

***Engagement on the Conference on the Future of Europe***

9:00, 18 November 2018

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Good morning and thank you for inviting me to contribute to this important and sometimes neglected debate.

As requested by the Clerk to the Committee, I will largely restrict my comments to the final question, namely my views on Treaty change and whether this should form part of the conclusions. I am happy to discuss the other issues raised in the invitation in the discussion.

I would like to structure my remarks around two questions. Firstly, whether what is proposed in the Conference would require Treaty change and secondly whether Treaty change is desirable.

**Whether what is being proposed in the Conference would require Treaty Change?**

Based on the documents produced to date by the institutions, what is currently being proposed will not necessarily need treaty change, although there may be some questions around transnational lists and the expansion or addition of competences. This, however, is with the significant proviso that we don't have any specifics yet, in the absence of which it is impossible to answer this question with any certainty and that the range of issues to be discussed by the Conference could expand.

In relation to institutional matters, the only two specific proposals are in relation to the Spitzenkandidat system and transnational lists. As was demonstrated in 2014, the Spitzenkandidat system can operate without any treaty reforms as a political practice. Whether this is a good idea or politically likely is a different question. The question of transnational lists is more difficult and may require treaty reform. The composition of the European Parliament is governed by a decision of the European Council. However, the wording of the Treaty, while not explicitly precluding other criteria for representation, clearly envisages Member State organised constituencies.

In relation to policy areas, all areas of policies mentioned in the various documents appear to be currently covered by the EU's competence. However, these competences are of a limited kind and may require expansion. Furthermore, in light of COVID, health and fiscal matters have been added to the issues to be discussed. These are areas with limited EU competence. However, in order to determine if treaty change is necessary, concrete proposals and an assessment in light of the specific treaty articles in any given policy area are required.

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If the recommendations of the Conference exceed the competence of the Union there are a number of options:

- Firstly, a Treaty amendment could be made, increasing the competences of the Union. This would entail the use of the Ordinary Revision Procedure with all the risks that entails.
- Secondly, the Conference could propose a programme of action addressed to both Member States and the Union, with the Member States adopting the measures which fall within their competence and the Union adopting measures within its competence. This could be supported by a soft law framework, similar to that employed with the Lisbon Agenda. This may not be appropriate if the purpose in some policy fields such as health and taxation is precisely to increase the Union's own capacity in these fields to benefit from action on a Union level.
- Thirdly, the Member States could adopt an international treaty outside the framework of Union law. While it would depend on the specific proposals, it is not evident that the policy areas to be considered in the Conference would be suitable for governance by international treaty. Moreover, this is a Conference on the Future of the European Union. Establishing parallel organisations outside the Union would appear to undermine that goal. There are also democratic and rule of law issues with this approach.

More importantly perhaps is whether treaty change is desirable.

### **Whether Treaty Change is Desirable?**

In relation to whether treaty change is desirable I would like to raise a number of points:

Firstly, while there are other mechanisms of treaty change, it is likely that any substantive change will require the use of the Ordinary Revision Procedure and in inter-governmental conference. This is an involved process and it might be difficult to restrict it to a discrete set of reforms in the context of broader inter-governmental bargaining.

Secondly, over the past number of decades, a number of different actors, in addition to Member State Governments, have become implicated in Treaty negotiation adoption.<sup>1</sup> This includes not only electorates via referendums but also Parliaments, including regional parliaments, which may require a supermajority and constitutional courts which have become increasingly wary of European integration. With an increased number of veto points, the risk of failure increases and the consequent political damage to the European Union also increases. It also means that the Member State governments do entirely not control the process once the ratification stage begins. This is not to say that Treaty change should never

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<sup>1</sup> See generally Dermot Hodson and Imelda Maher, 'The Necessary Complexity of Consent: Rules and Norms in EU Treaty Making' 21 CYELS 297.

be considered. It is simply to point out that we should be mindful that any Treaty change must navigate various obstacles of a political and legal nature throughout the 27 Member States and that failure will involve significant political damage to the project of European integration.

Thirdly, we live in an era of populism which targets international and transnational organisations and politics and which proposes simplified forms of nationalisms. In this context, the European Union may be particularly vulnerable. While substantial Treaty reform may provide a symbolic 'constitutional movement' for the Union, generating political mobilisation and commitment to the Union, it also raises the possibility of the Union being the target of contestation and repudiation in national parliaments and amongst national electorates. Treaty change is a high risk strategy and it is not evident that the ambitions of the conference will require Treaty change. As such, I would urge caution in this area. Treaty change should certainly only be considered if it is necessary and certainly not for its own sake.

Finally, however, I would not rule out treaty reform *a priori* as it would unduly restrict the Conference and undermine its deliberative potential. The Conference of Europe will be as important for the *process* in involving EU citizens, developing policy in a more responsive manner and increasing the legitimacy of the Union. I see an intrinsic value in the process itself. Ruling out any particular outcome in advance would risk undermining the bottom-up nature of the Conference and restricting the deliberations unduly. A major treaty reform may not be necessary, given the existing competences enjoyed the Union, and there are risks involved in this route as I described. However, citizens should have the option of proposing treaty change and an expansion of competences if that is what decided after careful debate. It is simply they should be aware of the difficulties and risks of this process.