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**The real challenge facing EU is not enlargement but combining expertise with democratic legitimacy while making sure EU principles and standards are complied with**

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The perspective of a further EU enlargement to some additional 11 Member States makes one wonder whether the EU Treaties should be amended to face the challenge of such an enlargement. A debate was triggered off mainly focused on two issues: *decision making* (if today's decision making is not amended, making room for the new Member States will not result in a paralysis?) and *variable geometry legitimacy* (will it be possible for all the perspective 38 Member States to be involved to the same degree in the EU processes?). It is here to be mentioned that, in view of the coming enlargement, (i) the EU Parliament recently issued a resolution promoting a conference for the revision of the Treaties<sup>1</sup>, (ii) Germany and France issued a comprehensive joint paper drafted by 12 independent experts on the revision of the treaties<sup>2</sup>.

The literature on EU decision making and on a EU *variable geometry legitimacy* is quite large so to allow us to draw some preliminary guidelines for a debate that might become hot in the

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1 European Parliament resolution of 9 June 2022 on the call for a Convention for the revision of the Treaties (2022/2705(RSP)) [https://www.europarl.europa.eu/doceo/document/TA-9-2022-0244\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0244_EN.html); Proposals of the European Parliament for the amendment of the Treaties, [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0427\\_EN.htm](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0427_EN.htm)

2 Report of the Franco-German Working Group on EU Institutional Reform, *Sailing on High Seas: Reforming and Enlarging the EU for the 21th Century*, <https://www.auswaertiges-amt.de/en/aussenpolitik/euope/cooperation-in-europe/-/2617320>, sept. 2023

coming months. According to the ongoing debate, we will organize our presentation into two chapters: *decision making* and *variable geometry legitimacy*.

We will see that the real challenge facing EU is not enlargement but the capacity of combining professional know-how with democratic legitimacy while making sure that EU principles and standards are complied with.

## 1. Enlargement and decision making

In today's debate many argue that the EU enlargement of the early 2000 was not a mistake: the mistake was not to have adjusted the decision-making mechanism to the increased number of Member States. We think that decision making processes actually changed deeply after the late 90s and early 2000 enlargements. The point is that in the early 2000 (when the Lisbon strategy took off) the basic message was a simple one and is as topical now as it was then: “we need to *govern ourselves better together* -European institutions and Member States. *We can do this without changing the treaty*, without necessarily waiting for the successful outcome of a new intergovernmental conference. Better governance together means active cooperation between the European Parliament, the Council, the Commission, and the national governments so that the people of Europe can see more clearly how they fit into major projects and into the EU Day to day business”<sup>3</sup>. This is what used to be referred to as the “power of the community method”.

It is according to the community method approach that a joint declaration on practical arrangements for the co-decision procedure (article 251 of the EC Treaty) (2007/C 145/02)<sup>4</sup> was issued and later (the 13<sup>th</sup> of April 2016) an inter-institutional agreement between the EU Parliament, the Council of the EU and the European Commission on better law making<sup>5</sup>.

To better grasp the bearing of the “community method” one has to keep in mind the “culture”, the way of thinking that has been guiding the European Community since its very beginning. Providing a professionally qualified output prevails over democratic legitimacy. What matters is to provide the best possible output to the citizens. *In house* expertise, staff's integrity and expertise are of paramount importance. Here lays the ground for the College of Europe in Bruges.

Policy shaping and implementation were overlapping in CECA which performed the function of an authority with the power of forcing the implementation of the very technical CECA treaty. EURATOM, on the other hand, developed a *Joint Research Center* to pool together all European scientists of the field<sup>6</sup>.

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3 European governance - A white paper /COM/2001/0428 final , <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52001DC0428>

4 CELEX 32007C0620(01) -EN TXT, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2007.145.01.0005.01.ENG&toc=OJ:C:2007:145:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2007.145.01.0005.01.ENG&toc=OJ:C:2007:145:TOC)

5 CELEX 32016Q0512(01) - EN TXT, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016Q0512%2801%29>

6 [https://joint-research-centre.ec.europa.eu/index\\_en](https://joint-research-centre.ec.europa.eu/index_en)

Since 1965 the 3 treaties (CECA, EURATOM and European Community) share the same Commission. The CECA technical approach was soon taken over by the unified Commission especially in the implementation of the first common policies (PAC and Custom Union). Implementation committees (made of national experts)<sup>7</sup> and implementation regulations came into being.

Even though it has been developing *in house* a science and knowledge expertise unknown in other bureaucracies, the Commission cannot cover all the areas where it is called upon to work out regulations and directives proposals<sup>8</sup>, especially once the Maastricht Treaty came into force. Various kinds of committees came into being, some devoted to support the Commission in the process of working out legislation proposals. In 2002 the Commission chaired by Prodi introduces a compulsory ex ante impact assessment<sup>9</sup> for new legislation proposals (assessment carried out by the Commission using models whose rationale has not yet been completely disclosed to the Parliament and to the Council) and the rule of stakeholders' consultations<sup>10</sup>.

In this period people start worrying about the upstream phase in the EU decision making. External experts are organized by the Commission into groups, originally separating experts' groups (composed by national officials) and advisory groups (composed by external experts) whereas experts groups perform not only the function of providing know-how and expertise to the Commission<sup>11</sup> but also the function that in the political science jargon might be labeled as input function (i.e., sending to decision makers the expectations of civil society). France is admired by all experts for the ability of its officials to have France's expectations heard at the EU decision making process by coordinating the positions of its officials in the various experts' groups<sup>12</sup>.

In this period (1990s and early 2000) the Commission develops an unsurpassed competence in articulating competing interests and in promoting negotiations in view of pooling in Brussels a shared authority. While the EU Parliament was fighting to have its voice heard in the decision-making process, the Commission gained power by matching an unequalled professional know-how with the ability of articulating and harmonizing competing cross national interests.

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7 The so-called "Comitology" as described by Advocate General Geelhoed in its Opinion in Case C-378/00 (par.1), *Commission v. European Parliament and Council*, ECLI:EU:C:2002:561

8 Commission's White paper *Completing the Internal Market*, COM/85/0310 Final, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A51985DC0310>

9 Better Regulation Toolbox Chap. 2 "How to conduct an impact assessment" pp. 43 ss. [https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation/better-regulation-guidelines-and-toolbox\\_en](https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation/better-regulation-guidelines-and-toolbox_en)

10 Commission's Better Regulation Action Plan COM(2002)275 & COM(2002)278, <https://eur-lex.europa.eu/EN/legal-content/summary/action-plan-for-better-regulation.html>

11 "*Improving the knowledge base for better policies*" Communication from the Commission on the Collection and Use of Expertise: Principles and Guidelines <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0713:FIN:EN:PDF%20>

12 Michel Mangenot (ed.), *Coordonner les Affaires Européennes*, Revue Française d'Administration Publique, n. 158, Strasbourg, 2016

Since the '90s national experts supporting CoRePer are formally organized in working groups where the actual negotiations take place. If an agreement is reached in the working group, no further discussion will take place in CoRePer and the Council will ritualistically approve the proposal without discussion.

### *1.1. The state of the art as today*

Between Nice and Lisbon, the world of expert/advisory groups exploded. Roughly speaking we have permanent and temporary groups, formal expert groups (set up by an official Commission decision) and informal expert groups (based simply on a decision by the Secretary General and/or the relevant Commissioner). Each group may be composed by national officials, professional experts, representatives of NGO/interest groups, international organizations, professional bodies etc. Any expert group can perform one or more of the following functions: a) support the Commission in the preparation of legislative proposals, b) support the Commission in the implementation phase, c) support the Commission in the drafting of delegated acts, d) support the Commission in the preparation of Regulatory Procedures with scrutiny to be submitted to the relevant comitology committee, e) support the Commission in the coordination efforts with Member States. There are no standard rules to appoint members of a committee. Committees can be subdivided into sub committees.

The informal rationale established after the Maastricht Treaty according to which experts' groups were composed by national officials while advisory groups were composed by professional experts is no longer there. The European Parliament and the Ombudsman made various efforts to clear up the situation<sup>13</sup>. In 2016 the Commission issued horizontal rules with basic standards for all the Commission experts' groups<sup>14</sup>.

As a matter of fact, EU policy making aims to be transparent to all European citizens and economic-political stakeholders. The institutional site of the European Commission [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives\\_en?frontEndStage=OPC\\_LAUNCHED](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives_en?frontEndStage=OPC_LAUNCHED) provides a panoramic view of all the work-in-progress concerning the preparation of its new legislative proposals. What is important here to stress is that each legislative initiative can be traced according to topic and to discussion level, i.e. from the internal draft proposal preparation (draft impact assessment of the proposal by the leading service, Scrutiny Board opinion, interservice consultation) through the various call for evidence (open consultations, targeted consultations) and synopsis reports (factual summary of the contributions published alongside with the contributions themselves, data collection and support studies) to the final proposal. This is evidence that the preparation of legislative proposals follows a well-established (even if not formally regulated) pattern as it is evidence of the involvement of experts' groups in the preparation of the proposal that the

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13 <https://www.ombudsman.europa.eu/en/recommendation/en/63441> on the composition of Commission's experts' groups.

14 Commission Decision of 30.5.2016 establishing horizontal rules on the creation and operation of Commission expert groups C(2016) 3301 final ; <https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups?lang=en>; [https://commission.europa.eu/about-european-commission/service-standards-and-principles/transparency/register-expert-groups\\_en](https://commission.europa.eu/about-european-commission/service-standards-and-principles/transparency/register-expert-groups_en)

Commission will later submit to the Council and to the Parliament. To substantiate the point, as per 16 February 2024 there were a total of 3082 legislation initiatives in the European Commission site and, considering a key legislative topic like ‘Agriculture & Rural Development’ the law initiatives were 232 (considering all discussion level). Given the variety and technical complexity of legislative topics as well as the amount of new law initiatives, it is very hard -maybe impossible? - for European citizens to follow and impact on this process. It is evident, beyond any doubt, that the positive attempt of ‘democracy in action’ cannot match with normal citizens. Here we must make two remarks. First, we have to stress that at the time being the effort to combine expertise and democratic legitimacy at the EU is the most advanced in the world. Then we have to point out that this effort is carried out mostly within the Commission whereas the EU Parliament still plays a secondary role.

### *1.2. Trilogue*

Since the Covid19 pandemic<sup>15</sup> decision making process in the EU has been getting quicker. Second reading in the Parliament disappeared. The above mentioned Inter Institutional Agreement of 13 April 2016<sup>16</sup> is being put into practice and takes the form of trilogues<sup>17</sup>, informal tripartite meetings at early stage of the co-decision procedure between representatives with mandate of the European Parliament<sup>18</sup>, the Council<sup>19</sup> and the Commission aimed at reaching a prompt provisional agreement on the Commission’s proposal.

These trilogues may concern both political and technical issues. During trilogue meetings, which are chaired by the co-legislator hosting the meeting (i.e., either Parliament or the Council), the two institutions explain their position and a debate develops. The Commission acts as a mediator with a view to facilitating an agreement between the co-legislators. Practically the working document is a four-column text reporting the Commission’s proposal, the Council’s amendments, the EP’s amendments, and the agreed amendments which subsequently must be approved by the Council and the European Parliament in accordance with their respective internal procedures. Interesting to note that the Rules of Procedure of the European Parliament also contains a Code of Conduct for negotiating in the context of the ordinary legislative procedure<sup>20</sup> and that the Commission retains in any case the right to withdraw its proposal of regulation<sup>21</sup>. Three points are here to be stressed. First, the composition of the delegations. The delegation of the Commission is led by a high official supported by experts (not necessarily belonging to the Commission’s permanent staff). The delegation of the Council is composed by the rotating president of CoRePer and/or by the rotating president of

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15 Adjusted Commission Work Programme 2020, COM(2020) 440 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0440&qid=1616602962048>

16 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016Q0512%2801%29>

17 [https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_BRI\(2021\)690614](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)690614)

18 [https://www.europarl.europa.eu/doceo/document/lastrules/RULE-070\\_EN.html?redirect](https://www.europarl.europa.eu/doceo/document/lastrules/RULE-070_EN.html?redirect) Are present the rapporteur of the lead commission and the shadow rapporteurs and an EP vice-president.

19 Represented by the rotating presidency at the COREPER or relative working group

20 [https://www.europarl.europa.eu/doceo/document/RULES-8-2016-09-15-ANN-20\\_EN.html](https://www.europarl.europa.eu/doceo/document/RULES-8-2016-09-15-ANN-20_EN.html)

21 Case C-409/13, Council v. Commission, ECLI:EU:C:2015:217



the working group in charge of the dossier. The Delegation of the Parliament is composed by one EP Vice president and the rapporteur and shadow rapporteurs of the lead commission in charge of the dossier. Second issue to be taken into consideration: the role of the Commission. The Commission assures the secretariat of the trilogue having therefore the advantage of *celui qui tient la plume*. The third point to take into consideration is the power the Commission has to withdraw its legislative proposal if the negotiation between Council and Parliament are taking paths that are not considered satisfactory by the Commission.

The effort to combine expertise with democratic legitimacy is very clear. Transparency is supposed to assure democratic legitimacy, whereas expertise is not available to all citizens.

## 2. Variable geometry legitimacy and compliance with EU principles and standards

Our question here is: on which ground can *variable geometry legitimacy* be based? The Commission runs periodical surveys and reports on the rule of law in each of the 27 Member States. Are these surveys satisfactory? The compliance with financial standards, concerning mostly the Euro countries, is evaluated according to official financial data. Can we be satisfied with this practice?

Every year the Commission carries out, following a resolution with recommendations of the EU Parliament of the 25<sup>th</sup> of October 2016<sup>22</sup>, an evaluation of the implementation of the rule of law principle in the 27 Member States. The analysis carried out are interesting<sup>23</sup>. However, they do not go beyond the formal level of national legislations. If this legislation is substantially implemented and how it is implemented is not, and could not, be investigated by the rapporteurs since they would lack the technical tools necessary to carry out such an evaluation. These reports evaluate the compliance of national norms with the principles of EU law. They do not go into the way these principles of EU law are being further down implemented by national authorities neither do they take into consideration if and how these principles and standards of EU law are being complied with by independent public bodies within the country concerned (i.e. in the case of Italy they do not check if and how these principles of EU law are being complied with by municipal regulations, university regulations etc.). Therefore, these reports do not evaluate if these independent bodies comply with EU principles and standards. In the case of Italy, we are in the position to state that the principle of hierarchy of norms is regularly neglected by public administration officials both in the State administration and in independent bodies such as municipalities and universities. As a result, we often had the occasion to wonder whether Italy really complies with EU principles and standards better than some *Visegrad* Countries like Poland and Hungary. Many problems arise when the administrations of two Member States are called upon to work together. Often, they do not manage to communicate simply because EU principles and standards are not being implemented at least in one of the

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22 Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2018:215:TOC>, page 162

23 [https://commission.europa.eu/publications/2023-rule-law-report-communication-and-country-chapters\\_en](https://commission.europa.eu/publications/2023-rule-law-report-communication-and-country-chapters_en)

administrations concerned. One of the authors of this paper is often called upon to support EU citizens in their attempts to make the administration of two different Member States work together following EU principles and standards. The Solvit<sup>24</sup> mechanism conceived out to bypass these problems does unfortunately not always work because it is implemented by officials of the very same administration which is not complying with EU principles and standards.

The compliance with EU financial standards also raises, in our opinion, similar doubts. Are we sure that public accounting mechanisms of all the Member States provide reliable data?

*Variable geometry legitimacy* will be called upon in the case of EU enlargement. *Variable geometry legitimacy* requires a stable ground on which to be based. Today Commission's reports are not enough. A real compliance evaluation mechanism is supposed to be set upon reliable data and evaluations. To be reliable data and evaluations must be based on surveys carried out on the field by EU officials and not by national officials.

### 3.Guidelines for the debate

The debate on EU enlargement that will most probably take off after the elections of the EU Parliament of next June should not be misled by wrong assumptions such as the one according to which the EU treaty should be changed to make room to the new Member States without paralyzing the decision-making mechanism. The “community method” has already taken care of this problem and trilogue practice has been making the EU decision mechanism one of the quickest in the world. The relationship between professional legitimacy and democratic legitimacy is the real problem. Even though EU is aware of this problem and is making a remarkable effort to bypass it via transparency, the problem is still there. Enlargement might be the occasion to face this problem.

The debate on EU enlargement should not underestimate or even neglect a real problem: the evaluation of compliance with EU principles and standards of the Member States not only at the level of national legislation but at the level of concrete implementation both by deconcentrated and decentralized structures.

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24 Solvit is an Internal Market Problem Solving Network created as a network of centers set up by the Member States within their own national administrations. The EU Commission set principles for using SOLVIT in its recommendation 2001 / 893 / EC of 7 December 2001, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32001H0893>