

## The day after the CoFoE: is the EU ready for a revision of the Treaty?

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SUMMARY: 1. Introduction. – 2. Parliament and Council do not see eye to eye on the revision of the Treaties. – 3. The post-conference follow-up that does (or not ?) follow. – 4. Concluding remarks

1. Just a few months before the conclusion of the Conference on the Future of Europe ('CoFoE'), expected for the first half of 2022, it is fair to say that the initial high expectations concerning the initiative seem to have been partly disregarded. Proposed by the President of the French Republic Emmanuel Macron in his [letter to European citizens of 4<sup>th</sup> March 2019](#) and then formally advanced by [President Ursula von der Leyen](#) with the aim of promoting an active and decisive role of European citizens, the CoFoE was thought to be a unique opportunity to engage European citizens in a “bottom-up exercise” (see [Joint Declaration on the Conference on the Future of Europe “Engaging with citizens for democracy – Building a more resilient Europe”](#), p. 2) that would allow different voices to engage in an open, inclusive and transparent debate for the construction of the future of the EU (see [revised Council position](#) of 3<sup>rd</sup> February 2021). However, as emphasised by MEP Daniel Freund (Greens/EFA and a component of the Executive Board of the CoFoE) during an [event](#) organized on the multilingual digital platform, the involvement of EU citizens' has been limited. Indeed, he stressed that, albeit the digital multilingual platform - conceived as “central hub and interactive tool” of CoFoE (see the [Third Interim Report Platform](#), November 2021, p. 13) - has done “quite well in terms of generating ideas” with “10 000 proposals”, the low percentage of participants should not be ignored. According to him, one of the reasons of this situation can be traced back to the lack of clarity about “what will happen with the results of the CoFoE, which rightly makes citizens wonder if their efforts to provide input will lead to any tangible results”.

Against this backdrop, in the framework of the abovementioned event, we took advantage of the presence of MEP Daniel Freund to ask a few questions. Based on the insights received, the present contribution aims to shed light on the nature and scope of the recommendations that are going to be elaborated at the end of the CoFoE. More precisely, it will be highlighted that the recent political developments at the EU level (i.e., the 2022 French Presidency of the

Council and the new German alliance) leave us with the hope that a stronger commitment of the EU institutions for a post-conference follow-up (section 3), and especially a revision of the Treaties (section 2), appear to be not only possible but also advisable to close the gap between the EU and its citizens. Indeed, the EU is finally given the opportunity to welcome the expectations of [a majority of citizens relying on “more Europe”](#), thereby addressing boldly various streams of Euroscepticism and improving its democratic legitimacy.

2. The first European Citizens’ Panels revealed that several participants expressed doubts as to whether their ideas and recommendations would be taken up by politicians and translated into future actions (see J. GREUBEL, C. STRATULAT, *Una casa para todos: Observations from the first European Citizens’ Panel of the Conference on the Future of Europe*, EPC Report, 2021, p. 4). In particular, uncertainties have been raised since the very beginning about the possibility of a Treaty change.

While according to the Joint Declaration, the “institutions will examine swiftly how to follow up effectively to [the] report *each within their own sphere of competences and in accordance with the Treaties*” (emphasis added), the Parliament defends the possibility for the CoFoE’s to produce its effects even beyond the current competences and seems to be open to all possible outcomes, including amending the EU’s primary law (see [European Parliament resolution](#) of 18<sup>th</sup> June 2020 on the European Parliament’s position on the Conference on the Future of Europe (2020/2657), p. 3).

The Council adopted a different position, and substantially denied such a possibility. First of all, it reiterated the content of the Joint Declaration, by recommending that “the outcome of the Conference should be reflected in a report to the European Council in 2022. In light of the conclusions of the European Council, the EU institutions would commit to examine swiftly how to follow up effectively to this report, each within their own sphere of competence and in accordance with the Treaties” (see [revised Council position](#) of 3<sup>rd</sup> February 2021, p. 7). Furthermore, in line with the ECJ’s traditional approach (on this point, see ECJ, 8<sup>th</sup> April 1976, *Defrenne*, [C-43-75](#), paragraph 58: “apart from any specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236”), the Council argued that the “Conference does not fall within the scope of Article 48 TEU” (see [revised Council position](#) of 3<sup>rd</sup> February 2021, p. 7),.

As effectively argued by MEP Freund, while “Parliament wants ambitious reforms of the EU, to ensure the Union can better deal with future crises, about half of the Member States in the Council want no legally binding outcomes and no changes to the Treaties”. These divergent positions held by the European institutions, especially the EU Parliament and the Council, on the structure and tasks of the CoFoE (see A. J. EMMANOULIDIS, J. GREUBEL, *Positions of EU-Institutions – Comprehensive Summary of Key Elements*, European Policy Centre, 2021) remain, according to MEP Freund, the key conflict in the Conference that prevents a clearer understanding of what

exactly the result of the Conference will be, how it will be decided and if any actual changes will follow. However, he insisted that the “Parliament will continue to fight for an ambitious process that takes citizens recommendations into account and delivers actual change”.

3. In the worst-case scenario, if no agreement to amend the Treaties is reached, the European legislator should, at least, take seriously the follow-up mechanism to ensure that the “ideas expressed during the Conference events result in concrete recommendations for EU action” (see [Joint Declaration](#), p. 3). But also on this point, some fear that, as happened in France with ‘[Le grand debat national](#)’ of 2019, the CoFoE will turn out being a mere “paper exercise that does not translate into much-needed policy and institutional reforms” (see J. GREUBEL, C. STRATULAT, *op. cit.*, p. 4).

Asked to express his opinion on the possibility that there will actually be, as the Joint Declaration states, a post-conference follow-up that will lead to tangible reforms, MEP Daniel Freund, sharing the citizens’ concern about the follow-up, stated that “if the results of the Conference do not reflect the proposals put forward by citizens and if they do not result in real change, the Conference will prove that the European Union can no longer be reformed and does not listen to its citizens”.

Different scenarios are possible for the outcome of the CoFoE, depending on the content of the recommendations that are going to be included in the final report of spring 2022. For those that can rely on a current legal basis (such as the will, expressed in the [report of the second European Citizens’ Panel](#), to increase sustainable agriculture), there are no particular problems – but the lack of common political will -, since the institutions all agreed to “examine swiftly how to follow up effectively to [the] report each within their own sphere of competences and in accordance with the Treaties”. Should European Commission fail to come forward with legislative proposals *ex officio* (Article 17, paras 1 and 2 TEU), the Parliament, which promised to “insist on a proper follow-up” (MEP Daniel Freund), could rely on Article 225 TFEU, in order to push the Commission along this way. Even if not bound to comply with the request of the Parliament, the Commission would undoubtedly be under pressure to act.

*A contrario*, the recommendations which cannot rely on an existing legal basis and those seeking radical institutional changes (such as the [modification of the voting system or the establishment of an “EU-wide” referendum](#)), would actually require a Treaty revision in order to be implemented. We could expect that the most involved actors (i.e. the European Parliament, some Member States) would trigger Article 48 TUE which represents, in principle, the only way to “increase [...] the competences conferred on the Union in the Treaties”. Regardless of its success (which is highly unlikely, because of the unanimity requirement and the reluctance of several Member States to consider such a possibility), this would certainly be a strong political signal.

As for the flexibility clause, it would be quite unrealistic to think of using it to bypass the Treaty revision given the intrinsic limits of Article 352 TFEU.

Again, the Commission would have to be willing to put forward a proposal, the Council should be unanimous and the action “should prove necessary, within the framework of the policies defined in the Treaties to attain one of the objectives set out in the Treaty” (Article 352 TFEU). In addition, as is well known such a provision “cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose” (on this point, see: [Opinion of the Court of 28 March 1996](#), Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/94, para 30).

To try to implement some of the CoFoE’s conclusions, MEP Daniel Freund underlines the necessity of having “a rather short list of very concrete proposals”. According to him, “too many proposals are too easily dismissed or there is a risk that just some smaller recommendations are cherry-picked and the rest ignored. It is also important that the recommendations are implementable as recommendations along the lines of ‘better jobs for everyone’ or ‘more efforts against climate change’ are too abstract to result in anything concrete”. The recommendations adopted by [Panel 2 “European democracy – values and rights, rule of law and security”](#) and by [Panel 3 “Climate change and the environment/Health”](#) seem to go in this direction as they suggested realistic policy actions and raised specific issues, for instance, the necessity of amending Directive 98/58/EC concerning the protection of animals kept for farming purposes, in order to increase the animal welfare standards, and of modifying the shared competencies of the EU (Art. 4 TFEU), including among them health and healthcare, in order to “guarantee healthcare for all EU citizens and to issue binding regulations and decisions”. Hopefully, the [remaining European Citizens’ Panels](#) will adopt similar recommendations in the areas of a stronger economy, social justice and jobs, and migration.

4. Once again, “Europe stands at the crossroads” ([Completing the internal market: White Paper from the Commission to the European Council, COM/85/0310 final, p. 55](#)): either its institutions will find the courage of accomplishing a historic step allowing their citizens to assume a key role in the shaping of the Union’s future, or the EU will make a rod for its own back, by exacerbating the criticisms expressed towards its participatory democracy mechanisms (on this point, see: A. IOANNIDOU, *Démocratiser le marché : stratégies juridiques de renforcement de la démocratie européenne*, in E. CARPANO, G. MARTI (sous la direction de), *Démocratie et marché dans l’Union européenne*, 1e édition, Bruxelles, 2021, pp. 366-367; [M. DUFRASNE, L’initiative citoyenne européenne révèle l’impasse communicationnelle entre les citoyens et les institutions, in Hermès, La Revue, 2017, p. 63-70](#)). In this regard, MEP Daniel Freund points out that a missed follow-up would be a “devastating signal” because it would definitely disappoint the EU citizens and undermine their trust in the European Union.

It appears quite clear that the outcome of the Conference depends on the stance taken by the different European institutions involved: while a

significant part of the European Parliament is receptive to a possible revision of the Treaties and will “insist on a proper follow-up” (e.g., MEP Daniel Freund) other stakeholders, as the Council, seem to be more reluctant to such a possibility. However, the leadership of some Member States may be decisive since France and Germany have shown strong support for the Conference. On the one hand, the [new German coalition approved the idea of a revision of the Treaties following the Conference](#). On the other hand, the 2022 French Presidency of the Council should help to build a path to consolidate the CoFoE’s proposals as the President E. Macron stated that its results [shall be taken into consideration to reshape the European Union](#). Moreover, given that the French Presidency’s programme, inspired by its motto “recovery, strength, and a sense of belonging”, intersects most of the CoFoE’s themes, it may constitute a lever to support the citizen’s expectations by translating them into binding measures.

However, as indicated and despite the political pressure generated by several grassroots movements, the perspective of an effective follow-up mostly depends on a common will of the Commission, the Council, the Parliament and even of the Member States, otherwise both the adoption of legislative acts and the possibility of a Treaty revision will be nothing but wishful thinking.