, there has been no official preparation for a Convention. There is precious little substantive discussion of constitutional change in academic and think-tank circles.⁴ In this respect, the EU is less prepared to indulge in a major and complicated round of treaty revision than it was in 2001 when the Laeken Declaration was blessed by the European Council. At the very least, it would seem wise for today's heads of government to set up an autonomous group of reflection to discuss the mandate for a Convention and prepare options for treaty amendment.⁵ Yet even this route, for which there is ample precedent in the history of the Union, does not seem popular.

If there is to be no Convention, therefore, is there an alternative viable approach to updating the Treaty of Lisbon? A slimmer reform agenda would certainly be more manageable than a Convention, and quicker to accomplish. In this paper, we propose five key amendments intended to avoid constitutional stalemate, to enhance the efficacy of the Union's decision-making, and to strengthen the legitimacy of its institutions. While falling short of the wider treaty revision, these amendments are all timely and would be transformative in and of themselves. The Union would have strengthened its constitutional framework, readying itself for economic and political challenges to come.

The five surgical strikes on the Treaties proposed here concern electoral reform, future treaty methodology, extending the qualified majority vote (QMV), installing a new category of affiliate membership, and enhancing Union competence in the field of health.

II. ELECTORAL REFORM

II.1. COMMENT

Using its rare right of initiative, the European Parliament has already proposed to reform its electoral system.⁶ The ambitious plan would supplement the existing elections fought by national political parties inside every Member State with a uniform election fought by EU-level parties across a single pan-European constituency. The reform would European-

³ For a progress report, see A Duff, 'Raising the Stakes on Constitutional Reform: The European Parliament Triggers Treaty Change' (6 March 2023) European Policy Centre www.epc.eu.

⁴ Honourable exceptions include J-C Piris, 'The European Union in Crisis: What Should the Member States Do?' (2022) European Papers www.europeanpapers.eu 969.

⁵ On the wider reform agenda, see A Duff, *Constitutional Change in the European Union: Towards a Federal Europe* (Palgrave Macmillan 2022), available in open access at link.springer.com.

⁶ Resolution P9_TA(2022)0129 of the European Parliament of 3 May 2022 on the proposal for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage, repealing Council Decision (76/787/ECSC, EEC, Euratom) and the Act concerning the election of the members of the European Parliament by direct universal suffrage annexed to that Decision (Rapporteur Domènec Ruiz Devesa).

ise the elections for the media and the electorate. At present, the lack of proper political parties at the federal level deprives the Union of a vital sinew of representative democracy. As the Conference on the Future of Europe averred, EU citizens feel disconnected from the exercise of supranational authority in Brussels.⁷ By adding in this way a truly European dimension to the election of the European Parliament, its democratic leadership should be improved. Members of the European Parliament would be made much more accountable than they are at present, both to European parties and to EU citizens. Such a reform would make sense of the *Spitzenkandidat* process – currently disorganised – for the nomination of the new Commission President (Article 17(7) TEU).

The electoral reform dossier is blocked for the moment in the Council on both legal and political grounds. Modification of the treaty is surely needed to remove dissonance between the proposed new transnational element and the existing principle of degressive proportionality that must apply to the distribution of national seats among Member States. Failing in its duty to take the initiative, Parliament has not yet proposed a formula on seat apportionment despite being requested to do so by the European Council which, rightly, seeks an “objective, fair, durable and transparent” methodology.⁸ Launching treaty change negotiations will force all three EU institutions, as well as national parliaments and constitutional courts, to address together the whole complex of questions surrounding the legitimacy and workings of the European Parliament.

Reform of the primary law will be followed by EU secondary legislation in the form both of a decision and a regulation, followed by implementing legislation at the national level. One can hope that all this will be in place in time for the 50th anniversary of the directly elected Parliament in 2029. In our proposal, the EU’s 1976 Act on the introduction of direct elections by universal suffrage is replaced, and the corresponding article in the TFEU is amended accordingly.

II.2. PROPOSED AMENDMENTS

Article 14 TEU

1. The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.

2. The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President.

⁷ The Conference ran from April 2021 to May 2022 and involved the institutions plus a randomly selected number of EU citizens. See Communication COM(2022) 404 final from the Commission of 17 June 2022 on the Conference on the Future of Europe.

⁸ Decision 2013/312/EU of the European Council of 28 June 2013 establishing the composition of the European Parliament.

3. The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free, *fair* and secret ballot.

~~Representation of citizens shall be degressively proportional. A certain number of Members of the European Parliament shall be elected for national or regional constituencies in the Member States. Seats will be apportioned among Member States according to an objective method ensuring degressive proportionality, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.~~

A certain number of Members of the European Parliament shall be elected for a single constituency comprising the whole territory of the Union.

4. ~~Before the end of the fourth year of each parliamentary term,~~ the European Council shall adopt ~~by unanimity,~~ on the initiative of the European Parliament and with its consent, a decision establishing the composition *and a regulation on the election procedure* of the European Parliament, respecting the principles referred to in the ~~first subparagraphs (2) and (3).~~ *The European Parliament shall act by a majority of its component Members. The European Council shall act by a qualified majority as defined in Article 238(3)(b) TFEU.*

5. The European Parliament shall elect its President and its officers from among its members.

Article 223 TFEU

1. The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its Members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.

~~The Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, which shall act by a majority of its component Members, shall lay down the necessary provisions. These provisions shall enter into force following their approval by the Member States in accordance with their respective constitutional requirements.~~

III. ORDINARY REVISION PROCEDURE

III.1. COMMENT

This amendment modifies the entry into force procedure for future treaty amendments, bringing the EU into line with all other federal or international organisations. It would prevent constitutional blackmail by one or two recalcitrant governments, national parliaments or constitutional courts. It should serve to discourage the holding of uncoordinated, arbitrary referendums. It would reduce the level of terror felt by several Member States whenever treaty change is mentioned. If an emerging democratic polity like the Union is to be well governed, constitutional change should be accepted as a normal and, indeed, regular occurrence.

Note that we do not propose to alter the “common accord” for the intergovernmental conference but focus only on easing the ratification process. The current Article 48(5) is an unhelpful leftover from the Constitutional Treaty of 2004. The proposal to create a new class of affiliate membership (see below) is relevant here.

III.2. PROPOSED AMENDMENTS

Article 48(4) TEU

4. A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties.

The amendments shall enter into force after being ratified by ~~all~~ *four-fifths* of the Member States in accordance with their respective constitutional requirements.

Article 48(5) TEU

~~5. If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.~~

IV. THE GENERAL PASSERELLE CLAUSE

IV.1. COMMENT

The Treaty of Lisbon adopted the concept of *passerelle* or bridging clauses to allow further steps to be taken towards political integration in specific legislative areas as and when political will solidified behind them. The device was included in the Lisbon treaty in the sincere hope and expectation that it should be useful. But the imposition of rigid unanimity on the deployment of the *passerelles* effectively rendered them inoperative.

Under this proposal we would enable the general *passerelle* clause to be triggered by super-QMV. Moreover, we would remove the anomaly which gives to any one national parliament the power of unilateral veto. (The normal rights of national parliaments to call in EU legislation are not affected.) This reform encapsulates Parliament’s key demand in its formal submission to the Council of 9 June 2022. Unlocking the *passerelle* would render the governance of the Union at once more flexible and democratic, allowing the institutions to modernise its decision-making procedures incrementally.

By deleting Article 353 in its entirety, we also lift all prohibitions on use of the general *passerelle* clause that were imposed, largely at German and British request, in the drafting of the Lisbon treaty. Currently proscribed are the very important procedures concerning the raising of revenue for the EU budget (“own resources”), the multiannual financial framework, the operation of the Article 7 procedures in respect of breaches of the rule of law, and the use of the flexibility clause.

Although the proposed changes would facilitate the future extension of QMV and the abolition of special laws of the Council, they would not oblige Member States to agree specifically at this stage where, when or on what the *passerelle* might be utilised. As everyone knows but too few acknowledge, there are many instances where the abolition of the unanimity rule would enhance the Union's capacity to act effectively and democratically. These range from rule of law issues, EU citizenship, the completion of the single market, taxation and fiscal policies, energy supply, arms procurement, as well as foreign policy and security.⁹ The ability actually to shift to QMV would trigger the debate which is at present stultified.

IV.2. PROPOSED AMENDMENTS

Article 48(7) TEU

7. Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence.

Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure.

Any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national Parliaments *in accordance with the Protocol on the role of national parliaments in the European Union*. ~~If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph shall not be adopted. In the absence of opposition, the European Council may adopt the decision.~~

For the adoption of the decisions referred to in the first and second subparagraphs, the European Council shall act by ~~unanimity~~ *a qualified majority as defined in Article 238(3)(b) TFEU*, after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.

Article 353 TFEU

Article 48(7) of the Treaty on European Union shall not apply to the following Articles:

- Article 311, third and fourth paragraphs,
- Article 312(2), first subparagraph,

⁹ See, for example, Resolution 2018/C 252/22 of the European Parliament of 16 February 2017 on possible evolutions and adjustments to the current institutional set-up of the European Union (Rapporteur Guy Verhofstadt).

~~–Article 352, and~~

~~–Article 354.~~

V. AFFILIATE MEMBERSHIP

V.1. COMMENT

Here we introduce a new category of affiliate membership of the Union. Installing this instrument would enlarge the options available to the EU in catering for the needs of the wider, troubled European neighbourhood. It would serve to clarify the ambiguous concept of privileged partnership. Welcoming affiliate members should bolster EU security and reinforce the EU's normative power. The innovation would help to overcome the Union's current internal divisions over the future of enlargement policy and provide for Eastern Europe and the Western Balkans a more reliable target than the mirage of full membership.

For some, such as Ukraine, affiliation would imply a significant upgrading of its current association agreement and could be a staging post to later, full accession via Article 49. Others might find in affiliation a long-stay parking place – suitable, for example, for the UK if it continues to resist the Copenhagen criteria objectives of economic, monetary and political union. The EFTA countries might choose formal affiliation as a way to exercise more political and legislative influence on the EU institutions. Certain existing Member States, notably Hungary, might prefer relegation to a looser engagement with Brussels, short of secession via Article 50, as the Union continues to integrate in the federal direction.

This new article sets the parameters of a Union legal framework for affiliation and posits an application process for any democratic European State. Affiliation commitments are drawn from Articles 2, 4(3), 5, 8 and 21 TEU.

V.2. PROPOSED NEW CLAUSE

Article 49a (new) TEU

1. Any European country which upholds democratic principles, the rule of law and human rights may become an Affiliate Member State of the Union. The conditions of admission to affiliate membership shall be the subject of an agreement between the Union and the applicant State.

An Affiliate Member State shall commit to respecting the values of the Union, the principle of sincere cooperation, the Charter of Fundamental Rights, and the Union's actions on the international scene. It shall develop progressively a special relationship with the Union on the basis of a balance of rights and obligations as laid down in the Union agreement.

2. The applicant State shall address its application to the Commission which shall give its opinion on the application to the European Parliament and European Council. A decision to open negotiations on an agreement with the applicant will be taken by the European Council acting by a simple majority, after obtaining the consent of the European Parliament.

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

VI. SHIFTING COMPETENCES

VI.1. COMMENT

During the pandemic, the Union took on effectively a new competence to cater for the European dimension of public health policy. This revision codifies that shift in treaty terms by upgrading health from its existing class of supplementary competence to that of an additional shared competence in Article 4. Consequently, Article 6(a) would be deleted.

VI.2. PROPOSED AMENDMENT

Article 4 TFEU

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:

- (a) internal market;
- (b) social policy, for the aspects defined in this Treaty;
- (c) economic, social and territorial cohesion;
- (d) agriculture and fisheries, excluding the conservation of marine biological resources;
- (e) environment;
- (f) consumer protection;
- (g) transport;
- (h) trans-European networks;
- (i) energy;
- (j) area of freedom, security and justice;
- (k) common safety concerns in public health matters, for the aspects defined in this

Treaty;

(l) protection and improvement of human health.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.