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policy paper

Antonio Padoa-Schioppa

Guidelines for the Constitutional Reform of the European Union

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*The **Policy Paper** series of the Centre for Studies on Federalism includes analyses and policy-oriented research in the field of national and supranational federalism. The papers aim to stimulate scholarly and political debate on topical issues by presenting original data, ideas and proposals.*

ANTONIO PADOA-SCHIOPPA is Professor Emeritus of History of Law at the University of Milan and former President of the Centre for Studies on Federalism.

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Guidelines for the Costitutional Reform of the European Union

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Ignoranti quem portum petat, nullus suus ventus est.
Seneca, Letters to Lucilius, LXXI

1. Premise[1]

On several occasions over the last few years, the prospect of a reform of the treaties, which seemed to have been put on the back burner after the laborious gestation of the Lisbon Treaty, has regained topicality and has also been called for by several EU governments, including Germany, ever since the economic crisis began to threaten the very survival of the Euro, resulting in a dramatic decline in growth and employment, unknown since the 1930s.

The aim of this paper is to lay down guidelines for a future reform that could ensure stable efficiency and democratic legitimacy both to the Union as a whole and the core Eurozone countries, as well as to any additional EU Member Country aggregations, which may be larger or smaller than the Eurozone but do not include all the members of the Union itself.

The reforms proposed herein can be carried out, depending on the issues and functions, following different procedures. Some of them do not require the treaties in force to be amended and can be achieved on the basis of the existing rules, in particular through enhanced cooperation or disciplines related to implied powers (Art. 352 TFEU) or the Euro (Art. 136 TFEU): a significant set of reforms to make the EU (or rather a group of Member States willing to advance) more effective and democratic - in economic policies of the UE, in introducing a European fiscal power at least inside the Eurozone, in launching a great investment plan for growth and employment, in extending qualified majority vote, in security and defense, in codecision etc.- could be achieved without changing the exiting treaties. Others require regulatory changes that can be achieved under the procedures provided for in Art. 48 of the Treaty on European Union (TEU). Finally, another way is proposed which would result in one

or more new treaties involving only some EU member countries, as was the case with the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) and the European Stability Mechanism (ESM).

Each of these proposals has a different implementation time schedule. While activating possible reforms within the treaties only formally requires the political will of a large number of Member Countries to implement them, amending the treaties involves ratification by all members, hence an implementation time of several years, as experience has proven. Even the adoption of one or more new treaties by some Union Members would take a rather long time because it is likely to be undertaken only when there is evidence that the amendment to the treaties on the basis of Art. 48 TEU may not be agreed upon by all Member Countries.

One additional point must also be emphasized *in limine*. The Union's constitutional reforms envisaged herein are based on the assumption that certain, still widespread ideological concepts regarding sovereignty as the exclusive prerogative of nation-states should be recognised as simply wrong in principle as well as already disproved by the political reality at the national and European level. EU Member States are already no longer sovereign in a series of functions and important competences. Therefore, these lines of reform aim at completing a trend already underway at the Union level, imposed by the inescapable reality of the globalisation of the planet, at the same time protecting to the fullest extent possible - on the basis of the principle of subsidiarity included in the treaties - national and local identities as well as the autonomy of nation-states (as required by Art. 4 TEU).

2. A Two-Tier Regulatory System of the Union

The still-unattained objective of the reform of the EU treaties should be twofold: ensuring the EU a stable constitution while, at the same time, making minor future regulatory adjustments possible under procedures which are sufficiently smooth.

To this end, a two-tier EU legal and institutional system should be created, as in the 2003 Convention and in part also included in the current combination of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

The top tier should be constitutional and should include: a) the principles on which the EU is founded, the basic profiles of its institutions, rules for future institutional reforms; and b) the EU Charter of Rights. The lower tier, which regulates the functioning of the Union, should include the current TFEU and the reforms the EU requires at this stage and at later stages.

Regarding future amendments, on both tiers the new treaty should: a) charge the European Council, the Commission and the European Parliament (EP) with making proposals; b) give the EC and the EP codecision power in the future treaties amendments.

Any future amendment to the first-tier Treaty (ECT: European Constitution Treaty) would require more complex procedures and more highly qualified majorities than the future amendments of the second-tier Treaty (TFEU).

Amendments to the TCE would presumably enter into force after being ratified by a super-qualified majority of Member States, calculated using the double parameter of number of States and overall population (e.g. two-thirds or three-fourths of one and the other). However, amendments to the TFEU (provided they are not in conflict with what has been laid down in the ECT) could enter into force with no need for national ratification, by reaching a qualified majority within the EC that accounts for a similar majority of the EU population (e.g. an absolute majority or two-thirds of the EC and the population).

From the perspective of a federal union, the new treaty should not allow for the withdrawal of one or more Member States (Art. 50 TEU); but the opportunity to shift from being full Member State to Associate State could be considered.

Institutional configurations that allow for participation, and that are well-differentiated in terms of coordination and integration level with respect to the new European Union, should be provided for EU Member States that are not parties to a new treaty, for Eastern European countries and Mediterranean countries. There could be distinct institutional arrangements for the different Associate States.

Forms of coordination including special procedures for decision-making and decision implementation should be laid down for cross-bor-

der regions sharing geographical and economic characteristics (alpine regions, sea-coasts).

3. Principles

The institutional reforms outlined herein are consistent with the fundamental principles enshrined in the EU Charter of Fundamental Rights and in the TEU: dignity, freedoms, equality, solidarity, citizenship and justice, to which the right to peace should be added. The reforms are based on the three fundamental pillars of the Union's legal system, all now laid down in the treaties:

- *subsidiarity* (as the principle of competence means to jointly achieve the objectives of minimum governance, the appropriate level of governance for the problem to be resolved, and governance that is as close as possible to the citizen);

- *efficiency* (only possible if there are rules ensuring real decision-making opportunities, hence by generally adopting the majority principle, which centuries of experience has proven to be the only way for a body to take decisions within its competences when its members take divergent positions);

- *democracy and rule of law* based on popular sovereignty (which, at the European level, is only possible by granting the European Parliament, elected by universal suffrage, full legislative co-decision, budgetary powers as well as control powers over the government of the Union). The channels of direct democracy established by Art. 11 TEU must remain open.

4. EU Institutions

The European Parliament

In addition to the functions provided for in the existing treaties, the European Parliament should be granted:

a) *codecision power in all EU legislative decisions*, including proposals for the reform of the European Constitution and the TFEU Treaty;

b) *the power to introduce tax at the European level, in codecision with the European Council*;

c) *the power to approve a share of the debt (borrowing capacity) within predetermined limits established by the treaties to be allocated for investments in European common goods on the basis of the principle of subsidiarity;*

d) *budgetary power relating to the amount and allocation of the EU's own resources, in codecision with the Council* and (as for the multi-annual planning of the resources transferred from national budgets) with the cooperation of national Parliaments;

e) *the power of legislative initiative* in cases in which the Commission has not responded to the invitation to prepare a draft law;

f) *the ability to define common foreign and security policy guidelines* and allocate the corresponding financial resources;

g) *the ability to appoint the President of the Commission and give a vote of confidence to the Commission in codecision with the European Council.*

Decision-making requiring an absolute majority of the EP members for legislative codecision and for appointments should be limited to a few matters of particular constitutional importance.

The parliamentary procedures as well as the forms and limitations of the powers of the EP Committees should be established by regulation by the EP itself, approved by a qualified majority.

A deadline should be set for adopting a uniform electoral procedure (Art. 223 TFEU), which should also be approved by a qualified majority in codecision between the EP and the Council.

The new treaty would be able to review the distribution of seats in the EP among Member States, reducing (but not necessarily completely eliminating) the over-representation of the smallest states with respect to the largest one (in fact, the strict proportionality of the representative bodies is often not be found also at the national level).

In decisions regarding the Eurozone and in the enhanced cooperation framework adopted for a group of countries, which may be larger or smaller than the Eurozone, the European Parliament must be involved at the legislative level (which is already possible: cf. Art. 333 TEU). In

this case, the debate could take place in plenary composition, both in the Committees and in the House, but *voting power should be limited to parliamentarians elected by countries participating in the initiative*, which has only been adopted by them and not by the entire Union[2].

The European Council

The European Council must retain its role as the highest body with political driving force, a sort of collegiate presidency of the Union. It must also continue to exercise the direct function of government, especially in foreign and security policy in synergy with the Commission and without creating another bureaucratic apparatus within the Union.

The majority principle must apply to all the decisions of the European Council - proposals for and decisions on new laws, actions, appointments, future reforms of the treaties -, with the double calculation of number of states and population: a simple, qualified, super-qualified majority depending on the matter.

The President of the Commission may be appointed by a qualified majority as President of the EC, already possible under the current TEU. This option would have the dual benefit of ensuring both the unity of leadership and the personalisation of leadership power that are typical of present-day democracies and maintaining a regime in which the Head of the Executive is chosen via second-order election by the two Chambers of the States and the citizens, in line with the outcome of the EP election, as already established by the treaties[3].

The Council of Ministers

The majority principle must apply to all the decisions of the Council of Ministers, with a simple or qualified majority depending on the matter. Regarding the legislative procedure to adopt for the Council of Ministers, the options are: to make sessions public, to make the minutes public within a specified period of time or to maintain the current system. The second of the three proposed solutions may be preferable to ensure both greater transparency and freedom of discussion, protecting against the risks of forcing any issues for internal political use.

Furthermore, a future reform could be envisaged which emphasises the configuration of the Council of Ministers as the second Chamber of the Union by adding a representative from the Member States' respective national Parliament, elected by the latter and belonging to the opposition or, in any case, to a different political grouping with respect to the Minister.

The Commission

The Commission should become the true government of the EU acting, as afore-mentioned, in synergy with the European Council, which would retain its role as the main political driving force of the Union: a synergy that would be greatly enhanced if the two presidencies were conferred on the same person.

The Commission's control and "guardian of the Treaties" could be partly entrusted to special agencies, accountable to the Commission itself. The latter, despite frequent claims, has always exercised *an inherently political function* as well, in that it has the exclusive right of legislative initiative, which is a political function par excellence.

This *legislative initiative* function could be maintained by the Commission, while granting both the European Parliament and the two Councils the power to put forward draft legislation when their invitation to the Commission to that effect has remained unanswered.

The principle enshrined in the treaties, according to which *the President of the Commission* must obtain the affirmative vote of both the European Council and the European Parliament, must be maintained. The need for such dual consent is based on the dual legitimacy of the Union, i.e., of peoples and nation-states.

However, the current procedure for the appointment of the President gives priority to the European Council's role with respect to the European Parliament's, although it is true that the Lisbon Treaty requires European election results to be taken into account. Looking ahead, a better balance between the two bodies seems necessary. Either the Council could choose from a list of names provided by the EP, or *the European Parliament could choose the President of the Commission from a list of names indicated by the Council*, also taking into account the election outcome. This second option seems preferable, especially if the previously suggested criterion of electing the President of the European Commission to the Presidency of the European Council as well was adopted.

The Commission should obtain a vote of confidence from the European Parliament. The individual Commissioners should be chosen by the appointed President, a vote of censure with the obligation to resign should be possible both on the President (in which case the entire Commission has to resign) and on each individual Commissioner, who would be replaced in this case after obtaining confirmation by the European Parliament.

The number of Commissioners could be reduced, with a reasonable rotating mechanism between larger and smaller Member States, without prejudice to the principle that each Commissioner would act as a Union Minister and not as a member of his/her nation-state.

The appointed Commissioners, respectively a) for the economy, taxation and the European treasury; b) for foreign policy; c) for defence as well as the internal and external security of the Union would have to be chosen and appointed upon mutual agreement between the European Council and the President of the Commission.

The Court of Justice

The Court of Justice would maintain its current functions in its two-tier structure. The functions of the Constitutional Court of the Union would be exercised only at the higher tier and could include the power to declare ineffective national laws that the Court states as conflicting with the Constitutional Treaty of the Union (TEU or TCE or Fundamental Law) and the Treaty on the Functioning of the European Union (TFEU).

National Parliaments

National Parliaments - either all of them or only those of the Member States sharing an Enhanced Cooperation - are called upon to cooperate with the European Parliament in the multiannual planning of EU budgetary resources as to the transfer of funds and tax revenues from national budgets to the Union budget.

5. The Budget, Union Taxation and the European Central Bank

In line with the above-stated, codecision between the European Parliament and the Council by a qualified or super-qualified majority should be a cornerstone of the reform insofar as Union resources are concerned (Art. 311.3 TFEU).

The multiannual financial framework (Art. 312.2 TFEU) should also be prepared in codecision with the Council and the EP, involving national Parliaments in the form of a convention-assembly, or via a mandate given by each Parliament to its own government, which would take decisions in the Council in accordance with said mandate.

The transfer of shares of taxes (e.g. VAT) or certain budget shares (e.g. regarding defence spending) from the national to the European level should take place under the same procedure: codecision between the Council and the EP, the involvement of national Parliaments in one of the two above-mentioned forms.

In both cases, decisions would be taken at the European level and would be binding on all Member States if codecision between the Council and the EP - by a qualified or super-qualified majority - is achieved.

The EU's annual budget (Art. 314 TFEU) may continue to follow the current procedure.

The Union must be able to establish its own taxation (e.g. carbon tax, financial transaction tax) under codecision between the EP and the Council by a qualified or super-qualified majority. Similarly, the Union must be able to have its own Treasury.

The European Central Bank must fulfill its role as a last-resort lender, which is also essential for stability.

The same codecision procedure between the Council and the EP must be respected in order to coordinate Member States' internal taxation at the European level.

It is essential that some budget sections and items be subject to a restricted configuration (e.g. with regard to European taxes, defence spending by means of funds transferred from national budgets, the ESM and so on), with the decision-making and voting powers of the European Council and the European Parliament limited to the governments and (as above-mentioned) the parliamentarians of the countries participating in the initiatives concerned. This applies not only to the Euro Group but also to other aggregations (e.g. in the area of the Financial Transaction Tax).

Both the TSCG and the ESM must be integrated into the Community method with appropriate roles for the EP, the Commission and the Court of Justice.

The obligation of a balanced Union budget should be imposed, freed from cycle shifts, to ensure a level of primary surplus that enables interest expenditures related to investments at the European level to be included while maintaining a balanced budget.

The possibility of establishing a *maximum ceiling for the EU budget* should be considered, for example 5% of European GDP including defence expenditures after the transfer of the current corresponding national allocations for this item.

6. Enhanced Cooperation and Dual Institutional Configuration

A key issue is whether or not it would be appropriate to maintain enhanced and structured cooperation procedures (EC, SC) in the institutional framework of a new treaty. On the one hand, it may be argued, with undoubted consistency, that adopting codecision and the majority principle across the board implies that the decisions regularly taken within the EU are always binding, even for the dissenting States. On the other, it may be assumed that proceeding with further reforms with an advance guard of member states - so far constantly followed by the EU (e.g. regarding its social policy, Schengen and the Euro) - does not deserve to be removed.

This second assumption seems preferable, but on three conditions: a) that the restricted configuration be applied in a way that does not jeopardise the single market by structurally altering the rules of competition and international trade; b) that obligations and benefits resulting from decisions made by only some governments in the Council (for example regarding its own resources or European taxation) are borne by or benefit only the Member States that have subscribed to them; c) that in these cases the right to vote in the European Parliament be reserved only for the parliamentarians of the Member States participating in the new initiative, similar to that provided for in Art. 330 TFEU on Enhanced Cooperation.

A specific institutional dimension is already up and running in the Eurozone, and has been explicitly recognised in the current treaties and in the two Treaties on the TSCG and the EMS, which are now in force. Similar rules should also apply to common defence.

Since it is highly unlikely (if not impossible) that Great Britain will agree to bring the Union to the level of a federation by increasing supranationalism, generalising the principle of majority rule and accepting the greater involvement of the EP, a two-tier configuration of rules needs to be provided for in order to maintain a single institutional framework. This means that there will be rules that are valid for all 28 Member States - maybe even accepting a reduction in their supra-nationality, as the British would prefer - and rules valid for those countries which have accepted the reforms, first of all the Eurozone countries and those which will agree to them.

This is in part already possible by adopting the Lisbon rules on enhanced cooperation, including Art. 333 TFUE allowing for the passage to ordinary legislative procedure, hence assigning a potentially greater role also to the EP. However, the new treaty will have to go further and impose general legislative codecision, the majority principle, the fiscal capacity of the EP, common defence and the other above-mentioned changes.

These rules (the majority principle and the double legitimacy of the EP as well as the Council of Ministers and the European Council, formed only by representatives of participating countries) should also apply within the group adopting enhanced cooperation, i.e., within the federal core of the Union: the two Councils in restricted formation and the European Parliament with the right to vote reserved only for the participating countries should decide within it.

7. Common Defence

The principle of structured cooperation, already included in the treaties (Art. 42.6 TEU), should become the basis for future common defence, if not all the Member States show their willingness to establish it from the outset for everyone. The States that agree to it would have to transfer a greater part (if not all) of their current budgetary resources for national defence to the EU, possibly reducing the amount in proportion to the economies of scale made possible by the far greater efficiency of common management.

The use of these resources should be regulated according to codecision procedure between the EP and the Council, both taking decisions in restricted configuration (only ministers and parliamentarians of the structured cooperation may vote), according to that which has been stated regarding enhanced cooperation.

A Commissioner appointed jointly by the European Council and the EP would perform the functions of Minister of Defence.

8. Planetary Cosmopolitan Guidelines

So far the European Union has long been leading the way in giving support to cosmopolitan and multiateral approaches to issues that (consistent with the principle of subsidiarity) do not have appropriate solutions outside a global framework.

This concerns peacekeeping, including peace enforcement and peacekeeping instruments; international trade; arms control, especially regarding nuclear weapons; climate control and policies to combat planetary global warming; investments in alternative sources of energy; the protection of biodiversity; reactions to genocide; and a world monetary system with its related institutions.

These objectives may be achieved through institutions and international agencies: from the UN to the WTO, from the International Criminal Court to the International Tribunal for the Law of the Sea, from the IMF to the World Bank and other international agencies.

The new EU treaty should include: a) a general clause similar to Art. 11 of the Italian Constitution, containing a willingness to transfer shares of EU sovereignty to global institutions, starting with the UN, in accordance with the principle of subsidiarity; b) the obligation to start negotiations (by a date to be agreed upon) for attainig in the future a unified EU representation within the UN Security Council and the IMF Board; or, alternatively and/or as an interim agreement, at least France's commitment to bringing the positions adopted by a qualified majority by the European Council into the UN Security Council; c) a UN reform aimed at modifying the Assembly system, promoting the implementation, even under a restricted configuration, of Art. 43 of the UN Charter as well as at reforming the Security Council by introducing representatives at the

continental level and removing veto power; d) the definition of transition measures and times towards the achievement of these objectives.

9. To Amend the Treaties or Draft a New Treaty?

There are two conceivable ways to carry out the EU reforms along the lines of the afore-mentioned suggestions with respect to the rules not contained in the current legislation that therefore cannot be adopted without changing the legislation, by taking recourse to enhanced cooperation.

A new treaty may be adopted following the procedure requested by art. 48 TUE for amending the existing treatises, or instead (once ascertained that unaninimity would be unattainable on the proposed reforms) choosing to quit such a procedure in order to establish a new treaty entering in force only among the Member States who agree.

The first way is clearly indicated in Art. 48 TEU: the European Parliament, the Commission or one or more of the EU governments may submit a proposal; the European Council shall act by a majority in favour of examining the proposed amendments and convene a Convention to draft the proposal; an Intergovernmental Conference (IGC) shall approve, amend or reject the proposal; and then all EU Member States shall ratify it according to their respective constitutional rules. While relatively easy in the first two stages, the rules of Art. 48 become very strict in later stages: the Convention shall decide in accordance with the principle of consent, which implies unanimity; the IGC shall act by unanimity; and ratification must take place in all the states.

Within the Convention the principle of consent may be interpreted as the consent of all four of its components, which does not mean unanimity is required within each of them and hence in the final decision. Within the IGC and the ratification process, however, unanimity is an insurmountable constraint, despite the fact that the saving clause in Article 48.5 establishes that the matter shall be referred to the European Council in the event of ratification by at least four-fifths of the EU Member States.

Since the scope of Art. 48, with the double unanimity of governments and national Parliaments, implies the almost absolute certainty that at least Great Britain, and perhaps a few other Member States, will not agree to such institutional reforms, at this point there might be three possible ways to achieve a genuine reform treaty of the EU:

a) adopting the treaty with an opting out clause for dissenting countries; this procedure, which is already being followed for the Euro in Maastricht, might be more easily adopted by Great Britain if the new treaty ensured the same country the return of some competences which do not hinder the single market, or at least some new opting out clauses;

b) launching the treaty within a treaty on the basis of the Vienna Convention on International Treaties, by means of the "rebus sic stantibus" clause;

c) launching a new treaty agreed upon by the consenting Member States, in which the previous treaties are deemed inadequate (due to the bottlenecks of Art. 48) to meet the objectives set out by the same treaties in force related to the improvement of the EU and are replaced by a new treaty. This can be achieved by envisaging the withdrawal of states in favour of the new treaty, or the withdrawal of dissenting states (for example, following the negative outcome of a British referendum on staying in the EU), in both cases through the negotiation of the relations after the approval of the new treaty in order to maintain the single market.

After national ratification, the new treaty would be submitted to European referendum and enter into force if approved by a qualified majority of the States and of the European people.

Notes

[1] These pages are a revised version of my 2012 paper published as Policy Paper on the Turin Centre for Studies on Federalism website (www.csfederalismo.it) and in the review "Il Mulino", 61 (2012), pp. 407-506. This revision has benefited greatly from the results of a workshop organised by the Turin Centre for Studies on Federalism and the Scuola Superiore S.Anna, Pisa, held on September 27th, 2013 in Pisa, which was attended with original contributions by Giuseppe Martinico, Carlo Maria Cantore, Roberto Castaldi, Giacono Delledonne, Federico Fabbrini, Cristina Fasone, Nicola Lupo, Leonardo Pierdominici, Paolo Ponzano, to all of whom I would like to express my thanks. Other valuable suggestiions came from Giuseppe Bianco, Katarzyna Granat, Mario Koelling, Nikos Skoutaris. The views expressed herein are mine.

[2] This solution seems far more preferable than the other possible options. In fact, it should be noted that: a) assigning the function of legislative codecision in these cases to national Parliaments or to another Assembly composed of representatives elected in the first or second grade at the national level (except for the cases that will be discussed below) distorts the necessary European level of popular representation legitimacy that is the *proprium* of the European Parliament elected by universal suffrage, seriously delegitimising its democratic representativeness; b) the extension of voting power to the entire EP would be unjustified in decisions regarding resources or actions concerning only the Eurozone or a larger or smaller group of member countries (e.g. for the Financial Transactions Tax); c) the participation of the entire EP in the debate would, however, take into account the needs of the EU as a whole.

[3] This solution - which is consistent with a constitutional structure typical of a federation of states in the form of a parliamentary republic based on the dual legitimacy of people (EP) and States (European Council of Ministers) - seems preferable than that of electing the President of the Commission by direct universal suffrage, which poses several problems, starting with the language barrier not yet removed nor likely to be removed in the near future.

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The activities of the CSF are focused on interdisciplinary research, documentation and information on internal and supranational federalism, the developments of regional and continental integration (notably, of the European Union), the issues related to the world order and the democratization process of the international system.

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CENTRE FOR STUDIES ON FEDERALISM
Via Real Collegio, 30
10024 Moncalieri (Turin) - ITALY
Phone +39 011 670 5024
Fax +39 011 670 5081
info@csfederalismo.it
www.csfederalismo.it