Quaderni AISDUE - Rivista quadrimestrale
ISSN 2975-2698 - Fascicolo n. 1/2024

BlogDUE

The Day After the CoFoE (Act II): the EU Treaty Revision at the Mercy of Enlargement?

Ève Buland, Anna Fiorentini (Dottorande di ricerca in diritto dell'Unione europea, Università *Alma Mater Studiorum* di Bologna) – 5 aprile 2024

SUMMARY: 1. Introduction: The EU institutions seem to be unable to agree eye (yet again). – 2. The European Commission, the Council and the European Council on the widening side. – 3. The European Parliament on the deepening side: begging for a (too?) heavy revision. – 4. Concluding remarks.

1. Only a few months before the end of the Conference on the Future of Europe ('CoFoE') on 9 May 2022, we wondered in a paper published on this Blog whether a revision of the Treaties was possible (A. FIORENTINI, È. BULAND, *The day after the CoFoE: is the EU ready for a revision of the Treaty?*, in this *Blog*, January 2022). In trying to answer this question, we concluded that much would depend on the ability and willingness of the European institutions to find a common ground between their positions, especially between that of the European Parliament (EP), which is in favour of revising the Treaties, and that of the Council, which is reluctant to embark on such a path. After two years, this conclusion seems to have been confirmed.

Rather than narrowing the gap between the positions of the European institutions at the end of the CoFoE, it has been pointed out that the latter was "overshadowed by interinstitutional rivalry and its conclusions have not shaken up the EU agenda" (Report of the Franco-German working group on EU institutional reform, Sailing on High Seas: Reforming and Enlarging the EU for the 21 Century, Paris-Berlin, 18 September 2023, cit. p. 25). Although the EU institutions were asked to ensure "effective follow-up" to the final report of the CoFoE, the conclusions of the European Council of 23-24 June 2022 quickly change the topic and focus mainly on the question of welcoming new members to the "EU family". Indeed, the changed geopolitical context, resulting from Russia's invasion of Ukraine has diverted attention away from the CoFoE, thereby exacerbating the differences between the institutions' positions. In particular, the divisive issue of enlargement has been brought to the table, along with the topic of "differentiated integration", which had already begun to resurface shortly after the Brexit crisis (*see* B. DE WITTE, *An Undivided Union? Differentiated Integration in Post-Brexit Times*, in *Common Market Law Review*,

vol. 55, 2018, pp. 227-250; M. KENDRICK, *Brexit the Ultimate Opt-out: Learning the Lessons on Differentiated Integration*, in *europeanpapers.eu*, vol. 7, 2022, pp. 1211-1227).

Therefore, as in the past, the EU institutions are now faced with a priority dilemma: whether to allow new States to join (widening) or to foster greater integration among the current Member States (deepening).

The paper will show that while the Commission, the Council and the European Council consider enlargement to be a priority (section 2), the European Parliament continues to favour a revision of the Treaties. The Parliament believes that changes to the existing institutional framework are necessary, regardless of the enlargement perspective, in order to equip the Union with the proper operating rules to ensure both its present and future functioning and to promote its development (section 3).

2. Following recent geopolitical events, opportunities for Treaty reform appear to have – at least for the time being – faded from the agendas of the Commission, the Council and the European Council. The focus has shifted towards enlargement, which is once again playing the role of a "constitutional agenda-setter" (B. DE WITTE, *The Impact of Enlargement on the Constitution of the European Union*, in M. CREMONA (ed.), *The Enlargement of the European Union*, Oxford, 2003, p. 209).

In the State of the Union address of the 13 September 2023, the Commission clearly stated that "we cannot – and we should not – wait for Treaty change to move ahead with enlargement". A month later, however, the Commission's work programme for 2024 was issued, stressing not only the need for candidate States to be ready, but also the necessity to take stock of the so-called "EU absorption capacity" through an analysis of "how each policy would be affected by a larger Union and how the European institutions would work" (p. 3). This has been recently reaffirmed in the Communication on pre-enlargement reforms and policy reviews, where the Commission identified some of the measures needed to "reconcile the opportunities of a larger Union with the challenges it poses" in terms of values, policies, budget and governance (p. 2). Regarding a potential revision of the Treaties, the Commission still considers it marginal issue and suggests using *passerelle* clauses to resolve any deadlocks in the functioning of the decision-making mechanisms (p. 19). Moreover, the Commission views enlargement as a means of enhancing internal policies, such as the environment, while being vague on constitutional reform (p. 9).

On 8 November 2023, the Commission adopted its Communication on the EU Enlargement Policy. In its Enlargement Package, the Commission recommended that accession negotiations be opened with Ukraine and the Republic of Moldova, as well as with Bosnia and Herzegovina, provided the necessary measures are in place, and that candidate status be granted to Georgia, once compliance with the accession criteria is achieved.

The Commission's Package has been subsequently endorsed by the Council. In its Conclusions of 12 December 2023, the Council did not explicitly mention a Treaty revision. However, it still agreed with the Commission's idea that both the aspiring countries and the EU must be ready at the time of accession, thus

reaffirming the need that the Union "lay down the necessary internal groundwork and reforms". There were no indications of what the EU's long-term ambitions should be, or how it would achieve them. On the contrary, much clearer words have been spent on the enlargement's scenario, which is specifically defined as a "strategic priority" that the Council would pursue in its "full and unequivocal commitment to the EU membership perspective of the Western Balkans, Ukraine, Moldova and Georgia".

Finally, confirming what had already been stated at the informal meeting in Granada in October 2023 among the Heads of State or Government of the Member States, the European Council embraced the same path traced by the Council. With the enlargement of the Union being considered not just a priority, but a matter of fact, attention to the Treaty revision is minimal. While acknowledging the importance of ensuring that Union policies are sustainable and future-proof, so that the European integration process can be successfully pursued, the European Council only mentions future meetings dedicated to addressing internal reforms. The objective has recently been reaffirmed in its latest Conclusions of 22 March 2024 (para. IV).

A different outcome could hardly have been expected, given the European Council's commitment, expressed in December 2022, to grant candidate status to Ukraine and the Republic of Moldova and to open accession negotiations with them, as well as to accord candidate status to Georgia, and to start negotiations with Bosnia and Herzegovina. Just one year later, on 14 December 2023, the European Council gave the green light, by consensus, to the negotiations with Ukraine and Moldova and granted candidate status to Georgia, Bosnia and Herzegovina, Serbia, Montenegro, North Macedonia and Albania. Kosovo remains an aspiring state and Türkiye's candidacy still appears to be distant.

The current historical circumstances lead the Commission, the Council and the European Council to align their positions and work in synergy. The failure of a good neighbourhood policy with Russia and the transformed geopolitical context have brought the issue of enlargement back to the centre of the Union's priorities. This comes after a period of apparent stagnation after the great enlargement of 2004. At that time, the decision to widen Europe's borders to new States was largely influences by the dismantling of the Iron Curtain and the fall of the Berlin wall (M. CREMONA (ed.), *op. cit.*, p. 2). Today, the Union's priorities are set by the Russian-Ukrainian and Israeli-Palestinian conflicts. For many Member States, enlargement represents a valuable foreign policy tool to counter the Kremlin's ambitions on the European continent, increase the Union's negotiating power in international agreements, and avoid being squeezed between China and the United States. Enlargement is also seen as a way to promote the spread of European integration throughout the continent, exporting our values to third countries, according to the so-called "Brussels effect" (A. BRADFORD, *The Brussels Effect: How the European Union Rules the World*, Oxford, 2020).

While it is true that the ongoing crises affecting the Union call for its strengthening as a global actor, one cannot ignore the reasons why, after the great enlargement of 2004, enthusiasm for accession by new Member States has waned ("enlargement fatigue": R. BALFOUR, C. STRATULAT, *The Enlargment of*

the European Union, Discussion Paper, European Policy Centre, 10 December 2012, pp. 1-8, cit. p. 1). Widening implies increased heterogeneity within the Union, it means greater economic and political diversity, which makes unanimity more difficult to achieve for constitutional decisions, such as the accession of new States or the Treaty change (*see below*).

Evident differences already exist between Member States, which often lead to a paralysis of the functioning of the institutions, as was recently the case in the European Council.

If achieving unanimity is currently a challenge, it will be even more difficult when moving from a Union of 27 to a Union of 30+, especially considering the existing tensions among some of the present Member States with some of the aspiring States. Suffice it to mention the wheat war between Poland and Ukraine, the tensions between the latter and Hungary due to the presence of an important Hungarian minority on Ukrainian territory. Moreover, many Member States have expressed concerns about the Ukrainian oligarchs' respect for the rule of law, similar to the doubts that have already been raised with regard to Poland and Hungary (E. PERILLO, *Il rispetto dello "Stato di diritto europeo" alla luce delle sentenze Ungheria e Polonia sulla clausola di condizionalità finanziaria. Quali prospettive?*, in this *Blog*, March 2022). Similar concerns arise regarding Serbia, which has a historical connection with Russia, and Bosnia-Herzegovina, suffering from a particularly unstable political situation.

The decision to allow new States to join the Union, even when there are doubts about their adherence to the Union's founding values of the Union, is not the only issue. The fast-track procedure is also problematic. As is well known, EU membership is achieved through a meritocratic procedure in which each applicant is assessed on its own merits in meeting explicit membership criteria (or Copenhagen criteria), constitutionalised by the Treaty of Amsterdam in Art. 49 TEU (*see* M. VELLANO, *Art. 49 TUE*, in F. POCAR, M. C. BARUFFI (a cura di), *Commentario breve ai Trattati dell'Unione europea*, II ed., Padua, 2014, p. 147 ss.).

More recently, in its conclusions on enlargement of 13 December 2022, the Council emphasised that the accession process must be based on fair and rigorous (positive and negative) conditionality, the principle of own merits and reversibility. Aspiring members are asked to establish fundamental reforms, especially in promoting the values upon which the EU is founded (Art. 2 TEU), including the rule of law and fundamental rights (e.g., rights of persons belonging to minorities, gender equality and freedom of expression). The functioning and independence of democratic institutions, public administration, and economic criteria are also key benchmarks used to evaluate progress towards EU membership.

Verifying the above-mentioned criteria requires a "step by step" rather than "big bang" accession process (M. CREMONA (ed.), *op. cit.*, p. 5) to ensure that past errors are not repeated. Consider, for example, the great enlargement of 2004, which saw 10 Eastern European countries, including Poland and Hungary, join at once. Tightening the timeframe for new States' accession appears risky for several reasons. Among these concerns is the potential prejudice to the mutual trust that should exist between the Member States in relation to the

recognition of the values of Art. 2 TEU and the respect for Union law, with negative effects for the integration process itself (F. CASOLARI, *L'Ucraina e la (difficile) prospettiva europea*, in this *Blog*, March 2022, pp. 6-7). In addition, the implementation of an accelerated procedure, not provided for in Art. 49 TEU, fuels the idea that, contrary to Art. 4, para. 2, TEU, not all Member States are equal (L. S. ROSSI, F. CASOLARI, *The Principle of Equality Among Member States of the European Union*, Berlin, 2017; F. CASOLARI, *Equality of States and Mutual Membership in European Union Law: Contemporary Reflections*, in D. AMOROSO et al. (eds.), *More Equal than Others?*, The Hague, p. 43).

Finally, a lengthy period of time before the entry of new States is crucial not only to check that these States comply with the *acquis communautaire*, but also to allow the Union to maintain and deepen its own development, including its ability to integrate new members, as envisaged by the conclusions of the Copenhagen European Council in 1993 and the new accession methodology developed by the European Council in 2020. According to M. Maresceau, the weak element of the Union's pre-accession strategy is the "fourth Copenhagen condition" (M. MARESCEAU, *Pre-accession*, in M. CREMONA, *op. cit.*, pp. 9-42).

3. The European Parliament shares the concerns about the geopolitical context and agrees on the benefits of an enlarged Union. However, it remains committed to providing a follow-up of the CoFoE. The EP recognizes that enlargement is a "very strong tool at the EU's disposal to protect and promote peace, security, stability, cooperation and democratic values on the European continent". Nevertheless, it expresses serious caveats about the soundness of the European integration process, arguing that a reform is not only essential for the viability of a potential enlarged Union, but "is already needed in the current composition of the EU" (European Parliament resolution of 13 December 2023 on 30 years of Copenhagen criteria – giving further impetus to EU enlargement policy).

In hindsight, such a statement is not surprising. Very soon after its adoption, the literature identified several weaknesses in the Lisbon Treaty that allowed some unresolved issues to persist. Someone, as the voice of Cassandra, warned of its inability to deal adequately with multifaceted crises and already called for a timely revision of its provisions (L. S. ROSSI, *A New Revision of the EU Treaties After Lisbon?* in L. S. ROSSI, F. CASOLARI (eds.), *The EU After Lisbon. Amending or Coping with the Existing Treaties?*, Berlin, 2014, pp. 3-19). In order to enhance the credibility and legitimacy of the integration process, it has become essential to strengthen democratic tools, due to the pervasive scope of application of EU law in citizens' everyday lives (E. TRIGGIANI, *Futuro dell'Unione e coscienza politica europea*, in VV.AA., *Quaderni AISDUE*, fasc. speciale n. 1, Naples, 2024, pp. 1-16).

A few months after the end of the CoFoE, the EP triggered Art. 48 TEU. In November 2023, it presented a more detailed resolution setting out the changes it deemed indispensable to "reshape the Union in a way that will enhance its capacity to act, as well as its democratic legitimacy and accountability". The EP's proposed reform is rather extensive, with 245 amendments to the existing Treaties addressing numerous and heterogeneous issues (*see* A. DUFF, *Raising*

the Stakes on Constitutional Reform: The European Parliament Triggers Treaty Change, Discussion Paper, European Policy Centre, 6 March 2023).

In short, the EP's proposals can be classified into three categories: i) those seeking to shift the institutional balance, such as extension of the qualified majority voting ('QMV') and the ordinary legislative procedure ('OLP'), composition and functioning of the EU institutions; ii) those aimed at reinforcing the core values of the Union; and iii) those related to changes in the system of competences, either through a recategorization or an expansion of the EU's powers (*Editorial comments*, in *Common Market Law Review*, vol. 59, 2022, in part. p. 1587). As it was expected, these categories coincide with those identified earlier with regard to the final report of the CoFoE (L. LIONELLO, *Gli esiti della Conferenza sul futuro dell'Europa e le prospettive di revisione dei Trattati*, in this *Blog*, in part. p. 4).

The EP's deepening perspective can be inferred in particular from its clear will to enhance the EU competences (both in their internal and external dimensions, *see* e.g. Amendments Nos. 3-8; 44, 46, 48, 50-58, 60, 69-83…) and by the fact that some of them belong to areas that are of special interest of the Member States, since they concern their budgetary organization or constitutional identity (e.g., healthcare systems, animal welfare, cultural diversity, *see below*).

Some of the EU's general or sectoral objectives have been revised to require a broader intervention at the supranational level. For instance, the EU's action on diversity would no longer be limited to "respecting" its "rich cultural and linguistic diversity", but would now imply *promoting* and *guaranteeing* it (*see* Amendments Nos. 6 and 144). The EP's proposal also strengthens environmental policy, with Amendment Nos. 4 and 83 modifying Arts. 3, para. 3, TEU and 11 TFEU to explicitly mention the fight against climate change and the safeguarding of biodiversity, in addition to Amendments Nos. 155-159, which clarify and broaden the above-mentioned policy's goals and principles.

As for the EU's health policy, it has not only had its objectives specified, but has benefited from a reallocation of the shared competences in order to equip the EU with sharper tools for a wider intervention (Amendments Nos. 70, 77, 147-151. For further examples of policies which have been relocated to different categories of competence, *see* Amendments Nos. 73, 74, 75, 76, 79). Most of the changes, especially concerning civil protection, industry, and health, are the result of the lessons learnt during the Covid-19 pandemic (*see* G. DI FEDERICO, *L'assistenza sanitaria transfrontaliera alla prova della pandemia*, in P. MANZINI, M. VELLANO (a cura di), *Europa 2020*, Padua, 2021, pp. 63-83; N. DE GROVE VALDEYRON, M. BLANQUET, *D'une vague à l'autre. La compétence de l'Union vis-à-vis des menaces transfrontières graves de santé publique à l'épreuve et à l'école de la Covid-19*, in E. DUBOUT, F. PICOD (dirs.), *Coronavirus et droit de l'Union européenne*, Brussels, 2021, pp. 29-83; F. CASOLARI, *The EU Approach towards Disaster Management. A Critical Appraisal in the Light of the Action Put in Place to Face the COVID-19 Pandemic*, in *Yearbook of International Disaster Law*, vol. 4, n. 1, 2023, pp. 51-69).

In light of the above, it seems clear that the current mindset differs from the one that guided the previous Treaty revision(s) (e.g., the content of the TECE

was largely copied and pasted into the Lisbon Treaty), which aimed, above all, at limiting undue supranational interventions by clarifying the division of competences and advocating a more rigorous use of those general Treaty provisions that facilitate or support it (Laeken Declaration on the future of the European Union, 15 December 2001). However, opening up the floodgates of EU powers, and formally rationalising the legislative process would be the best way to make the EU system more democratic.

As S. Garben puts it, this would prevent "parallel integration", which in her view "combines the worst of all worlds" and is "the least legitimate form of competence creep", as well as the impossibility for the EU legislator to fill in the holes left by negative integration through "re-regulation" (S. GARBEN, *From sneaking to striding: Combatting Competence Creep and Consolidating the EU Legislative Process*, in *European Law Journal*, vol. 26, nn. 5-6, 2020, pp. 429-447).

Furthermore, the proposals put forward by the EP would have a – positive – side effect of codifying part of the legislator's practice. This would shed light on the role that the EU *actually* plays and provide more transparency and intelligibility for EU citizens. For example, it would take stock of the EU pervasive intervention in the field of health, which has been gradually achieved through the combined use of Arts. 114, paras 1-3, and 9 TFEU (G. DI FEDERICO, S. NEGRI, *Unione europea e salute. Principi, azioni, diritti e sicurezza*, Padua, 2019) as well as its involvement in wildlife protection, although the latter is never explicitly mentioned in Art. 191, para. 1, TFEU (P. THIEFFRY, *Droit de l'environnement de l'Union européenne*, 2ème édition, Brussels, 2011, in part. pp. 344-366).

Although there have been criticisms of the legal framework for animal welfare (F. MARCHADIER, *La protection du bien-être de l'animal par l'Union européenne*, in *RTDEur*, 2018, p. 251 ss.; A. ADINOLFI, *Il trattamento degli animali nel diritto dell'Unione europea tra interessi commerciali, protezione ambientale e "benessere": verso lo sviluppo di valori condivisi?*, in VV.AA., *Scritti per Luigi Lombardi Vallauri*, vol. 1, Padua, 2016, pp. 19-44) and calls from EU citizens for greater supranational intervention in this field (A. FIORENTINI, È. BULAND, *op. cit.*, in part. p. 4; CoFoE Report on the final outcome proposals n. 1, 7, 30), it is difficult to discerna any attempt to either clarify or extend the EU competence.

Instead of addressing the shortcomings of Art. 13 TFEU or including animal welfare among the general objectives of Art. 3 TEU, the EP proposes to add animal welfare to the areas listed in Art. 168, para. 4, lett. b), TFEU (*see* Amendment No. 148). The added value of this innovation remains to be seen, as Art. 168, para. 4, lett. b), TFEU already allows the legislator to adopt harmonisation measures in the "veterinary" field, provided that these measures have "as their direct objective the protection of public health". Not only does Amendment No. 148 maintain this requirement, but the formulas about animal health and the "One Health approach", enclosed in Amendments Nos. 70 and 147, are too nebulous to imagine using Art. 168, para. 4, lett. b), TFEU to protect animals as sentient beings.

As far as the protection of animals remains contingent on their role in ensuring public health and safety, it is difficult to consider the new version of the above-mentioned provision as the consecration of an *ad hoc* legal basis that would enable the EU legislator to carry on a comprehensive and coherent action in the field of animal welfare (on the necessity to opt for a specific legal basis in matter of animal welfare, *see*: V. BOUHIER, *Le difficile développement des compétences de l'Union européenne dans le domaine du bien-être des animaux*, in N. MAILLARD, X. PERROT (dirs.), *Ad bestias. Regards sur le droit animalier*, Ferrara, 2023, pp. 288-296; C. VIAL, F. PICOD, *L'animal en droit européen*, in *Revue des affaires européennes*, n. 1, 2017, pp. 7-12). Even if the EP proposal falls short of fully enhancing the growing value of animal welfare (ECJ, 17 December 2020, *Centraal Israëlitisch Consistorie van België e.a.*, Case C-336/19), it still contributes to promoting common interests and echoes the "serio ripensamento" hoped for by G. Tesauro (G. TESAURO, *Una nuova revision dei Trattati dell'Unione per conservare i valori del passato*, in *I Post di AISDUE*, 2021, cit. p. 8).

The strengthening of the European policies goes hand by hand with a reconsideration of the mechanisms that make them effective. In particular, the EP's proposal aims to address the Commission's (excessive) discretion, which hides behind the political strategies, responsible for the erosion of its role as of "guardian of the Treaties". In this regard, the resolution proposes to make the EP the new watchdog for EU law compliance by conferring it the power to trigger the infringement procedure (Amendment No. 199). Additionally, it introduces a 12-month deadline within which the Commission "shall" (and no longer "may") "bring the matter before the Court" (Amendment No. 198. *See* also Amendment No. 202 which similarly modifies Art. 260, para. 2, TFEU). However, during his speech at the University of Bologna on 23rd February 2024, M. Condinanzi noted that one would have expected an explicit – and binding – recognition of the principle of primacy, the latter constituting a genuine "cohesion rule" ("regola di coesione") between the EU and the national legal systems (L. S. ROSSI, *Il principio del primato come "regola di coesione" dell'ordinamento dell'Unione europea*, in VV.AA., *Quaderni AISDUE*, fasc. speciale, n. 1, Naples, 2024).

Despite some aspects may have deserved closer attention, the EP's reform proposal remains an ambitious one. Its *raison d'être* is to address the fear that a in-depth revision of the Treaties may no longer be possible in the event of an enlargement. Although the EP also proposes to modify the revision procedure by inserting the QMV in Art. 48, para. 7 § 4, TEU (*see* Amendment No. 64), the need for unanimous ratification by all Member States would remain. In other words, the reason for prioritizing a full Treaty revision over enlargement may be due to the concern of Treaty "fossilization" ("fossilisation", the quote is borrowed to O. DUBOS, *L'Union européenne: Sphynx ou Énigme?* in *Études en l'honneur de J-C GAUTRON, Les dynamiques du droit européen en début de siècle*, Paris, 2004, cit. p. 32). Furthermore, the EP's commitment to respecting its representative mandate certainly justifies the elaboration of this far-reaching project, which – as recently underlined by MEP Sandro Gozi – takes as its starting point the proposals contained in the final report of the CoFoE (for an analysis of the final report's proposals, *see* F. RASPADORI, *La Conferenza sul*

futuro dell'Europa e le colonne d'Ercole della lontananza dei cittadini, in this *Blog*, in part. pp. 5-7).

In the meantime, the Council advocates for a reform achieved *à droit constant*, relying on the existing tools. Although it undertakes to fulfil its obligation under Art. 48, para. 1, TEU (e.g., to submit the EP's proposal to the European Council) with regard to the "very limited number of measures […] that would require Treaty change to be fully implemented", the latter affirms that "work is ongoing" on the possibility of improving "some aspects" of the Council-decision making process, and in particular on extending the use of QMV within the Council (General Secretariat of the Council, Conference on the Future of Europe – Proposals and related specific measures contained in the report on the final outcome of the Conference on the Future of Europe: Updated assessment).

Given the political discrepancies, it may be more realistic and feasible to implement a small-scale reform (A. DUFF, *Five Surgical Strikes on the Treaties of the European Union*, in *europeanpapers.eu*, vol. 8, n. 1, 2023, pp. 9-16). However, it is advisable for the Council and the European Council to be receptive to the EP's requests, as its approval is necessary for the conclusion of any accession Treaty (M. VELLANO, *op. cit.*, p. 149). The EP has previously used its consent as a bargaining tool to claim (in vain) a Treaty reform when Sweden, Finland, Austria and Norway were in the SAS to join the EU (see C. BLUMANN, L. DUBOUIS, *Droit institutionnel de l'Union européenne*, 7ème edition, Paris, 2019, in part. p. 51).

4. The challenges currently faced by the EU institutions and the Member States are by no means new: the constant attempt to strike a balance between the complementary dynamics of widening and deepening is in the DNA of the European integration process (*see*, for all, K. LENAERTS et al. (eds.), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas*, Oxford, 2023) and the question of Treaty revision "has always been [a] complex and obscure" one (D. HINE, *Constitutional Reform and Treaty Reform in Europe*, in A. MENON, V. WRIGHT (eds.), *From the Nation State to Europe? Essays in honour of Jack Hayward*, Oxford, 2001, pp. 118-138, cit. p. 127). At the end of the day, the debate on what should or should not be revised brings out the usual dichotomy between intergovernmentalism on the one hand and supranationality on the other (*see* J. A. WINTER, D. M. CURTIN, A. E. KELLERMANN, B. DE WITTE (eds.), *Reforming the Treaty on European Union. The Legal Debate*, The Hague, 1996).

What is more unusual is the context in which these questions arise. The original objective of guaranteeing a *Pax Europaea* has returned to the forefront, but with a new perspective: building a strong Union ready to fight a future war. As Ursula von der Leyen recently highlighted during her speech to the European Parliament Plenary on strengthening European defence in a volatile geopolitical landscape: "The threat of war may not be imminent, but it is not impossible".

We believe that what is really at stake is the protagonists' conception of the integration process. By attaching importance to the results of a participatory democracy exercise such as the CoFoE, the European Parliament is moving

towards a federalist vision, which is further confirmed by the content of its proposal (W. KAISER, *Federalism in the European Parliament. From Ventotene to the Spinelli Group*, European Parliament History Service, March 2024, in part. p. 10). The Council, the European Council and, more surprisingly, the Commission tend to prioritize a policy of "quantity over quality".

The geographical enlargement of the EU seems to be a pressing matter, but it should not overshadow the need to strengthen the EU's already fragile balance. Additionally, there is a discrepancy between the positions resulting from the exercise of representative and participatory democracy.

Although the outcome of the CoFoE cannot be considered as the mirror of the "European people" ("popolo europeo", *see* F. RASPADORI, *cit*. in part. pp. 9-10), some may question whether it would not "be ironic if the [CoFoE] and its institutional reception were one day cited as evidence of a growing distance between citizens' ambitions and Member State conservatism when it comes to the value and direction of European integration – a Union no longer driven, but rather inhibited, by political elites?!" *(Editorial comments*, in *Common Market Law Review*, vol. 59, 2022, cit. p. 1594). This attitude clearly shows the 'schizophrenia' described by A. Tizzano: the will to progress together, as well as the reluctance to move towards a more sophisticated integration (A. TIZZANO, *Il costituzionalismo europeo nell'età dell'incertezza*, in *Il diritto dell'Unione europea*, n. 2, 2023, cit. p. 367).

A very last way for EU citizens to express their desire for "more Europe" is by launching a European Citizens' Initiative ('ECI') calling the European Commission to "submit to the Council proposals for the amendment of the Treaties" (Art. 48, para. 2, TEU). Despite the supportive case law of the ECJ in matter of ECI accessibility and effectiveness (*see* F. CLAUSEN, *Le contrôle de la Cour de justice de l'Union européenne sur les conditions de mise en oeuvre de l'initiative citoyenne européenne*, in E. DUBOUT, F. MARTUCCI, F. PICOD (dirs.), *L'initiative citoyenne européenne*, Brussels, 2019, pp. 285-321), the Commission remains hostile to consider Art. 11, para. 4, TEU as enabling the EU citizens to ask for a Treaty revision (V. MICHEL, *Initiative citoyenne et limites des compétences de l'Union européenne*, in E. DUBOUT, F. MARTUCCI, F. PICOD (dirs.), *op. cit.*, in part. pp. 208-209. On the doctrinal debate related to the possible use of the ECI in matter of treaty revision, and in particular, on the difficulties around the interpretation of the notions of "legal act" and "[implementation of] the Treaties" contained in Art. 11, para. 4, TEU *see*: M. MEZZANOTTE, *La democrazia diretta nei trattati dell'Unione europea*, Padua, 2015, pp. 109-111 and literature cited).

Identifying the appropriate reform for the survival of the integration process is a complex task. According to G. Marti and P. Berès, two of the 'Group of Twelve' experts who contributed to the well-known 'Sailing on High Seas' report, the most polarising issues have been deliberately excluded to increase the chances of the recommendations being exploited. For instance, some constitutional courts consider the question of the Charter's scope of application too sensitive. Additionally, the *Spitzenkandidat* system is controversial due to its strong federalist vision (these insights were shared on 5 March 2024 during a

debate organised by the GIS-EuroLab at Université Paris 1 Panthéon-Sorbonne. The registration of the debate is available here).

The report, which was drawn up both "in preparation for potential future enlargement and as a follow-up of the CoFoE", nevertheless received some criticism. According to J. Cloos, some of the proposals are neither useful, because they address "non-existent problems" (e.g., the idea of changing the Council Presidency by replacing the trio by a quintet), nor desirable (e.g., the idea of extending QMV to sensitive areas of a constitutional nature), or even incongruous (e.g., the idea of introducing automatic sanctions after a time-limit in order to strengthen the respect of the EU's values, since this would undermine the Council's unwillingness to use the procedure provided for in Art. 7 TEU) and utopian (e.g., extending the QMV to the MFF) (J. CLOOS, *A Critical Look at the Report of the Franco-German Working Group on EU institutional reform*, 21.11.2023). Moreover, while the generalization of QMV and the extension of OLP constitute suitable tools to enhance both the EU's capacity to act and democratic legitimacy, they may collide with effectiveness, by raising some issues during the implementation phase from those Member States that would otherwise have vetoed it (*see* M. DAWSON, F. DE WITTE, *EU Law and Governance*, Cambridge, 2022, p. 25).

The report clearly states that a Treaty revision would be the best way to ensure "democratic legitimacy, transparency, coherence and ambition of change" and that it is necessary to carry out a systemic revision in order to welcome enlargement (F. CHALTIEL, *Le couple franco-allemand face au défi de réformes structurelles*, in *Revue de l'Union européenne*, n. 673, 2023, p. 521). However, aware of the fact that "timidity reigns when it comes to reform, particularly concerning a Treaty revision", and in the event that none of the proposed options for achieving the desired reforms would be successful, the Franco-German experts offer the fallback solution of a Europe made of concentric circles.

According to some authors, the latter could be sustainable and fruitful, provided that the number of circles remains limited and that additional cases of differentiation within the circles is prohibited (*see* L. S. ROSSI, *L'Unione Europea e il paradosso di Zenone. Riflessioni sulla necessità di una revisione del Trattato di Lisbona*, in *Il diritto dell'Unione europea*, n. 4, 2013, pp. 749-770). With 4 concentric circles lying on various *membership* status (e.g., i. The inner circle; ii. The EU; iii. Associate members; iv. The European Political Community), the architecture proposed by the experts is rather tortuous, as it combines both internal and external differentiation, along with various integration strategies (e.g., multi-speed, variable geometry and *à la carte*) with space and time playing as main variables (*see* the categorization carried out by A. C. G. STUBB, *A Categorization of Differentiated Integration*, in *Journal of Common Market Studies*, vol. 34, n. 2, 1996, pp. 283-295, in part. pp. 285-286).

While differentiated integration has sometimes facilitated the integration process (e.g., thorough constructive abstention on the Common Foreign and Security Policy or as a means of securing Treaty ratification by granting opt-outs) or even deepening it (e.g., through the introduction of the enhanced cooperations by the Amsterdam Treaty), it can't be denied that the latter often

reveal a certain reluctance towards the idea of a common political project, and is capable of undermining the whole system.

As acknowledged in the report, it could introduce further complexity and inconsistency into the EU legal order, hence the formulation of five key principles designed to safeguard its integrity (*see* Report of the Franco-German working group on EU institutional reform, Sailing on High Seas, cit., pp. 33-34). For much less than differentiated integration, a sense of frustration and confusion has arisen among both Member States and their citizens, as the well-known fear of the 'Polish plumber' reminds us. The mere lack of harmonisation in some areas has led to an unfettered regulatory competition between Member States that somewhat called into question the fairness of their relationships when economic benefits are involved (*see* E. CARPANO, M. CHASTAGNARET, E. MAZUYER (dirs.), *La concurrence règlementaire, sociale et fiscale dans l'Union européenne*, Brussels, 2016).

If differentiated integration is taken to an extreme, it could undermine the credibility of some of the fundamental principles of the EU legal order and trigger a "domino effect". Would the principle of primacy be seriously applied, and would national courts genuinely refer to the ECJ where the uniform application of EU law or the principle of equality between European citizens are not as important as it would seem? Will Member States continue to respect the principle of sincere cooperation towards other States with which they won't be on an equal footing in terms of rights and obligations? Above all, will the EU remain a *sui generis* legal order if all these principles are eroded?

Among the issues that deserve serious discussion is undoubtedly that of respect for the rule of law. The values enshrined in Art. 2 TEU play a strong role in safeguarding the rights of individuals deriving from EU law (E. CARPANO, *Par-delà la souveraineté étatique dans l'Union: Etat de droit et intégration*, in *federalismi.it*, n. 21, 2020, pp. 43-59) and, therefore, surely contribute to preserve the *sui generis* nature of the EU legal order (ECJ, 5 February 1963, *Van Gend & Loos*, Case 26/62). The accession of new States requires a serious monitoring to ensure full respect for these values.

In the recent *Repubblika* case, the ECJ insisted that Art. 49 TEU imposes an obligation not only to comply with the values at the time of accession but also to continue respecting it after the EU membership has been granted (ECJ, 20 April 2021, *Repubblika*, Case C-896/19, paras 61-64). It is worth considering whether a combined reading of Art. 49 TEU with Arts. 3, para. 1, and 4, para. 3, TEU does not imply a duty for Member States to be particularly careful when assessing whether a candidate State respects the values of Art. 2 TEU. In other words, the question is whether the obligation to *promote* the EU values (Art. 49 TEU), along with the duty to "refrain from any measure which could jeopardise the attainment of the Union's objectives" (Art. 4, para. 3, TEU), could result in Member States being obliged to deny access to the EU if there are reasonable grounds to suspect that it may endanger the cornerstones of the EU.

ABSTRACT (ITA)

A quasi due anni dalla chiusura dei lavori della Conferenza sul futuro dell'Europa (CoFoE), i riflettori della scena politica europea sembrano essere puntati (quasi) esclusivamente sulla possibilità/necessità di allargare i confini della famiglia europea. A fronte dell'attuale contesto geopolitico, la Commissione, il Consiglio e il Consiglio europeo vedono nell'allargamento una priorità assoluta. Marginale, invece, il tema delle riforme istituzionali interne, ad eccezione di quelle che, senza richiedere una revisione delle norme di diritto primario, potrebbero consentire di superare situazioni di paralisi nel processo decisionale dell'Unione. L'unico effettivo difensore delle istanze dei cittadini europei pare essere il Parlamento europeo, il quale pone le raccomandazioni finali della CoFoE come punto di partenza della sua recente proposta di riforma dei Trattati. Dando conto di queste differenti posizioni, il presente contributo mira a evidenziarne i possibili profili di problematicità quanto al rispetto dei valori e dei principi cardine dell'ordinamento europeo. Senza alcuna ambizione di fornire risposte definitive, l'intento è piuttosto di stimolare riflessioni future sulle implicazioni costituzionali di alcune delle strade prospettate per l'avvenire dell'Unione europea.

ABSTRACT (ENG)

Almost two years after the end of the Conference on the Future of Europe (CoFoE), the spotlight of the European political scene seems to be focused (almost) exclusively on the possibility/need to broaden the borders of the European family. Against the current geopolitical background, the Commission, the Council and the European Council see enlargement as a major priority. Marginal, on the other hand, is the issue of internal institutional reforms, except for those that, without requiring a revision of primary law, could make it possible to overcome situations of paralysis in the Union's decision-making process. The only strenuous defender of European citizens' demands seems to be the European Parliament, which sets CoFoE's final recommendations as the starting point for its recent proposal to reform the Treaties. Taking into account these different positions, the present contribution aims at highlighting their potential problematic issues in terms of respect for the core values and principles of the European order. Without any ambition to provide definitive answers, the intention is rather to stimulate further reflection on the constitutional implications of some of the avenues envisaged for the future of the European Union.