The Proposals of the European Parliament to Amend the European Treaties

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Abstract

As a follow-up to the proposals from the Conference on the Future of Europe in May 2022, the European Parliament proposed a comprehensive catalogue of amendments of the Union's primary law in November 2023. In addition to a series of minor adjustments, the proposals contain far-reaching institutional and competence-related reforms. The focus is, of course, on strengthening Parliament's position itself, but they also address issues that would increase the Union's working capacity in the run-up to future enlargements in the Western Balkans, but also in the light of internal and international crises that put the Union to the test. The proposals are far-reaching, but do not address all of the points required for a genuine and necessary reform of the Union. This contribution tries to shed some light on the most important aspects of Parliament's proposal an put them into context. Moreover, it will make some careful predictions on the feasibility of the proposals and potential alternatives.

Keywords: passerelle, Future of Europe, Article 7, amendment, institutional reforms

1. The Treaty of Lisbon and the Constant Need for Reform

Ever since the founding of the European Communities and later the EU, European integration *stricto sensu* has been a process of change and reform rather than the achievement of some 'final stage'. This is due internal and external transformations, geopolitical changes and the enlargement of the organization. It may be also due to the fact that treaty amendments tend to

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be more cumbersome and time-consuming the more players are involved and the more comprehensive it is. In the world of sports this is enshrined in the saying: After the game is before the (next) game.

In fact, the last constitutional reform of the EU is now almost 20 years old and was negotiated right before and during the so called Eastern Enlargement in the early 2000s and which took several years to conclude. In December 2001, the heads of the EU Member States commissioned a large convention under the leadership of former French President Valéry Giscard d'Estaing to draw up a new European treaty. As is well known, this project of a 'constitutional treaty', whose draft was proposed in 2003 by the European Convention and revised and finalized by the Intergovernmental Conference in October 2004, eventually failed. However, most of its content was carried over to the Treaty of Lisbon, which entered into force in December 2009, thus eight years after the start of the reform process.

It has now been about fifteen years that the EU has operated under the new framework. During that time, the EU has been struck by several crises, some consequent and some concurrent, which led to the use of the word 'poly-crisis' to describe the multitude of challenges that the EU faces and needs to address with the instruments it has at its disposal. Some of the problems could and can be dealt with at the level of secondary law, but *e.g.* the discussions surrounding the secondary law changes ('banking union') and international law supplements ('European Stability Mechanism') to the Union's economic constitution as reaction to the economic and the sovereign debt crisis showed changes may be required also to the EU's primary law framework. It does not come as a surprise therefore that the economic and monetary union was subject to comprehensive reform proposals from various sides, including the so called 'Five Presidents Report' of 2015[1] or the Commission's proposals of December 2017 on the European Finance Minister and the incorporation of the ESM into EU law.[2]

1 The 'five presidents' are those of the European Commission, the Euro Summit, the Eurogroup, the European Central Bank, and the European Parliament. *See* European Commission, Completing Europe's Economic and Monetary Union, Report by Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi, and Martin Schulz, at https://commission.europa.eu/document/download/261ad02b-070a-47a1-b52b-b242db48addf_en?filename=The%20Five%20President%27s%20Report%3A%20Completing%20Europe%27s%20Economic%20and%20Monetary%20Union.

2 European Commission, A European Minister of Economy and Finance, COM(2017) 823 final and European Commission, Proposal for a Council Regulation on the estab-

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For some years now, the European Parliament has also been increasingly focusing on the questions of what primary law changes are necessary on the one hand and what integration potential can still be exploited in the existing treaties on the other. In February and March of 2017 presented comprehensive resolutions on possible evolutions of and adjustments to the current institutional set-up of the EU,[3] on improvements in the functioning of the EU building on the potential of the Lisbon Treaty,[4] on budgetary capacity for the euro area,[5] and on constitutional, legal and institutional implications of a common security and defence policy under the Lisbon Treaty.[6] These documents resonate a two-tiered approach of exploiting the full potential of the existing treaty framework on the one hand and necessary treaty amendments on the other hand.[7]

In March 2017, the Commission presented the "White Paper on the Future of Europe" with reflections and scenarios for the EU by 2025.[8] It presented a variety of options for the future development of the Union ranging from a re-centering of competences to the single market to a flexible and differentiated approach among the members to stronger cooperation in all policy areas and beyond. This sparked a debate on the overall design and finality of the EU, which eventually led to an agreement between the European Commission, the European Parliament and the Council to set up the "Conference on the Future of Europe" (CoFE), a citizen-led series of debates and discussions and an unprecedented pan-European exercise

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lishment of the European Monetary Fund, COM(2017) 827 final. *See in detail* Robert Böttner, 'Der Europäische Minister für Wirtschaft und Finanzen nach den Plänen der Kommission', *Zeitschrift für europarechtliche Studien,* 2018/1, pp. 69–96; and Cornelia Manger-Nestler & Robert Böttner, 'Der Europäische Währungsfonds nach den Plänen der Kommission', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* Vol. 79, Issue 1, 2019, pp. 43–84.

3 Resolution P8_TA(2017)0048 of 16 February 2017, 2014/2248(INI), at www.europarl.europa.eu/doceo/document/TA-8-2017-0048_EN.html.

4 Resolution P8_TA(2017)0049 of 16 February 2017, 2014/2249(INI), at www.europarl.europa.eu/doceo/document/TA-8-2017-0049_EN.html.

5 Resolution P8_TA(2017)0050 of 16 February 2017, 2015/2344(INI), at www.europarl.europa.eu/doceo/document/TA-8-2017-0050_EN.html.

6 Resolution P8_TA(2017)0092 of 16 March 2017, 2015/2343(INI), at www.europarl.europa.eu/doceo/document/TA-8-2017-0092_EN.html.

7 Parliament's efforts are summarized in its resolution of 13 February 2019 on the state of the debate on the future of Europe, P8_TA(2019) 0098, 2018/2094(INI), at www.europarl.europa.eu/doceo/document/TA-8-2019-0098_EN.html.

8 COM(2017) 2025.

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in deliberative democracy. In its final report,[9] the CoFE presented 49 proposals and 326 specific measures, structured around nine major themes (*e.g.* climate change and the environment, EU in the world, or digital transformation). In its follow-up to the CoFE,[10] the European Commission underlines that the institutions and the Member States should make use of the untapped potential within the existing Treaties in order to respond to the CoFE's proposals, but does not rule out treaty changes where they are necessary. The latter is subject of the comprehensive resolution of the European Parliament of November 2023,[11] which is not only a resolution but a full-fledged proposal to treaty amendments in accordance with Article 48(2) TEU.[12]

2. The European Parliament's Proposals

The following sections try to categorize and analyze the proposals put forward by the European Parliament. To this end, they look at institutional changes and changes in competences separately. Thirdly, due to the importance of the Union's values as its very foundation and the difficulties that the Union had to face with regard to the rule of law, the first section will deal with this issue separately.

9 Conference on the Future of Europe, Report on the Final Outcome, May 2022.

10 Commission Communication, Conference on the Future of Europe – Putting Vision into Concrete Action, COM(2022) 404 final and the Annex. *See also* European Parliamentary Research Service, Conference on the Future of Europe – Overview of the final proposals, Annex to the briefing, PE 738.214, November 2022, at www.europarl.europa.eu/cmsdata/281672/Overview%20of%20the%20final%20proposals%20EPRS_BRI(2022)738214(ANN1)_EN.pdf, which classifies the CoFE's proposals into "EU (non-)legislative initiative" and "treaty change".

11 European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties, P9_TA(2023)0427, 2022/2051(INL), at www.europarl.europa.eu/doceo/document/TA-9-2023-0427_EN.html. *See also* the draft report by the competent committee (AFCO) at www.europarl.europa.eu/doceo/document/A-9-2023-0337_EN.html.

12 In fact, already in June 2022 the European Parliament called for a Convention for the revision of the Treaties, to which the proposals of November 2023 are added. See European Parliament resolution of 9 June 2022 on the call for a Convention for the revision of the Treaties, P9_TA(2022)0244, 2022/2705(RSP), at www.europarl.europa.eu/doceo/document/TA-9-2022-0244_EN.html.

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2.1. Protecting the Union's Values

The so-called rule of law crisis has been a pressing issue in the last couple of years. While certainly a variety of Member States show deficits in their rule of law standards,[13] notably Poland and Hungary have become the center of attention for enacting measures that disregard fundamental aspects of the rule of law principle as one of the Unions values laid down in Article 2 TEU. Article 7 TEU had been designed to counter a systematic backsliding of the Union's values. The provision allows the Member States (*i.e.* the Council and the European Council) to adopt measures that would force a 'rouge' State to resume a behavior compatible with EU law standards. The 'warning mechanism' under Article 7(1) requires a four-fifths majority in the Council (not counting the Member States concerned), whereas the 'sanction mechanism' under paragraph 2 of that provision requires unanimity in the European Council as a basis for sanctions adopted by the Council.

Two Article 7 procedures (warnings) have been initiated, one by the European Parliament against Hungary and one by the European Commission against Poland. So far, however, none of these procedures have led to tangible success, which is mostly due to the voting requirements that lead to a situation where "there is honor among thieves".[14] Against this background, the EU has adopted secondary law measures that allow withholding funds in case rule of law problems in a Member State may be detrimental to the Union's financial interests (so called 'conditionality regulation').[15]

It is thus evident that the current set-up of the Article 7 procedure is ineffective. Therefore, Parliament proposes to strengthen and reform the procedure in Article 7 TEU by ending unanimity and by making the Court

13 *See* the country chapters in the European Commission's Rule of Law Report, at https://commission.europa.eu/publications/2023-rule-law-report-communication-and-country-chapters_en.

14 *See e.g.* Robert Böttner & Nic Schröder, 'Article 7 TEU as 'Nuclear Option'? An Analysis of its Potential and its Shortcomings', *in* Robert Böttner & Hermann-Josef Blanke (eds.), *The Rule of Law Under Threat,* Edward Elgar, Cheltenham, 2024, pp. 219–238.

15 *See* most recently Jonathan Bauerschmidt, 'The Rule of Law in the European Union and the Toolbox to Defend it: Article 7 TEU, Rule of Law Report and Dialogue, Budgetary Conditionality', *in* Böttner & Blanke (eds.) 2024, pp. 196–218.

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of Justice the arbiter on the existence of a violation.[16] More specifically, it proposes adaptions to the Article 7 procedure in the following relevant elements:[17]

1. 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 *qualified* majority ~~of four fifths of its members~~ after obtaining the consent of the European Parliament, *shall* determine *within six months of receiving a proposal whether* there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. […]
2. The ~~European~~ Council, acting by ~~unanimity on~~ *a qualified majority within six months of receiving* a proposal by one third of the Member States*, by the European Parliament, acting by a majority of its component Members, or by the Commission* ~~and after obtaining the consent of the European Parliament~~, may ~~determine~~ *submit an application to the Court of Justice on* the existence of a serious and persistent breach by a Member State of the values referred to in Article 2~~, after inviting the Member State in question to submit its observations~~.
   The Court of Justice shall decide on the application after inviting the Member State in question to submit its observations.
3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, ~~may decide to suspend certain of the rights~~ *shall decide within six months thereof to take appropriate measures. Such measures may include the suspension of commitments and payments from the Union's budget, or the suspension of* certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council *and the right of the Member State in question to hold the Presidency of the Council.* […]

In essence, three proposed amendments are remarkable. First, voting requirements in the Council, *i.e.* the representation of Member States are lifted. At the moment, it requires a four-fifths majority (currently 21 States) to issue a warning and unanimity (26 States, not counting the Member State concerned) to enable sanctions. Under the system proposed by the European Parliament, it would only take 15 States (55 % – qualified majority – of 26 States). It would still take a majority of States to activate the

16 P9_TA(2023)0427, Recital (17).
17 Id. amendments 9 through 12. Deletions are crossed out, amendments are in italics.

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Article 7 procedure, but it could not be prevented by a (very small) minority. Furthermore, Parliament proposes putting a deadline of six months on the procedure in which the Council must take a decision. It must be underlined that there will not be any automatic decision upon expiry of the six-months delay, but Council could no longer avoid taking a (positive or negative) decision indefinitely.

The most innovative proposal is the inclusion of the CJEU in the sanction procedure, a role it is currently not endowed with under Article 269 TFEU. The determination on the existence of a serious and persistent breach by a Member State of the Union's values would no longer be made by the European Council acting unanimously, but by the CJEU. This would have two clear advantages. *(i)* Firstly, it would relieve the Member States from pointing fingers at each other when it gets to sanctioning a State for a breach of the Union's values. Clearly, the specific measures/sanctions would still be adopted by the Council, *i.e.* by the Member States. But they could do so only after the CJEU switched the lever. *(ii)* Secondly, endowing the CJEU with this decision would do away with allegations of the Article 7 procedure's being too political, discretionary, or even opportunistic. On the other hand, however, this latter point may exactly be the reason why the CJEU *should not* have a say in the procedure. Determining a breach of the Union's values requires clarity on their scope. Article 4(2) TEU calls on the Union to respect the Member States' constitutional identities, which may be characterized by different approaches to, for example, rule of law or democracy. Moreover, discussions on a political rather than a judicial level allows for different tools and approaches that may be necessary to address the issue, for a backsliding in one of the Union's values does not happen by accident but rather by (political) choice.

Thus, lowering the voting requirements and installing obligatory deadlines may make the procedure more operational. Including the CJEU in the procedure, however, is not a good or bad idea *per se*, but Member States and the EU's institutions should have a serious discussion on the political or judicial character of Article 7 TEU, especially beyond the current rule of law debate. In this context, another – small – amendment is worth mentioning. Parliament proposes an addition to Article 49 TEU (accession to the Union), which would be declaratory in nature, but would make one

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thing unmistakably clear: "Member States must continue to respect the values referred to in Article 2 after their accession to the Union."[18]

2.2. Institutional Reforms at EU Level

The European Parliament's proposal contains a number of institutional reforms that, among others, aim at adapting the decision-making mechanisms in the Union to more accurately reflect a 'bicameral system' by further empowering the European Parliament and by changing the voting mechanisms in the Council.[19] In addition, the relationship between the Commission and the European Council is to be redefined by reducing the European Council's role in favor of the 'Executive'. The CJEU is also to be given new competences.

2.2.1. Strengthening the European Parliament in Relation to the Council

Strengthening the Parliament as one chamber of a genuine bicameral system at Union level includes a long-requested legislative right of initiative for the Parliament.[20] The existing *indirect* right of initiative (Article 225 TFEU), according to which the European Parliament can request the Commission to submit a proposal, is to be amended to the effect that the Parliament can independently submit a proposal within the framework of the ordinary legislative procedure (which, according to the proposal, shall apply in more cases) and introduce it into the procedure.[21] The Parliament's proposals do not, on the other hand, provide for the Council, as the second chamber, to be given such a right of initiative. However, there is no obvious reason why only one of the two (legislative) chambers should be strengthened beyond the current indirect right of initiative. A right of initiative for Parliament as the directly elected chamber is often used as an argument in favor of increased democratic legitimacy. In reality, however, it would significantly upset the institutional balance of the EU's political

18 Id. Amendment 65.
19 Id. Recitals (3) and (4).
20 *See e.g.* Andreas Maurer & Michael Wolf, *The European Parliament's right of initiative,* Study for the European Parliament, PE 655.134, July 2020, at www.europarl.europa.eu/RegData/etudes/STUD/2020/655134/IPOL_STU(2020)655134_EN.pdf.
21 P9_TA(2023)0427, Amendments 189 and 210.

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system.[22] In this setting, especially in the ordinary legislative procedure, it is the Commission's role to balance the interests of the Member States (Council) and the Union citizens (European Parliament) and to balance general with special interests.[23] This includes the drafting stage of legislative procedures, which is enshrined in the Commission's task to "promote the general interest of the Union and take appropriate initiatives to that end" [Article 17(1) TEU]. The call for a right of initiative for the European Parliament should therefore not be made hastily and without reflection, but should be made against the background of the institutions' tasks and the current system of interinstitutional agreements between Parliament and the Commission.

2.2.2. Redesigning the European Commission and Cutting back on the European Council's (Assumed) Role

The European Parliament's proposals seek to re-organize the relationship between the European Commission and the European Council, the latter being an official institution only since the entry into force of the Lisbon Treaty. The European Commission (now the 'Executive') and its President (now the 'President of the European Union') are to take on a more prominent role by curtailing that of the President of the European Council. At the same time, the increasing indirect decision-making power that the European Council has assumed in the recent past is to be reduced to the role of providing guidance. As Article 15(1) TEU reads, it "shall provide the Union with the necessary impetus for its development", but "it shall not exercise legislative functions." The proposed new relationship between the European Council and the Commission would underline the Commission's (prospective) role as European Government.[24]

22 With the same view Andrew Duff, *Towards common accord? The European Union contemplates treaty change*, EPC Discussion Paper, 31 October 2023, p. 5.

23 *See* in this regard John Temple Lang, 'How much do the smaller Member States need the Commission? The role of the Commission in a changing Europe', *Common Market Law Review,* Vol. 39, Issue 2, 2002, pp. 319–339.

24 *See* on this point in detail Robert Böttner, 'The Commission as a European Government' *in* Darren Harvey *et al.* (eds.), *Reforming the EU Treaties,* Nomos, Baden-Baden, 2023, p. 21 *ff.*

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The proposed amendment to Article 15(2) TEU[25] suggests that the office of President of the European Council should be completely replaced by that of President of the Commission. In fact, the idea of merging the President of the European Council and the President of the European Commission into a double-hatted President of the European Union is not new[26] and could probably be established already under the existing primary-law framework.[27] The double hat is linked with a change in the electoral procedure. As proposed by Parliament, the President of the Commission will henceforth be elected by the European Council,[28] but the right of nomination will be transferred to the European Parliament, which will propose a candidate to the European Council by an absolute majority (majority of component members). This will further strengthen the nexus introduced by the Treaty of Lisbon between the outcome of the European elections and the office of Commission President and could create a true lead candidate system. The Parliament already has the option of rejecting a candidate proposed by the European Council if, in the Parliament's view, he or she does not have the necessary political affiliation or – as in the case of Ursula von der Leyen – has not even participated in the electoral campaign as a lead candidate. However, it would plunge the Union into a political crisis if Parliament were to actually play this card. In contrast, a separate right of nomination is the gentler method because it forces the European Council to respect the will of the voters embodied in the parliamentary proposal unless there are compelling reasons not to do so.

The European Parliament's Committee on Constitutional Affairs' (AFCO) draft proposal to introduce a binding individual motion of censure against individual Commissioners was not included in Parliament's final resolution. What is included though and would be incorporated into primary law is the rule that Parliament can request the Commission to

25 P9_TA(2023)0427, Amendment 24: "The European Council shall consist of the Heads of State or Government of the Member States, together with ~~its President and~~ the President of the *European Union*."

26 *See* European Political Strategy Centre, A Double-Hatted President – A New Way of Governing for a Union of 27, February 2017, at www.politico.eu/wp-content/uploads/2018/02/Double-Hatted-Presidency.pdf; Christian Calliess, 'The Future of Europe after Brexit: Towards a Reform of the European Union and its Euro Area', *Yearbook of European Law*, 2021, p. 15..

27 Id. p. 7. *See also* Christian Calliess, 'Proposals to Prevent an 'Overstretch in Integration", *VerfassungsBlog,* 6 July 2023.

28 Id. Amendment 41.

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dismiss an individual Commissioner, which already applies by virtue of an agreement between Parliament and the Commission. However, the rule is tightened even further: If the Commission does not comply with the request to dismiss an individual Commissioner, the Commission as a whole must face a new favorable vote by Parliament.[29]

Also proposed by the AFCO, but not included in Parliament's resolution, is a (primary-law based) reduction in the size of the Commission to 15 members.[30] Although such a specification would be desirable, it is not necessary, as Article 17(5) TEU already stipulates *de constitutione lata* that the number of Commissioners should correspond to two thirds of the number of Member States (currently 18 Commissioners) and that the European Council can decide on a different number of Commissioners. The abolishment of the "one Commissioner per Member State" rule is favorable, as the Commission is not a representative institution.[31] As is well known, the European Council made use of this authority, but not for making the College smaller, but for keeping one Commissioner per Member State. Against this background, Commission Presidents Juncker and von der Leyen established groups of Commissioners or project teams, that rationalized the work of a Commission of 27. However, it introduced a sort of hierarchy that is problematic with regard to the principle of collegiality in the Commission.[32] This is why it was a good choice to cancel AFCO's original idea to let the Commission appoint 'undersecretaries' (or second-class Commissioners, to put it bluntly).[33]

Lastly, in addition to the High Representative for Foreign Affairs and Security Policy, a "Union Secretary for Economic Governance" is to be appointed as a mandatory Commissioner under primary law.[34] In 2017, the European Commission proposed the introduction of a European Economy

29 Id. Amendment 42.

30 *Cf.* id. Recital (7).

31 Among the proponents of a 'representative' Commission, *see* Lang 2002. Against this view, *see* Robert Böttner, 'The size and structure of the European Commission – Legal issues surrounding project teams and a (future) reduced College', *European Constitutional Law Review,* Vol. 14, Issue 1, 2018, pp. 37–61.

32 On this issue, *see* Böttner 2018, p. 42; and Robert Böttner, 'Project Teams in the European Commission – A fair balance between efficiency and politics?' *in* Michael W. Bauer *et al.* (eds.), *The European Commission in Turbulent Times*, Nomos, Baden-Baden, 2018, pp. 113–132.

33 This idea was enshrined in AFCO's amendment to Article 17(5) TEU (Amendment 47) and still resonates in Recital (7) of Parliament's resolution.

34 P9_TA(2023)0427, Amendment 40.

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and Finance Minister that would assume a multi-hatted role as chairperson of the Eurogroup, chairperson of the ESM and, of course, Commissioner and Commission Vice-President for the respective dossier.[35] Parliament's resolution does not further specify what role the proposed Commissioner for Economic Governance would assume. From the proposals in which this new Commissioner is mentioned,[36] one can infer that its institutional position would be similar to that of the High Representative. If that is the case, it would require constitutional amendments that go beyond the Commission's 2017 proposal.

2.2.3. Giving New Powers to the CJEU

Parliament proposes adaptions also to the Union's judiciary, the CJEU. Apart from some clarifications, the resolution envisages new competences for the Union courts.

As mentioned above, the CJEU would be involved in the Article 7 procedure for the sanctioning of breaches of the Union's values. Instead of the European Council, the CJEU would establish if a Member State breached the European values in a serious and persistent manner.[37] It should be noted, however, that the CJEU would only have the competence to make the determination on the existence (or not) of such a breach and only upon application by another institution (not *ex officio*). The CJEU would not act as a prosecuting authority, as the (political) decision on the sanctions would remain with the Member States (in the form of the national representatives in the Council).

The subsidiarity complaint before the CJEU is not enhanced, but at least made more visible. The CJEU already has jurisdiction to scrutinize EU legal acts for compliance with the principle of subsidiarity. An infringement of subsidiarity can be challenged in an action for annulment under Article 263 TFEU. The Member States, the European Parliament, the Council and the Commission as privileged plaintiffs are entitled to bring action before the CJEU, *inter alia* for infringement of the subsidiarity principle. The same applies to the Committee of the Regions and the national parliaments pursuant to Article 8 of Protocol No. 2 (the so-called Subsidiarity Protocol),

35 European Commission, A European Minister of Economy and Finance, COM(2017) 823 final. *See* in detail Böttner 2018.

36 P9_TA(2023)0427, Amendments 40 *in fine* and 193.

37 Id. Amendment 10.

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but their legal standing is limited to the subsidiarity principle. To date, however, the principle of subsidiarity has played virtually no role in judicial practice.[38]

In contrast, another proposed amendment is interesting, although it is only outlined and not specified in detail: Parliament suggests to confer on the CJEU the power to a pre-emptive abstract review of norms.[39] To this end, the following wording would be added to Article 19 TEU: "The Court of Justice of the European Union [...] may give preliminary rulings on whether the Union has acted ultra vires." Such an instrument would be new to the Union's judiciary, but it is not unknown in (some) national legal systems. It remains to be seen who would be entitled to file an application in such proceedings before the European jurisdiction, but it would probably be the actors who can bring an action against a legal act in the context of an action for annulment. The CJEU also already has a preventive control competence in that Article 218(11) TFEU provides for the possibility that international agreements of the Union may be submitted to the CJEU for examination of their compatibility with Union law before they are concluded. This is reasonable, so that the Union does not enter into obligations that are effective under international law but whose fulfilment is prohibited under internal law. However, it is questionable to what extent such a preventive control competence is relevant and necessary with regard to internal law.

Finally, the European Parliament would like to have legal standing in the context of infringement proceedings alongside the Member States and the Commission and proposes and amendment to Article 259 TFEU to that end.[40] However, as in the case of the right of initiative as a new privilege for the European Parliament, endowing the Parliament with legal standing in the treaty infringement procedure would upset the Union's institutional system. According to Article 17(1) TEU, the European Commission shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them and it shall oversee the application of Union law under the control of the CJEU. This is why the Commission is the primary

38 *Cf.* Diane Fromage, *Controlling Subsidiarity in Today's EU: the Role of the European Parliament and the National Parliaments,* Study for the European Parliament, PE 732.058, April 2022, p. 34, at www.europarl.europa.eu/RegData/etudes/STUD/2022/732058/IPOL_STU(2022)732058_EN.pdf.

39 P9_TA(2023)0427, Recital (19).

40 Id. Amendment 199.

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institution to initiate infringement procedures under Article 258 TFEU.[41] Even Member States that want to initiate proceedings against another State under Article 259 TFEU must first refer the matter to the Commission. The Member States' standing is justified by the European Union's character as an international (intergovernmental) organization; there is, however, no similar justification for Parliament to assume a similar role. Even without the power to press charges against a Member State for an infringement of EU law, Parliament can still bring a matter to the Commission's attention which then can decide to open proceedings against that Member State or not.

2.3. Adapting the Union's Competences and Decision-making Procedures

In addition to institutional changes, Parliament also proposes adjustments in the area of Union competences and decision-making procedures. This relates in particular to a comprehensive transition to qualified majority voting in the Council or even to the ordinary legislative procedure. In terms of content, the areas of climate and environment as well as the common foreign and security policy are to be strengthened and further supranationalized.

2.3.1. Internal Policies

Proposed amendments in the Union's internal policies essentially rest on three pillars: *(i)* enhancing the competence in environmental policy; *(ii)* creating shared competences where the Union only had coordinating and supporting competence; and *(iii)* extending some existing competences in their scope. All these proposed material changes are accompanied by a general transition from special legislative procedures to the ordinary legislative procedures in the specific legal bases or at least a transition to qualified majority voting in the Council where currently unanimity is required.

A major concern for the European Parliament as regards material competences is the field of climate, environment and biodiversity. To this end, Article 3 on the Unions aims and objectives shall be amended to include

41 *Cf.* Bernd Martenczuk, 'Artikel 17 EUV' *in* Eberhard Grabitz *et al.* (eds.), *Das Recht der Europäischen Union*, May 2023, para. 19f.

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"reducing global warming and safeguarding biodiversity in line with international agreements" in the context of the establishment of the internal market [Article 3(3) TEU].[42] The AFCO proposed therefore to upgrade the Union competence for the environment, which is currently shared between the Union and the Member States according to Article 4(2)(e) TFEU, to an exclusive Union competence and supplement it by a competence for biodiversity. However, this proposal was not included in the operative part of the final Parliament resolution, but remained in the recitals.[43] What remained, however, is a reference to "global negotiations on climate change" in the context of the Union's exclusive external competences according to Article 3(2) TFEU,[44] which is a codification of the so called ERTA doctrine on the exercise of shared competences.[45] It appears however, that the proposed change would only be declaratory in nature, as the conditions for creating an exclusive external competence elaborated in Article 3(2) TFEU remain the same, *i.e.* an external Union competence for the conclusion of an international agreement would exist only when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

As regards the scope of the environmental competence, the European Parliament proposes a number of substantial changes that are worth being presented in the context of the current legal basis of Article 191 TFEU:

Article 191

Mindful of its responsibility towards future generations, the European Union, acting in accordance with the Treaties, shall protect the natural foundations of life and animals by Union law, including by executive and judicial action.

1. Union policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilization of natural resources; promoting measures at Union and international level to deal with

42 P9_TA(2023)0427, Amendment 4.
43 Id. Recital (13).
44 Id. Amendment 69.
45 *See* Andrea Ott, 'EU External Competence' *in* Ramses A. Wessel & Joris Larik (eds.), *EU External Relations Law, 2nd edition,* Hart, 2020, p. 61; Inge Govaere, 'Implied Powers of the EU, Limits to Political Expediency and Internationally Inspired Pragmatism: Commission v Council (ERTA)' *in* Graham Butler & Ramses A. Wessel (eds.), *EU External Relations Law: The Cases in Context,* 2022, pp. 9–20.

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regional or worldwide environmental problems, and in particular combating climate change, protecting biodiversity, and implementing the Union's international obligations.

2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the *one health approach and on the* precautionary principle, as well as ~~and~~ on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. […]

3. In preparing its policy on the environment, the Union shall take account of: available scientific and technical data; environmental conditions in the various regions of the Union; the risk to cross planetary boundaries, applying a precautionary principle; the potential benefits and costs of action or lack of action; the economic and social development of the Union as a whole and the balanced development of its regions. […]

Article 191a

1. The Union shall, in line with its international obligations, pursue efforts to limit the global temperature increase and adhere to the objective of balancing Union-wide greenhouse gas emissions and removals to achieve negative emissions.

2. In the context of the adoption of any draft measure or legislative proposal, including budgetary proposals, the Commission shall endeavor to align those draft measures and proposals with the objectives referred to in paragraph 1. In the event of non-compliance, the Commission shall provide the reasons for that failure to align as part of the impact assessment accompanying the relevant proposal.

The proposed new opening of the provision resembles to some extent the horizontal clause of Article 11 TFEU, which requires that "environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development", and Article 13 TFEU with regard to animal welfare. However, the proposed amendment goes even further in that it adds a reference to the responsibility towards future generations, thus giving the environmental competence a more intertemporal aspect. This element has gained importance in recent years in climate litigation, *e.g.* directly before the German Federal Constitutional Court[46] and at least

46 German Federal Constitutional Court, Cases 1 BvR 2656/18 and others, Order of the First Senate of 24 March 2021.

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indirectly before the ECtHR.[47] The proposed new provision of Article 191a adds a new obligation (or extends existing obligations) on justifying Union measures with regard to the achievement of certain climate goals. An interesting addition is proposed to Article 83(1)(2) TFEU on criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension, as 'environmental crime' should be included in the list of offences.[48] Regardless of whether these proposals would indeed extend the scope of the environmental policy, *i.e.* are not already covered by a progressive interpretation of the provision, they would certainly put more emphasis on climate and environmental issues.

Secondly, Parliament proposes establishing shared competences on public health matters and the protection and improvement of human health, especially cross-border health threats, cross-border infrastructures as part of transport, civil protection, industry, and education especially when transnational issues such as mutual recognition of degrees, grades, competences and qualifications are concerned.[49] In fact, these policy areas are already part of the Union competences, but they are currently enshrined in Article 6 TFEU, giving the Union a competence only to carry out actions to support, coordinate or supplement the actions of the Member States. The proposed changes would leave culture, tourism, vocational training, youth and sport, and administrative cooperation (as well as economic, employment, and social policy as laid down in Article 5 TFEU) among the coordinating competences.

Thirdly, throughout the TFEU, Parliament proposes amendments to existing competences, both in substance and scope as well as in procedure. While a comprehensive list cannot be presented here, by way of example one can refer to the amendment proposed to Article 153(1)(j) to include the fight against poverty and the supporting of social housing[50] or the inclusion of a new aim of developing common objectives and standards of an education that promotes democratic values and the rule of law as well as digital and economic literacy in the education competence of Article 165 TFEU (which is to become a shared competence).[51] More importantly,

47 *Verein KlimaSeniorinnen Schweiz and others v. Switzerland,* No. 53600/20, 9 April 2024.
48 P9_TA(2023)0427, Amendment 106.
49 Id. Amendments 70 through 79.
50 Id. Amendment 134.
51 Id. Amendment 143.

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on the basis of Parliament's proposal, almost all existing legal bases that prescribe for a special legislative procedure are to be transformed to the ordinary legislative procedure, thus giving equal rights to Parliament in the legislative process and providing for qualified majority voting instead of unanimity in the Council. This is just a logical step in the line of treaty amendments that enhanced Parliament's role on its way towards a true bicameral system (see above). Crucially, Parliament's proposal also covers the flexibility clause of Article 352 TFEU.[52] A transition to qualified majority voting for this legal basis would confer onto the Union a sort of *Kompetenz-Kompetenz*[53] that would most definitely meet the resistance of the German Federal Constitutional Court.[54]

While certainly it would be good to have it inscribed in primary law, a transition to qualified majority voting or to the ordinary legislative procedure is possible already on the basis of the *passerelle* clauses in Article 48(7) TEU. The treaty-makers of the Constitutional Treaty and then the Treaty of Lisbon made a big leap forward by providing for an opportunity to change all legislative procedures to the ordinary legislative procedure without a full-fledged treaty revision, *i.e.* through a simplified treaty revision procedure. Especially the transition to the ordinary legislative procedure would enhance Parliament's role, as in those cases it acts on equal footing with the Council as co-legislator. Using the *passerelle* clauses [especially Article 48(7) TEU], these changes could be introduced even today. In fact, the use of the *passerelle* clauses is what the Commission[55] and the

52 Id. Amendment 238.

53 Lionello, Luca, 'A Leap Towards Federalisation?', *VerfassungsBlog*, 9 September 2023; *cf. also* Andrew Duff, *Towards common accord? The European Union contemplates treaty change,* EPC Discussion Paper, 31 October 2023, p. 6.

54 *Cf.* Federal Constitutional Court, Case 2 BvE 2/08 and others, Judgment of the Second Senate of 30 June 2009, para. 328: "[Article 352 TFEU] meets with constitutional objections with regard to the ban on transferring blanket empowerments or on transferring *Kompetenz-Kompetenz*, because the newly worded provision makes it possible substantially to amend treaty foundations of the European Union without the constitutive participation of legislative bodies in addition to the Member States' executive powers […]. Because of the indefinite nature of future application of the flexibility clause, its use constitutionally requires ratification by the German *Bundestag* and the *Bundesrat* on the basis of Article 23.1 second and third sentence of the Basic Law. The German representative in the Council may not express formal approval on behalf of the Federal Republic of Germany of a corresponding lawmaking proposal of the Commission as long as these constitutionally required preconditions are not met."

55 Commission Communication, A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy, COM(2018) 647 final; Commission

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European Parliament[56] have consistently called for. There is, however, an important limit to the *passerelle* clauses that one should keep in mind during a treaty revision: It allows only to transition from a special to the ordinary legislative procedure, but it does not allow for the introduction of a legislative procedure where there is currently a non-legislative procedure in place.[57] The Treaties, however, do not follow any inherent logic in the distinction between legislative ad non-legislative procedures.[58]

2.3.2. External Action

Several changes, some of them fundamental, are also planned for the area of foreign policy. These concern the Common Foreign and Security Policy regulated in the TEU and, in particular, the general trade policy in the TFEU as well as the general rules for the conclusion of international agreements by the European Union.

It is true that the Common Foreign and Security Policy [Articles 23 *ff.* TEU] has already been supranationalized to some extent with the Treaty of Lisbon, but it is still subject to specific rules and procedures as laid down in Article 24(1)(2) TEU. This includes unanimity in the Council (and the European Council) as the default voting procedure, the exclusion of legislative acts, and a diminished role for the European Commission, the European Parliament and the CJEU. The European Parliament proposes to change this default in CFSP: Foreign policy "shall be defined and imple-

Communication, Towards a more efficient and democratic decision making in EU tax policy, COM(2019) 8 final; Commission Communication, A more efficient and democratic decision making in EU energy and climate policy, COM(2019) 177 final; Commission Communication, More efficient decision-making in social policy: Identification of areas for an enhanced move to qualified majority voting, COM(2019) 186 final. On these initiatives, *see* Robert Böttner, 'The Commission's initiative on the passerelle clauses. Exploring the unused potential of the Lisbon Treaty', *Zeitschrift für europarechtliche Studien,* 2020/3, pp. 489–508.

56 *See* most recently European Parliament resolution of 11 July 2023 on the implementation of the passerelle clauses in the EU Treaties, P9_TA(2023)0269, 2022/2142(INI).

57 Robert Böttner & Jan Grinc, *Bridging Clauses in European Constitutional Law – Legal Framework and Parliamentary Participation,* Springer, 2018, p. 33.

58 Michael Dougan, 'The Treaty of Lisbon 2007: winning minds, not hearts', *Common Market Law Review,* Vol. 45, Issue 3, 2008, p. 647; Nicholas Otto, *Die Vielfalt unionaler Rechtsetzungsverfahren*, Mohr Siebeck, 2022, p. 49; Robert Böttner, *Special legislative procedures in the Treaties,* Study for the European Parliament, PE 738.331, October 2022, p. 10.

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mented by the European Council and the Council acting by a qualified majority, after obtaining the consent of the European Parliament." On top of that, one can assume that Parliament would like to include the adoption of legislative acts in foreign policy, even though this is not quite clear and consistent in the proposal.[59] Furthermore, the CJEU "shall have jurisdiction with respect to these provisions".[60] In addition, the qualified abstention enshrined in Article 31 TEU would be crossed out[61] and the emergency brake in Article 31(2) TEU, according to which a Council member could oppose qualified majority voting (for vital and stated reasons of national policy) and demand that the matter be referred to the European Council for unanimous decision, would be watered down.[62] All in all, this would considerably cut back on veto options in foreign policy, but it is unlikely that Member States would agree on those radical changes. There are already a few options for qualified majority voting in CFSP and the *passerelles* (transition from unanimity to QMV) apply here as well. Therefore, even without an ordinary treaty amendment, there are already options to transition to more qualified majority if the political agreement among the Member States exits.

In foreign and security policy, the most far-reaching proposal is the expansion of the common security and defence policy into a genuine defence union on the basis of Article 42 ff. TEU, which "shall enable the Union to defend Member States against threats".[63] Whereas currently the performance of the tasks in the defence union "shall be undertaken using capabilities provided by the Member States" [Article 42(1) TEU], Parliament proposes that the CSDP, including the (common) procurement and development of armaments, "shall be financed by the Union through a dedicated budget in respect of which the European Parliament is a co-legislator and exercises scrutiny".[64] Moreover, the Defence Union would entail

59 The exclusion of the adoption of legislative acts is deleted in Article 24(1) TEU (Amendment 45), but retained in Article 31(1) TEU (Amendment 47). Furthermore, in none of the CFSP legal bases does Parliament introduce legislative procedures.

60 P9_TA(2023)0427, Amendments 45 and 47 through 50.

61 Id. Amendment 47.

62 The proposed wording of Article 31(2)(2) TEU according to Amendment 48: "A member of the Council may request that, for vital and stated reasons of national policy, the matter be referred to the European Council", which would decide by qualified majority in accordance with the new version of Article 24(1) TEU.

63 P9_TA(2023)0427, Amendment 51.

64 Id. Amendment 51.

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"military units, including a permanent rapid deployment capacity, under the operational command of the Union" and not only capabilities made available to the Union by the Member States (which Member States would be free to deploy additionally as a matter of course).[65] The common defence clause in Article 42(7) TEU, that was introduced by the Treaty of Lisbon, would be aligned with the wording of Article V of the North Atlantic Treaty.[66] In view of Denmark's, Sweden's and Finland's turn towards the EU and NATO in the face of Russia's war of aggression against Ukraine, a further development of European defence policy in terms of primary law cannot be ruled out. Even though the common defence in the realm of the EU would be without prejudice to the specific security and defence policy of certain Member States including their membership in NATO [see Article 42(7) *in fine* and Protocol No. 11], any intensification of defence cooperation within the EU would raise questions as to the co-existence and cooperation with the North Atlantic alliance.

Apart from the CFSP, amendments are proposed to the common commercial policy as part of the Union's foreign policy as well as to the competence and especially procedure for the conclusion of international agreements by the EU. First of all, Parliament proposes to include 'investment protection' and 'economic security' in the scope of the common commercial policy in Article 207(1) TFEU.[67] The common commercial policy is one of the Union's exclusive competences [Article 3(1)(e) TFEU] as the (external) counterpart to the (internal) customs union [Article 3(1)(a) TFEU]. The scope of this competence has been extended through various treaty amendments including the Treaty of Lisbon. However, there are still parts that commonly feature in recent free trade agreements that the Union concludes with third countries ('new generation' trade agreements) but that are not covered by Article 207(1) TFEU, thus making it necessary that the Member States ratify those agreements as well (so called 'mixed agreements').[68]

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65 Id. Amendment 52.

66 Article 42(7) in the version proposed by Amendment 55: "If a Member State is the victim of ~~armed~~ aggression ~~on its territory~~, the *Defence Union and all* ~~other~~ Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. *An armed attack on one Member State shall be considered to be an attack on all Member States.* "

67 Id. Amendment 170.

68 *See* on this prominently the *Opinion 2/15* that the CJEU issued pursuant to Article 218(11) TFEU on the free trade agreement with Singapore, ECLI:EU:C:2016:992.

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Parliament also claims a stronger position at the procedural level as lid down in Article 207 and Article 218 TFEU. It wants to have a say in the authorization of negotiations[69] and be on equal footing when it gets to the distribution of information by the Commission as negotiator to the special committee appointed by the Council.[70] In accordance with the easing of voting requirements in internal polices and the parallelization with external policies, the Council would no longer be required to vote on the conclusion of an agreement by unanimity, but by qualified majority or even simple majority.[71] Moreover, Parliament proposes to do away with the distinction between parliamentary consultation or consent for the conclusion of agreements currently enshrined in Article 218(6) TFEU depending on the subject matter. Instead, all international agreements would be subject to consent given by the European Parliament.[72] This would certainly add a parliamentary dimension to the Union's foreign and especially trade policy and enhance its democratic legitimacy.

3. What's Next? Treaty Amendment and Possible Alternatives

The European Parliament has presented a comprehensive review of the current treaty framework that touches upon a number of issues that have been subject to debate in the past years. But it also leaves out some issues that clearly need to be addressed in a convention or an intergovernmental conference for the amendment of the EU Treaties, most prominently the massive reconstruction of the economic and monetary union. It is clear, however, that the proposed amendments primarily concern the status of the European Parliament itself. What is also clear is that not all of these propositions will be fully endorsed by the Member States, but it is a brave and sometimes blunt proposal that will have to be discussed in line with proposals from other institutions and players.

Among the many voices that have made suggestions on a reform of primary law is the report from the Franco-German working group ('Group of Twelve') that was presented shortly before Parliament adopted its reso-

69 P9_TA(2023)0427, Amendments 171 and 178.
70 Id. Amendment 172.
71 Id. Amendments 174 and 175.
72 Id. Amendments 180 through 182.

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lution.[73] This expert group recommends a number of changes aimed at increasing the EU's capacity to act, getting the EU enlargement ready, and strengthening the rule of law and the EU's democratic legitimacy. To this end, the report makes several recommendations to strengthen the protection of the rule of law through budgetary conditionality and procedural reforms. It also proposes, among other institutional reforms, a reduction of the size of the Commission's College to two-thirds of Member States or developing a hierarchical model, a transition in all remaining policy decisions from unanimity to qualified majority voting in the Council, accompanied by full co-decision with the European Parliament through the ordinary legislative procedure (combined, however, with a 'sovereign safety net' of recourse to the European Council where vital national interests are at stake), and an agreement between the European Parliament and the European Council as regards the election of the Commission President. There are, in fact, noticeable overlaps between the expert group's and Parliament's proposals.

The ball is now in the European Council's court. In accordance with Article 48(3) TEU, the European Council will decide whether it wishes to continue the process of amending the Treaties on the basis of the proposals received. Opinions on the idea of a treaty amendment vary among the Member States. In reaction to the final report from the CoFE, a group of thirteen States from Northern, Central, and Eastern Europe circulates a 'non-paper'[74] underlined that "Treaty change has never been a purpose of the conference", but while "they do not exclude any options at this stage", they "do not support unconsidered and premature attempts to launch a process towards Treaty change". And further: "We already have Europe that works. We do not need to rush into institutional reforms in order to deliver results." Only a few days later, Belgium, Germany, Italy, Luxembourg, the Netherlands, and Spain, supported by France, replied with a

73 Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century, Report of the Franco-German Working Group on EU Institutional Reform, 18 September 2023, at www.auswaertiges-amt.de/blob/2617206/4d0e0010ffcd8c0079e21329bbbb3332/230919-rfaa-deu-fra-bericht-data.pdf.

74 Non-paper by Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, Latvia, Lithuania, Malta, Poland, Romania, Slovenia, and Sweden on the outcome of and follow-up to the Conference on the Future of Europe, 9 May 2022, at https://twitter.com/SwedeninEU/status/1523637827686531072/photo/1.

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letter of their own[75] in which they declared themselves "in principle open to necessary treaty changes that are jointly defined" in an interinstitutional process involving the European Parliament, Council, and Commission. If the European Council agrees that treaty changes are necessary, it can convene by simple majority a Convention composed of representatives of the European and the national Parliaments, of the national governments, and of the Commission, that would discuss the proposals and make recommendations to an intergovernmental conference. At its meeting in March 2024, the European Council underlined that preparations for enlargement and internal reforms need to advance in parallel to ensure that both future Member States and the EU are ready at the time of accession. It announced that it will address internal reforms at an upcoming meeting with a view to adopting by summer 2024 conclusions on a roadmap for future work.[76] Whether the European Council will opt for a full-fledged, ambitious and open-ended convention or targeted changes remains to be seen. In any case, it is almost certain that any possible treaty change will be preceded by intensive and lengthy political debates and compromises. It is equally certain that not all proposals for deeper integration are capable of consensus in view of Eurosceptic tendencies – because every treaty amendment must be ratified by all member states.

75 Non-paper submitted by Germany, Belgium, Italy, Luxembourg, the Netherlands, and Spain on implementing the proposals of the Plenary of the "Conference on the Future of Europe", 13 May 2022, at https://twitter.com/alemannoEU/status/1526922932970262528/photo/2.

76 European Council of 21–22 March 2024, Conclusions, EUCO 7/24, para. 29.

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