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Raising the stakes on constitutional reform: The European Parliament triggers treaty change

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Executive summary

The European Parliament, for the first time, has used its powers to trigger a revision of the EU treaties. Its central demand is to change the decision-making procedure behind the *passerelle* clause from unanimity to qualified majority voting. The EU Council has so far refused to submit Parliament's request to the European Council — in breach of its treaty obligations. MEPs continue to develop wider reform proposals to make the government of the EU more robust, decisive, and democratic. In this Discussion Paper, Andrew Duff explains the current state of affairs and suggests that the heads of government need the assistance of a reflection group to prepare for a new Convention.

Introduction

Whatever we think of the European Parliament (and we do), it can no longer be ignored on matters constitutional. The assembly may be said to have excelled itself during the Convention of 2002-03 which led, after a kerfuffle, to the signature of the Treaty of Lisbon in 2007. MEPs have now had fifteen years of first-hand experience with that treaty — passing laws, ratifying international agreements, asking questions, grilling candidates for top jobs, holding inquiries, and generally sounding off as parliaments do. It has been a busy time for parliamentary Europe: three member states have joined the European Union and one has left; there's been a financial crash, an immigration crisis, a pandemic, and now a war. New areas of policy and legislation have opened to meet the digital age and the climate crisis at the same time that Parliament has begun to exercise its new Lisbon powers. Russia's invasion of Ukraine has revitalised the EU's internal debates, long languishing, about both enlargement and defence policy.

European Parliamentary elections take place again next year. Now is a good time, therefore, for parliamentarians to take stock of their own performance, to review their place in the governing system of the Union, and other things being equal, to prepare for future reform.

The Convention

One of the great concessions of the Lisbon Treaty was to grant the European Parliament the right to initiate a revision of the treaties.¹ That advance was coupled with the right of Parliament to insist on the calling of another constitutional Convention.² A Convention works by consensus to prepare the way for an intergovernmental conference that must conclude by unanimity.³ MEPs will seize the opportunity of their participation in a Convention to promote Parliament's constituent powers and challenge the traditional claim of the member states to be 'masters of the treaties'. The stakes for all are high.

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On 9 June 2022, after plenty of vacillation, the European Parliament voted to initiate a treaty change.⁴ Whether all those 355 MEPs who voted for the move realised the historical significance of what they were doing is a moot point. But the leaders of the main groups felt

Parliaments are generally disgruntled about their lot, and the European Parliament is no different. But the current discontent of MEPs is linked to a wider and rising realisation that European integration is more volatile than secure, and that the EU institutions lack the efficacy and decisiveness to cope well with contemporary and future challenges. In an ideal world, more could be achieved under the existing treaties, and the EU could avoid the always complex, often unpopular, and usually protracted task of revising its treaties. We are afforded no such luxury today, however: treaty change is again on the cards.

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bound to respond constructively to the outcome of the Conference on the Future of Europe, which had involved hundreds of randomly selected citizens from across the EU in an elaborate consultative process and whose demand for treaty change was clear — notably to reduce the use of the national veto in the Council.

Parliament makes two specific demands. The first is to introduce the Qualified Majority Vote (QMV) to Article 29 TEU concerning orientation decisions of a geographic or thematic nature in the field of Common Foreign and Security Policy (CFSP). Obviously conceived as a way to overcome Hungary's resistance to sanctions against Russia, the proposal at once invites another Hungarian veto.⁵ Abolition of the veto in CFSP is particularly problematic because few member states trust Germany, or for that matter the Franco-German axis, to do the right thing in foreign policy.

Parliament's second request of 9 June is more subtle. It proposes to change the decision-making procedure in Article 48(7) TEU, the general *passerelle* clause, from unanimity to QMV.⁶ The Lisbon Treaty added the '*passerelle*' or 'bridging' clause, which allows the European Council, acting by unanimity, to change almost any Council procedure from unanimity to QMV or to move a special law of the Council to the ordinary legislative procedure (QMV in the Council

plus codecision with the Parliament).⁷ Inevitably, because of the unanimity requirement, it has never been possible to deploy the *passerelle* in practice: it remains a hypothetical adornment of the Treaty of Lisbon.⁸

The charm of the Parliament's formal proposal is that, to accept it, member states will not have to decide where, when or what they will actually shift to QMV. The proposed revision is a procedural device designed to facilitate the use of the *passerelle* in the future — with controversy postponed if not avoided entirely.

According to Article 48(2) TEU, the Council should have transmitted Parliament's proposal of 9 June to the European Council which was then bound to decide by simple majority whether or not to proceed to a Convention. This did not happen. Faced with opposition from a number of EU governments, in spite of Macron's rhetorical commitment to treaty change, the then French Presidency of the Council failed to act. The succeeding Czech Presidency of the Council, being of a right-wing eurosceptic bent, refused to do its duty. Resolving to ignore the constitutional import of Parliament's initiative, the Czechs circulated a disingenuous questionnaire about QMV to member states, with entirely predictable negative results.⁹ The current Swedish Presidency has done nothing so far to advance the dossier. Parliament is therefore already well within its rights to take the Council to the European Court of Justice for its failure to act.¹⁰ That MEPs have not done so tells us something about the calibre of Parliament's current leadership.

The Committees

At any rate, AFCO is collecting views from across the House under the general rapporteurship of veteran federalist Guy Verhofstadt. The results are in.

The Foreign Affairs Committee (AFET) calls for the EU to become “a more credible and decisive geopolitical power”.¹² As expected, it wants to ditch unanimity in favour of QMV except for those decisions concerning military operations — although it would keep the last resort provision that can push up to the European Council, acting unanimously on controversial decisions “for vital and stated reasons of national policy”.¹³

In light of the Ukraine invasion and cyberwarfare, the committee wants a more muscular EU security policy, with wider competences. The EU budget should be enabled to finance military operations, it says, and the public procurement exemption for the armaments industry should be dropped.¹⁴ National military and R&D spending should be in part pooled at the Union level. AFET calls for more powers for the European Parliament to authorise the opening and closing of all the EU's international negotiations.¹⁵

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Instead, Parliament has embarked upon drafting a portmanteau report in an effort to consolidate the case for treaty change. But the latest exercise, led by the Constitutional Affairs Committee (AFCO), provides the Council with another pretext for procrastination over Parliament's initial proposals. It is a risk for the Parliament. Unless MEPs show that their level of political ambition is matched with evident expertise in constitutional matters, they will only have weakened their position. They need to demonstrate acceptance of Parliament's role as one part of the Union's bicameral legislature as well as being willing to improve its own democratic legitimacy. Parliament should focus its efforts on streamlining and strengthening the EU's constitutional framework, on enhancing the law-making process, and on holding to good account both the Commission and, when it acts in an executive capacity, the Council. It could be less preoccupied with self-promotion. The main flaw in the Union's constitution is the lack of a democratic federal government.¹¹ I have no doubt that when faced with a more powerful and centralised executive authority, the European Parliament will rise to the occasion.

Branching into wider institutional issues, AFET wants to merge the roles of the President of the European Council and President of the European Commission, to strengthen the powers of the High Representative/Vice-President for Foreign Affairs, and to unite the External Action Service (EEAS) with the Commission. It suggests the creation of a European Security Council. This is bold stuff, and mostly well argued — including its final proposal that the Council should set up a group of reflection to prepare for a Convention. Alas, the foreign affairs' MEPs say nothing about the reform of enlargement or neighbourhood policy.

The Committee on Budgets (BUDG) tackles the controversial Article 122 TFEU that is used to provide emergency funding to member states.¹⁶ Naturally, it wants the ordinary legislative procedure to replace the special law of the Council, but it also proposes a new instrument outside the Multiannual Financial Framework (MFF) funded by new sources of revenue. Most importantly, BUDG demands that Parliament should have a full say alongside the Council in all aspects of raising EU revenue ('own resources') as well as expenditure under

the MFF.¹⁷ This would liberate the budgetary powers of the Parliament from the constraints of the Lisbon Treaty.¹⁸ Allowing MEPs to vote on tax revenue would transform EU democracy.

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Reasonably enough, the Budgetary Control Committee (CONT) wants to extend its powers of discharge to the budget of the Council.¹⁹ Much less exciting is the opinion of the important Committee on Economic and Monetary Affairs (ECON), which mostly contents itself with generalities.²⁰ No concrete proposals are made for the reform of the economic governance of the Union beyond the revision of Article 122 TFEU. ECON merely asks the Commission to “relaunch the discussion on the use of QMV in some tax matters, through a phased approach”. Clearly, in this area, Parliament needs help — which rather strengthens the idea, already floated, that Mario Draghi, former President of the European Central Bank, should be invited by the European Council to lead a group of reflection.

The Committee on Employment and Social Affairs (EMPL) reiterates previous demands for the greater recognition in the treaties of social progress, including subjecting the annual semester process to codecision between the Council and Parliament. More ambitious is the Committee on Environment, Public Health and Food Safety (ENVI).²¹ The environmentalists would add to the shared competences of the Union biodiversity, carbon capture and storage, climate neutrality and adaptation.²² Likewise, ENVI wants climate protection to become one of the EU’s horizontal policy principles.²³ In light of the pandemic, ENVI suggests upgrading public health policy from a supplementary competence to a shared competence.²⁴ Responding to the clearly expressed preference of the Conference on the Future of Europe, the Culture and Education Committee (CULT)

recommends a similar shift of competence in the field of education policy. ENVI would move to the ordinary legislative procedure (away from special laws of the Council) on water resources, land use, energy sources and structure of energy supply.²⁵ The Industry, Research and Energy Committee (ITRE) takes a similarly active stance.²⁶ It calls for the ordinary legislative procedure to apply across the domain of R&D policy.²⁷ Curiously, no mention is made of the incorporation of Euratom.

Some of the most sensitive issues concerning national sovereignty are addressed by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) in an opinion that the European People’s Party (EPP) opposed.²⁸ Big changes are proposed to Article 7 TEU which governs the processes that follow a breach of the values of the Union by an errant member state. Notably, the European Council should act by QMV and not unanimity to determine that a serious and persistent breach has taken place.²⁹ The committee wants a new legal basis to instrumentalise the values expressed in Article 2 TEU and the Charter of Fundamental Rights. It would broaden the scope of the Charter.³⁰ The EU’s Fundamental Rights Agency and Data Protection Supervisor should be given the right to approach the Court of Justice. The rights of EU citizenship should be extended to resident non-EU nationals.³¹ Action should be taken to combat discrimination on the grounds of gender identity and existing categories of equal treatment under the ordinary legislative procedure.³² The Committee on Women’s Rights and Gender Equality (FEMM) would pepper the treaty with references to gender equality. LIBE would also abolish the lead policy role granted under Lisbon to the European Council in the areas of freedom, security and justice.³³ It wants the ordinary legislative procedure to apply to the whole of EU policy on asylum, immigration and border control.³⁴ Oddly, LIBE says nothing about the EU’s stalled accession to the European Convention on Human Rights (ECHR).³⁵

Neither the Committee on Legal Affairs (JURI) nor the Committee on International Trade (INTA) saw fit to offer an opinion. And the farmers’ Committee on Agriculture and Rural Development (AGRI) opined that no treaty change is needed to preserve the Common Agriculture Policy.

Drawing conclusions

It is now up to AFCO to collate the results of the trawl of the House and prepare the final Verhofstadt report, aiming for a plenary vote in July.³⁶ Three main conclusions can already be drawn: first, nobody believes that the *passerelle* can be deployed under the conditions of unanimity imposed by Lisbon; second, something must be done to enhance the Union’s capacity to deal with breaches of the rule of law; and third, Parliament must finally be granted the power of codecision over revenue.

Sectoral committees have made useful indications of specific treaty amendments involving both Union competences and powers of the EU institutions.

There are nonetheless several important gaps that AFCO needs to fill in and join up to make a coherent package of treaty reform. One of those concerns taxation, where Lisbon’s rigid unanimity prevents a deepening of integration in fiscal policy.³⁷ The transformation of the

European Stability Mechanism into a federal monetary fund needs confirmation.³⁸ No progress in harmonising tax will advance unless commensurate progress is made in social policy.³⁹ If more use is to be made of enhanced cooperation among a group of like-minded states, adjustments are needed in the relevant Lisbon provisions.⁴⁰

MEPs are keen to strengthen their own right of legislative initiative, although this is a delicate matter affecting the Community method — a delicacy which MEPs too often ignore.⁴¹ If the intention is to reduce the number of prohibitions and inhibitions on the Union's capacity to act effectively, there must be adjustments to the interinstitutional balance. Limitations on the judicial authority of the European Court of Justice, for example, should be suppressed.⁴² The European Central Bank should attain the status of lender of last resort with powers of supervision over the whole financial services industry.⁴³ As the European Parliamentary elections beckon in May 2024, questions must be asked about the role of the two Presidents of the Commission and European Council, the method of appointment and size of the college of Commissioners.⁴⁴ Adjustments at the top will lead to a review of the rotating presidency of the Council of ministers.⁴⁵ A bold Parliament would propose amendments to the constitutional part of the Treaty itself, at least to ensure that treaty revisions could come into force before being ratified by all member states.⁴⁶

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Parliament must use the Convention to progress its own recent proposals for electoral reform in time for the elections in 2029. These involve the installation of a pan-EU constituency, whose aim is to force proper federal political parties to contest transnational lists.⁴⁷ The initiative is now stalled in the Council, and no resolution seems possible without a Convention where member states and national political parties can be challenged directly and treaty change secured.⁴⁸ Altering the apportionment of seats in the Parliament cannot leave the voting system in the Council untouched.⁴⁹ Here, AFCO can suggest viable alternatives: either a square root formula that reduces differentials between large and small states or a return to the weighted voting system of the Treaty of Rome.

Above all, however, Parliament must substantiate the argument that no further enlargement of the Union can take place under Lisbon. Ukraine forces the pace of constitutional reform, as does Brexit: introducing a new category of affiliate membership may be of benefit to the EU's whole neighbourhood.⁵⁰ The future of the conference of the European Political Community, whose next meeting is in Chisinau on 1 June, must also be considered: is it to be grounded in the EU treaties? Should it evolve as a European Security Council? What will be the status of NATO in such a structure?

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Clearly, it is beyond the capacity of the European Parliament to write a new constitutional treaty for the Union. But it can raise all the necessary questions and articulate its own priorities.⁵¹ As the Commission of Ursula von der Leyen is mute on these matters, and the Council is badly divided, MEPs can fill the vacuum. Once they have received Parliament's recommendations, only 14 heads of government are needed to trigger a new Convention.⁵² As the European Policy Centre has previously recommended, the European Council would be sensible to invite a group of wise folk to prepare that Convention.⁵³ Such a reflection group could stimulate constitutional proposals from the Commission, Court and Central Bank. It could suggest a mandate and timetable for the Convention in which, in any case, MEPs are bound to play a leading role.

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- ¹ Article 48(2) Treaty on European Union (TEU).
- ² Article 48(3) TEU.
- ³ Article 48(4) TEU.
- ⁴ Resolution on the call for a Convention for the revision of the Treaties, 2022/2705(RSP), 9 June 2022.
- ⁵ Curiously, Parliament did not focus on Article 31(1) that has wider application. See Jean-Paul Jacqu , *The European Parliament's Institutional Proposals following the Conference on the Future of Europe: Much Ado About Nothing?*, Common Market Law Review, vol. 59 Special Issue, 2022.
- ⁶ Article 48(7) TEU.
- ⁷ Article 294 Treaty on the Functioning of the Union (TFEU).
- ⁸ See Julina Mintel & Nicolai von Ondarza, *More EU Decisions by Qualified Majority Voting – but How?: Legal and political options for extending QMV*, SWP Comment 2022/C 61, 19 October 2022.
- ⁹ Council of the EU Presidency Note, *Conference on the Future of Europe: Follow-up*, 12277/22, 14 September 2022.
- ¹⁰ Article 265 (TFEU).
- ¹¹ Andrew Duff, *Constitutional Change in the European Union: Towards a Federal Europe*, Palgrave Macmillan, 2022 (Open Access). <https://link.springer.com/book/10.1007/978-3-031-10665-1>
- ¹² Rapporteur Hilde Vautmans (RE).
- ¹³ Article 31(2) TEU.
- ¹⁴ Article 346(1)(b) TFEU. See Karel Lannoo, *After one year of war, the EU must create a single market for defence*, CEPS, 23 February 2023.
- ¹⁵ Article 218 TFEU.
- ¹⁶ Rapporteur Nils Usakovs (S&D). See Merijn Chamon, *The rise of Article 122 TFEU: On crisis measures and the paradigm change*, Verfassungsblog, 1 February 2023.
- ¹⁷ Articles 311 and 312(2) TFEU.
- ¹⁸ Article 353 TFEU.
- ¹⁹ Article 319 TFEU.
- ²⁰ Rapporteur Margarida Marques (S&D).
- ²¹ Chair Pascal Canfin (RE).
- ²² Article 4 TFEU.
- ²³ Article 11 TFEU.
- ²⁴ That is from Article 6 to Article 4 TFEU.
- ²⁵ Article 192(2) TFEU.
- ²⁶ Chair Cristian-Silviu Busoi (EPP).
- ²⁷ Articles 182(4) & 188(1) TFEU.
- ²⁸ Rapporteur Juan Fernando L pez Aguilar (S&D).
- ²⁹ Article 7(2) TEU.
- ³⁰ Article 51(1) CFR.
- ³¹ Article 20 TFEU.
- ³² Article 19 TFEU.
- ³³ Article 68 TFEU.
- ³⁴ Article 70 TFEU.
- ³⁵ Article 6(2) TEU.
- ³⁶ Proposals for the amendment of the Treaties, 2022/2051(INL).
- ³⁷ Articles 113 & 115 TFEU.
- ³⁸ Article 136(3) TFEU.
- ³⁹ Article 153 TFEU.
- ⁴⁰ Articles 20 TEU and 329 & 333 TFEU.
- ⁴¹ Resolution on Parliament's right of initiative, 2020/2132(INI), 9 June 2022. The Commission's right of initiative is prescribed in Article 17(2) TEU and protected in Article 293 TFEU. See Andreas Maurer & Michael C. Wolf, *The European Parliament's right of initiative*, EPRS, July 2020, PE 655.134.
- ⁴² Articles 275 & 276 TFEU.
- ⁴³ Article 127(6) TFEU.
- ⁴⁴ Article 15(6) TEU.
- ⁴⁵ Article 16(9) TEU.
- ⁴⁶ Article 48(5) TEU.
- ⁴⁷ Election of the Members of the European Parliament by direct universal suffrage, 2020/2220(INL). Rapporteur Dom nec Ruiz Devesa.
- ⁴⁸ Article 14 TEU.
- ⁴⁹ Articles 16(4) TEU & 238 TFEU.
- ⁵⁰ For a draft Article 49a TEU, see Duff op.cit, pp.123-24.
- ⁵¹ AFCO might also recommend simplification of the structure of the two treaties (plus Euratom).
- ⁵² Article 48(3) TEU.
- ⁵³ Herman Van Rompuy & Brigid Laffan, *Adding Ambition to Europe's Unity*, European Policy Centre Op-Ed, 16 June 2022. One notes the decision by French Europe Minister Laurence Boone and her German counterpart Anna L hrmann to set up an informal reflection group of Franco-German EU experts.

NOTES

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