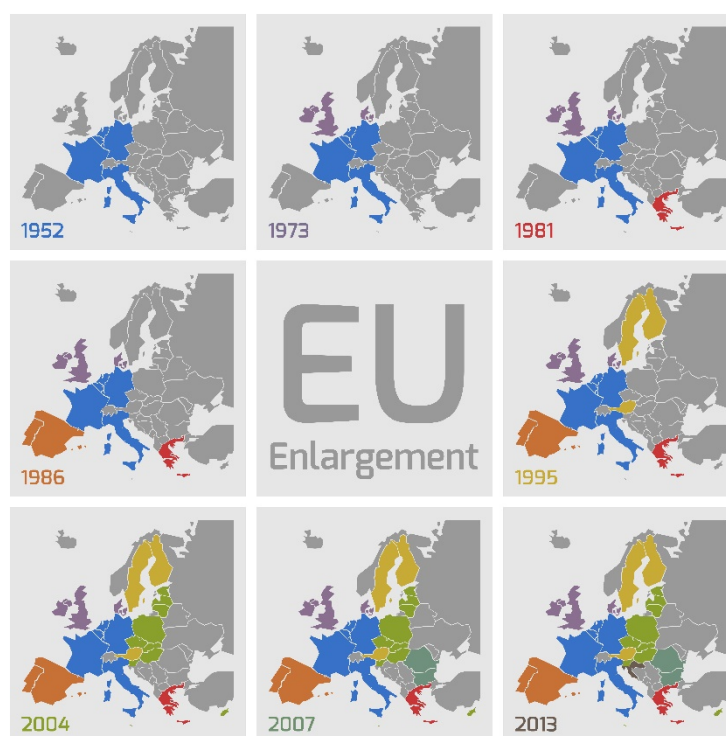


Constitutional Challenges of the Enlargement: Is Further Enlargement Feasible without Constitutional Changes?



Constitutional Challenges of the Enlargement: Is Further Enlargement Feasible without Constitutional Changes?

IN-DEPTH ANALYSIS

Abstract

This in-depth analysis, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Constitutional Affairs, recalls the earlier debates linking the enlargement of the Union with the need to adapt its constitutional framework, and discusses whether further constitutional reforms, involving Treaty change or not, are necessary when a further enlargement of the Union will take place in the near future. It focuses on three main themes: the Union's decision-making capacity; forms of differentiated integration; and the question on how to ensure respect by all member states for the Union's fundamental values.

ABOUT THE PUBLICATION

This research paper was requested by the European Parliament's Committee on Constitutional Affairs and commissioned, overseen and published by the Policy Department for Citizen's Rights and Constitutional Affairs.

Policy Departments provide independent expertise, both in-house and externally, to support European Parliament committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU external and internal policies.

To contact the Policy Department for Citizens' Rights and Constitutional Affairs or to subscribe to its newsletter please write to: poldep-citizens@europarl.europa.eu

RESPONSIBLE RESEARCH ADMINISTRATOR

Roberta PANIZZA
Policy Department for Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: poldep-citizens@europarl.europa.eu

AUTHOR

Bruno DE WITTE, Professor of European Union law, Maastricht University & European University Institute

LINGUISTIC VERSION

Original: EN

Manuscript completed in March 2019
© European Union, 2019

This document is available on the internet at:
<http://www.europarl.europa.eu/supporting-analyses>

DISCLAIMER

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the publisher is given prior notice and sent a copy.

CONTENTS

1. THE CONSTITUTIONAL CHALLENGES OF ENLARGEMENT – THE EARLIER STORY	8
1.1 The Question of the Union’s Decision-Making Capacity	9
1.2 The Question of Organising Differentiated Integration	11
1.3 The Question of Safeguarding the Union’s Fundamental Values	14
2. A CONSTITUTIONAL AGENDA FOR THE NEXT ENLARGEMENT	16
2.1 Decision-Making Capacity: Abandoning the Unanimity Rule for Council Decision-Making and for Treaty Revisions?	16
2.2 More Flexibility for Differentiated Integration?	20
2.3 More Effective Protection for Fundamental Values?	25
2.4 Conclusion and Policy Recommendations	28

EXECUTIVE SUMMARY

Background

Despite the new impetus given to enlargement by the EU institutions in 2018,¹ there is still a lingering doubt as to whether further enlargement of the Union will happen any time soon or whether, instead, the Western Balkan states find themselves on a 'slow train to nowhere'.² Their adaptation to the EU *acquis* is a slow-moving process, and political conditionality continues to create major obstacles to their accession. If and when the next enlargement occurs, it will, most likely, not include all the current candidate and potential-candidate countries, but only a few among them. Nevertheless, it makes sense for the EU institutions to reflect on the perspective of further enlargement, not only from the point of view of the economic and political readiness of the prospective new members, but also from the point of view of the European Union's absorption capacity. In its enlargement policy paper of February 2018, the Commission refers to the need for the Union to be 'stronger and more solid, before it can be bigger', and it mentions in particular the need to shift from unanimity to qualified majority voting in the Council in areas such as foreign policy and the internal market, and also the need to strengthen the enforcement of the rule of law in the Union.³

Article 49 EU specifies that accession treaties may make 'adjustments' to the existing Treaties upon which the EU is based, and accession treaties have, so far, only made rather minor adjustments to the existing rules, such as providing for the representation of the new member states in the Council, the Parliament and the other institutions. Further-reaching changes were excluded, on the basis that the acceding countries should accept the entire *acquis communautaire*, subject only to transition phases in specific policy areas. It is an open question whether the 'adjustments' mentioned in Article 49 could also imply other changes to the operation of the European Union, which are not directly related to the accession of new states, such as the issues mentioned by the Commission in its paper of February 2018. This question is meaningful for the European Parliament (EP). Since the EP has the power to give or deny its approval to accession treaties, it could make its approval conditional on the making of some constitutional adjustments to current EU law. Even if one assumes that the 'adjustments' mentioned in Article 49 should be strictly interpreted and do not include Treaty changes that are not directly related to accession, the EP could still decide to make a political linkage between its approval of the accession treaty and the adoption of separate but contemporaneous changes to the EU's institutional system. From this point of view, it becomes meaningful for the EP to reflect on how the future accession of new member states could be used as an occasion for the improvement of the EU's constitutional edifice. The present in-depth analysis aims at contributing to that reflection and does so in two parts, corresponding to the two chapters of the study, whose main content is described below.

¹ Communication from the European Commission, *A credible enlargement perspective for and enhanced EU engagement with the Western Balkans*, COM(2018) 65 of 6 February 2018.

² J. O'Brennan, 'On the slow train to nowhere? The European Union, 'enlargement fatigue' and the western Balkans', 19 *European Foreign Affairs Review* (2014) 221.

³ *A credible enlargement perspective* (note 1 above), p.2 and 15-16.

Aim

The first chapter of the study recalls the earlier debate linking the enlargement of the Union with the need to adapt its constitutional framework. That debate was particularly lively in the years leading to the large-scale enlargement of 2004, and was facilitated by the fact that no less than three Treaty revisions took place in the years preceding the enlargement (Treaty of Amsterdam, Treaty of Nice, and the Constitutional Convention leading eventually to the Lisbon Treaty). On each of these occasions, the need to adapt the EU's constitution to the forthcoming enlargement was a major issue in the political and legal debate. Three main themes emerged in that debate: the need to preserve the EU's decision-making capacity after enlargement; the question whether and how to introduce forms of differentiated integration; and the question on how to ensure respect by all member states for certain fundamental values. After recalling those debates, the study highlights the constitutional changes that were accomplished in response to the pending enlargement, and also mentions the 'missed opportunities', i.e., the constitutional adaptations that could have been made at the time but were omitted. The latter point is relevant for the future. The next enlargement may well involve a small number of countries (possibly only one or two); however, the need for constitutional adaptation will not just arise from the fact that one or two new countries would join the EU, but also from the accumulated deficit in adjusting the EU's constitutional system to the huge increase in membership that has happened over the years.

In the second chapter of the study, the analysis becomes forward-looking. The three main themes discussed in the first chapter are taken up again. Current reform ideas are discussed from the point of view of their legal feasibility and their constitutional acceptability, and a range of possible and desirable reforms are put forward, involving either changes of the Treaties or institutional innovations that can be made under the current Treaties. The European Parliament has advocated some of these reforms in recent resolutions; the process of enlargement could give more force to the EP's constitutional design preferences if those preferences are carefully discussed and presented.

Key Findings and Recommendations

A first finding of the second chapter relates to the need to move away from unanimity in Council and European Council decision-making, which is today still required in a large number of cases. The argument can be made that unanimity is no longer tenable in a EU with 30 or more member states. Abandoning unanimity may well entail costs in terms of national sovereignty, but it is the price to be paid for the European project to be able to function adequately with such a large number of states, and therefore abandoning unanimity is, arguably, in every country's long-term national interest. To a large extent, a shift away from unanimity could be accomplished by means of the *passerelles*, therefore requiring simplified Treaty revision or, in some cases, no Treaty changes at all. A separate issue, in the field of external relations, is the requirement of unanimity that results from the practice of mixed agreements; that practice should also be reconsidered. Beyond this, one should also question the unanimity rule when it comes to revisions of the Treaties themselves. This has so far been a taboo subject for the Member States' governments, but for the same reasons of long-term national interest mentioned above, the question could be put on the table again on the occasion of a future enlargement, although this would of course require a revision of Art. 48 TEU.

The second finding of the second chapter relates to the need to improve the current regime of differentiated integration. Essentially (and in the absence of Treaty revision) differentiated integration takes two forms: enhanced cooperation, and the conclusion of separate international agreements by a group of member states (the Schengen and ESM model). The study discusses whether future enlargements should lead us to rethink the mode of operation of these two forms of flexibility, and whether the creation of 'concentric circles' would be politically advisable and legally feasible. Also, the current distinction between the euro area and the rest of the EU will continue to exist in the future and may require a more coherent arrangement than the one we have today (for example, as regards the creation of a separate budgetary capacity for the euro area).

The third theme discussed in the second chapter is that of the protection of fundamental rights and values (including democracy, the rule of law and minority protection). So far, there has been a strict distinction between pre- and post-accession. Whereas detailed standards are imposed on candidate countries, as part of the political conditionality for accession, respect for those standards is no longer required once a country has joined the EU, except through the cumbersome rule-of-law mechanism of Article 7 of the EU Treaty. A future enlargement may provide the opportunity to set out a more coherent system of protection for those fundamental values, applicable to all EU member states and not only to the candidates and the newcomers. The elements of such a system are presented in the study.

Based on the findings of the second chapter, the following Recommendations are made:

- The accession of new member states would make the unanimity rule for Council decision-making even more unbearable than it is today. The European Parliament should therefore require the use of the *passerelle* mechanisms that allow for a transition to majority voting without changing the Treaties. More radically, the Parliament should link its agreement to future accession to the negotiation of a revision of the Treaties that would aim at removing all cases in which the Council decides by unanimity, as well as for future Treaty revisions themselves. This does not necessarily mean that unanimity should be replaced by the current system of qualified majority. A higher threshold could be set for the most important decisions, such as amendments of the Treaties.

- As long as unanimity continues to exist, though, the use of the mechanisms of differentiated integration will remain useful and necessary, even more so when new members will join the Union. Attempts at creating a closed 'core Europe' should not be encouraged, because creating a closed circle of cooperation is hardly feasible in legal terms (enhanced cooperation may not be exclusive, but is always open to the participation of all) and is politically not appealing. Instead, the existing mechanism of enhanced cooperation should be used without hesitation whenever it allows to by-pass the vetoing by one or more countries of measures that are useful for the majority of member states. Separate agreements under international law between groups of member states (on the model of the Schengen Convention) are not desirable, as they have a cost in terms of democratic accountability and judicial control, but their use should nevertheless be envisaged in those cases where cooperation seems politically important but where the text of the European Treaties makes it impossible to adopt Union legislation.

- The European Parliament should require the creation of a continuous and comprehensive assessment of the respect by *all* member states for the values of Article 2 TEU, as was proposed in its resolution of October 2016. This should, however, be preceded, by a more precise definition of what is understood

by respect for the rule of law and respect for democracy. Similarly to what happened with human rights (of which the Union adopted a catalogue in the form of the Charter of Fundamental Rights), there should be a Union catalogue of the elements of the rule of law and democratic government. The new assessment procedure should involve evaluations by independent experts and an active role for the EU's Fundamental Rights Agency, which should become an agency in charge of fundamental rights, democracy and the rule of law. A mechanism comparable to the existing Cooperation and Verification Mechanism for Bulgaria and Romania should also be applied to states that will accede in the future, so as to ensure a better transition between the pre-accession political conditionality and a post-accession continuation of the reforms.

- The Commission has recently brought infringement actions before the Court of Justice of the European Union for what it considers violations of fundamental rights and threats to judicial independence by member states. The Commission should develop further this new approach and make the infringement action an important tool to address systematically the deficiencies in the protection of fundamental rights, the rule of law and democratic principles whenever member states act to implement EU legislation or whenever they use EU funding. The Commission should not hesitate to ask the Court of Justice for urgent interim measures while an infringement case is pending.

1. THE CONSTITUTIONAL CHALLENGES OF ENLARGEMENT – THE EARLIER STORY

In the 1990s, the probable accession of an unprecedented number of new states was considered to call for institutional responses of unprecedented sophistication. The tone was set by the Copenhagen European Council of June 1993, at which the enlargement process was officially started by the European Council, and the general conditions for accession were laid down. It also was a defining moment in setting the agenda of enlargement-related constitutional reform of the Union. In particular, three strands of that enlargement-related constitutional agenda were broached by the European Council at that time.

- The Copenhagen European Council's conclusions specified in general terms that accession would depend not only on the political and economic performance and state of preparation of the candidate states, but also on the *institutional state of preparation* of the European Union. The document affirmed that 'the Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries'.⁴ Thereby, internal reform of the decision-making capacity of the Union became a precondition for enlargement. The IGC of 1996 was, in part, devoted to this question, and the IGC of 2000 was almost entirely devoted to it. However, the Treaty of Nice that resulted from the latter did not constitute a convincing response to the problem, and the overhaul of the EU's institutional system became a central concern, again, of the Convention on the future of the Union that drafted the Constitutional Treaty.

- An eye-catching aspect of the Copenhagen conclusions was the unprecedented imposition of so-called *political conditions* for membership (respect for democracy, fundamental rights, rule of law and protection of minorities). This stimulated a debate on whether the European Union itself should take these basic constitutional values more seriously by entrenching them more firmly in its own legal order. Democracy and fundamental rights concerns became part of the agenda of the 1996 IGC, and the Amsterdam Treaty enacted some important Treaty changes in this respect. These questions were equally prominent in the reform debate leading to the Constitutional Treaty and, beyond it, to the Lisbon Treaty.

- A third strand of the constitutional reform debate is less immediately apparent from the Copenhagen Conclusions, but 'Copenhagen' indirectly formed a watershed also in this respect. Until 1993, attempts had been made to devise innovative forms of institutional linkage between the European Union and the central and eastern European countries that would closely associate the latter to the EU but without offering them full membership. Such forms of asymmetrical integration based on advanced methods of international cooperation were definitively discarded by the Copenhagen European Council. Full membership of the European Union became the sole option for the future. At the same time, this decision to take concrete steps towards full membership and a major enlargement of the Union fuelled discussion on whether membership of the EU should be accompanied by *new forms of differentiation* of rights and obligations between member states; while asymmetrical relations would no longer be pursued as part of the EU's *external relations* with Central and Eastern Europe, they might be put in place as part of its *internal constitution*. The debate on 'flexibility' and 'closer cooperation' took off in earnest in the summer of 1994, and the prospect of enlargement greatly contributed to keeping it on the EU's constitutional reform agenda during the following ten years.

⁴ European Council of Copenhagen (June 1993), Conclusions of the Presidency, *Bulletin of the European Communities* 12-1993.

So, the Copenhagen summit of 1993 inaugurated a period in the history of European integration in which we saw an *intersection* between two legal-political questions that occupied the minds of the EU institutions and member states between 1993 and 2003, namely (i) anticipating the consequences of enlargement, and (ii) proceeding with the overall constitutional reform of the EU. In the following pages, we briefly recall the outcomes of that combined discussion: to what extent were the enlargements of 2004 and 2007 accompanied by internal constitutional reform of the EU? We look, in turn, at the three themes mentioned above: the strengthening of the Union's decision-making capacity, the design of a regime of differentiated integration and the protection of fundamental values.

1.1 The Question of the Union's Decision-Making Capacity

Already in its 1992 report on 'Europe and the Challenge of Enlargement', written shortly after the adoption of the Treaty of Maastricht, the Commission stated the following:

'In the perspective of enlargement, and particularly of a Union of 20 or 30 members, the question is essentially one of efficacy: how to ensure that, with an increased number of members, the new Union can function, taking account of the fact that the responsibilities would be larger than those of the Community, and that the system for two of its pillars is of an inter-governmental nature. In that perspective, how can we ensure that "more" does not mean "less"?'

This challenge was thus defined, to put it in simple terms, as 'dealing with numbers'.⁵ The Turin European Council of 29 March 1996, when formally launching the post-Maastricht Intergovernmental Conference, was quite explicit about the important consideration to be given to the effects of enlargement: 'The Union must also preserve its decision-making ability after further enlargement. Given the number and variety of the countries involved, this calls for changes to the structure and workings of the institutions'.⁶ So, a central goal of the institutional reforms of the Union in the period between the entry into force of the Maastricht Treaty (1993) and the adoption of the Lisbon Treaty (2007) was to prevent that the Union's decision-making capacity would be negatively affected by a major expansion of its membership. Decision-making capacity can be understood as being 'the probability that a political system, given the diversity of interests to which it is exposed, will be able to take decisions'.⁷ As the diversity of political interests increases with the accession of new member states, the capacity to act of the EU institutions is likely to decrease, unless the decision-making rules are modified so as to promote the 'ease of action'.

The accession of new states affects the functioning of the institutional system in several ways. The new states are represented in each of the institutions of the EU. Accession of new states makes the overall number of members of most institutions grow, with the risk of exceeding the appropriate size allowing for effective deliberation. This is probably most obvious for the Council, since that institution meets, both at the formal ministerial level and at all the preparatory stages, in a format allowing for the representation of all (now) 28 member states which, quite obviously, renders the discussions more cumbersome than in the 'cosy' environment of the original Community of Six, or even the pre-2004

⁵ H. Wallace, 'Flexibility: a tool of integration or a restraint on disintegration?', in Neunreither and Wiener (eds), *European Integration After Amsterdam: Institutional Dynamics and Prospects for Democracy* (2000) 153, at 179.

⁶ European Council of Turin (March 1996), Conclusions of the Presidency, *Bulletin of the European Communities* 3-1996.

⁷ B. Kerremans, 'The political and institutional consequences of widening: capacity and control in an enlarged Council', in Laurent and Maresceau (eds), *The State of the European Union, Vol. 4: Deepening and Widening* (1998) 87, at 87.

Union of Fifteen. The actual decision-making of the Council is also affected when it has to decide according to the unanimity rule. Moreover, the addition of multiple new members complicates the 'game' of coalition-building for the purpose of assembling a qualified majority. It also means, in most cases, the addition of new official languages of the Union, which creates higher translation costs and forms a new source of communication failures in the decision-making process. Each new member state also brings new practices of political and administrative culture, which again complicates (at least in a first period of adaptation) the informal patterns of EU decision-making.

One might wonder, at first sight, whether this issue can truly be qualified as a 'constitutional question'. It is arguable, however, that the capacity to take effective action is a primary constitutional value since it represents the original *raison d'être* of the European Communities (which remains as vital in the European Union today) namely to provide an institutional apparatus that can perform more effectively certain common tasks that the member states can no longer adequately perform themselves. Maintaining or improving the institutions' capacity to act thereby enhances the 'performance legitimacy' of the European Union. This does not mean that improving the ease of action of the EU institutions is an independent value. Indeed, easier and speedier decision-making by Council, Parliament and/or Commission, with reduced possibilities for vetoes and blockage, may allow for *more* decisions to be adopted, but does not necessarily mean *better* EU law and policies. It does not directly address the concern that the European institutions are remote and undemocratic, nor does it guarantee that the policies thus decided will be effectively applied by the member states and private actors. Thus, in constitutional terms, promoting the capacity to act of the EU institutions is a means for achieving other ends – but an essential means nevertheless.

Prior to the 'big bang' enlargement of 2004, the Union's *widening* had effectively been accompanied by some degree of *deepening* of the integration process. Successive reforms of the European Treaties which took place through the Single European Act, the Treaty of Maastricht and the Treaty of Amsterdam all led to an extension of the range of common policies and also introduced reforms of the institutional system. In the areas of internal market and social regulation, there was a marked shift away from unanimity towards qualified majority voting in the Council and a major increase in the role of the directly elected European Parliament, which developed into a co-legislator with the Council. In other areas of EU policy, such as the common foreign and security policy, and justice and home affairs, the institutional approach was rather different, with decision-making power concentrated in the hands of the Council and with its decision-making mode being that of unanimity rather than majority voting. So, it appears that the threat to the EU's institutional capacity that could *prima facie* result from increasing numbers of member states was addressed in some areas of European policy-making by easing the conditions for making decisions, but this did not happen in other areas.

During the Intergovernmental Conference that was to lead to the adoption of the Treaty of Amsterdam, there gradually developed a triangle of sensitive enlargement-related institutional questions which were considered to be intimately linked, so that a compromise could only emerge, it appeared, on a package covering each of these three issues: the size and composition of the Commission; the weighting of the votes of states when acting within the Council of Ministers; and the extension of qualified majority voting (rather than unanimity) to further fields of EU policy. A compromise on this triangle of issues was eventually reached only at the next IGC, the one leading to the Treaty of Nice, whose modest agenda was deliberately limited to the three institutional 'left-overs' from Amsterdam, as if a negotiated solution of these three issues were the only key to a successful institutional

adaptation to the coming enlargement. The intra-EU condition for accession now appeared to be fulfilled, at least according to the governments of the EU countries. At the Nice European Council meeting of December 2000, they agreed on the text of the Treaty of Nice and stated, in an annexed *Declaration on the future of the Union*, that 'with ratification of the Treaty of Nice, the European Union will have completed the institutional changes necessary for the accession of new Member States'.⁸ The candidate countries received the assurance that their EU accession now depended on their own economic and political performance, and on the willingness of the EU states to recognize the quality of this performance, but no longer on the question whether the Union itself managed to put its own house in order.

And yet, before the enlargement effectively took place, a new and much more ambitious reform debate took place within the Convention on the Future of the Union (2002-3), the results of which were by large laid down (after the failure of the Constitutional Treaty) in the Treaty of Lisbon. The question whether the rather modest institutional reforms agreed at Amsterdam, Nice and Lisbon have equipped the European Union with the practical capacity to act after enlargement received at first a rather positive answer. Several studies conducted shortly after the enlargement highlighted that the new member states had integrated the EU system rather smoothly without causing any disruption of the functioning of the institutions.⁹ Indeed, one can say, some fifteen years after the enlargement of 2004, that all the EU institutions have found ways to accommodate the larger membership without too much hampering their operation. Also in the inter-institutional relations, new ways have been found to preserve decision-making capacity, not the least of which is the systematic recourse to trilogues in legislative decision-making. However, one can certainly say that the institutional machinery of the Union has been adjusted only in part to 'deal with the numbers': the most obviously missing part of that adaptation is that unanimous decision-making is still an important mode of decision-making in the Council and European Council, as well as for Treaty revisions.

1.2 The Question of Organising Differentiated Integration

The prospect of enlargement with a large number of new states promoted the debate on differentiated (or 'multi-speed') integration in the second half of the 1990s. The consensus that emerged during the 1996 Intergovernmental Conference, after long and extenuating negotiations, was that some mechanism of institutional flexibility (or of, as it was eventually called, 'closer cooperation') should be put in place, but that it should be encapsulated within the existing EU framework and be made subject to rather strict conditions. In fact, the conditions for closer cooperation imposed by the Amsterdam Treaty were so rigid that, only one year after the Treaty's entry into force, and before the new regime had even been tested in practice, the member state governments started a process of reviewing and, ultimately, redrafting of the relevant rules during the IGC that took place in 2000. An agreement was eventually reached, in the final stages of the Nice Treaty negotiations, on facilitating recourse to closer cooperation. The new Treaty text allowed for what was now named 'enhanced cooperation' to be launched by a qualified majority vote in the Council, except in common foreign and security policy. The

⁸ OJ 2001, C 80/85, point 2.

⁹ See in particular: R. Dehousse, D. Deloche-Gaudez and O. Duhamel (eds), *Elargissement – Comment l'Europe s'adapte* (2006); E. Best, T. Christiansen and P. Settembri (eds), *The Institutions of the Enlarged European Union – Continuity and Change* (2008).

substantive conditions for closer cooperation were also somewhat relaxed compared to the Amsterdam regime.

The potential political energy needed to exploit the enhanced cooperation mechanism was diverted, immediately after the signature of the Treaty of Nice, into the new constitutional reform process launched by the Convention on the Future of the Union. Within that context of across-the-board constitutional reform, flexibility did not emerge as a central issue. The few changes proposed in the Draft Treaty, which were then carried forward to the final text of the Constitutional Treaty and, much later, to the Lisbon Treaty, once again aimed at facilitating enhanced cooperation compared to the post-Nice situation. Enhanced cooperation initiatives can now be started on request of at least nine Member States and the authorization is given by a qualified majority vote of the Council; they can cover all areas of non-exclusive EU competence.¹⁰ In the years since the Lisbon Treaty, the enhanced cooperation regime was finally used, for the first time since its creation by the Treaty of Amsterdam. A first and rather uncontroversial application occurred for conflicts of law on divorce.¹¹ A second, much more controversial application related to the new EU patent system, where two countries (Italy and Spain) challenged the recourse to enhanced cooperation before the Court of Justice.¹² In its judgment, the Court confirmed that the function of enhanced cooperation is indeed to advance European cooperation even where (or rather, *especially* where) the unanimity requirement makes 'normal' decision-making too difficult. Since then, a third piece of enhanced cooperation law was adopted, namely the twin Regulations on judicial cooperation in matters of matrimonial property and registered partnership property. A fourth Council authorization for enhanced cooperation was given for the creation of a financial transaction tax, but the directive itself was not yet adopted.

The most striking element of the Lisbon reforms was, possibly, the emphasis on closer cooperation in the field of the Common Foreign and Security Policy (CFSP) and particularly defence. Whereas the latter policy field was previously off-limits for closer cooperation initiatives, it was now turned into a privileged area for experimentation with a range of flexibility regimes, denoting a greater acceptance of the European Union as a policy-making venue for military matters. A sudden acceleration happened in 2017, leading to the launch of a permanent structured cooperation (PESCO) in December 2017.¹³ This form of cooperation is defined by Article 42(7) TEU which provides that those member states whose military capabilities fulfil higher criteria and agree to make binding commitments with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework. The format of that cooperation is spelled out in greater detail in Protocol nr. 10 to the Lisbon Treaty. As was noted by Cremona, 'in a number of ways permanent structured cooperation resembles enhanced cooperation, but agreed in advance by way of a specific Protocol.'¹⁴ The drafters

¹⁰ Art. 20 TEU. The conditions and procedures are spelled out in considerable detail in Articles 326 to 334 TFEU.

¹¹ Council Regulation 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ 2010, L 343/10. The authorization had been given by Council Decision 2010/405 of 12 July 2010, OJ 2010, L 189/12. See S. Peers, 'Divorce European style: The first authorization of enhanced cooperation', 6 *European Constitutional Law Review* (2010) 339.

¹² Joined Cases C-274/11 and C-295/11 *Spain and Italy v Council*, EU:C:2013:240. The Council had authorized enhanced cooperation in this area by a Decision adopted (despite negative votes of Italy and Spain) on 10 March 2011, OJ 2011, L 76/53.

¹³ Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States, OJ 2017, L 331/57; and the implementing measure Council Decision (CFSP) 2018/340 of 6 March 2018 establishing the list of projects to be developed under PESCO, OJ 2018, L 65/24. The suddenness of this development is illustrated by the fact that the European Commission's Reflection Paper, published only a few months earlier, does not even mention PESCO (European Commission, Reflection Paper on the Future of European Defence, COM(2017) 315 of 7 June 2017).

¹⁴ M. Cremona, 'Enhanced cooperation and the common foreign and security and defence policy', *EUI Working Papers LAW* 2009/21, p.14.

of the Constitutional Treaty and of the Lisbon Treaty took care to define in rather great detail the institutional and substantial shape of PESCO, making it into an 'off-the-shelf form of cooperation', which may have facilitated the launch once the political impetus was there. PESCO's main institutional characteristic is the fact that decision-making is entirely situated *within* the EU legal order, namely with the Council and its preparatory bodies. Although it was estimated, only a few months before its launch, that only between 10 to 15 member states would be able and willing to participate in PESCO, eventually 25 States (all except the UK, Denmark and Malta) decided to join the project.

Another specific regime of enhanced cooperation created by the Lisbon Treaty, which was less prominently discussed in its preparatory phase but proved to be important in practice, concerns the field of economic governance, where it was grafted upon the existing variable geometry between Eurozone and non-eurozone countries. The legal basis allowing for the adoption of euro-area specific legislation on economic governance (Article 136(1) TFEU) was used for important parts of the 'six-pack' and 'two-pack' economic governance reforms; and more recently, unprecedented forms of variable geometry were experimented for banking supervision, where the new ECB-centred mechanism, while legally mandatory only for euro-area states, is opened up for 'closer cooperation' with non-euro states who wish to join.

At the same time as creating the closer cooperation mechanism, the Amsterdam Treaty had also 'repatriated' the Schengen regime within the legal order of the European Union, but the price that had to be paid for this move – given the lack of unanimous support among all Member States – was a new opt-out Treaty regime for the United Kingdom and Ireland, and another one for Denmark. A system of differentiation between EU Member States that had existed *outside* the EU legal framework was thus brought *inside* that framework, but without modifying the degree and content of the differentiation and creating, indeed, a number of frictions in the institutional functioning of the EU's immigration and border control policies. This vast new opt-out area established by the Amsterdam Treaty joined the Maastricht-based opt-out regime for EMU. The Lisbon Treaty added yet another opt-out regime in the field of police cooperation and criminal justice where, in return for the introduction of the 'Community method' in that policy area, the United Kingdom obtained an opt-out from future developments and even a right to unilaterally pull out from *existing* third pillar instruments by which the UK was bound. The fact that the Amsterdam Treaty had terminated the separate legal life of the Schengen Agreement and Convention, by transforming their content into EU law, and that it had also established a system of enhanced cooperation within the EU institutional framework, seemed to put an end to the conclusion of Schengen-type agreements situated *outside* EU law. Yet, recent practice shows that the EU member states consider that they have retained the capacity and the right to conclude international treaties among themselves, even when the subject matter of their agreement is closely connected to European Union matters. The conclusion of the 'Fiscal Compact' between 25 member states, and of the Treaty establishing the European Stability Mechanism between the (then) 17 euro area states, are recent and controversial examples of the use of international law as a mechanism of differentiated integration.

The unity of the EU legal order is not formally affected by the many forms of flexibility that have spread profusely during the past 20 years. There are rather firm criteria to determine whether a legal norm belongs to the EU legal order or not. Thus, measures of enhanced cooperation are part of EU law, although they are binding only upon, and within, the member states that participated in their adoption. Similarly, legal measures from which some countries opt out are also part of the EU legal order, despite their limited geographical scope. What is still sometimes called 'Schengen law' has

become regular EU law after the incorporation of the Schengen regime in Amsterdam. On the contrary, international agreements concluded by a limited set of member states (such as the ESM treaty and the Fiscal Compact) are not part of the EU legal order, and the Court of Justice cannot review the decisions adopted by organs set up under such an agreement.

Thus, if the formal criteria for deciding what belongs to the EU legal order still function well, the content of that EU legal order presents a very unusual shape. Its degree of fragmentation, in terms of participation of states in decision-making, and of applicability of legal norms across the EU territory, is rather unique and sets the European Union firmly apart from the federal constitutional systems to which it resembles in other respects. The Court's old ideal of EU legal rules being 'fully applicable at the same time and with identical effects over the whole territory of the Community'¹⁵ has become unattainable. This, in itself, may not be such a great loss; but the easy and almost insouciant recourse to flexibility also comes with lack of transparency, complicated accountability mechanisms, and neglect of intra-state solidarity, and those are serious challenges for the constitutional integrity of the European Union.

1.3 The Question of Safeguarding the Union's Fundamental Values

The political conditionality, which the Copenhagen European Council first formulated in 1993, has, since then, become a condition for accession to the European Union that is entrenched in the EU's constitutional document, namely in Article 49 TEU. As a condition for accession, candidate countries must respect 'the values referred to in Article 2' and that Article states, in turn, that the Union 'is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities', and also that 'these values are common to the Member States.' These are thus, drawing from the wording of Article 2 TEU, *foundational values* of the Union, but they are also, more importantly perhaps, *fundamental values* in the sense that both the Union institutions and the member states are expected to abide by them. Indeed, it would make no sense to require candidate countries to abide by the values of Article 2 as a condition for accession, and not to bother about whether the member states - both the old and new ones - comply with those values as well.

As far as the Union is concerned, the most important step forward since 1993 is certainly the adoption of the EU Charter of Fundamental Rights, first elaborated in 2000 and made into a binding instrument of primary EU law by the Lisbon Treaty. As for the member states, they are bound to respect the values of Article 2 TEU when they implement EU policies, and they can be the object of infringement actions in case of non-compliance, but it was felt that respect for the values of Article 2 TEU should also be somehow ensured when the member states act autonomously, that is, *outside* the scope of EU policies.

For that purpose, the Treaty of Amsterdam introduced a mechanism that aims at preserving a minimal degree of respect for those fundamental values by the member states even when acting outside the scope of Union law. That mechanism was slightly modified by the Treaty of Nice and then again by the Treaty of Lisbon, and is now laid down in Article 7 TEU. On a reasoned proposal by one third of the member states, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may

¹⁵ Case 48/71 *Commission v Italy*, EU:C:1972:65, para 8.

determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. The procedure may, in a second step, end in a unanimous decision to suspend voting rights in the Council. The mechanism described by the Treaty was complemented, on the initiative of the European Commission, by a Rule of Law framework, which organizes a dialogue between the Commission and the member state concerned in a preliminary stage, so as to try to prevent the formal opening of the Article 7 procedure. However, the Article 7 procedure was indeed formally opened, for the first time, on the Commission's initiative, against Poland,¹⁶ and shortly afterwards also against Hungary, this time on the initiative of the European Parliament.¹⁷ These two procedures constitute a test for the effectiveness and legitimacy of the Article 7 procedure. During the debates leading up to these procedures, institutional actors and scholars have reflected on whether this 'nuclear option' mechanism is adequate or sufficient in itself to safeguard the values of democracy, fundamental rights and the rule of law.¹⁸ Alternative or complementary mechanisms have been proposed, which will be discussed in the next chapter.

In addition to the Article 7 mechanisms, two member states continued, immediately after their accession, to be subject to a special mechanism of monitoring of their compliance with rule of law requirements. This is the Cooperation and Verification Mechanism that is still today applicable to Bulgaria and Romania. This mechanism seems to fulfil a useful role in putting pressure on those states to continue to comply (or rather: to gradually comply better) with the political conditions for accession to the Union, in particular in the field of justice and the rule of law¹⁹ However, it is also odd that these two countries are being singled out, since the issues which are at the heart of this Cooperation and Verification Mechanism arise also in other member states.

¹⁶ European Commission, Reasoned proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 of 20 December 2017.

¹⁷ European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, P8_TA(2018)0340.

¹⁸ Among the rich literature on this subject, the following may be mentioned: C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (2016); T. Konstadinides, *The Rule of Law in the European Union – The Internal Dimension* (2017); W. Schroeder (ed.), *Strengthening the Rule of Law in Europe – From a Common Concept to Mechanisms of Implementation* (2016); and the recent study by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, *The EU framework for enforcing the respect of the rule of law and the Union's fundamental principles and values*, January 2019, [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608856/IPOL_STU\(2019\)608856_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608856/IPOL_STU(2019)608856_EN.pdf)

¹⁹ See the evaluation of this Mechanism in a recent study for the European Parliament's Committee on Budgetary Control, *Assessment of the 10 years' Cooperation and Verification Mechanism for Bulgaria and Romania*, December 2017, [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/603813/IPOL_STU\(2018\)603813_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/603813/IPOL_STU(2018)603813_EN.pdf)

2. A CONSTITUTIONAL AGENDA FOR THE NEXT ENLARGEMENT

In this second chapter, the analysis is forward-looking. Based on the reflection on the past experience, recounted in the previous chapter, and taking into account the reform ideas that have been expressed in recent times by either the EU institutions (mainly the Commission and the Parliament) or by other political actors, ideas for constitutional change will be discussed, criticized and/or recommended to the attention of the EP. The discussion is organized along the lines of the same three reform themes already presented in the previous section, starting from the question of the EU's decision-making capacity, then moving on to the organization of differentiated integration, and ending with reflections on how to strengthen the protection of the Union's fundamental values.

2.1 Decision-Making Capacity: Abandoning the Unanimity Rule for Council Decision-Making and for Treaty Revisions?

One author predicted, back in 1999, that 'a much larger Council, eventually including Central or Eastern European states, might not face the insurmountable collective action problems that many have predicted, regardless of whether or not majority voting rules are extended to the few remaining areas of treaty competence governed by unanimity'.²⁰ One reason offered for this paradoxical conclusion is that the Council rarely votes and that attempts are systematically made by the Commission and the Council Presidency to reach a consensus among all delegations, irrespective of whether the measure can be adopted by qualified majority or requires unanimity. However, even though consensus decision-making remains the unwritten rule of the game, it does regularly happen, nowadays, that member state delegations are formally outvoted at a Council meeting or that they cease to oppose a decision when they see that a qualified majority has emerged. Indeed, in policy areas subject to QMV, the Council, the Coreper and the working groups all very much operate 'in the shadow of the vote', so that states that find themselves in an isolated minority position sometimes accept a relatively unsatisfactory compromise proposal for fear of being outvoted. There are also signs that the strongly ingrained practice of consensus seeking is increasingly under threat in the current, more politically diversified, European Union. The formal veto power wielded by each country is becoming a much more unpredictable and obstructive weapon than in earlier epochs.

Therefore, the conclusion seems warranted that a shift from unanimity to qualified majority in any given policy area is an essential means of maintaining the Union's capacity to act in that area when the number of member states is growing. The Lisbon Treaty did indeed shift the voting rules for a number of areas, but today many decisions of the EU are still subject to unanimity,²¹ so that this very important challenge to the Union's decision-making capacity is still firmly in place.

In his State of the Union speech of 2017, Commission president Juncker announced initiatives to move away from the unanimity rule in a number of areas by using the so-called *passerelles*. One year later, the Commission followed up on this promise with two concrete proposals, one to move from unanimity to qualified majority voting in selected areas of Common Foreign and Security Policy,²²

²⁰ J. Golub, 'In the shadow of the vote? Decision making in the European Community', 53 *International Organization* (1999) 733, at 760.

²¹ For a complete list, see J.C. Piris, *The Lisbon Treaty – A Legal and Political Analysis* (2010), appendix 8.

²² Communication from the Commission, *A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy*, COM(2018) 647 of 12 September 2018.

followed by another one proposing a similar shift to QMV for selected issues of tax policy.²³ In those two proposals, the Commission carefully explains that it proposes a gradual and partial passage to majority voting, but *not* a sweeping renouncement to the unanimity rule in CFSP and tax matters. One can understand this caution, given that the decision to use the *passerelles* itself requires the unanimous agreement of all member state governments. But from a broader and more long-term perspective, the European Parliament might go further and insist that the time has come to do away with unanimous decision-making *in all areas* of EU policy and for all kinds of decisions.

One institutional feature of the Union's external action should be included in this reflection, namely the frequent practice of concluding *mixed agreements* with third countries, whereby both the European Union and all its member states are parties to an agreement with that third country (or group of countries). In such situations, the Union itself normally acts by qualified majority, and mostly with the consent of the EP, to approve the agreement, but that decision-making agility is undone by the fact that all the member states need to approve that same agreement separately, according to their own constitutional requirements for treaty ratification. In this way, the EU is effectively subject to the unanimity rule and to the possible veto of single member states. This problem cannot be solved by changing the text of the Treaties (in which the mixed agreement phenomenon is not even mentioned), but it requires a change in institutional practice whereby it must be accepted by the Council and by the member state governments that the European Union can conclude on its own any international agreement falling within the scope of its shared competences, without the need for the participation of the member states; and when a matter falls entirely outside the competences of the EU (which will rarely be the case), then the member states should conclude a *separate* agreement with the third country concerned and not *together* with the Union.

A final observation on this question of reducing or removing altogether the need for unanimous decision-making is that the alternative should not necessarily, or always, be a shift to the qualified majority voting mechanism as described in Art. 16(4) TEU. It is possible to choose, in especially sensitive matters, for an intermediate solution that removes the veto power of single countries but still requires a very high threshold of support from the member state governments, over and above the threshold for QMV as defined in Art. 16(4) TEU.

One might also extend this thinking one step further and consider whether the time has finally come to move away from the unanimity rule for *Treaty amendments*, and to set in place a truly simplified Treaty revision procedure. The original rule that the European Community treaties could only be revised with the agreement of all the member states made perfect sense when the Community counted only six states, but it was left untouched on each later occasion, despite the fact that membership grew from 6 to 28, which has rendered the unanimity requirement an ever more cumbersome obstacle in the way of treaty change.²⁴ At the same time, the close control exercised by the member state governments on the revision process has been diluted somewhat in the course of time. Compared to the previous revision clauses, the new rules enacted by the Lisbon Treaty innovate in two respects: they prescribe the use of the 'Convention method' for future revisions, and they

²³ Communication from the Commission, *Towards a more efficient and democratic decision making in EU tax policy*, COM(2019) 8 of 15 January 2019.

²⁴ For an analysis of how, in particular, the requirement that each treaty revision should be separately ratified by each State has placed obstacles in the way of Treaty change on many occasions, see C. Closa, *The Politics of Ratification of EU Treaties* (2013).

provide for two so-called simplified revision procedures, in addition to the ordinary revision procedure.²⁵

The most significant change, compared to the previous (pre-Lisbon) method of Treaty revision text of Article 48 TEU, is the formal integration of the Convention method as a normal feature of future revisions. The Convention's role is modestly defined as that of adopting 'by consensus a recommendation to a conference of representatives of the governments of the Member States'. However, the Convention's role had been described in equally modest terms by the Laeken Declaration of 2001, and this did not prevent the 2002/3 Convention from adopting a complete draft text of the treaty rather than a mere 'recommendation'. The new Article 48 has thus entrenched for the future a direct parliamentary involvement in treaty reforms.

The second innovation of the Lisbon Treaty regarding future revisions is the creation of a distinction between one *ordinary* Treaty revision procedure and several *simplified* procedures. Paragraphs 2 to 5 of Article 48 TEU, as amended by the Lisbon Treaty, are entitled *Ordinary revision procedure*. The word 'ordinary' indicates that the procedure described there is applicable to any amendment of the Treaties and their Protocols, unless the amendment comes within the scope of one of the simplified revision procedures described in paragraphs 6 and 7 or provided for in specific articles of the Treaties.

Simpler ways to amend particular bits of primary EU law had existed before. For example, the Statute of the Court of Justice, which was annexed to the EC Treaty in the form of a Protocol (and therefore with full Treaty status) could be amended, already long before Lisbon, by means of a unanimous Council decision²⁶ - with the exception of the most sensitive part, Title I of the Statute, which could only be modified through the ordinary revision procedure. The novelty brought by the Lisbon Treaty is that we now have two *standard* simplified procedures, applicable to a wider range of cases, and whose legal regime is now incorporated within Article 48 TEU, rather than being mentioned in the particular corner of the Treaty to which a simplified mechanism applies.

Of those two, the one laid down in Article 48, *paragraph 6*, has the broadest scope. It applies to amendments of 'Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union', all together some 171 Treaty articles – subject to one major exception: if the proposed amendment of an internal policy provision leads to an increase in the European Union's competences, then the ordinary revision procedure will have to be used instead. However, upon a closer examination of the procedure prescribed by paragraph 6, it soon appears that it is not simple at all. The amendment is 'adopted' directly by the European Council acting by unanimity of its members without the need for a formal Intergovernmental Conference; but that decision is then subject to 'approval' by each member state under its own constitutional requirements. If one considers the fact that adopting a unanimous European Council decision is not necessarily a simpler feat than reaching an agreement at an IGC (the actors being essentially the same...), one may well wonder whether the paragraph 6 procedure is really any simpler than the ordinary revision procedure.²⁷

²⁵ For a presentation of the current, post-Lisbon, EU treaty amendment regime, see S. Peers, 'The future of EU Treaty amendments', 31 *Yearbook of European Law* (2012) 17; B. De Witte, 'Treaty revision procedures after Lisbon', in Biondi, Eeckhout and Ripley (eds.), *EU Law after Lisbon* (2012) 107.

²⁶ See, for example, the Council Decision of 20 December 2007 amending the Protocol on the Statute of the Court of Justice, OJ 2008, L 24.

²⁷ Indeed, the one example of the use of Article 48, paragraph 6, so far, namely the amendment of Article 136 TFEU to allow for the creation of the European Stability Mechanism, took more than two years between the adoption of the amendment in March 2011 and its entry into force in May 2013.

Moreover, unlike the latter, it does not require any involvement by the European Parliament, thus making it also a distinctly less democratic mechanism.

The other simplified revision procedure, the one described in *paragraph 7* of Article 48, does introduce a genuine measure of flexibility in treaty amendment. It is commonly called the *general passerelle* because it allows the EU institutions to shift from one decision-making system to another within a given policy area. In all the areas and cases where the Treaties continue to provide that the Council must act by unanimity, a European Council decision (itself taken by unanimity and with the consent of the European Parliament) is enough to remove the unanimity lock in a particular case or area, and allow the Council to act henceforth by qualified majority. Similarly, the European Council is able to introduce the ordinary legislative procedure in all the areas and cases in which the Treaties still provide for a different (normally, more intergovernmental) procedure. In other words, a further deepening of integration by making EU decision-making less intergovernmental is, to some extent, possible without the need for setting up an IGC and, above all, without the need for constitutional ratification of these changes by all the member states separately. The scope of application of this simplified procedure is limited by Article 353 TFEU (to which, confusingly, Article 48 fails to cross-refer): certain matters cannot be the subject of the simplified revision. In addition, one must note the existence, scattered throughout the Treaties, of the so-called *passerelles spéciales* which apply to specific policy areas instead of the general clause of Article 48 (7). One of them is in Article 31 (3) TEU and allows for a passage to qualified majority for any matter of CFSP; this is the clause which the Commission proposed to use in its above-mentioned communication of September 2018.²⁸

Still, each national parliament is able to stop any simplified amendment based on Article 48 (7) by expressing its opposition within a six-month period following the European Council decision (that decision will, obviously, not enter into force during this period). The two-phased approach to treaty revision is thus not entirely abandoned.²⁹ More generally, we can see how the innovations brought to the revision procedures by the Lisbon Treaty do not affect the fundamental legal and political rule of the game, namely that all member states must give their unanimous consent to future amendments of the Treaties. The EU's rules of change thereby continue to be much more rigid than those applying to national constitutions, but also more rigid than those applying to the founding instruments of other, less integrated, international organizations.³⁰ This rigidity of the EU's constitution has become ever more problematic since the 'happy days' of the semi-permanent Treaty revision process that started with the Single European Act and ended with the Treaty of Nice. Since then, the Treaties have grown fatter; they contain ever more rules that constrain or prohibit certain institutional or substantive reforms. Also, the views of the Member States are diverging ever more, especially since the great enlargement of 2004. Not only is it nearly impossible to reach a consensus among the governments on Treaty changes, but those changes have to be approved now by an increasing number of 'veto players' at national level, such as national parliaments, constitutional courts and even the electorate when ratification referenda are held. Maybe the next enlargement could be the right time to bring this 'taboo' subject to the table. Is it really reasonable to expect that the European Union can respond to new

²⁸ Other *passerelles spéciales* can be found in Article 81(3) TFEU (measures concerning family law), Article 153(2) (certain fields of employment and social security law), Article 192(2) TFEU (certain environmental policy matters), and Article 312(2) TFEU (multiannual financial framework).

²⁹ The national parliaments do not possess a similar veto power under the *passerelles spéciales* (except for the one about family law), so that those *passerelles* are somewhat easier to use.

³⁰ For this comparison, see W. Lehmann, *Federal States and International Organisations: A Short Comparison of their Amending Rules with the European Union*, European Parliament studies, December 2011, www.europarl.europa.eu/studies.

challenges if it has become virtually impossible to modify its basic legal instruments? Is it not in the *national* interest of each member state to ensure that treaty amendment supported by a vast majority of countries should remain possible, and not be stopped by the veto of one or a few among them? Again, abandoning the unanimity rule does not necessarily mean a shift to qualified majority decision-making. Given the formal importance of Treaty amendments, one should rather envisage a procedure requiring a super-qualified majority among the member states (maybe 90% of their total number, representing 80% of the total population), coupled with a qualified majority of votes in the European Parliament.

2.2 More Flexibility for Differentiated Integration?

The history of differentiation, flexibility and variable geometry in the European Union is closely linked with the presence of an 'awkward member' of the EU, namely the United Kingdom.³¹ Indeed, it is largely because of the positions adopted, in the course of time, by successive UK governments that the EU legal order gradually moved away from the ideal of unity and started to accommodate various forms of non-participation of some states in the making of EU law norms. Given this history, one might have expected that the announced withdrawal of the UK would diminish the attraction of variable geometry as a model for the future development of the EU. But this will not necessarily be the case, for two contrasting reasons. On one view, the distrust of the EU expressed by a majority of British voters reflects similar feelings in other parts of the European Union, and this implies that the Union should perhaps evolve towards a less centralized and more flexible organization so as to reassure the growing mass of Eurosceptic citizens across Europe. On another view, the defection of the UK may act as an incentive for other countries to advance the integration project more vigorously, but given that it is unlikely that all 27 states would join that project and agree to a major revision of the EU Treaties to strengthen the EU institutions, a division between a core Europe and the rest becomes an attractive option for the future. In this respect, we have seen a recent revival of the multi-speed and/or concentric circles models. In particular, it is suggested that euro area countries could form a core group, advancing into new areas of cooperation, whilst the remaining countries would stay behind in a less-integrated rest group. This model had been canvassed already at the time the UK was still part of the Union, and with a view essentially to circumvent the obstructive power of that country,³² but it was revived after the Brexit referendum as it is feared, in some circles, that the Union still counts some 'awkward partners' which the other states may want to 'neutralize' by means of a Euro-area based closer cooperation.

The question therefore arises whether, in connection with a future enlargement, steps should be taken to make differentiated integration more readily available than it is today. Before answering that question, we should briefly summarize the currently existing legal limits to engage in differentiated integration.

Starting with the general mechanism of enhanced cooperation, its main attraction is that it can be used in any area of EU shared competence. It has so far been used only for piecemeal projects, where a shift to enhanced cooperation occurred in order to overcome the opposition of one or more countries in

³¹ S. George, *An Awkward Partner: Britain in the European Community*, 3rd ed (1998).

³² See, for a carefully developed model of this kind, J.C. Piris, 'It is time for the euro area to develop further closer cooperation among its members', *Jean Monnet Working Papers* 05/11, and also, by the same author, *The Future of Europe: Towards a Two-Speed EU?* (2012).

the course of the legislative process. This use of enhanced cooperation, as veto-avoidance instrument, had always been one of the contemplated usages, and it was approved by the Court of Justice. Given the rather open-ended formulation of the relevant Treaty articles, it has sometimes been suggested that enhanced cooperation should not be limited to single-project cases, but could also be used in a systematic way by a group of same-minded member states so as to constitute a true 'pioneer group' that operates together in a whole range of policy areas. This option was even openly envisaged in the Treaty on Stability, Coordination and Governance (more commonly known as Fiscal Compact), whose Article 10 states that the Parties to that Treaty 'stand ready to make active use, whenever appropriate and necessary, of measures ... of enhanced cooperation ... on matters that are essential for the proper functioning of the euro area, without undermining the internal market.' This statement seems to contain a promise (or threat) of concerted action to multiply the usage of enhanced cooperation as a tool to build a euro-area integration project. Yet, no action in this sense was taken during the five years since the entry into force of the Fiscal Compact. Rather, the few cases of enhanced cooperation that emerged since then were based on other fault lines than that between euro-area and non-euro-area countries.

In fact, the rules on enhanced cooperation contain a number of constraints³³ which make it very unlikely that this tool could be used for the construction of a closed and coherent pioneer group operating across a whole range of policy areas, despite the fact that the Court of Justice gave a rather 'flexible' interpretation to some of those constraints in its case law on enhanced cooperation. The first constraint is the 'last resort' rule, which is taken rather seriously since all cases of enhanced cooperation so far were preceded by genuine attempts to achieve the desired result through legislation applicable to all states. A second constraint is that the authorization for launching an enhanced cooperation project must be given by the Council acting by qualified majority. A third constraint is the right for every member state to join an enhanced cooperation project, so that a self-defined pioneer group cannot exclude states that do not form part of the group; in fact, Article 328(1) TFEU provides that 'the Commission and the Member States participating in enhanced cooperation shall ensure that they promote participation by as many Member States as possible.' Finally, enhanced cooperation operates within the existing limits of EU competences: it cannot be used to extend EU competences beyond the domains currently defined by the Treaties.

The other available instrument for variable geometry is the conclusion of agreements of international law between a group of member states, formally outside the EU legal order, but very much connected to the European Union in substantive terms. The model for this used to be the Schengen Convention and is nowadays the European Stability Mechanism. In a sense, one could say that this form of flexibility exists since the early days of the European integration process. Hundreds of bilateral and multilateral international treaties were concluded between member states of the European Union ever since the 1950's, in areas such as tax law, environmental protection, defence, culture and education. They typically occur in areas in which the European Union has no law-making competence at all, but also in areas in which the EU possesses shared law-making competence, but where a set of member states prefer to use their 'share' in order to conclude an agreement among themselves rather than acting in the framework of the European Union. These *inter se* agreements become a true alternative form of

³³ See, for a general discussion of the conditions for recourse to enhanced cooperation, in the light of the Court's case law, S. Peers, 'Enhanced cooperation: The Cinderella of differentiated integration', in De Witte, Ott and Vos (eds.), *Between Flexibility and Disintegration – The Trajectory of Differentiation in EU Law* (2017) 76.

variable geometry when they serve the purpose of allowing a group of member states to move European integration forward in the face of the opposition of other member states. In this respect, the Schengen experience continues to be invoked in current discussions as a positive model because it offers an example of both the potential of such agreements to overcome a blockage within the Union's decision-making system, and the possibility for their later re-integration within the EU legal system.

In the post-Lisbon years, the EU member states have claimed the capacity and the right to conclude international treaties among themselves, even when the subject matter of their agreement is closely connected to European Union policies. The conclusion of the Fiscal Compact and of the Treaty establishing the European Stability Mechanism were already mentioned.³⁴ They were followed more recently (in May 2014) by the signature of yet another international agreement in the sphere of EMU law, namely the Agreement on the Single Resolution Fund, which is the intergovernmental part of the banking union package. A further international agreement closely connected with the functioning of the EU, but in a very different domain, was signed on 19 February 2013 between 25 Member States (all except Croatia, Poland and Spain), namely the Agreement on a Unified Patent Court. That court's main task is to adjudicate an EU law instrument, namely the Regulation on the creation of unitary patent protection, which is itself, as mentioned above, the outcome of an enhanced cooperation initiative. There was no legal reason why this adjudication task could not have been entrusted to the Court of Justice, but the 'patent community' apparently persuaded the member state governments that it would be preferable to create a separate and allegedly more expert court instead.

In light of this recent practice, we can clearly see the advantages and disadvantages of recourse to *inter se* agreements as compared to other forms of variable geometry. The main advantage is that the participants to the cooperation project can be freely chosen: a self-proclaimed core group can indeed decide to act together without being forced to offer (as is the case with enhanced cooperation) a standing invitation to the other EU states to join at any time. Furthermore, again unlike enhanced cooperation, separate international agreements can be concluded outside the scope of EU competences and can therefore serve to extend the integration project beyond the existing EU policies without the need for a prior revision of the EU Treaties.

At the same time, though, such 'side agreements' may not contain norms conflicting with EU law order. They cannot derogate from either primary or secondary EU law. In its case law, the Court of Justice has consistently held that the primacy of EU law extends not only to measures of national law but also to agreements between two or more member states, which must be disapplied by national courts if they are inconsistent with EU law. Similarly, in direct actions for infringement, the Court has not distinguished between infringements caused by a state acting on its own and infringements caused by a bi- or multilateral agreement concluded between several member states.³⁵ This is entirely logical. It would otherwise be easy for the member states to escape from their EU law obligations by concluding a conflicting treaty between each other.

³⁴ For more detailed discussion of the reasons for the use of international side agreements in the context of the euro crisis, see B. De Witte and T. Martinelli, 'Treaties between EU Member States as quasi-instruments of EU law', in Cremona and Kilpatrick (eds.), *EU Legal Acts – Challenges and Transformations* (2018) 157, at 170-181. For a critical assessment, highlighting the threat to the EU's institutional integrity, see A. Dimopoulos, 'The use of international law as a tool for enhancing governance in the Eurozone and its impact on EU institutional integrity', in Adams, Fabbrini and Larouche (eds.), *The Constitutionalization of European Budgetary Constraints* (2014), 41-64.

³⁵ See, for a judgment of the Court of Justice in this sense, Case C-546/07, *Commission v Germany*, ECLI:EU:C:2010:25, para 42 to 44.

Apart from these legal limitations, cooperation outside the framework of EU law, using the traditional tools of international law, has major disadvantages in terms of democracy, transparency and judicial control, at least when compared to law-making through the ordinary legislative procedure of EU law. From the perspective of national sovereignty, it is true that the negotiation of an international agreements gives the member states governments full control, since they cannot formally be outvoted by the others, but they face the extra transaction costs of setting up a little diplomatic conference instead of being able to discuss within the tried and tested institutional framework offered by the EU legal order. All in all, this method of differentiated integration, despite its great flexibility, has major shortcomings not only from the perspective of constitutional integrity, but also from a pure national interest perspective.

One of the most spectacular reform proposals in the variable geometry domain fails to meet the test of compatibility with the current Treaties, namely the proposal to reinforce the democratic quality of economic governance by creating a special *Parliamentary Assembly for the Eurozone*. The idea was endorsed by the French president Macron in his Athens speech of the late summer of 2017, but no longer with so many words in his later Sorbonne speech. The idea had been developed earlier that year, as part of the election campaign of the socialist candidate Benoit Hamon, by a group of scholars around Thomas Piketty. The new assembly was presented as the key element of a new international treaty aiming at the 'democratization of Europe'.³⁶ That assembly would be composed of a large majority (4/5) of national members of parliament and a much smaller number (1/5) of MEPs. Yet, apart from the dubious merits of creating a separate European Assembly alongside the EP, if only because of the confusion this would create, it is not at all clear which countries should be represented in such an assembly; indeed, EMU law displays a considerable degree of variable geometry, with various non-euro area states participating in various bits of EMU law and Euro-crisis law.³⁷ But, quite apart from these issues, attributing genuine decision-making powers to a European Assembly, as envisaged by the Piketty group, would not be compatible with current EU law. As we noted above, a separate international agreement between a group of EU Member states does indeed allow for an extension of European cooperation beyond the limits of EU competences, but it does not allow for the adoption of legal rules that conflict with EU law as it stands. So, a parliamentary assembly for the euro area cannot be entrusted with powers that are conferred by the EU Treaties to the EU institutions. Yet, this is what the initiators of the project propose: their parliamentary assembly would not be a mere talking shop, but would, among other things, have the power to approve or reject the country-specific recommendations of the Council before they reach the member states. This conflicts with the current attribution of powers in the TFEU which do not allow for a decision-making role of other institutions than the Commission and the Council in the field of economic coordination. So, the creation of a parliamentary assembly for the euro area with real decision-making powers in the field of economic governance would require a revision of the European Treaties.

Another often discussed reform plan is the creation of a *budgetary capacity for the euro area*, either within or outside the frame of the EU budget, in order to allow for investments or the funding of structural reforms that would increase the long-term stability of the euro area and avoid the recurrence of crises such as the one that happened in the past years. If created outside the EU budget, by means

³⁶ Hennette, Piketty, Sacriste and Vauchez, *Pour un traité de démocratisation de l'Europe* (Seuil, 2017), translated in several other languages.

³⁷ I. Cooper, 'A separate parliament for the Eurozone? Differentiated representation, Brexit and the quandary of exclusion', 70 *Parliamentary Affairs* (2017) 655, at 661-665.

of a separate agreement among all the euro area states, or a sub-group among them, there do not seem to be major legal problems. A similar extra-EU budget was created when the European Stability Mechanism was set up in 2012. In fact, one option would be to extend the tasks of the ESM so as to allow it to fund investment programmes improving the long-term stability of the euro area. An alternative approach would consist in creating this new budgetary capacity for the euro area within the EU budget, and using the tools of EU law. This is, for obvious reasons, the preferred option of both the European Commission and the European Parliament. Depending on the envisaged size of this new budgetary capacity, several legal problems might arise but none seems to be insurmountable.³⁸ Those problems could include the need to create new own resources for the EU (and to handle the unanimity requirement applying in this respect),³⁹ and the need to adapt the budgetary procedure in order to separate the euro-area-only part of the EU budget from the rest. In this context, it should be noted that EU budgetary practice has recently experimented with the creation of a variety of special funds (such as the Emergency Trust Fund for Africa or the Facility for Refugees in Turkey) which are effectively disconnected from the main EU budget in terms of their revenue and expenditure, and are expressly designed to allow for differentiated contributions by the EU member states.⁴⁰

But new forms of differentiated integration are also envisaged in other areas than that of EMU law. Indeed, the Commission scenario of 'Those who want more do more'⁴¹ lists a number of other areas in which new projects of differentiated integration could be experimented, such as defence, justice and security, taxation and social policy. For areas such as taxation, migration and criminal justice, where the TFEU provides clear and fairly comprehensive legal bases, enhanced cooperation would seem the most appropriate tool. It would allow for the circumvention of the unanimity requirement as long as it remains in place, and more generally would allow like-minded states to take forward their cooperation, using the instruments of EU law and side-lining the acrimonious resistance of other states. In the field of social law, the scope for enhanced cooperation is more problematic, as some of the most frequently invoked reform measures, such as the creation of a European minimum wage system, or of a European minimum income benefit, would likely fall outside the scope of EU competences. In that case, the tool of enhanced cooperation would not be available, and the conclusion of a separate side agreement by socially-minded states would be the only available option.

In more general terms, among the many reform ideas that have been proposed and discussed in recent years, some will not fly because they would require a revision of the Treaties that will not be forthcoming; others may be successful, if they gather the political support of a sufficiently large group of member states, and might take the form of either intra-EU enhanced cooperation or an extra-EU international agreement, the choice among these two instruments depending mainly, though not

³⁸ See the discussions of those legal options by R. Repasi, *Legal options for an additional EMU fiscal capacity*, Study for the European Parliament (2013); and by L. Lionello, "Establishing a budgetary capacity in the Eurozone. Recent proposals and legal challenges", 24 *Maastricht Journal of European and Comparative Law* (2017) 822. The latter author lists the many political proposals made in recent years to create such a budgetary capacity, at 826-828. See also the recent in-depth analysis, *A fiscal capacity for the Eurozone: constitutional perspectives*, European Parliament, Policy Department for Citizens' Rights and Constitutional Affairs, February 2019,

[http://www.europarl.europa.eu/RegData/etudes/IDAN/2019/608862/IPOL_IDA\(2019\)608862_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2019/608862/IPOL_IDA(2019)608862_EN.pdf)

³⁹ Article 311 TFEU.

⁴⁰ See, on this institutional phenomenon, R. Crowe, 'The European budgetary galaxy', 13 *European Constitutional Law Review* (2017), 428. The budgetary implications of variable geometry are also discussed in the Monti report, *Future financing of the EU – Final report and recommendations of the High Level Group on Own Resources*, December 2016.

⁴¹ European Commission, *White Paper on the Future of Europe – reflections and scenarios for the EU27 by 2025*, COM(2017) 2025 of 1 March 2017.

exclusively, on the competence resources offered by the European Treaties. The European Parliament, in its most recent resolution on its subject,⁴² expresses considerable reluctance to move towards more differentiated integration, and is particularly hostile towards the conclusion of separate international treaties in which parliamentary participation seems, almost by definition, to be limited or inexistent. However, this is not necessarily the case. Faced with the impossibility of formal treaty reforms, and with limits of EU competence under the current Treaties, the conclusion of a separate international agreement among a group of 'willing and able' member states may, occasionally, be the solution of last resort, and it is, in fact, possible to ensure a meaningful role also for the European Parliament even in such an intergovernmental construction.

2.3 More Effective Protection for Fundamental Values?

Elements for a more effective safeguarding of the EU's fundamental values have been proposed in recent years with a growing sense of urgency, in light of the tense debates created by the launch of the Article 7 procedures against Poland and Hungary. There is not one magical reform that could improve the current situation. Rather, it is through the combined application of a number of different tools that the best results can be achieved, in combination with the Article 7 procedure.

What is missing from the current Article 7 mechanism is a uniform monitoring framework, in which the content of the fundamental values is clearly listed and assessed in an independent manner, so as to confront and rebut the criticism that the current mechanism is insufficiently objective and applies double standards to the different countries of the EU.

A distinction should be made, in this respect, between the three main fundamental values: human rights, rule of law and democracy. As regards respect for *human rights*, the European Union institutions can use a clear benchmark, namely the rights contained in the European Convention of Human Rights and those of the EU's own Charter of Fundamental Rights. If a systemic breach of one or more of those rights occurs, there is a firm basis for applying the Article 7 mechanism. The second fundamental value, respect for the *rule of law*, is less clearly defined. The European Union has no 'catalogue' of rule-of-law elements similar to its catalogue of fundamental rights. However, one element of the rule of law has been clearly identified in some recent judgments of the Court of Justice, namely the independence of the judiciary. For other aspects of the rule of law, the Union can rely on the work of the Council of Europe, and especially of its Venice Commission that adopted, in 2016, a very useful Rule of Law Checklist.⁴³ The third fundamental value, the *respect for democracy*, is the one that is least firmly defined. Conceptions of democracy differ widely and governments often claim that their democratic legitimacy is unassailable as long as they are supported by a majority in their national parliament. The argument that democracy is a much richer and more complex concept, requiring more than the organisation of free elections and the support of a majority in parliament, is powerful and convincing, but we do not have an authoritative European instrument that clearly sets out what are the minimum conditions that are required before a country can be said to be governed in a democratic manner. Therefore, the European Parliament could take the initiative for *an inter-institutional declaration listing the constitutive and necessary elements of democratic rule*, so that the Article 7 mechanism can address systemic

⁴² European Parliament resolution of 17 January 2019 on differentiated integration, P8_TA-PROV(2019)0044.

⁴³ European Commission for Democracy through Law (Venice Commission), *Rule of Law Checklist*, March 2016.

infringements on a firmer and less controversial basis than today. The long series of opinions of the Venice Commission dealing with standards for democratic institutions, as well as the judgments of the European Court of Human Rights dealing with political rights, could serve as useful guidance in drafting such a text.

Furthermore, the criticism that the current Article 7 mechanism targets certain countries in an unfair manner, whilst ignoring similar problems in other countries of the Union, could be met by the creation of a continuous and comprehensive assessment of the respect by *all* member states for the values of Article 2 TEU. This was proposed by the European Parliament in its resolution of October 2016.⁴⁴ The Commission would have to draw up an annual report on the state of democracy, rule of law and fundamental rights in *all* the member states, based on the findings of a newly created Panel composed of independent experts. The Commission's report could lead to recommendations addressed to the member states to improve their performance, thus creating a virtuous policy cycle not unlike the European semester cycle applying in the field of economic governance. Inspiration could also be found in a proposal made, some years ago already, by the Dutch Advisory Council on International Affairs, to institute a regular peer review mechanism whereby review teams composed of experts and national representatives would examine each country's rule of law performance.⁴⁵ As for the legal feasibility of such a reform, it would seem to fall within the existing competences of the Union and not to require a Treaty change, as long as it is just an ancillary mechanism to the Article 7 procedure, and does not aim at formally changing that mechanism. We could add to this proposal that it would be useful to give an important role also to the Fundamental Rights Agency in this assessment exercise. Although the FRA's current remit is limited to fundamental rights, it could be extended (by a modification of its founding Regulation) to also include issues of democracy and the rule of law. It could thus become the Union Agency for Democracy, Fundamental Rights and the Rule of Law.

Another possible building block for better safeguarding the Union's values would be the creation of a general rule of law conditionality applying to all forms of EU expenditure, as proposed by the Commission in 2018.⁴⁶ This would involve a mechanism for the withdrawal of EU funds from member states that present 'generalised deficiencies as regards the rule of law' when that affects the financial interests of the Union. The proposal itself would need to be improved, in terms of achieving greater clarity and consistency,⁴⁷ and there is no reason why it should be limited to rule of law deficiencies and not also include democracy and fundamental rights deficiencies. Moreover, it should be avoided that the final beneficiaries of the EU funds (who bear no responsibility for the failure to respect the

⁴⁴ European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, P8_TA(2016)0409; and see the further explanations in the accompanying European Value Added Assessment, *An EU mechanism on democracy, the rule of law and fundamental rights*, October 2016, PE 579.328. The proposal was reiterated in the more recent European Parliament resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, rule of law and fundamental rights, P8_TA-PROV(2018)0456.

⁴⁵ Advisory Council on International Affairs, *The Rule of Law: Safeguard for European Citizens and Foundation for European Cooperation*, Advisory report no. 87, 23 April 2014. See, for further discussion of this proposal, A. Meuwese, 'Peer review in the context of constitutionalism and the rule of law', in Adams, Hirsch Ballin and Meuwese (eds.), *Bridging idealism and realism in Constitutionalism and Rule of Law* (2017) 479.

⁴⁶ European Commission, Proposal for a Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, COM(2018) 324. It echoes the EP resolution of 14 March 2018 on the Next MFF: Preparing the Parliament's position on the MFF post-220, para. 119.

⁴⁷ See in particular the criticisms on this point by V. Vita, Research for REGI Committee – *Conditionalities in Cohesion Policy*, European Parliament, Policy Department for Structural and Cohesion Policies, 2018, pp. 54-59, [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/617498/IPOL_STU\(2018\)617498_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/617498/IPOL_STU(2018)617498_EN.pdf)

fundamental values) should be affected by the withdrawal of funds. Subject to these improvements, the proposal would be an useful additional tool in ensuring respect for the fundamental values.

An additional instrument that could be more promising (in that it would have no negative repercussions on the individual beneficiaries of EU funds) would be the *positive* use of EU funds to support projects that reinforce the daily practice of democracy, and of respect of the rule of law and fundamental rights. The Justice, Rights and Values Fund, proposed by the Commission in view of the next Multiannual Financial Framework, seems an appropriate tool for this,⁴⁸ although the proposed volume of its funding is insufficient for allowing it to make a real impact. Also, it would be important that such funding can be awarded not only to central and local government authorities in the member states, but also directly to grassroots organisations. We realize that direct funding by the Union of civil society organisations is not without problems; it would be essential to make sure that only *bona fide* organisations could benefit from EU budgetary allocations, and that the European Commission should be very transparent in publicizing its funding allocations.⁴⁹

Finally, the existing instrument of the *infringement action* for any violations of Union law could, and should, be put to more active and systematic use for the protection of the fundamental values of the Union. Recently, an evolution in this direction has started. The Commission has brought infringement actions for what it considers violations of the fundamental rights of the EU Charter⁵⁰ and for measures that endanger judicial independence.⁵¹ One advantage of infringement actions is that they have an inbuilt dialogue stage with the member state concerned, during which the alleged violation of EU law can be corrected, or during which the Commission can be convinced that there is no violation. Despite the existence of this pre-judicial phase, infringement actions can also be used for urgent reactions, because the Court of Justice of the European Union can decide interim measures which the member state concerned must implement while waiting for the final judgment.⁵² A disadvantage of the infringement action is that it is inherently limited to breaches of the fundamental values that occur when member states act within the scope of EU law (for example, when implementing EU regulations and directives); they cannot address the situations where member states act outside the scope of their EU obligations. The Commission should develop further this new approach and make the infringement action an important tool to address systematically the deficiencies in the protection of fundamental rights, the rule of law and democratic principles whenever member states act to implement EU legislation or whenever they use EU funding. The Commission should not hesitate to ask the Court of Justice for urgent interim measures while an infringement case is pending.

⁴⁸ See the Commission proposal for a regulation establishing the Rights and Values programme, COM(2018) 383 of 30 May 2018.

⁴⁹ See the study for the European Parliament, *Democratic accountability and budgetary control of non-governmental organisations financed from the EU budget – Update*, January 2019.

[http://www.europarl.europa.eu/RegData/etudes/STUD/2019/621798/IPOL_STU\(2019\)621798_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/621798/IPOL_STU(2019)621798_EN.pdf)

⁵⁰ See for example the infringement procedure concerning Hungarian laws that impose restrictions on foreign-funded civil society organisations. The Commission argues, in this pending Court case, that there is a violation of the EU Treaty provisions on free movement of capital but also, and above all, a violation of the right to freedom of association and to the protection of personal life and personal data enshrined in the Charter of Rights of the Union (Court of Justice, Case C-78/18, *Commission v Hungary*, pending).

⁵¹ See for instance the infringement case brought by the Commission against Poland for threatening the judicial independence of the Polish Supreme Court: Court of Justice, Case C-619/18 R, *Commission v Poland* (final judgment pending).

⁵² For an example of interim measures see the 'judicial independence' case mentioned above (Case C-619/18 R, *Commission v Poland*, Order of the Court of 17 December 2018).

The reforms outlined above would apply to the member states of the Union, and therefore also to any new state that may join the Union in the near future. If these reforms (or at least some of them) were enacted, there would no longer be the large gap that we know today between the strict political conditionality imposed on candidate countries and the almost complete absence of monitoring of those political conditions once the country has joined the Union. The Cooperation and Verification Mechanism applying to Bulgaria and Romania (mentioned in Chapter 1) is a sort of middle-way, since it aims to ensure that the new member states remain on the path of political and judicial reform also after their accession. A mechanism of this kind should also apply to any new member state that will join the EU in the future. It should be accompanied by a vigilant use of the infringement procedure for failure to comply with the obligations of membership, although the use of the infringement procedure should be even-handed, that is, the compliance by the new member states should be monitored as severely as that of the current members.

2.4 Conclusion and Policy Recommendations

If, and when, new member states will accede to the European Union, the European Parliament should make its consent to such accession subject to a number of institutional reforms designed to make the operation of the enlarged European Union more effective and democratic. The date at which such a new enlargement will take place is highly uncertain. The reforms recommended here should also be pursued, and hopefully achieved, before any new enlargement takes place, but to the extent that they cannot be achieved by that time the accession process will give to the EP a window of opportunity to insist on the enactment of those reforms as a condition for the accession of new states.

The following reforms are recommended, in particular:

- The accession of new member states would make the unanimity rule for Council decision-making even more unbearable than it is today. The European Parliament should therefore require the use of the *passerelle* mechanisms that allow for a transition to majority voting without changing the Treaties. More radically, the Parliament should link its agreement to future accession to the negotiation of a revision of the Treaties that would aim at removing all cases in which the Council decides by unanimity, as well as for future Treaty revisions themselves. This does not necessarily mean that unanimity should be replaced by the current system of qualified majority. A higher threshold could be set for the most important decisions, such as amendments of the Treaties.
- As long as unanimity continues to exist, though, the use of the mechanisms of differentiated integration will remain useful and necessary, even more so when new members will join the Union. Attempts at creating a closed 'core Europe' should not be encouraged, because creating a closed circle of cooperation is hardly feasible in legal terms (enhanced cooperation may not be exclusive, but is always open to the participation of all) and is politically not appealing. Instead, the existing mechanism of enhanced cooperation should be used without hesitation whenever it allows to by-pass the vetoing by one or more countries of measures that are useful for the majority of member states. Separate agreements under international law between groups of member states (on the model of the Schengen Convention) are not desirable, as they have a cost in terms of democratic accountability and judicial control, but their use should nevertheless be envisaged in those cases where cooperation seems

politically important but where the text of the European Treaties makes it impossible to adopt Union legislation.

- The European Parliament should require the creation of a continuous and comprehensive assessment of the respect by *all* member states for the values of Article 2 TEU, as was proposed in its resolution of October 2016. This should, however, be preceded, by a more precise definition of what is understood by respect for the rule of law and respect for democracy. Similarly to what happened with human rights (of which the Union adopted a catalogue in the form of the Charter of Fundamental Rights), there should be a Union catalogue of the elements of the rule of law and democratic government. The new assessment procedure should involve evaluations by independent experts and an active role for the EU's Fundamental Rights Agency, which should become an agency in charge of fundamental rights, democracy and the rule of law. A mechanism comparable to the existing Cooperation and Verification Mechanism for Bulgaria and Romania should also be applied to states that will accede in the future, so as to ensure a better transition between the pre-accession political conditionality and a post-accession continuation of the reforms.

- The Commission has recently brought infringement actions before the Court of Justice of the European Union for what it considers violations of fundamental rights and threats to judicial independence by member states. The Commission should develop further this new approach and make the infringement action an important tool to address systematically the deficiencies in the protection of fundamental rights, the rule of law and democratic principles whenever member states act to implement EU legislation or whenever they use EU funding. The Commission should not hesitate to ask the Court of Justice for urgent interim measures while an infringement case is pending.

This in-depth analysis, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the Committee on Constitutional Affairs, recalls the earlier debates linking the enlargement of the Union with the need to adapt its constitutional framework, and discusses whether further constitutional reforms, involving Treaty change or not, are necessary when a further enlargement of the Union will take place in the near future. It focuses on three main themes: the Union's decision-making capacity; forms of differentiated integration; and the question on how to ensure respect by all member states for the Union's fundamental values.

PE 608.872

Print ISBN 978-92-846-4695-1 | doi: 10.2861/352394 | QA-02-19-235-EN-C
PDF ISBN 978-92-846-4694-4 | doi: 10.2861/868468 | QA-02-19-235-EN-N