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## Can the Enlarged European Union Continue to be that United

Giorgio Maganza\*

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# Can the Enlarged European Union Continue to be that United

Giorgio Maganza

## **Abstract**

Although a tribute to Jean-Claude Pirijs could easily stretch through the whole spectrum of European Union law-which broadened in part thanks to his active contribution over the twenty-year term when he served as Legal Adviser to the Council of the European Union, the European Council, and several intergovernmental conferences for the reform of the treaties-it is appropriate to devote the following lines to the theme of institutional strengthening, which always attracted his consideration and thinking and to which he contributed some illuminating and forward-looking writings; and it is tempting to do so in the light of a specific feature that presently keeps him busy as a Senior Fellow in New York: "Two-Speed Europe."

# CAN THE ENLARGED EUROPEAN UNION CONTINUE TO BE THAT UNITED?

Giorgio Maganza \*

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*“How can we ensure that ‘more’ does not lead to ‘less’?”<sup>1</sup>*

*“Such an expanded Union would defy the comprehension of the founding fathers such as Jean Monnet. The micro-reforms currently under discussion in the EU on the size of the Commission, and the voting weights of the 15 members states, might help to accommodate up to five new members. But much deeper reforms would be required to manage greater diversity.”<sup>2</sup>*

## INTRODUCTION

Enlargement of the European Union (“EU” or “Union”) to include Central and Eastern Europe countries ceased to be an option twenty years ago—the European Union was still the

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\* Director, Legal Service, Council of the European Union. The views expressed are the author’s alone and do not commit in any way either the Council or its Legal Service.

1. Report Prepared for the European Council, on Europe and the Challenge of Enlargement, 25 E.C. BULL., no. 3, supp. (1992) [hereinafter Challenge of Enlargement].

2. Lionel Barber, *Uniting the States of Europe*, FIN. TIMES (London), Dec. 29, 1999, at 12.

European Communities—when the Berlin Wall crumbled down. At that moment enlargement became a must, a political necessity, with the only options left being when and how.

Jacques Delors, then president of the European Commission, had started very early in the 1990s to warn about the possible implications of enlargement on the institutional system that had been conceived in the founding treaties forty years earlier and had hardly been adapted ever since. He had pointed to the expected enlargement to Austria, Finland, Norway, and Sweden, and to the next one to follow, possibly involving over ten countries. Since 1992, he had been calling in particular for a strengthening of the institutional system as a precondition for any further widening of the Union.

Twenty years later, discussions about adapting the Union's institutions have (provisionally) closed with the entry into force of the Lisbon Treaty. In the meantime, Europe has changed, and the European Union has changed with it: its membership has grown of course (twice as many!). The Union is not the same as it was, in the way it acts—or reacts to external events (consider the debate on the intervention in Iraq)—as well as in the way it sets its priorities (consider the issue of refugee landing in the Mediterranean EU countries) and reaches compromises. There is no surprise about that: a club of twenty-seven cannot possibly be as like-minded as a club of six.

This Essay assumes that the European Union had no other choice than to accept the political necessity of enlargement. That being so, one could certainly not expect things to be the same after the biggest enlargement of the Union and the introduction of a single currency, indeed the biggest events in the Union's history. It may, however, be argued that enlargement could have been better prepared and managed, not least had Jacques Delors' warnings been followed by appropriate action. And it is fair to question whether due consideration has been given to the impact of the growing and diversifying membership on the European integration model.

Is it too late though? It would no doubt be more difficult to do now what has not been done over the past twenty years to make the Union's institutions more effective, assuming that there continues to be a political will to do so, at a time when the general attitude toward the European Union is shifting in many

Member States. However, strengthening the institutions—as well as explaining better what they do and why they do it—remains a priority if the Union is to live up to its challenges and progress further. Should that not prove possible, the alternative option in the short term might well be for some like-minded Member States to take a different route, creating a “pioneer group” to move ahead toward greater integration, a sort of “return to the origins” option.

Although a tribute to Jean-Claude Piris could easily stretch through the whole spectrum of European Union law—which broadened in part thanks to his active contribution over the twenty-year term when he served as Legal Adviser to the Council of the European Union, the European Council, and several intergovernmental conferences for the reform of the treaties—it is appropriate to devote the following lines to the theme of institutional strengthening, which always attracted his consideration and thinking and to which he contributed some illuminating and forward-looking writings; and it is tempting to do so in the light of a specific feature that presently keeps him busy as a Senior Fellow in New York: “Two-Speed Europe.”

I. *THE STARTING POINT: IF YOU HAVE TO ENLARGE, MAKE SURE TO KEEP STRONG*

Enlargement to the Central and Eastern Europe countries in the early 1990s was not an option; the Madrid European Council, in December 1995, defined it as a “political necessity and a “historic opportunity.”<sup>3</sup> Reaching out to European countries that had struggled for democracy was felt as a duty by the European Union, as the Communities had felt, twenty years earlier, that the prospect for European integration was the natural way out of dictatorship to show to Greece, Portugal, and Spain. And after all—as François Mitterrand had forcefully reminded in a historic address to the last meeting of the European Council he attended, in Essen, on December 10, 1994, which heads of candidate countries also attended—those countries were “not less

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3. See EUROPEAN COMMISSION, GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN UNION 1995, at 3 (1995).

European than us”<sup>4</sup> and therefore not less entitled to sit at that table than the members of the European Union.

So, enlargement was not an option: everybody knew in the early 1990s, that it needed to happen, the only options being the timing and modalities; in other words, how best to make it happen. Equally, everybody knew from the beginning that enlargement on such a large scale—adding fifteen new countries to the twelve signatories of the Maastricht Treaty—would inevitably change the nature of the European Union, making it a less cohesive club. Although that prospect could look more welcome to some than to others, the Union was not going to be the same anymore.

For that reason, the debate had focused very early on the need to make the Union stronger before—or in preparation for—its enlargement. Jacques Delors had repeatedly warned, since the signing of the Maastricht Treaty, about the need to strengthen the Union as a condition for enlargement, and he presented a Commission report to the Lisbon European Council in June 1992 entitled *Europe and the Challenge of Enlargement*, which was added to the presidency conclusions.<sup>5</sup> And when the Copenhagen European Council in June 1993 set the conditions for the candidate countries to meet to be able to join the Union, the need was felt to specify that “the Union’s capacity to absorb new members, while maintaining the momentum of European integration” was also an important element to take into consideration, in the interest of the Union and of the candidate countries as well.<sup>6</sup>

Why was that need felt in particular? And why was such an emphasis put on strengthening the European “building” before launching any further construction works? To answer that question, one has to ask whether there is a point at which European integration cannot bear further enlargement; in other words, can European integration—which is a process involving by definition “an ever closer union among the peoples of Europe,” while being open to any European state sharing the Union’s values—proceed unimpeded notwithstanding the number of

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4. Author’s personal recollection.

5. Challenge of Enlargement, *supra* note 1.

6. Copenhagen European Council, Conclusions of the Presidency, 26 E.C. BULL., no. 6 (1993).

participants? The answer should be affirmative, theoretically. Practice, however, is another story.

As Jean-Claude Piris stressed on several occasions, the European Union is “a partially federal entity”<sup>7</sup>: it cannot be compared to—and is not meant to be—a federal state, nor can it be classified as a classical international organization. Its specific features date back from the original treaties and were consolidated over the years. Those specific features—namely its supranational character and its legal order—and the very nature of the European Union itself have, despite the criticism to which they may often give rise, attracted new applications from countries wishing to join, and continue to do so.

Understandably, therefore, strengthening before bringing in new members has been, from the beginning, a Union concern and a way to preserve those features. Thus, the doors were finally opened to the United Kingdom’s entry, after two failed attempts and only after the six original Member States agreed, at the Hague summit in December 1969, to “relaunch” the European project under the French-sponsored triple heading of achievement, consolidation, and enlargement, which notably included agreements on financing the Common Agricultural Policy, on establishing Community Own Resources, on strengthening the European Parliament’s budgetary powers, and on economic and monetary cooperation.<sup>8</sup> Similarly, Portugal and Spain only joined the European Communities fifteen years later, after the Single European Act was concluded, which further strengthened Community powers by enlarging the areas of its competences and providing its institutions with the means to act effectively in that respect. But what about the latest enlargements?

If the Maastricht Treaty may still be regarded as providing, in turn, a basis for the newly established European Union to welcome four (in the end, actually three) new European Free Trade Association (“EFTA”) states in the mid-1990s, one must admit that the subsequent and long-advocated strengthening of the Union with the prospect of adding Central and Eastern

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7. See Jean-Claude Piris, *The European Union: Towards a New Form of Federalism?*, in *PATTERNS OF REGIONALISM AND FEDERALISM: LESSONS FOR THE UK* 69, 78–87 (Jörg Fedtke & Basil S. Markesinis eds., 2006).

8. The Hague Summit, 3 E.C. BULL., no. 1, at 16–26 (1970).

European countries actually never happened. The institutional adaptations that the Maastricht European Council mandated the next intergovernmental conference to adopt could not be agreed upon, neither within the 1997 Amsterdam Treaty<sup>9</sup> nor, three years later, at the hard-fought Nice European Council, which signed off on the 2001 Nice Treaty. And, although the Lisbon Treaty finally retained—in December 2007, once the Union had already been twice enlarged—most of the substance of the failed Constitutional Treaty, it only partially answered the question whether the Union was equipped at last to safely stand the challenge of nearly doubling its membership. Indeed, several relevant issues were either left unaddressed or hardly given a proper solution as negotiations evolved. It remains to be seen, for example, whether the new “double majority” voting system, which would only apply as of 2014, will allow the enlarged Union to act effectively. And, last but not least, answers have yet to be provided regarding how best to explain to an enlarged Union’s citizens what the European Union is about, how it functions, and how it is relevant to their everyday lives.

In the end, almost twenty years after the Delors Commission submitted its report on enlargement to the Lisbon European Council, one cannot really say that things have changed, apart from the fact that the Union’s membership has, in the meantime, more than doubled. Despite the European Council’s reaffirmation, in June 2006, of the importance of “ensur[ing] in future that the Union is able to function politically, financially and institutionally as it enlarges, and to further deepen Europe’s

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9. Belgium, France, and Italy entered a declaration for the Amsterdam Final Act stating that the treaty did not meet the need for substantial progress toward reinforcing the institutions and that such reinforcement was an indispensable condition for the conclusion of the first accession negotiations. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Declaration by Belgium, France and Italy on the Protocol on the Institutions with the Prospect of Enlargement of the European Union, 1997 O.J. C 340/1, at 144. In a comment on the future of Europe written for the *LONDON FINANCIAL TIMES* in the last days of 1999, Lionel Barber—who, a few years earlier, had been the newspaper’s Brussels correspondent—took the view that “the planned enlargement of the European Union to the east and to the south will force the pace of political reform,” noting that “[s]uch an expanded Union would defy the comprehension of the founding fathers.” Barber, *supra* note 2. Referring to the envisaged changes in the size of the Commission and to the voting system in the Council, he then found that “much deeper reforms would be required to manage greater diversity.” *Id.*



common project,"<sup>10</sup> no clear action has been taken to make sure that the Union can continue, with a larger number of members, to function on as solid bases and as effectively as it did twenty years ago. Additionally, no real effort has been made to explain the European project to the public, despite the alarm bells periodically ringing since the Danish referendum of 1992. As a consequence, indifference and even distrust toward that project kept growing in the Member States.

On the other hand, the size of the European Union has almost doubled over the last six years, and the way to perceive European integration is less and less commonly shared throughout it. Can this be redressed? It can, although it may prove very difficult given the apparent lack of any political will to do so. If it cannot, however, there may be a good case to accept that, in a larger European Union, integration cannot continue to mean the same thing to everybody, and move forward accordingly.

The two options considered below are both *state-driven* options. Whether it is improving the institutions' functioning, possibly through additional treaty amendments, or creating a "pioneer group" of like-minded Member States to push ahead for greater integration by making a new treaty, either option presupposes a process that must be launched and conducted by Member States.

One could argue that another way exists, which could be opened by the development of a political "consciousness" in all Member States and the formation of a political arena where issues of European relevance would be debated and political options (on climate change, immigration, or delocalization) confronted. This could in turn lead to a political confrontation between European political parties within the framework of a truly European-based campaign for the election to the European Parliament (as such a confrontation has never taken place), determine the appointment of the Commission on a political platform (which has never happened, despite timid attempts), and ultimately influence the positions that representatives of Member States are daily called to take as members of the Council, thereby bridging the gap between the political debates

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10. Brussels European Council, Conclusions of the Presidency, E.U. BULL., no. 6, at 16 (2006).

at the European level and at each Member State level. All of this might generate a *peoples-driven* move toward further European integration, one in which the European Parliament (and the European political parties represented therein) would then play its normal role. As things are now, however, it is fair to assume that any possible movement toward a change—whatever it is—in the European Union integration process can only be state driven.

## II. *OPTION ONE: BETTER LATE THAN NEVER—KEEP INSTITUTIONS FUNCTIONING*

European integration was always meant to be a political project. It has been so since the founding fathers' functionalist approach opened the way to the European Communities, and it developed with the same political vision in the 1990s through the establishment of the European Union. If the political system resulting from that project is to keep its original features in a Union of twenty-seven or more, rather than turning into something of a lesser ambition, Member States need to ensure that institutions are still able to function efficiently to cope with growing global challenges. In that respect, the creation of a permanent chair for the European Council<sup>11</sup> and of a High Representative for Foreign Affairs and Security Policy,<sup>12</sup> with an embryonic diplomatic service,<sup>13</sup> are steps forward, which are also meant to enhance the visibility of EU institutions. In a larger Union, however, the Council and the Commission also need to keep working efficiently, and the European political system needs a firmer rooting in the Member States, to bridge the gap with citizens. The former could hardly happen without a simpler decision-making system in the Council and a substantially slimmer Commission; the latter is badly needed if one wishes to repair the damage, caused over two decades, to popular legitimacy of the Union, which can be achieved only through better links with national parliaments.

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11. The President is elected by the European Council for a term of two and one-half years, renewable once. Consolidated Version of the Treaty on European Union art. 15(5), 2010 O.J. C 83/01, at 23 [hereinafter TEU post-Lisbon].

12. *See id.* art. 18, at 26.

13. *See id.* art. 27(3), at 32.

*A. Reforming Institutions at Last*

Safeguarding the Union's capacity to act efficiently presupposes efficient institutions, particularly the Commission and the Council. To that end, the Convention on the Future of Europe and the ensuing intergovernmental conferences had gone the right way; however, that way was somehow lost as negotiations unfolded, and should be found again.

A streamlined Commission, with a substantially smaller number of members than the number of Member States, has been on the agenda of four intergovernmental conferences. No doubt it is a most sensitive issue, and it is perfectly legitimate for Member States to feel comfortable only insofar as they have a national seated at the Commission's table. One should not forget, however, the impact on the Commission's capacity to fulfill its mission. And if it is true that a management board can only remain effective insofar as all the board members can look into each other's eyes across the table, then one is bound to conclude that the Commission's size is already overstretched.

Moreover, the principle of independence of Commission members should be kept in mind, at a time when the number of those members equals the number of Member States, thus making the former look like representatives of the latter, and the Commission resembles more and more an intergovernmental assembly rather than an executive organ. Although it can be argued that institutions are what people make of them (and one unfortunately cannot expect to have a Hallstein or Delors every five years), it is also true that size matters.

After pointless discussions at Amsterdam and Nice on the issue of reducing the number of Commission members, an agreement had been reached in the Treaty Establishing a Constitution for Europe. The Lisbon Treaty subsequently confirmed that the Commission shall consist of a number of members corresponding to two-thirds of the Union's membership based on a system of equal rotation between Member States.<sup>14</sup> However, that decision, which was only due to

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14. *See id.* art. 17(5), at 25. That was without prejudice to the need for the Commission to keep in close touch with the realities and needs of each Member State, as stressed in Declaration 10 to the Lisbon Final Act. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Declaration on Article 9 D of the Treaty on European Union, 2007 O.J. C 306/1, at 254.

take effect in 2014, was a source of concern for several Member States who would not be unhappy to stay with the status quo. In light of the failed Irish referendum of June 12, 2008—which appeared to also be due to the electorate concerns about the future composition of the Commission—the European Council, while reaffirming that “the Treaty of Lisbon is considered necessary in order to help the enlarged Union to function more efficiently,” agreed that “a decision will be taken, in accordance with the necessary legal procedures, to the effect that the Commission shall continue to include one national of each Member State,”<sup>15</sup> thus setting aside, for the sake of the treaty entering into force, the compromise signed in Lisbon.

As for the Council, it needs to remain capable of reaching decisions without being constantly exposed to the risk of paralysis and of efficiently preparing those decisions. That implies simpler decision making, involving both simple rules on the double-majority voting—and possibly a lesser scope for vetoing decisions—and a less burdensome way of conducting business around the Council table. Concerning the latter, one does not need to look very far for recommendations and concrete measures to improve the functioning of the Council in an enlarged Union. The so-called Truppf/Piris report of March 1999 contained a few recommendations concerning the organization and conduct of meetings, some of which were transposed into the Council Rules of procedure or simply turned into practice, while others still await implementation.<sup>16</sup>

Simpler decision making was at hand for a while in 2004. A new system of majority voting had been agreed upon, at last, in the Constitutional Treaty. This system called for a majority (fifty-five percent) of states and for a majority (sixty-five percent) of the Union’s population.<sup>17</sup> The negotiations that resumed after

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15. Brussels European Council, Conclusions of the Presidency, E.U. BULL., no. 12, at 8 (2008).

16. Council of the European Union, Operation of the Council with an Enlarged Union in Prospect, SN 2139/99 (Mar. 10, 1999), *available at* [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/misc/02139.EN9.htm](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/misc/02139.EN9.htm). The operational recommendations stemming from that report were approved by the European Council in December 1999 and attached to the conclusions thereof. Helsinki European Council, Presidency Conclusions, E.U. BULL., no. 12, at 17 (1999).

17. Draft Treaty Establishing a Constitution for Europe art. 24(1), 2004 O.J. C 310/1, at 19 (never ratified).

the failed referenda, however, brought about a more complicated mechanism, which was approved at Lisbon.<sup>18</sup>

In order to increase the efficiency of the Union's decision making, the double-majority voting system—a system that embodies the double legitimacy of the Council—should be implemented immediately (rather than wait for three or even six more years of transition), and it should be stripped of all qualifications and conditions that make it difficult to operate and understand. It would thus be an easy majority system to use and to explain to the Union's citizens: the majority of states, coupled with the majority of the population, wins. The Union's decision-making capacity would be equally enhanced by further reducing the scope of cases in which one member of the Council can veto a decision. This is a system that can be (and indeed was) conceived in a Community of six, but that can hardly be sustainable in a Union of twenty-seven or thirty members.

B. *A Better Rooting in the Member States to Be Understood Better*

Building upon the previous Amsterdam and Nice Treaties, the Lisbon Treaty strengthened the role that national parliaments are called to play in the functioning of the Union.<sup>19</sup> That should be fostered, pending the birth of a truly European electorate, in order to promote closer links with the Member States' legislatures, which are directly connected to the national electorates, and hopefully to succeed, through those links, where Member States' governments repeatedly failed: making the European citizens feel more connected to and more concerned by what happens at the European Union level, which is as relevant to their own interests as what happens at the Member State level.

In spite of repeating—since the Birmingham European Council in October 1992, a few months after the failed Danish referendum on the Maastricht Treaty—that it was a priority to explain to citizens the process of European integration and to inform them better about what European institutions do and why, EU leaders never really did and occasionally preferred to

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18. TEU post-Lisbon, *supra* note 11, art. 16(4), 2010 O.J. C 83, at 24; *see also* JEAN-CLAUDE PIRIS, *THE LISBON TREATY, A LEGAL AND POLITICAL ANALYSIS* 221–25 (2010).

19. TEU post-Lisbon, *supra* note 11, art. 12, 2010 O.J. C 83, at 21.

blame the Union's institutions for not doing what clearly needed to be undertaken at the ground level of each Member State. It is self-evident that this task cannot be handled by the information services of the Union's institutions, including their national information offices (assuming that they finally join forces), which can at best only coordinate existing national resources. It goes without saying that such an information effort, which remains to be launched twenty years on, would, if successful, help to avoid recurrent misunderstandings about the nature and action of the Union. It would also be of great relevance at a time when public opinion in a more diversified Union tends to lose confidence in and turn away from the European project.

It has, on the contrary, to be accepted that—at least for the moment—the European Parliament has not been able, as one could have hoped, to bridge the gap between the Union and its citizens, whom the Parliament is supposed to directly represent but who show, every five years, that they feel less and less concerned by that Parliament's elections. An end should be put to the mantra that for years equated democratic legitimacy of the Union's decision making to an ever enhanced role for the European Parliament. That emerged—and was hardly ever disputed—from a dramatic confusion between the Union's and states' constitutional models regarding democratic control powers and the need for citizens to be represented in legislation-making and political control. The fact is that the European Union is not a state, nor is it on its way to becoming one, and that the European Parliament, in spite of its denomination, cannot be likened to any elected national assembly (including in terms of voter turnout), and, in spite of being made to share budgetary and legislative powers and to censor the Commission, has no power to call the Council to account.

The misunderstanding should also cease about the Council lacking democratic legitimacy. Its action results from the combined will of its members, which are all representatives of democratically legitimate governments. The real source of democratic legitimacy has, therefore, ultimately to be found in the Member States, which ratified the founding treaties; hence the importance of furthering the links with national parliaments while recalling the responsibilities of national governments to

make sure that the functioning of the Union's political system is not wrongly perceived and that it is appreciated on its merit.

Things may change in the more or (rather) less near future, and they may even evolve to a point where European issues are debated and oriented through a larger and more direct popular participation. That is not the case at present, however, and it hardly serves the interest of a better functioning Union to act as if it were—and should accordingly function as—a state.

### III. OPTION TWO: SHOULD "MORE" LEAD TO "LESS," REVERT TO "LESS" TO KEEP "MORE"

"[H]ow can we ensure that 'more' does not lead to 'less'?" asked the above-mentioned report on the challenge of enlargement that the Delors Commission submitted to the Lisbon European Council in June 1992.<sup>20</sup> The answer might well be that there is no way to make sure that, in the end, that does not happen. Even still, it must not necessarily mean settling for "less." There would still be other ways to go, if there are Member States willing to try them, in order to preserve the "more."

In an interview in early 2004, the then Commission president Romano Prodi took the view that, had the treaty reform proceedings remained blocked during that year, some Member States could—or even should—take the initiative to go forward with closer European integration.<sup>21</sup> The Constitutional Treaty was agreed upon six months later and indeed included measures to strengthen the functioning of institutions in a Union that had just enlarged to include ten more Member States, although it never came into force because of the failed referendum of 2005.<sup>22</sup> No doubt, it would have been preferable that the Union's structure be strengthened then; still, the Lisbon Treaty, which was signed at the end of 2007 and entered into force two years later, contains most of the substantive reforms previously

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20. Challenge of Enlargement, *supra* note 1, at 14.

21. Andrea Bonnani, *Intervista al Presidente della Commissione* [Interview with the President of the Commission], LA REPUBBLICA (Rome), Jan. 2, 2004, available at <http://www.repubblica.it/2004/a/sezioni/politica/euprod/euprod/euprod.html?ref=search> ("The Union train cannot always move forward at the speed of the slowest wagon." (author's translation)).

22. See PIRIS, *supra* note 18, at 3, 24–25.

envisaged.<sup>23</sup> The question remains, however: Is the Union now equipped to function in a satisfactory way, or are further improvements still needed in that respect?

Some Member States might consider that a lesser level of institutional efficiency—or a lesser level of political ambition that might flow from it—are acceptable (if not welcome), notably if, for instance, the prospect of a less efficient Commission is balanced with the prospect of not being able to retain a national in that institution on a permanent basis. Some might not be too concerned by the prospect of possibly diluting the original supranational project into something closer to a classical international organization; after all, that is the direction toward which the Lisbon Treaty started steering, while leaving the basic nature of the European Union untouched.<sup>24</sup> Some, particularly some new Member States, while accepting becoming part of the “European family,” might choose to give priority to national traditions and independence over further European integration. Finally, some Member States, though originally aiming for more integration, might consider that the option of a new treaty revision is not viable in the present political circumstances (not least because of the need to inevitably go through more referenda).

But would all Member States settle for that? They might not. The idea that, in a larger membership group, every member should not be bound to align on the lowest common denominator was repeatedly expressed by German political leaders. In the Summer 1994, Christlich Demokratische Union und Christlich-Soziale Union manifesto, Karl Lammer and Wolfgang Schäuble first suggested that a “*noyau dur*” (“core group”) of Member States could move forward faster toward European integration without pressuring those who could (or would) not do the same; the proposal was notably intended to make enlargement to the Central and Eastern European countries easier and, although it did not go far due to the mild (French) or negative (British and Italian) responses, as well as to an overall distaste for the two-speed Europe idea, it nevertheless had the merit to put in clear terms the question of the future of

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23. *Id.* at 46–48 (assessing the treaty as reflecting a draw in the match between “integrationists” and “co-operationists”).

24. *Id.* at 328–31.



European integration.<sup>25</sup> In the Amsterdam Treaty, three years later, Member States agreed instead on the “enhanced cooperation” mechanism,<sup>26</sup> which was not meant to answer that question but rather to keep any *noyau dur* away. In the speech he delivered at the Berlin Humboldt University on May 12, 2000, the German Foreign Affairs Minister Joschka Fischer took over the *noyau dur* idea, in the broader framework of the progress toward a European Federation; he namely considered the creation of a “centre of gravity” as an essential step that a group of states could take on the way to full political integration.<sup>27</sup>

While regarded as unrealistic until a few years ago, such an option could be revived if a group of “like-minded” Member States were to take the view that the prospect for European integration is at risk of being diluted to the point of losing its essential features and turning into something that would no longer and in any way resemble that project.<sup>28</sup> That would not entail either a “variable geometry” approach—which is somewhat already an in-built reality of the present treaties<sup>29</sup>—or an “à la

25. KARL LAMMERS & WOLFGANG SCHÄUBLE, ÜBERLEGUNGEN ZUR EUROPÄISCHEN POLITIK [REFLECTIONS ON EUROPEAN POLICY] 5 (1994), available at [www.cduscu.de/upload/schaeublelammers94.pdf](http://www.cduscu.de/upload/schaeublelammers94.pdf).

26. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. C 340/1, at 22–23.

27. Joschka Fischer, German Foreign Minister, From Confederacy to Federation—Thoughts on the Finality of European Integration, Address at the Humboldt University in Berlin (May 12, 2000), available at [www.ena.lu/speech\\_joschka\\_fischer\\_ultimate\\_objective\\_european\\_integration\\_berlin\\_12\\_2000-2-17984](http://www.ena.lu/speech_joschka_fischer_ultimate_objective_european_integration_berlin_12_2000-2-17984).

28. See François Mitterrand, President of France, Address before the European Parliament (Jan. 17, 1995), reprinted in DOCUMENTS ON EUROPEAN UNION 298–99 (A.G. Harryvan & J. Van der Harst, eds., trans., 1997) (emphasizing that he was “totally in favour of enlargement to include the whole of democratic Europe” and adding, “I do not wish the situation to arise that, when the last country joins, it joins something which no longer exists, because it has been destroyed from within.”).

29. Seventeen out of twenty-seven Member States share a single currency and have to comply with rules, notably on price stability and budgetary discipline, that are specific to eurozone countries; twenty-two Member States share with three non-EU countries (Iceland, Norway, and Switzerland) the Schengen area, with no border control on the movements of persons; not to mention the Lisbon Treaty provisions on permanent structured cooperation in the field of defense. SVEN BISCOP, PERMANENT STRUCTURED COOPERATION AND THE FUTURE OF ESDP 5–6 (Royal Institute for International Relations, Egmont Paper 20, 2008), available at <http://www.egmontinstitute.be/paperegm/ep20.pdf>; Raymond J. Ahearn et al., *The Future of the Eurozone and U.S. Interests*, EUR. UNION REP. BLOG (Jan. 31, 2011), <http://european-union-reports.blogspot.com/2011/01/future-of-eurozone-and-us-interests.html>; *The Schengen Area and Cooperation*, EUROPA (Mar. 8, 2009), [http://europa.eu/legislation\\_summaries/](http://europa.eu/legislation_summaries/)

carte” Europe,<sup>30</sup> or even the use of the enhanced cooperation treaty provisions. It would rather entail a new agreement between the states concerned. Such a group of states would need to be sufficiently homogeneous and “like minded” on a number of essential issues (rather than on one single issue), which would allow it to go ahead as a united group.

Could it be a group whose composition would more or less correspond to that of the founding Member States? Or could it take, as a starting point, the Eurozone Member States, as qualified by a single approach on social and tax harmonization? Or a combination of those? The existence of a jointly shared common ground would in any case represent a *sine qua non* to go down that road. It might certainly be argued that such a homogeneous group would not be easy to identify; besides, observing the political leadership in today’s Union may suggest that the conditions do not exist for such a development to occur. However, that is no reason that it could not happen, in the near future, under changed political conditions: the catalyst could be, for instance, the inability to agree on measures largely regarded as essential for the economic health of the Union or to react to an external event that calls for a jointly agreed-upon Union stand.<sup>31</sup>

A “core-group” would probably have to be sufficiently small to encompass a minimum common denominator. If it takes the single currency as a starting point, its potential participants

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justice\_freedom\_security/free\_movement\_of\_persons\_asylum\_immigration/133020\_en.htm.

30. It goes without saying that having different groups, established according to specific projects (which each state would choose), would go against the idea of unity that underlies the European integration project and would run against, rather than help preserve, that project.

31. At the time of this Essay, newspaper headlines commented on the Competitiveness Pact that the German Chancellor and the French President brought to the European Council on February 4, 2011. See, e.g., Carlo Bastasin, *Europa dei Governi senza Unione* [*European Union without Governments*], *IL SOLE 24 ORE*, Feb. 11, 2011, <http://www.ilsole24ore.com/art/commenti-e-idee/2011-02-11/europa-governi-senza-unione-063851.shtml?uuid=AaRvgK7C>; *The Union within the Union*, *ECONOMIST*, Feb. 12, 2011, at 62; Philips Stephens, *All Aboard for a Two-Speed Europe*, *FIN. TIMES* (London), Feb. 11, 2011, at 9. The first reactions to the Competitiveness Pact pointed to its intergovernmental nature, tending to forget that all founding treaties proceed from the same approach; that is, sovereign states getting together to agree on common objectives and on the means to achieve them. The early comments, however, only provide evidence that a two-speed Europe can no longer be regarded as pure speculation.

would then have to make sure that they at least share the same approach on social and tax harmonization, possibly on a few basic elements of foreign policy and, above all, on the future of European integration. Members of a “core-group” would continue to share actions and institutions with the larger group, and they could organize institutionally by somehow replicating the existing EU structure.

In this respect, the treaty provisions on enhanced cooperation could hardly provide any help, as they may only be used by a group of Member States for a given action in a given area, subject to several conditions and procedures, and make such cooperation subject, in the end, to the will of the other Member States. Quite the contrary, the above approach would flow from the conviction of a group of Member States that the treaty framework no longer allows, in a too heterogeneous Union, a proper realization of the integration project launched in the 1950s in Paris and Rome and confirmed, forty years later, in Maastricht. That approach would thus inevitably imply going beyond the existing treaties.

This is where this Essay ends, as its purpose is not to go into the details of the legal modalities according to which that could be realized. No doubt, Jean-Claude Piris’ current reflections will be of the utmost value and provide helpful input for any further thinking in this respect.

It would however be essential for any initiative of that kind to take the necessary legal precautions to avoid—as Joschka Fischer had stressed in his Berlin speech—putting the European Union *acquis* in jeopardy and to make sure that any “core group” does not have the effect of fragmenting the efforts of Europe at large to cope with the global challenges it has to face. As long as it is not created as an exclusive club, but remains open to any Union Member State that would come to share its objectives, a “core group” could eventually turn out to be a catalyst.<sup>32</sup>

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32. Reginald Dale, commenting about the outcome of the 1993 Danish referendum, qualified two-speed Europe:

[A] two-speed Europe really started with the birth of the Community in the 1950s, when only six states took the plunge and the others, led by Britain, held back. The lesson from the past is that as long as there are enough countries ready and able to press ahead, they must lead, and others—including Britain again, if necessary—will eventually follow.

*CONCLUSION*

European integration is by its own definition an integration project and a political one—a project that Jean-Claude Piris would define as “the most noble cause in history”<sup>33</sup> and one that aims to create an “ever closer union” between the peoples of the states that are party to it.<sup>34</sup>

That project—whether it is called “federal” or “quasi-federal,” whether it draws inspiration from state or confederation experiences—is one that has pursued, for over sixty years, more (and not less) integration and should accordingly not be allowed to be diluted into something less political than it has become. The European Union was not established, twenty years ago, to be turned back into a single market or a free exchange zone, nor to be the European Community again, but to be more than that, and to grow further. European integration is a work in progress and as such it should be allowed to progress. Enlargement could conceivably not turn out to be an obstacle to that. Although the best option would always be for the Union to keep strong and united while welcoming new members, a lower level of political ambition should not be the price to pay in return for enlargement.

The European Union that was born in Maastricht should remain the reference, not least because that is to what new European countries have in turn adhered. That European Union is therefore what one should turn—and return—to, should the need ultimately arise to make a new start, on a smaller scale, in order to preserve the European integration original project.

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Reginald Dale, *Thinking Ahead: The Danes Got It Right Twice*, N.Y. TIMES, May 21, 1993, available at <http://www.nytimes.com/1993/05/21/business/worldbusiness/21iht-think.html>.

33. See PIRIS, *supra* note 18, at 339 (“The European project is the most noble cause in history, as its primary and essential aim is reconciliation and peace among peoples who have fought each other for centuries.”).

34. TEU post-Lisbon, *supra* note 11, pmb., 2010 O.J. C 83, at 16.