



The formal prerequisites for the successful establishment of a federal European Political Union

EUROPEAN INSTITUTIONS & POLICIES

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Summary

- Across Europe today, the aspiration to create a federal EPU is admittedly far from vibrant; it occupies hardly any space in the public political debate. It goes without saying that displaying a clear political will to create a federal EPU on the part of the peoples and politicians of Europe constitutes an essential prerequisite for the feasibility of the project.
- This being said, on the one hand, it cannot be completely ruled out that this prerequisite could be fulfilled in the future and, on the other hand, even if this were the case, the mere existence of the corresponding political will would not be sufficient to ensure the successful creation of a federal EPU. For this to happen, certain formal prerequisites would also have to be met. These are precisely the prerequisites that would allow a political will, if it existed, to be cast into an appropriate constituent legal text, such as a constitution.
- Three of these formal prerequisites are highlighted in the present contribution. They concern the scope of the project to create a federal EPU, the technique to be used for drafting its founding text (constitution) and the procedure to be followed to successfully bring its founding text (constitution) into force.
- As regards the scope of the project, it should *focus primarily and as a minimum on the institutional issues*. As regards the technique to be used for drafting the founding text of a federal EPU, a *tabula rasa technique* should be used rather than the old and familiar *amending technique*. As regards the procedure to be followed for a successful entry into force of the founding text of a federal EPU, rather than the *ordinary revision procedure* of Article 48 TEU, a *constituent procedure based on classical international law and containing elements of direct democracy* should be used.
- The suggested constituent procedure should be designed in such a way that no member state that is not in favor of the EPU project is forced to participate and that, in the event of such a rejection, other member states favourably disposed to the project are not prevented from embarking upon it and making it a success. A *group of pioneer states* could therefore emerge and act as a *catalyst for the creation of a federal EPU*.
- Resorting to the aforementioned constituent procedure would be tantamount to assuming the *prima facie* responsibility for potentially dissolving the current partnership between EU member states. However, political forces within EU member states who advocate the emergence of a federal political entity in Europe could rightly retort in such a case that the real responsibility for this development lies less with those who dared to cross the Rubicon of the European integration project than with those who failed to do so.

Introduction

The creation of a federal political entity in Europe, such as a federal European Political Union (EPU), is by no means a new political ideal. Indeed, it predates the establishment of the European Communities in the 1950s.

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Since then, the federalist ideal has remained in that same precarious state. As is well known, its timid attempts at gaining greater visibility in the preamble to the Maastricht Treaty have failed miserably. After all, Mrs Thatcher placed a ban on the 'f' word being so much as enunciated in her presence. So the legend goes...

Across Europe today, the aspiration to create a federal EPU is admittedly far from vibrant; it occupies hardly any space in the public political debate. Moreover, the ideal of creating a federal EPU no longer functions in a vacuum, as it did in the aftermath of WWII, but rather in symbiosis with the political organisation that is already in place in Europe, i.e. essentially the EU, whose very existence unleashes a vast amount of inertia. Thus, in order to have any chance of realisation, the said ideal must first confront the current political *status quo* and prove that it has clear advantages over it. As a result, it is generally taken as given that, unless there is a fundamental upheaval of a magnitude greater than the aforementioned inertial force, the said ideal has no chance at all of being seriously considered.

It goes without saying that displaying a clear political will to create a federal EPU on the part of the peoples and politicians of Europe constitutes an essential prerequisite for the feasibility of the project. This being said, two questions arise in this respect: first, can it be completely ruled out that this prerequisite could be fulfilled in the future and, second, if this were the case, would the mere existence of the corresponding political will be sufficient to ensure the successful creation of a federal EPU?

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With regard to the first question, the answer cannot be unequivocally affirmative. The stance of the peoples of Europe towards the creation of a federal EPU is not as uniformly dismissive as one might think. This is especially true of the younger European generation, which is very attached, as a minimum, to privileges such as freedom of movement and the common currency. This generation in particular, if faced with the dilemma, would be less afraid of the prospect of being citizens of a united Europe based on solidarity, efficiency and democracy than of a continuation of the current situation with a more or less ineffective and undemocratic Europe. Even among the middle-aged, there are some - including politicians - who very much agree with the principle of a much closer integration of the peoples of Europe, but are perplexed as to how this goal might be achieved.

Furthermore, Europeans have not been spared major upheavals in recent years, both internally and, above all, internationally. One only has to think of the terrible COVID-19 pandemic, or the ongoing climate change crisis, or Russia's neo-imperialist war of aggression against Ukraine that tramples on all the multilateral rules. All these crises have severely tested Europe's ability to respond effectively. Can it be ruled out that, at some point in the future, their cumulative thrust will be far greater than the aforementioned inertia, making the project of a federal EPU relevant once more?

Even though the existence of a clear political will is a necessary condition, it is not yet a sufficient condition for the actual realisation of the project. For this to happen, certain formal prerequisites would also have to be met.

Finally, the creation of a federal political structure in Europe does not necessarily mean that it must be endowed from the outset with all the competences that could theoretically belong to a federal political entity. On the contrary, what counts at the start is that an appropriate institutional structure is set up with an absolute minimum of essential competences; the EPU could be progressively endowed with additional competences thereafter.

As far as the second question is concerned, even though the existence of a clear political will is a necessary condition, it is not yet a sufficient condition for the actual realisation of the project. For this to happen, certain formal prerequisites would also have to be met. These are precisely the prerequisites that would allow a political will, if it existed, to be cast into an appropriate constituent legal text, such as a constitution.

Therefore, it would not be entirely out of place to consider what these formal prerequisites for the successful realisation of a federal EPU would be.

The formal prerequisites for the successful creation of a federal EPU

Turning to the so-called formal prerequisites for the successful creation of a federal EPU, it seems that there are at least three and that they concern the scope of the project, the technique to be used for drafting the founding text (constitution) and the procedure to be followed to successfully bring the founding text (constitution) of a federal EPU into force.

Focusing primarily and as a minimum on the institutional issues

As suggested above, the successful creation of a federal EPU would require, firstly, the elaboration of an *institutional structure* and a *decision-making procedure* that are efficient, balanced and democratic. In particular, contrary to what President Macron implied in his inspiring speech to the German Bundestag in November 2018, merely extending competences in favour of the EU, however comprehensively, is unlikely to usher in a "new stage in the process of European integration", not as long as the current institutional structure and plethora of existing decision-making procedures remain untouched. The project must therefore focus primarily and as a minimum on the institutional issues.

Resorting to a "tabula rasa" technique for drafting the EPU founding text

Secondly, to deal with the aforementioned institutional issues, the successful creation of a federal EPU would presuppose that a *tabula rasa technique* was used when drafting the EPU constitution, rather than the old and familiar *amending technique*. The latter technique—which, incidentally, has been used in every treaty revision to date, with the possible exception of Pillars II and III of the Maastricht Treaty, and which, moreover, seems to be favoured by the Commission in its Communication on the outcome of the Conference on the Future of Europe—would certainly make it possible to implement certain piecemeal remedies (e.g. the abolition of the unanimity requirement where it still exists, etc.) in the TEU and TFEU to tackle the EU's current competence- and structure-related shortcomings. However, such an approach would certainly not remedy the fundamentally intergovernmental and neo-functional orientation that has characterised today's EU since the establishment of the first three European Communities, thus making a federal EPU project a false hope. On the other hand, employing the *tabula rasa technique* would make it possible to rethink and redefine the entire institutional structure of an EPU from scratch, including the distribution of powers both vertically (between the EPU and its member states) and horizontally (between institutions), without disregarding the best practices of

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existing democratic (parliamentary or presidential) federal constitutions and the successes achieved by European integration to date. This technique would also make it possible to cast the competences of the EPU in clear and transparent *catalogues of (exclusive, concurrent and parallel) competences*, which could make the maintenance of the current cumbersome system of specifically conferred powers superfluous. Resorting to a *tabula rasa technique* for the drafting of the EPU constitution is therefore the second prerequisite for a successful establishment of a federal EPU.

Resorting to a constituent procedure based on classical international law and containing elements of direct democracy

Thirdly, and most importantly, the successful creation of a federal EPU requires very careful consideration of the *question of the procedure* that could ensure a smooth start and a successful completion of an EPU project.

The ordinary revision procedure under Article 48 TEU

Although it seems to be intended for revisions rather than a fundamentally different development of the EU, such as the creation of a federal EPU, one must first examine the procedure provided for in Article 48 TEU, namely the *ordinary revision procedure*, to see whether it can reasonably make the creation of a federal EPU possible. Under this procedure, any EU member state as well as the European Parliament and the Commission are entitled to initiate the procedure on their own initiative by submitting proposals for the amendment of the Treaties to the Council, which in turn forwards them to the European Council. Subsequently, the procedure provides that, in order for the proper negotiations to begin, a simple majority decision of the European Council in favour of examining the proposed amendments is required and that, at the end of the negotiations, the adoption of a negotiated Amending Treaty and its entry into force are subject to the consent of each member state.

Designed in this way, the revision procedure of Article 48 TEU raises insurmountable obstacles to the launching, as well as to the entry into force, of a project to create a federal EPU. Firstly, as regards the launching of an EPU project, the ordinary revision procedure, by granting the Heads of State and Government (HOSG), acting by simple majority, the power in question, makes the EPU project both part of and dependent on the imponderables of each member state's domestic politics and subject to a prior trade-off negotiation between the HOSG. Expecting all these different disparate parameters to align themselves simultaneously seems totally unrealistic. Moreover, assigning the responsibility for voting on an EPU project, which is likely to result in a serious abandonment of national sovereignty, to the HOSG, themselves constitutionally entrusted by each member state with the task of defending national sovereignty, appears to render the entire task impossible. After all, it is fair to assume that should some HOSG dare to take a pro-EPU stance, they would become prime targets for resentful nationalist and populist forces at home. Secondly, as far as the entry into force of an EPU project is concerned, the above-mentioned procedure seems to place a heavy burden on its prospects. Indeed, if at the end of the process of creating a federal EPU, a single member state were unable to ratify for whatever reason, the whole hard-won project would collapse.

In summary, the revision procedure under Article 48 TEU gives any member state that rejects a proposal to amend the TEU the certainty both that it cannot be forced to accept it and that its rejection cannot lead to it being bypassed by other member states that are favourably disposed to the proposal. This means that either all member states agree to the proposal and progress in unison towards closer European integration (albeit at the cost of

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The revision procedure under Article 48 TEU sacrifices the prospect of an important (and perhaps for this reason controversial) deepening of the European integration process, such as the creation of a federal EPU, in order to preserve the current composition of the EU.

A constituent procedure should be designed in such a way that no member state that is not in favour of the EPU project is forced to participate and that in the event of such a rejection, other member states favourably disposed to the project are not prevented from embarking upon it and making it a success. In this way, a group of pioneer states could emerge to serve as a catalyst for the creation of a federal EPU.

occasional disruptive and confusing national exceptions in the form of opt-outs) or, in the event of dissent by a single member state, that there is no progress at all. This procedure thus sacrifices the prospect of an important (and perhaps for this reason controversial) deepening of the European integration process, such as the creation of a federal EPU, in order to preserve the current composition of the EU. In the longstanding existential dilemma of breadth versus deepening in the future development of the EU, the Article 48 TEU procedure takes a clear stand in favour of maintaining the bloc's current breadth.

Therefore, under no circumstances can this procedure be relied upon for realising a project to create a federal EPU. If this procedure were to be used, such a project would either not even get off the ground or, if it did, either lead to a total deadlock (as the stillborn 2005 Constitution demonstrated), or produce a lowest common denominator result that would not be worthy of the label 'federal EPU'.

[A constituent procedure based on classical international law and containing elements of direct democracy](#)

Under these circumstances, political forces within the EU member states which advocate the emergence of a political entity of a federal nature in Europe, such as a federal EPU, would be well advised to seriously consider a procedure other than that provided for by Article 48 TEU, namely a *constituent procedure* based on *classical international law* and containing *elements of direct democracy*. Such a procedure should be designed in such a way that no member state that is not in favour of the EPU project is forced to participate and that in the event of such a rejection, other member states favourably disposed to the project are not prevented from embarking upon it and making it a success. In this way, a *group of pioneer states* could emerge to serve as a *catalyst for the creation of a federal EPU*.

More specifically, the suggested constituent procedure could feature the following steps:

In the first instance, using Europe's current organisational set-up as a starting point, the procedure under discussion would allow for a *smooth and pragmatic setting in motion of the EPU project*. Thus, at a given meeting of the European Council, the willing HOSG could commit themselves to reflect, in a brainstorming session with their respective governments, on the following: firstly, whether, given the current state of the EU and its wider geopolitical environment, the creation of a more integrated political entity in Europe, possibly with federal characteristics, would represent, from the point of view of *their national interest*, an appropriate and necessary step forwards in the process of European integration; and, secondly, whether their respective governments would be prepared to put this fundamental question to their respective populaces.

In a second step, the suggested procedure would help determine *the circle of candidate countries that would participate in future negotiations* aimed at creating a more integrated political entity in Europe, possibly with federal characteristics, such as an EPU. To this end, at a subsequent meeting of the European Council, the willing HOSG could, with the benefit of hindsight as to their counterparts' positions on the two issues in question, commit themselves to organising preliminary national referenda in their respective countries, at a jointly agreed date, with a view to answering the question of the appropriateness of, and need for, such a political entity. In jointly setting this date, particular attention should be paid to the need to allow sufficient time for the most wide-ranging democratic debate possible, both within and between the peoples of Europe concerned, on the pros and cons of, in principle, establishing an EPU.

In a third step, the constituent procedure under discussion would help determine *the circle of countries that would actually participate in the negotiations* aimed at creating a more integrated political entity in Europe, possibly with federal characteristics, such as an EPU. To this end, the preliminary national referenda on the principle of the creation of an EPU, decided on the previous step, could be organised at the jointly agreed date and should have a positive outcome.

The suggested constituent procedure means that, even if one or more member states disagree with the creation of a federal EPU, the project would not be permanently derailed. It also means that, in the event of a fully implemented procedure, a new legal entity would eventually come into being in Europe alongside the current EU.

In a fourth step, this procedure would provide *an appropriate framework* (e.g. a convention) *for negotiations aimed at drafting and signing*, by common agreement, *the treaty establishing the envisaged EPU*. The relevant negotiations between the representatives of the countries whose peoples gave a positive response in the relevant referenda could begin as soon as their results were known.

In a fifth step, the suggested constituent procedure would ensure *a solid democratic foundation for the new federal EPU*. To this end, final national referenda, this time to approve the concrete content and modalities of functioning of the federal EPU, could be held at a date jointly agreed at the end of the previous step. When setting this date, sufficient time should once again be allowed for the signed text to be clearly explained to the citizens concerned.

In a sixth and final step, the constituent procedure under discussion would provide for *entry into force modalities* preventing last-minute setbacks, such as a negative final national referendum, from jeopardizing the completion of the entire hard-won project. To this end, the treaty establishing the EPU could provide for it to enter into force after a reasonable period of time among the signatory states that have successfully ratified it. For obvious historical and political reasons, but also for reasons of political plausibility, it seems essential to require that France and Germany at least should be among the states that have successfully ratified the treaty.

The constituent procedure proposed above, unlike the ordinary revision procedure provided for by Article 48 TEU, would all the more make it possible for an EPU project to be launched. This is because transferring the relevant decision-making power to the peoples of Europe (see the third step above) would, first, keep the EPU project safely isolated from domestic political imponderables and, second, ensure that only those are endowed with the decision-making power who can validly decide on the (alleged) curtailment of national sovereignty, namely the sovereign European peoples themselves. Moreover, the suggested constituent procedure offers a far greater likelihood that the treaty establishing a federal EPU could successfully enter into force at the end of the day. This is because, if a member state that has signed the treaty establishing the EPU were ultimately unable to ratify it, this would not automatically lead to a complete breakdown of the project as a whole. Instead, under certain circumstances, the treaty could be saved among the other signatory states (see the sixth and final step above).

Resorting to the aforementioned constituent procedure would be tantamount to assuming the prima facie responsibility for potentially dissolving the current partnership between EU member states.

In summation, the suggested constituent procedure for the creation of an EPU gives any member state that rejects a proposal to amend the TEU only the certainty that it could not be forced to subscribe to it, but not that it could not, as a result of its negative position, be sidelined by other member states favourably disposed towards it. This means that, even if one or more member states disagree with the creation of a federal EPU, the project would not be permanently derailed. It also means that, in the event of a fully implemented procedure, *a new legal entity--the aforementioned EPU--would eventually come into being in Europe alongside the current EU, thereby giving birth to a Europe à deux vitesses*. The EPU member states would then have to withdraw from the current EU at the same time as the EPU is established, in accordance with Article 50 TEU, and the terms of cooperation

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between the two entities (EPU and EU) would—if necessary—have to be negotiated (perhaps along the lines of the EEA agreement). This procedure thus sacrifices the preservation of the current (composition of the) EU to the prospect of a significant deepening of the European integration process, such as the creation of a federal EPU. In the aforementioned existential dilemma of breadth versus deepening in the future development of the EU, the suggested constituent procedure, in contrast to the ordinary revision procedure, takes a clear position in favour of deepening the EU towards an EPU.

As already mentioned, resorting to the aforementioned constituent procedure would be tantamount to assuming the *prima facie* responsibility for potentially dissolving the current partnership between EU member states. Political forces within EU member states advocating the emergence of a federal political entity in Europe, such as a federal EPU, should be prepared to take the blame for this outcome. However, these federalist political forces could rightly retort that the responsibility for this development lies less with those who dared to cross the Rubicon of the European integration project than with those who failed to do so.

Resorting to a *constituent procedure* based on *classical international law* and containing *elements of direct democracy* for the launching, negotiation, drafting, signing, approval and finally the entry into force of the EPU constitution, rather than to the ordinary revision procedure provided for by Article 48 TEU, is hence the third and most important prerequisite for the successful creation of a federal EPU.

Epilogue

In a nutshell, awareness of the formal prerequisites that must be met for the creation of a federal EPU to be successful is just as important as the emergence of a significant political will in Europe in favour of this historic project. A failure to recognise these prerequisites on the part of politicians would mean that, were it to emerge, the political will in question could neither be concretely verified nor translated into a tangible political achievement.