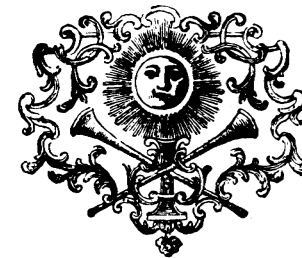*To look for a continuation of harmony between a number of independent uncon- nected sovereignties situated in the same neighbourhood, would be to disregard the uniform course of human events and to set at defiance the accumulated experience of ages.*
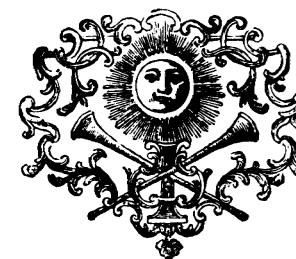
Hamilton, The Federalist

THE FEDERALIST

a political review

The Federalist was founded in 1959 by Mario Albertini together with a group of members of the Movimento Federalista Europeo and is now published in English and Italian. The review is based on the principles of federalism, on the rejection of any exclusive concept of the nation and on the hypothesis that the supranational era of the history of mankind has begun. The primary value *The Federalist* aims to serve is peace.

CONTENTS

How to Respond to the Crisis
of the European Union

Contrary to what is far too often affirmed, the crisis gripping the European Union is not due to the French and Dutch electorate's rejection of the constitutional Treaty, but rather to the lack of projects capable of leading the process of unification in the direction of the federal outcome envisaged by Europe's founding fathers. There have, of course, been periods of regression and crisis in the past. One need only think of the deeply troubled 1970s, a decade in which the breakdown of the international monetary system and widespread fluctuation of exchange rates brought the process of economic integration to an abrupt standstill and led the weakest countries to the brink of disaster. Back then, the politicians, under pressure from the federalists among others, proved able, by setting new targets (the European monetary system, the election of the European Parliament by universal suffrage, the single currency), to put Europe back on the road to unification. The proposal currently on the table, however, is the constitutional Treaty, which, even were it to be ratified, would not change the European power framework one jot. It may correctly be interpreted as an attempt to adapt the rules of cooperation to the increasingly heterogeneous setting of the enlarged European Union, but it makes no provision at all for any relinquishing of national sovereignty. In the face of the huge challenges posed by today's ever more precarious world order, the constitutional objective has passed fleetingly through the minds of the governments and the politicians, but simply to use the word "constitution" in reference to a set of principles and rules is not enough to make these a constitution proper and thus the basis of a state. Today, the European federal state is the only objective that can get the process of unification started again.

We should not be surprised by the reluctance of the political class — the governments, the parties, and the parliaments — to embark on the last stage of the journey and make Europe a true political entity: the states and their apparatuses work constantly to ensure the preservation of the

existing institutions. Yet might we not expect an extraordinary act of responsibility in the face of a global situation now so difficult that the whole planet seems to be hurtling towards the edge of a precipice? The wars in the Middle East, the spread of nuclear weapons, the energy problem, the presence of deeper and deeper social disparities, international terrorism, together with the many other problems that have accumulated over the years, are all clear signs of a growing disorder that no country — not even the United States — has the capacity, alone, to contain.

If the creation of a new state is the most difficult of political undertakings, then it is easy to see why there is such uncertainty over the most efficient strategy for carrying it out. Even in the building of Europe, different opinions emerged, and continue to emerge, over the routes that should be followed. In this very difficult situation, a militant journal can make its contribution by encouraging a broad debate, open to all opinions, even those that do not reflect its own line of thinking. It was this clear need for a broad debate that gave rise to the idea of staging an international meeting of Italian, French and German scholars of Europe, entitled "Building a European Federal State in an Enlarged European Union."

By promoting, in collaboration with the University of Pavia and the Mario and Valeria Albertini Foundation, this meeting, which took place on February 20th, 2006, The Federalist set out, first of all, to remove the obstacle of the "small steps" philosophy, which no longer leads anywhere, and to look at the problem of adopting a realistic approach to Europe's unification — one that, not prepared to settle for what the states are willing to concede, involves the working out of clear objectives and of the means by which these objectives can be achieved.

The lectures that we publish in this issue deal with many of the problems that have fuelled European debate in recent years. We are anxious to underline, in particular, several crucial points that emerged clearly both in the lectures and in the ensuing discussion: a) the transformation of the European Union, which is still set firmly in the Community mould, into a federal state is the prerequisite that will allow Europe to operate efficiently, both within its own confines and internationally; b) the constitutional Treaty drawn up by the Convention goes no further than making a few changes to the Union's decision-making mechanisms; it does not alter in any way the essential powers, which will continue to be exercised through the intergovernmental method; c) following the entry into the Union of ten new countries, to say nothing of its imminent further enlargement, it is unthinkable that reform of the Union can be achieved through its transformation into a federation, given the often totally contrasting views of its members; d) the only course that can realistically be pursued is that of the creation of a federal core, which will be made up of those countries that are already willing to transfer part of their sovereignty to the European institutions, and will remain open to any others that may later be willing to take this step.

The crucial problem is how to arrive at the formation of this federal core. There are various proposals on the table. The most appealing of these suggests going back to the text rejected by the French and the Dutch, expunging the most controversial parts of it, and once more submitting it for ratification in the twenty-five countries, on the clear understanding that it will come into force in those that ratify it. But as one of the speakers pointed out, this proposal is not an option if the aim is true political unification, because it leaves the intergovernmental character of the Union completely intact. For this very reason, the countries that might ratify it cannot constitute the federal core that is so clearly needed.

This core can derive only from a close pact entered into by those countries that are ready to relinquish a part of their sovereignty immediately, rather than at some unspecified future time. But since, as Spinelli put it, "Europe will not simply fall from the sky," there has to be someone prepared to take the initiative. This journal has frequently reiterated that the responsibility for this is primarily that of Europe's founding member states — the same states that, having tragically set Europe ablaze and left it in ruins, then managed to summon up the will to start a new cycle of amity and cooperation that only the founding of a state can establish definitively. This appeal to the six founder members — and particularly to France and Germany — to shoulder their responsibilities should not be interpreted as a call to create a closed core, but rather as a stimulus to take the initiative that will lead to the creation of a European federation that is open to all the states that should wish to be part of it.

In politics, there is nothing worse than indicating an objective without also specifying the means by which it can be achieved, and the people and institutions that should make it their concern. If Europe's progress to date has been desperately slow and tortuous, and if today the whole process of unification looks set to enter a blind alley, this is partly because almost no one is stating clearly the objective that needs to be pursued (the European state) and the means by which it can be achieved.

The Federalist

The Project for a Political Europe in the Wake of the 2005 French Referendum

CHRISTOPHE CHABROT

A reflection on the French referendum of May 29th 2005 that, with a majority of around 55 per cent, rejected the Treaty establishing a Constitution for Europe cannot be separated from a reflection on the future European model, necessarily in the framework of a one-speed or a multi-speed federal design. The problems raised during the French referendum campaign, the different arguments presented by the two sides, and the French people's intense participation in the debate cast our proceedings today in a special light, to which I feel it is important to draw attention. Even though one may be disappointed — as I was — by the negative result, it nevertheless has to be acknowledged that the entire Treaty campaign has brought out the strengths, but also the weaknesses of this project of European construction.

The result of this referendum is paradoxical. Conducting a survey among my students at the start of the academic year, or talking to friends who voted "no", I find that many say they rejected this text *because it was insufficient*. Most of those opposed to this Treaty in France, above all on the left, were against it essentially for two reasons: it did not pursue European integration enough, and what is more, it pursued it badly. This is why it seems to me important to draw a distinction between the French referendum, which, in the final analysis is a bearer of hope, and the Dutch "no" vote, which can undoubtedly be interpreted as a rejection of the very concept of European integration.

So, what exactly is the paradox of this French referendum, which might prove useful to our discussions today? Last year, the debate centred on whether or not to reject Part 3 of the Constitution, which relates to EU policies. Its core, i.e., Parts 1 and 2, on the other hand, gathered almost unanimous consensus, if we discount the odd squabble among experts which, in the end, made little impression on public opinion. Let us recall that modification of Part 3 of the Constitution was not part of the mandate

conferred on the Convention by the Laeken Declaration, and that this part had, in fact, already been adopted through the referendum that ratified the Maastricht Treaty in 1992. And herein lies the irony: this third part had been added symbolically to the Treaty drawn up by the Giscard Convention *on the request of the French representatives*, who wanted the Union's final text to be complete and coherent, not split in two, with the institutions on one side and the policies on the other.

Thus, the French voted against a text whose essence (Parts 1 and 2) they generally supported, and, obtained the opposite of what they had hoped for, i.e., conservation of Part 3, which has already come into force in the absence of the necessary political and legal instruments, instruments for which the Treaty under ratification made provision. How is it possible to say 'no' to a Treaty you approve of and, in so doing, give your blessing (through your own vote) to that which you reject? The great paradox embodied by this French result will have to be resolved before any further steps towards European integration are taken; otherwise, there is a risk of creating a Europe against the will of the people, which is the last thing we want — at least, I hope.

To ensure that this French result is not subject to facile criticism, it must first be made clear that the referendum campaign was conducted in exemplary fashion. Of course, there was behaviour that sullied the debate; false and demagogic arguments did the rounds in both factions, via the internet for example, without there always being the possibility to correct information or issue denials, etc. But these things are among the traditional excesses of democracy and of electoral campaigns. In truth, there was, generally speaking, great freedom of speech, which gave everyone the possibility to form their own definite opinions. For many months, countless debates were staged all over France, in schools, in universities, in various meeting places, from town halls to cafés, on television, within the political parties, and so on. Books introducing readers to the Treaty or setting out the arguments for and against it were among the best sellers of the period. Every day, the newspapers published articles and readers' letters on the issue. In short, I have rarely seen such an active and well-documented campaign (in this regard, it far exceeded the one on Maastricht in 1992). In short, the French made a convinced and certainly an informed choice, and as such, this choice cannot simply be criticised or ignored. Moreover, I do not think that any other European state had such an outstanding debate on this issue.

I would say, in fact, that the main problem with this campaign was not the quality of the debate, but rather the framework in which we were

forced to conduct it. The real problem — the one which sank the whole referendum, and with it the outline of political integration it contained — was that of the terminology used.

French has long been the language of diplomats, and the French have always loved to play with their language. But in the context of this campaign, they in some way rejected the words that were employed, and that they were being asked to accept. The Giscard Convention offered the Europeans a *Treaty establishing a Constitution for Europe*. Any legal expert would shudder at such a choice of expression, which puts a treaty on the same level as a constitution, and would indeed appear to equate the two, completely in contempt of Kelsen's pyramid of norms. Before long, everyone was talking of the "constitutional treaty," which in legal terms is an even more unfortunate expression. Basically, the French simply refused to accept that the members of the Convention and the member states that had ratified the Treaty should be allowed to play around with words in this way, using them incorrectly; essentially, they caught them in their own trap.

Many French people believed, or wanted to believe, that they were voting on a constitution. They therefore expected, from this Treaty, the same things that they would have expected had they been faced with a question of fundamental law. Disappointed, they voted "no". Conversely, those who analysed the treaty as a treaty proper could not accept that it was called a constitution and that it created a political framework worthy, or almost worthy, of a state. They voted "no". What about the most convinced Europeanists, who wanted greater integration and who were willing to overlook the confusion over whether the treaty was a constitution, or vice versa? Well, this group saw that the text they were being offered was a fudge — it did not demand that a choice be made between one course and another; it failed to go far enough — and they refused to accept a perpetuation of this uncertainty. They, too, voted 'no'.

Thus, the first lesson to be learned from this referendum is one for the European legal experts and politicians: beware of playing with words and, in so doing, with people's hopes, because there is always the risk that the people will take you seriously. The French did!

That said, this language problem is not merely a question of semantics or of political strategy. The members of the Convention wanted to introduce the idea of a European "constitution," which, in itself, is not something to criticise. But they lacked the courage to follow through the consequences of this. When one talks of a constitution, or of a treaty, the consequences, in legal terms, are not the same. The first failure in this referendum is thus, without doubt, down to the European strategists themselves, who were unable to decide exactly what they wanted. And the French were unwilling to support a project that did not disclose clearly its ambitions.

The fundamental problem to be resolved, highlighted by the French "no" vote, is that of clarifying what the objective of European integration currently is, and what stage in it we are being asked to overcome. This issue has been complicated by Europe's enlargement to twenty-five member states, as the Union now embraces countries that are, economically, politically and juridically, increasingly different, and whose objectives are sometimes even contradictory. Thus, the questions that must be answered boil down to two: must European integration be based on the adoption of a treaty or a constitution? And, in either case, should this text unite all the states, or only those that want to proceed further towards political integration? Since the purpose of this meeting is to consider the prospect of European integration at different speeds, this is the perspective from which I shall try to analyse the situation, leaving aside the debate — albeit fundamental — on whether there is actually a need for differentiated integration.

Europe's political integration could be continued, first of all, within the framework of the traditional Europe, starting from the Treaties — either as they are now or modified — and deciding the manner of the differentiation between the member states. This is the most pragmatic course, but it carries risks, which need to be identified (I). Alongside this hypothesis, and above all from the viewpoint of the creation of a federal Europe, we find the other solution: that of founding Europe on a genuine constitution. But the creation of this federation demands that two underlying problems be resolved: the size of the federation and the procedures that should be followed (II). The choice of one or the other of these two solutions is primarily a political one and without doubt dependent upon an evolving historical and geopolitical scenario. But if, within the context of the possible creation of a federal Europe within the European Union, a multi-speed Europe should mean a parallel development, i.e., the political integration of some alongside the economic integration of all, then this will create real legal difficulties relating to the co-existence of the two systems, and I will look at these briefly in the conclusions. In fact, given that these problems are still virtual, and too dependent on the concrete political solutions that will be adopted in the future, it is difficult, at present, to establish their clear legal implications.

I. Political Differentiation within a Traditional Union.

This scenario is that of a European Union based on a treaty and not on a constitution, and it allows two needs to be met. First of all, it allows less integration than the federal solution does, and thus safeguards national sovereignty. In this framework, in fact, the European Union is attributed with only limited competences and, while European law can always prevail over national law, the member states do not lose entirely their sovereignty, either in strategic internal sectors or at international level (for example, they retain their seat at the United Nations). Furthermore, this form of integration, in particular through the system of protocols, allows the development of a many-speed Europe through the aggregation of those states that want to proceed further or the dissociation of those unwilling to pursue more resolute forms of integration, the behaviour of the various states being allowed to vary, depending on the policies in question.

This traditional Europe can be considered to tackle, to a great extent, one of the problems raised by our meeting today. It allows differentiated integration and it can also give rise to cooperation agreements of a political nature. But it cannot lead to a political Europe. In fact, this differentiation, an inherent part of this traditional Europe, creates instability, be this within (a) or outside (b) the EU, and prevents the creation of a coherent political organisation. The many-speed Europe we are talking about here is none other than the Europe that is already in place, and for which, equally, the 2004 Treaty made provision. But should it be confirmed in the wake of the "no" votes that came out of the French and Dutch referenda, in the absence of a "plan B" we can certainly expect to see the introduction of certain corrective measures in order to counter a growing risk of disintegration.

a) *The Formation of a Hard Core through European Law.*

Within each of the three current pillars of the EU, provision is made for the creation of "hard cores," which correspond either to dissociating or to aggregating states, depending on the questions on the table. It is a process that can be likened to the construction of a multi-speed Europe.

Thus, within the framework of the first pillar, we must mention, first and foremost, the eurozone. This group embraces just twelve of the European Union's current twenty-five member states, leaving out the ten states that entered the EU in 2004, plus the UK and Denmark, which chose not to be part of the single currency, and Sweden, which still does not meet the convergence criteria.

Equally, we must recall the Schengen area, which the Amsterdam Treaty integrated into the Community framework. Only thirteen of the twenty-five EU member states are part of this area — not included are the ten newest member states, plus Ireland and the UK —, but it does include non-EU members Norway and Iceland and, as of this year (2006), Switzerland, which voted in favour of participation in its June 2005 referendum on the issue. A similar situation emerges with regard to the Dublin Convention on the rights of asylum seekers.

Within the framework of the second pillar (Common Foreign and Security Policy), we must consider essentially the enhanced cooperation policies provided for by the Treaty on European Union (TEU) modified by the Nice Treaty (Art. 27a onwards). In this framework, the Council authorises the formation of enhanced cooperations subject to certain conditions and the hard cores created in this way can thus differ from cooperation to cooperation. The same applies to the cooperations that are in some cases chosen by the Commission, and accepted by the Council, in the framework of police and judicial cooperation in criminal matters (the third pillar, TEU Art. 40 onwards). Article 11 of the Treaty establishing the European Community (TEC) also makes provision for these cooperations within the framework of the first pillar, in certain cases attributing the European Parliament with a right of veto.

In more general terms, enhanced cooperations are envisaged for Union policies as a whole in Title VII of the TEU (Art. 43 onwards) and were again included in the 2004 Treaty (Articles I-44 and III-416). In these cases, it is European law itself that provides the framework allowing the emergence of one or more hard cores in the sectors in which the Union has competence.

But what is the nature or value of these enhanced cooperations? First of all, it has to be remarked that they do not appear to be particularly useful within the framework of the first pillar, where Community integration has already reached an adequate level, or meets essentially objective criteria (e.g., convergence criteria) designed to discourage a further deepening of integration. In the framework of the second pillar, it must be noted that enhanced cooperations are prohibited in the sphere of defence or in fields that have military implications (Art. 27b of the TEU). Yet these are the fields, having particularly strong political connotations, in which it is easiest to envisage the formation of a stable hard core. On the other hand, the power of the Commission, and in some cases of the Parliament, to

select the cooperations seems to work against the will of the states, a factor that could dissuade the latter from using them. In more general terms, numerous factors seem to seem to reduce considerably the effective use that the member states can make of these cooperations, particularly in sensitive sectors: the obligation to gather a minimum number of states in order to realise them (the TEU demands eight, and the 2004 Treaty a third of the members), the encouragement to get the greatest possible number of states to take part (TEU, Art. 43b), and the need to guarantee that enhanced cooperation does not weaken the domestic market and social cohesion (Art. 43e), together with the measures to ensure consistency with EU and Community policies, guaranteed by the Commission and the Council (Art. 45), and the possibility of recourse to the European Council.

It therefore seems improbable that a political hard core can be formed within the framework of these enhanced cooperations. The hard core they are able to generate either has to change according to the different fields of cooperation, or aims to extend rapidly to all the states; or, indeed, the differentiation stems not simply from a spontaneous decision reached by the states, but is, rather, the result of a choice made by the European institutions or by the Treaties.

To favour the possible formation of a political hard core there thus seems to be a need to modify — if this is still possible — some of the current limitations. It would be necessary, for example, to allow enhanced cooperations in the military field, to lower or even abolish the minimum number of states needed to realise them, and to strengthen the states' decision-making powers and perhaps even their power to depart from Community law. But if we envisage this kind of progress in political fields, we must also be prepared to accept its democratic correlative, namely the intervention of the parliaments and of the national and European judiciary in order to guarantee more soundly the assent, and the rights, of the citizens; because it is out of the question to think of creating a political Europe that is not subject to the same working rules as are applied to all political communities.

But the construction of a political Europe on the basis of enhanced cooperations produces a double risk. If excessively encouraged, these cooperations could lead to the collapse of European integration through the formation of intra-Community alliances capable, when it is time to reach collective decisions in the bosom of the EU or the EC, of placing corporative interests in opposition to the general interest. Furthermore, enhanced cooperations could depart too much from Community law,

which would destroy the very legal unity being sought. Conversely, set in too rigid a framework, these cooperations could be off-putting and induce states to pursue common, targeted actions outside the EU system. In this case, the Union, under the weight of the competition from these other alliances, would be unable to acquire a clearly political dimension. The alliances, for their part, would not be equipped either to replace the Union efficiently, or to serve as the basis for a new organisation with a political vocation, being founded on cooperations that would be too changeable, too narrow, and too focused on specific interests; furthermore, the members they would bind together would be too liable to change from cooperation to cooperation. In this way, Europe would no longer have *one* hard core, but *many* hard cores, recalling the far from perfect situation of the nineteenth and twentieth centuries, characterised by numerous alliances that proved incapable of preventing the wars of those centuries. It is a risk that is now clearly emerging, reflected in the growing number of interstate cooperations that we are now seeing in Europe.

b) *The Formation of a Hard Core through non Community Treaties.*

There is another idea that competes with that of the establishment of a hard core within the Community: that of the adoption of treaties outside the framework of the European Union.

In this case, we must consider two separate hypotheses. The first is that of the *treaties or conventions signed by EU member states,* which were provided for by the TEC and by the TEU in order to develop or complete the law in the areas in which the EU has competence. Article 293 of the TEC provides for the concluding of such treaties, or conventions, in relation to the protection of the individual, double taxation, recognition of judgments, company law, etc. In this ambit, we can also recall the Europol and Eurociel agreements, as well as the European Patent Convention and the European Bankruptcy Convention. In truth, this intra-Community conventional law, often called "supplementary law" is very important; it is a system that produces legislation every bit as efficient as that of Community law, to the point that Community law can sometimes even be dispensed with. But it avoids the democratic process developed since the Maastricht Treaty; in particular, it gets round the decision-making power of the European Parliament. Equally, it fails to recognise systematically the competence of the Court of Justice. Further, these treaties or conventions, even though they influence our

daily lives, often deal with questions of little political significance.

From the point of view of European integration, these treaties are thus at once interesting and dangerous. By imparting greater flexibility to the production of European laws, they help to reduce, at the same time, the clarity of the Union's image and of its laws, too often defining as "European" laws that are not, in fact, EU laws. What a confusing situation for the defendant, what a lack of clarity for citizens and for our students! What is more, when even one state decides not to ratify such a treaty (and by so doing stands out a little from the general homogeneity of Europe), this creates a real legal difficulty. It is thus unlikely that a political European Union can be constructed on the basis of these treaties.

Let us take the other hypothesis: the building of hard cores that, with regard to their competences and members, *have no direct link with the EU*.

A typical example of this is military Europe, which was based, in part, on the Western European Union (WEU): starting with the Single Act in 1986, and subsequently through the Treaties of Maastricht and Amsterdam and the progressive entry of the EU member states into this organisation, the WEU became the "armed wing" of the European Union. But this option was abandoned following the Cologne European Council in June 1999, and the Nice Treaty and the Laeken Declaration in 2001. Instead, faith was placed in a European Union that would express its own common military policy directly, rather than "subcontracting it" to the WEU. But common endeavours at EU level are still awaited. The European Security and Defence Union (ESDU), proposed in April 2003 by Germany, Belgium, France and Luxemburg with a view to securing greater independence from NATO, was rejected by the more pro-Atlantic member states, such as the UK and Poland. Since then, common military policy has been replaced by a series of specific and variously formed cooperations: the Eurocorps (made up of soldiers from Germany, Belgium, Spain, France and Luxembourg), Eurofor and Euromar (the latter, a rapid reaction force created on 5th July 2000 by a convention between Spain, France, Italy and Portugal), the military satellite, Helios (funded by Belgium, France and Spain), and so on.

In a different framework, we must recall the Schengen Agreement of 1985 and the Schengen Implementation Convention of 1990. These agreements, which now include non EU member states as well, were initially signed by five states that, while certainly EU members, took this step entirely outside any Community mandate.

These military and policing arrangements could prefigure a more determined drive for political integration, creating ties that could serve as a model for the European institutions. But they also risk relativising the whole integrative force of the European Union. Because these treaties could just as easily be seen *as alternatives* to common European policies, and not as examples. Above all, they give rise to changeable alliances, embracing a territory that is also changeable and that can be extended to states outside the European Union, something that could seriously complicate the political and legal coordination of the two systems, above all when regional strategies oppose the collective strategies of the European Union. Could the Eurofor intervene in a European state, contrary to the opinion of the EU? Could the EU ask Euromar to support a military intervention already rejected by states that contribute to this force? In fact, the EU member states risk creating, among themselves, associations capable of setting, effectively, their own interests in opposition to the collective European interest (we may think of Benelux, the Visegrad Group, the Nordic Council, the project for a Franco-German Union, etc.). They could also veer towards alliances that include non EU member states (NATO, OSCE, Mediterranean Union) whose interests would complicate and compete with Europe's ambitions. Were this to happen, Europe would be left with no choice but to become a large economic and social market, completed, in the political sphere, by these other evolving alliances. While some of these initiatives outside the ambit of the Community could, in fact, be brought back within that of the EU, following the example of the Schengen Agreement, which the Amsterdam Treaty brought within the Community framework, the same probably cannot be said of many of the military and policing conventions, as these seem to concern sectors too sensitive to allow this.

Finally, the different alliances hypothesised here open up a prospect that has a direct bearing on our proceedings today. A European treaty that establishes a *European confederation outside the EU* is certainly not inconceivable. Such a treaty, signed by states that desire it and are united in this desire, would bring about a uniting of their will in different spheres — military and diplomatic, or economic and social — in a manner different from that of the Union and more in line with their wishes. This confederation would allow the idea of European integration to be relaunched on the basis of a new project, and could constitute the initial core of a future European state. Such a scenario, however, could easily lead to the disintegration of the current Union, since it would prompt the dissenting states to leave the Union in order to form the new confederation. In fact, the exit of these states from the Union would simplify

considerably, from a legal point of view, relations between the confederation and the European Union, which would be regulated purely through diplomatic channels, would not come under the control of the Court of Justice, and would be free from all constraints deriving from membership of the European institutions. But this hypothesis — highly plausible — of a new confederal Europe must not allow us to forget the primary objective of a truly federal Europe, which implies the drawing up of a constitution with a clearly political purpose.

II. Political Integration within a Federal Europe.

Today's Europe is faced with the problem of how to create a "community" that is not based on a pre-existing "affinity." It is, in truth, a problem that confronted most of Europe's historical rulers, from the Middle Ages through to the founding of the nation-states. But the means of solving it has changed. Now, the powers-that-be can no longer simply impose, through force, their political order. Democracy rests on the people's acceptance of their project.

This complicates things considerably if the powers insist on presenting their project from on high. The European Parliament provides by far the best example of this. Even though the European Parliament is supposed to be the place where the European peoples are represented, the place that guarantees the expression of their will within the democratic system of the Union, it is clear that they do not always identify with it. The big irony is that the more powers and legitimacy the European Parliament acquires (co-decision, the capacity to appoint and dismiss the Commission, the possibility to appeal to the Court of Justice, etc.), the less the European citizens are inclined to participate in its election. Clearly, the European Parliament's problem is not the democratic deficit — now largely overcome — but rather its credibility. But why does it have this problem? It is because instead of allowing it to emanate from the people, attempts were made, *from its conception*, to impose it from on high. Well, the European peoples are diffident: they do not want to be given freedom (or democracy): they want to take it, or acquire it by themselves (because they are sovereign).

It is rather like the problem we see today with regard to the construction of a federal Europe. The process cannot be imposed from on high, but must originate "from the bottom," where legitimacy resides. Naturally, the initiative to get a federal process started will undoubtedly, at some point, go through the established political powers, national and/or Euro-

pean. But it cannot deny the people their voice, otherwise it will have to pay the price of growing disinterest or rejection of the project. This is certainly one of the biggest lessons to be learned from the "no" pronounced by the French people in their referendum.

The problem of a federal Europe is twofold: it concerns, at the same time, both its content and the process of its creation. But, in fact, this twofold problem itself offers the solutions it is looking for, and in so doing makes it possible to resolve the question of the size of this federation. A federal state differs from an international organisation in that it possesses *Kompetenz Kompetenz*, that is, the competence to determine its own competences; an international organisation, on the other hand, can act only within the ambit of the competences that are attributed to it. Affirmation of this *Kompetenz Kompetenz* requires the presence of an acknowledged constituent power, a supreme seat of sovereignty, and thus the drawing up of a constitution that, through its adoption, transfers sovereignty from the states to the newly created state.

The conditions governing the adoption and content of such a constitution (as opposed to a "Treaty establishing a Constitution for Europe"), contained in the classical theories of constitutional law, are well known but they must be read in the light of the French referendum of 2005 (a). The procedure for adopting this constitution will determine, almost naturally, the spatial dimensions of the federation created. But if the territory of this federation turns out to be different from that of the Union, without the federation actually replacing the Union, then there will arise delicate questions relating to the legal co-existence of the two entities (b).

a) The Democratic Adoption of a Federal Constitution.

The process for the drawing up and adoption of the Treaty establishing a Constitution for Europe was undoubtedly one of the most democratic employed since 1951 in order to draw up a European treaty. Two thirds of the members of the Giscard Convention came from the various national parliaments and they represented all the different political families. The work conducted by the Convention was open to public scrutiny through consultations with experts of all political orientations, from the various associations and from different economic and political settings, through internet forums and through numerous meetings held in the different states. This allowed some highly divergent projects to emerge. The final text was adopted — and this is rare — *by consensus* and not through the imposition of the choices of a majority: the legitimate

political powers in each state were able to modify this final text, the same text that was finally adopted by the peoples of the different states, either directly through the holding of referenda, or indirectly through their representatives in parliament.

And yet the referendum campaign in France highlighted clearly the illegitimacy of this Convention and of this procedure for drawing up a "constitution." Certain arguments in this regard may well have been advanced in bad faith. After all, in France there are numerous examples of constitutions drawn up by small groups of experts, starting with that of the Fifth Republic, or by assemblies that were not, legally, constituent powers (in 1791, 1814, 1830 and 1875). But this made no difference: the French refused to accept the imposition on them of a text that they themselves had not been able to influence from the outset, and that they were being asked to ratify unconditionally. They said "no" as much to the text as to the procedure used, which reduced them to nothing more than a mere means of *recording* a decision already reached.

The requirements of modern democracy and the obligation to obtain the agreement of the sovereign power, particularly in a field as crucial as the creation of a federal state, demand a rethinking of this entire constitutional procedure. If the constitution is the responsibility of a constituent power, a sovereign power, then this power needs to be clearly present throughout the process of its adoption. Thus, there arise two problems: who is the constituent power in Europe, and how can this power be mobilised?

The answer to the first question, in the framework of the established states, can be found in classical theory: the People (possibly regarded as the Nation). In the European setting, however, the reality is that of *a number* of different peoples, which empties this concept of much of its constituent force. This explains why, in the framework of the 2004 Treaty, we see the development of another hypothesis, expressed in article 1, which refers to *the will of the citizens and States of Europe*. This seems to indicate that the United States of Europe, or United Europe, because of its federal character, has a dual constituent power: the citizens *and* the states. Accordingly, every constitution must ensure that there is room for both these facets of the constituent power. This is what the procedure for the adoption of the 2004 Treaty intended to do, given that it was to be written by a relatively democratic Convention, corrected by the states, and adopted directly or indirectly by the peoples.

This idea of a dual constituent power is a fascinating one. It makes the foundations of democracy once more a topical issue and it takes into

account the complexity of the modern world and the decisive role of the executive powers. And yet it appears rather dangerous. In fact, it recognises the important power of the authorities, against which the rules of contemporary sovereignty were rightly created. If the purpose of affirming the people's sovereignty is to limit the powers of the rulers, the dual sovereignty expressed in the 2004 Treaty, on the contrary, reinforces the fundamental power of these executive authorities and increases the risk that the power of the state will be exercised against the people. This solution is thus liable to create a growing diffidence on the part of the people, who would see their democratic choices once more thrown into question by *raisons d'état* and by other strategies of the machinery of state. Instead, the construction of a federation demands, first of all, a restoration of trust between the citizens and the national and European authorities.

Without presuming to establish, here, an absolute theory of the European constituent power, I nevertheless feel that it is necessary, in order to restore this trust, to go back to the classical formulas of constitutional law: the *convening of a constituent assembly elected* by the citizens of Europe. The task of this assembly would be to write a text that would subsequently be submitted for ratification by the different countries, either through a referendum, or through approval by the national parliaments. This would have to be done without any modification of the text on the part of the states or the European institutions, as such intervention would interfere with the expression of the popular will. Some aspects of this solution must, however, be examined.

First of all, it must be established where this initiative should come from. The decision to convene a constituent assembly and to make provision for the election of its members is one that must certainly be taken at European level, either by the general consensus of the member states themselves, or simply by those states that are interested in the initiative. From this perspective, there are various types of action, geared to this end, that may be envisaged: popular petitions launched through the mass media, the internet, the decision-makers of all political colours, or through high-profile public figures, and supported by demonstrations throughout Europe, a project proposed by a group of states, a proposal from the European Parliament or from any other European institution, and so on. It is also clear that any one of these initiatives would not, by itself, be sufficient and that the whole process will depend a great deal on the economic, political and social context, and on how acutely the political actors of a future federation feel the need for such an action. We

must not allow ourselves to be taken in by the pious political speeches (Joschka Fischer, Jacques Chirac) in which this hypothesis has already been considered: in the absence of pressure exerted by civil society, or of new economic and social crises, this process cannot be entrusted solely to statesmen who would have everything to lose in a federation that would deprive them of their personal power.

The convening of a constituent assembly also carries a certain risk: that of allowing the production of a text far removed from the will of the European experts and the states' politicians. This assembly could even write a text that would not be in the best interests of Europe, but would be the result of difficult and unsatisfactory compromises reached between its members. But risk is an inherent part of democracy, which is based on recognition of the peoples' capacity and legitimate right to choose their own destiny, beyond rational calculations.

The election of a constituent assembly is certainly not legally necessary in order to write a constitution, but it is a political necessity. What is more, it has theoretical and practical advantages: first of all, the drawing up of a constitution by a constituent assembly would make it possible to get round the restrictions imposed by the states themselves, states that, from 1951 onwards have produced increasingly complex treaties in order to protect their own autonomy, as the Maastricht Treaty showed. A text written by representatives of the European citizens, who do not have to defend the same interests as the states, would undoubtedly have the advantage of being simpler. What is more, this constituent assembly could possibly make much more progress in the direction of federal integration than the states could, given that the state powers never really go so far as to sacrifice themselves in favour of a superior entity.

From a democratic perspective, the election of this constituent assembly would also make it possible to conduct a sort of self-survey, in other words, to ascertain the natural dimensions of all the different pro- and anti-European currents present within the member states, because it would not, after all, be legitimate to create a highly integrative federation if the populations showed themselves to be rather nationalist. This election would thus serve to set the tone of the future Europe on the basis not of projects developed in the corridors of power, but of the citizens' own wishes. Finally it would allow the citizens, in particular, to take possession of the European project, in a sense to become its authors, which fits in perfectly with the whole constitutional philosophy.

It is impossible to predict what type of federation this sovereign constituent body might choose. In truth, there exist as many types of

federation as there are federal states, and Europe's choices will depend largely on the power relations that, within the constituent assembly, are formed between the various elected members and political parties. On the other hand, there exists no concrete definition of constitution. The text of a constitution can contain provisions of any kind. But, without doubt, the content of this constitution will nevertheless have to take into account what happened with the 2005 referendum in France, and also the criticisms that were raised during the debates, which will make it possible to arrive at the basic outline of this fundamental text.

The supporters of the campaign to say "no" to the Treaty establishing a Constitution for Europe were helped considerably in their task: all they had to do was produce the text in order for their entire audience to laugh out loud upon realising that they were being asked to adopt, in full awareness of all the facts and implications, a massive 800-page tome. In addition to the Treaty's 448 articles (!), there were dozens of pages making provision for the management of special cases and adding details through protocols, appendices, special agreements, and so on. To those a little better acquainted with the text, it appeared that Part I presented the institutions and provided practical information on them (role, mode of operation), only then to refer readers, sometimes with the emergence of contradictions, to Part III, which dealt with policies, but also with the organs and institutions: a second raising of these issues that did little to facilitate the reading of the text.

A constitution must obviously be a fairly simple text that cements the political, social and possibly economic pact that a constituent power makes with itself. It must define the legitimate institutions, the way they will work, and how they will relate to one another, just as it must set out the principles that provide the framework for their actions (art. 16 of the 1789 French Declaration of the Rights of Man and of the Citizen). In a federal setting, the constitution must also establish the competences that will be recognised at each level, that of the federation and that of its members, as well as the organs entrusted with ensuring that these are respected. In short, it limits itself to describing the essential operating principles of the political society it has generated, after which it must leave it to the actors in the various roles it has created to put these principles into practice or to act on the basis of them. A constitution cannot compromise policies subsequently decided by the organs created.

Accordingly, there would, for example, have to be an end to the obligatory policies provided for by the Treaty, which preclude the consideration of possible other forms of action on the basis of electoral

results. The ECB's obligatory anti-inflationary policy is a typical example of this. Similarly, the harshness of the euro convergence criteria, or the absolute ban on state aid to enterprises, seem out of place in the text of a constitution, because they oppose the application of other political strategies, such as those of a Keynesian nature, or certain specific redistributions of wealth. While a constitution can certainly contain fiscal or economic provisions, it should not boil down only to these, or restrict itself to specific ones. It should set out, from the very first articles, and not in Part II, the fundamental rights that form the framework for federation policy. A constitution is, first and foremost, a political pact, not a collection of economic dogmas that even more laissez-faire states, like the USA, do not apply and that certainly do not inspire the citizens. As regards its content, the European federal constitution must certainly draw inspiration from the classic federal constitutions of certain European states, which are much more readily understood by the citizens.

b) *A Federation that Competes with or Complements the European Union?*

The creation of a European federation poses various problems with regard to its relationship with the European Union, and particularly with regard to its members and the subdivision of competences. If it is the Union, *en bloc*, that becomes a federation, then there is no problem: it is simply a question of transforming the existing body with its existing members. The problems arise if the two institutions are separate, albeit co-existing in the same space. This separation is exactly what is contemplated within the framework of the integration of a many-speed Europe.

The first aspect of this co-existence to consider is the territorial competition that could arise between the two entities. But, all things considered, this should not constitute a problem. It seems rather pointless to try and establish, in advance, the size of this constitutional Europe. Doubly misleading are projects that aim to federate the countries belonging to the eurozone, or this or that group of states because they are, historically, among the founders of Europe or because they present cultural, economic or social similarities. First of all, the Europe these projects envisage is a rational Europe conceived of on high in accordance with technical criteria, a Europe that would be imposed on the citizens, who would merely be required to rubber stamp decisions taken above their heads. Second, it is a Europe based on similarities, a Europe that refuses the political challenge of diversity, being willing to unite only

states considered to be sufficiently homogeneous. Moreover, a federation is, first and foremost, a political pact between states that share the same political will to unite, above and beyond their differences; it reflects the will of the citizens to support the project and, together, to take this step which, at the crucial moment, has to prevail over all the mathematical and rational criteria devised by the European bureaucrats.

Is it possible to imagine Italy without Puglia, considered too poor and too culturally far removed from Lombardy to be part of the same country? Could Germany be reformed leaving out a Land that does not meet the criteria of efficiency demanded by a more competitive federation? And how would Italy or France respond were the technocrats in Brussels to turn round and tell them that their internal situation, political and economic, made it impossible for them to remain in the "hard core" of political integration? It is clear to see: while political unification has to take into consideration the problem of excessive economic divergences between its members, it nevertheless cannot be based exclusively on performance ratings, as this would devalue the debate and lead to the sacrificing of willing peoples in favour of figures and plans. Preliminary calculations are irreconcilable with a credible political federation, and indeed plans of this kind, based on an initial subdivision of Europe, are still failing to resolve the problems of the project — the group that should take the initiative, the procedure that should be followed, the drawing up and ratification of the treaty —, which, in this case too, threatens to leave the citizens out of the process.

We must therefore go back to having faith, first of all, in the citizens — this is the essential basis for a project of this scope — and give them the freedom to make up their own minds. A broad project for the creation of a federation will have to be launched. Each of the Union's member states will then be required to declare, through a referendum or a law passed by parliament, whether it wants to take part in it. The stakes are so high that this will automatically result in an initial selection. And one can be sure that the group of states that turns out to be most receptive to and most honest about the federal project will be very different from that hypothesised *a priori*. The states that are in favour will organise elections to appoint a constituent assembly. This assembly will produce a document which will then be put, for approval, directly to the citizens of the participating states, without the national and European institutions making any adjustments or alterations whatsoever. It is also likely that, to be on the safe side, a rule will be introduced saying that if the document is rejected by more than two thirds of the states, it will have to be rewritten

(possibly by a new constituent assembly). But if more than two thirds accept it, through a referendum or a law passed by parliament, then the federation will automatically come into existence, uniting these states and leaving out those that refused to ratify the project. What is more, a federation that may that may include non contiguous states is not a problem, as shown by the United States of America, which includes Alaska, and by Greece's entry into the Community in 1981.

We need to break free from the a-result-at-any-cost mentality. The Giscard Convention imagined that it would be able to impose its Treaty on all the members on the strength of a "yes" vote by a qualified majority, which would have amounted to imposing it on peoples that had rejected it. But if a federation is to be a pact based on trust, then the "no" votes have to be acknowledged, while still allowing those that want to proceed to do so. The anticipated "hard core" must be allowed to evolve by itself, through choices made by sovereign peoples. To give an example, some projects suggest that the European federation should be formed starting with the eurozone countries. This is a good idea, but it needs to be turned on its head: it is not the eurozone that should predetermine the federation, but the federation that should demand adoption of the euro. This, in fact, would make it possible for countries currently outside the eurozone to take part, albeit subject to their acceptance, again through the citizens, of certain necessary economic conditions. It is politics that must control the economy, not the other way round. In the words of President De Gaulle, "l'intendance suivra." The Europe that emerges at the end of such a process will be a much stronger one, as it will be built on free will, on a real desire to live together, and not on the calculations of experts who have often got it wrong.

For this reason, it is very likely that the territory of the federation will be distinct from that of the Union. There are many consequences of this, each of which brings together a number of hypotheses regarding the co-existence of the two entities.

As far as the competences are concerned, there are many possible options: the Union could transfer its political competences (such as defence, the creation of an integrated jurisdiction, and of a federal police force, etc.) to the federation, or it could retain its competences in relation to the second and third pillars and the federation could act within the union in place of its single member states on the basis of the subrogation of states principle which is a characteristic of the Treaties. In the first case it is possible to imagine a merging of the EC and the EFTA, which would have become too similar to each other, with the EC nevertheless impart-

ing some "extra soul" to the EFTA through its environmental, educational and health policies, for example. Moreover, the federal state's *Kompetenz Kompetenz* would imply a review of the competences exercised by the Union, the first pillar included, regardless of whether the federal state assumes responsibility for these areas, agrees to delegate to the Union their management in specific cases, which would have to be decided (problems relating to agriculture, scientific research, etc.), or indeed respects the whole of the *acquis communautaire*, becoming a part of the Union and, like all the other states, bowing to the terms of the Treaties and the existing system of law.

It is equally possible to imagine a profound reorganisation of the Union. Leaving it to the federation to pursue an extremely advanced level of integration in the political and legal fields, this Union would be based on new treaties that, by making provision for simplified decision-making processes in limited fields, would be, at the same time, more unifying (which is not to say that they would imply a return to ambiguous and confusing "supplementary" law) yet also more respectful of the sovereignty of the states. Such a union could much more easily embrace other states and could even reach as many as 45 members (the members of the Council of Europe minus Russia) within the framework of a large, streamlined market, maybe even with a single currency, but it need not cause alarm to the states grouped in the federation, because they would have their own policies. From this perspective there would even arise the hypothesis of a merging of the EU with the Council of Europe.

It is certainly rather premature to reflect upon these aspects, many of which depend on the federal responses that will be given by a constituent assembly that, as yet, does not even exist. Having said that, the solutions that ultimately come out of the debates will undoubtedly be the simplest and the most economical. In fact, the prospect of drawing up a federal constitution and totally rewriting the European Treaties could well discourage the desire to choose solutions that are more refined and more ambitious, but also much more complicated. Thus, it is perhaps better if, like the Zen archer, we focus on the method, the procedure, rather than on the objective. The option of assigning the citizens and their representatives the task of searching for the solutions has to prevail over all other conceivable plans, which in due course will be elaborated.

It is worth considering one final possibility that, from one point of view, would ease the legal difficulties. It is that — already seen in relation to a possible European confederation — of creating *a European federation outside the framework of the EU*. Its members would leave the

European Union in order to concentrate exclusively on nurturing the new federation. No longer obliged to comply with Community regulations, these states would escape the control of the Court of Justice and the Commission and, as a result, find themselves, once again, in full possession of their competences. They would have to redistribute these within the framework of the new federation, and they would be in a position to review, entirely autonomously, their relations with the other European states and with the Union. These relations could not fail to be influenced by historical and geopolitical factors, but, now being outside the framework of the *acquis communautaire* and of collective decisions, they would give a whole new dimension — still difficult to imagine — to the Federation-Union relationship. This deep division, which would undoubtedly influence the whole European and even world balance, is not as improbable as it might seem. And its knock-on effects would also force us to evaluate the whole question of federalism and differentiated integration with extreme caution. Advance too far and you end up having to retrace your steps; go too fast and you risk missing opportunities.

All in all, these reflections can be concluded with a semantic question. Should we call the federation thus envisaged the "United States of Europe," in so doing echoing Victor Hugo and Winston Churchill, but also using a term that, with its obvious parallel with the Unites States of America, risks damaging its identity, or would it not be better, instead, to talk of "United Europe," thereby emphasising the unity that this federation would produce and the solidarity among its members, who are grouped in a single entity that they have chosen to render more prominent? Again, the numerous legal solutions are dependent on political choices still to be made.

The Feasibility of a United States of Europe in an Enlarged European Union

RALPH ALEXANDER LORZ

I. The Crisis of Europe as a Political Project.

In ancient Rome, it was often remarked that it was just a stone's throw from the Capitoline, from where Rome was governed, to the Tarpeian Rock, from which traitors were hurled to their deaths; in fact, the Rock formed the western part of Capitol Hill, and so it was, indeed, just a short walk from power to death. Apparently, then, the Romans already knew the truth of what has since become a general observation: that success and failure live side by side. And this observation now holds true for the European Union as well. Europe is a success story that is unparalleled in history: states that had fought bitter wars against each other joined forces to create a community of peace and prosperity. War between them has become inconceivable, and the Common Market thus created has ensured a continuous rise in their standard of living. Not surprisingly, this successful project, almost from its beginnings, exerted a strong force of attraction on its neighbours, and the steady growth of the European Communities, and later of the Union, was thus a natural development. The unification of Europe that this development entailed neared completion when ten new member states, no longer shackled to the Communist bloc, entered the Union in 2004. And the force of attraction exerted by this Union with regard to outside states seems unbroken, as the numerous remaining applications for membership show — Turkey's being only the most prominent example.

Yet, while the European Union clearly remains attractive to outsiders, the same cannot be said of its relationship with its own citizens. As the constitutional referenda in France and the Netherlands have made clear,

internal support for the EU is threatening to fade. The explanations offered for this phenomenon are manifold. However, as the Belgian prime minister Guy Verhofstadt has pointed out, they all boil down to a fundamental insecurity, characterized by feelings of fear and doubt that have become widespread among the peoples of many of the "old" member states.[1] In Germany, for instance, the "Polish plumber" has come to symbolise the fear that cheap labour from the "newcomer" states could take away jobs. The state of our social security systems, belying their name, tends to fuel this insecurity (although this is certainly not the fault of Europe). And so, too, does the growth of organised crime, because people correctly realise that the open borders from which we all benefit also facilitate cross-border criminal activities. And finally, one should not underestimate the fact that large sections of the different European peoples are afraid of losing what they consider their "identity."[2]

Thus, as in so many other historical constellations, the biggest successes often already contain the seeds of their own failure, to quote the German equivalent of the Roman proverb mentioned above. In this case, the tremendous enlargement of the European Union, driven by its unparalleled success, is precisely the thing that is now endangering its original ideal, namely, the creation of a unified political entity. Again, the possible accession of Turkey is just the culmination of this development: if Turkey is accepted — and in the long run this seems to be the most likely outcome —, there will be no keeping the successor states of the former Yugoslavia and even the Ukraine out of the Union either. Thus, it is probably realistic to predict that ten years from now the member states of the European Union will be almost exactly the same as those making up the Council of Europe. That would not, in itself, be a bad thing — indeed, the creation of a free trade zone and ultimately a common market that reaches from Greenland to Anatolia could give the European economies in general a remarkable boost, thereby enabling Europe to hold its own in the competitive global economy, especially in relation to the other big players on the world market, such as the United States, China and India.[3]

But as a political unit, this European Union will not work. A political unit in this context must be capable of acting jointly in pursuance of a common interest, even if, in specific cases, this may go against the national interests of certain members, and this capability presupposes that the members can agree on a common interest and are willing to submit to the formation of a general will. It is thus a clear source of tensions, which will become more difficult to withstand the more members are involved. In a Union numbering, in a not too distant future,

perhaps 35 or 40 members, it is hard to imagine how this problem could be handled in a convincing manner. As far as the idea of political unification is concerned, the Union is therefore destined to fall prey to what has been termed "strategic overstretch."[4]

This analysis underlines what has to be the basis of any attempt to start the European project anew, in order to get back to the original idea of a politically unified entity somewhere within the European continent. Since the European Union in its current form will not be able to develop into such a unified political entity, new models of integration are needed to pursue this goal. And leaving aside the question of whether it will really take a new state to achieve this — this question triggers so many spontaneous and strong, albeit rationally unfounded, reactions that I shall avoid it here — it seems pretty clear that all of these models must eventually produce federalised structures of some kind, however they may be organised. Creating these structures will serve a twofold purpose: first, it will make Europe capable of unified political action as described above. And second, as a consequence of this, the European citizens — it can be hoped — will lose their feelings of fear and doubt upon observing that Europe can indeed provide answers to what they perceive as threats: in particular, the loss of jobs and of social security, and the rise of organised crime. Of course, if this Europe is to be created, the citizens will first have to be convinced of the need to support this project, which is already a challenge in itself and raises the problem of their involvement in any kind of political building process. Finally, it seems unavoidable that this united Europe, or "United States of Europe," as it shall be labelled here for want of a more suitable term, will certainly encompass fewer than the current member states of the Union, which brings up the question of its relationship with the remaining ones.

II. Challenges for a United States of Europe.

What are the policy areas in which a "federalisation" of this kind is needed most? A brief glance at the structure of the European Union immediately reveals that the lack of political coherence is most apparent in the second and third pillars, namely, in Common Foreign and Security Policy (CFSP) and in the Common Area of Freedom, Security and Justice. By contrast, in the first pillar, i.e. that of the European Communities, this deficiency is less obvious. The so-called community method, which embodies the unique European concept of supranationality, already contains many federal elements.[5] The Community enjoys broad

competences with regard to the realisation of the Common Market and almost exclusive ones in relation to the agricultural sector and the common trade policy.[6] Most of its decisions in this area can be taken by a qualified majority, which prevents any single member state from having any real power of veto, and it is generally capable of promulgating laws that are directly applicable in the member states and thus do not need further measures for their implementation. All these features are not so far away from those of a federal state, and the success story of the Community in precisely these areas amply proves that its mechanisms have, so far, worked.

However, even within the first pillar considerable problems remain. The pivotal one is probably the discrepancy between monetary unification on the one hand and diverging national economic and social policies on the other — a conflict that will reappear in any attempt to create a "United States of Europe" unless the territory of this new entity coincides exactly with that of the eurozone, an aspect that I will return to at the end of this analysis.[7] For the moment, it may suffice to note that the introduction of a common European currency — certainly the most tangible and far-reaching element of European integration since the original Treaties of Rome — has not been accompanied by the establishment of a corresponding economic and social policy at Community level. The economic policy of the Community, if one leaves aside the so-called Stability Pact, relevant solely to the monetary union, is limited to a few directives and the legally non-binding method of "open coordination."[8] And the same is basically true of European social policy, which is largely restricted to establishing minimum working conditions and ensuring safe workplaces.[9]

From the outset, this discrepancy aroused harsh criticism, and many economists, in particular, have considered the euro doomed because a monetary union without a sound economic and social policy at its basis seems bound to fail.[10] Fortunately, the story of the euro so far has belied these gloomy forecasts, but this should not lead us to discard them too easily: for if the economic and social situations of the participating member states become too different, the European Central Bank will no longer be able to devise a monetary policy that meets the needs of all of them. Some first signs of this dilemma can already be seen: while the biggest European economy, i.e. Germany, has now been sluggish for years and really needs low interest rates to remain in place for some time to come, the Central Bank must also take into account the fact that some of the smaller member states' economies are already "overheated" and need to be slowed down.

The problem described here is exacerbated by the fact that economic and social policy are precisely the areas in which the current performance of Europe in general is not at all satisfactory.[11] To be sure, the creation of a unified European policy in these areas alone is no guarantee that this performance will improve; on the contrary, the implementation of a bad common policy, from which the member states could no longer even deviate, would place the whole "United States of Europe" in great danger. However, once the fundamental decision in favour of a monetary union has been implemented, it simply makes sense to introduce, alongside it, a coherent economic and social policy as well. This must not be considered the same as harmonisation or as an attempt to merge the incompatible national social security systems. But the "United States of Europe" will, at least, need a common economic strategy that ensures a certain convergence of the economic development of its member states. And it is important to note in this context that the European Union as it is now simply lacks the competences needed to pursue this goal.[12] It may take further measures to complete the Common Market and to remedy the deficiencies it still presents; but as the example of the endless and futile efforts to develop a common scheme for levying value-added taxes shows, this empowerment reaches its limits long before what would be necessary for a convergence of national economic policies.

In the other pillars of the Union, the result is even more obvious because in these areas, in addition to the factors just highlighted, the typical features of supranationality, which are at least present in the European Community, are entirely lacking. In other words, the legal instruments employed within these two pillars normally do not enjoy direct applicability in the member states, and moreover, the corresponding decisions are all subject to the requirement of unanimity, which in a Union of 25 or more member states renders common action almost impossible or at least reduces it to the lowest common denominator. Certainly, the Treaty of Amsterdam has allowed some progress in this respect, bringing within the sphere of the European Community considerable areas of regulation that used to belong to that of the old "Cooperation in the Field of Justice and Home Affairs." Moreover, the framework decision on the European Arrest Warrant and its domestic implementation shows, in spite of the failure of the first attempt at this domestic implementation in Germany[13], that "Police and Judicial Cooperation in Criminal Matters," as the third pillar is now called, is indeed improving. But there is still a long way to go before the envisaged "area of freedom,

security and justice" can be realised and, above all, without the transfer of further competences to European level it seems impossible, for instance, that an effective investigation service, as well as a coordinated public prosecution or a common immigration regime, can be created.

The same is true for the CFSP. The Balkan wars have demonstrated how powerless the European Union can be; the Iraq war has provided a clear example of how Europe is simply not listened to if it does not speak with one voice. If this situation is to change, a united Europe will need a foreign minister of its own — and this must be somebody who is empowered to do something, not just to assess a situation and to formulate recommendations —; it must strive for a common diplomatic service and, at the end of the day, also for a common defence structure, i.e. a European army or at least something like the European Defence Community which failed in 1954. Again, many useful steps have been taken in this regard, especially the introduction of a European Security and Defence Policy, including the setting up of a "rapid reaction force." But within the current structure of the CFSP and, in particular, in view of the requirement of unanimity among the member states, it is practically impossible to imagine how this process could be completed.

To sum up, a real political unification of Europe faces a lot of pivotal challenges, and the meeting of these challenges — provided, of course, that one accepts this unification as a desirable goal — will necessitate a considerable number of institutional and legal adjustments. In this regard, two lessons must be borne in mind: first, as already noted, it will not be possible to perform these adjustments simultaneously with 25, 30 or 35 member states. Whatever new structure is envisaged for a future "United States of Europe," these adjustments can be implemented only within a smaller group of member states. Second, the Constitutional Treaty recently rejected in France and the Netherlands could not really contribute to solving the problems mentioned above, because it would not produce any fundamental changes with regard to the corresponding competences of the Union.[14] Thus, the seemingly simple recommendation that member states that would like to forge ahead with European integration should accept this Treaty as binding among themselves is not an option to bring about a real political unification.

III. "Enhanced Cooperation" in the Existing Treatie.

There is, however, an option for further integration that is already contained in the existing Treaties: the mechanisms of "enhanced coop-

eration" that were introduced by the Treaty of Amsterdam and slightly modified at Nice.[15] The general idea behind these mechanisms is not new: it is now almost three decades since considerations of this kind first began to be advanced, prompted by the entry of Great Britain, Ireland and Denmark into the Community.[16] Moreover, the situation back in the '70s is somehow comparable: at that time, qualified majority voting was not at all accepted as a standard decision-making mechanism, and the unanimity requirement that existed was, in fact, already proving to be a problem with just nine member states. One of the biggest and most stunning achievements of the subsequent development of European integration was the overcoming of this obstacle in central areas of the economic and monetary union envisioned within the first pillar of the Union, even within a further expanding circle of members. But despite this impressive achievement, the hope for a similar leap forward by 25 or more member states together, to reach a coherent economic and social policy, a real Common Foreign and Security Policy and the establishment of common police and judicial services, is probably bound to be disappointed.

Against this background, we have to come to the sobering conclusion that, although this problem has accompanied the integration process almost from its beginning, not only has it taken an extremely long time formally to introduce mechanisms of "enhanced cooperation," but also — and this is perhaps even more significant — these mechanisms are simply not utilized, at least not for creating formal empowerments as envisaged by Art. 43 TEU. Enhanced cooperation, thus far, has come about on an informal basis only and been limited to the implementation of certain ideas specifically accepted by the other member states. There are many explanations of why the formal activation of enhanced cooperation encounters so much reluctance within the Union: the procedure is complicated, the concrete conditions listed in Art. 43 TEU are too numerous and at the same time too vague; the fact that enhanced cooperation is expressly declared a means of "last resort" only (Art. 43a TEU) has a deterring effect; the openness to all member states demanded by Art. 43b TEU is not realistic; the procedural thresholds, i.e. that at least eight member states must participate and a qualified majority must approve this, are too high, and so forth.[17]

But the most important reason for the non-utilisation of this instrument is a lack of political will, caused by the general fear of seeing Europe fractured. In this context, it is emphasised that the European Union was founded on, and still needs, consensus, and that enhanced cooperation

could turn out to be the first crack in its whole structure. Another criticism is that it could be used to blackmail countries that would otherwise use their power of veto to block common policies. But if it is accepted that these common policies are needed and that it would be illusory to wait for all member states to agree to them, then this danger cannot be avoided. It is, then, probably better to establish these policies within a separate and transparent institutional setting instead of using mechanisms that apparently do not work. However, the Constitutional Treaty would, again, be unable to fulfil this task. It might relax, a little, the conditions of enhanced cooperation, especially in the CFSP field, but it would not bring about a major overhaul of the relative mechanisms.[18] Thus, the earlier affirmation that simply recommending its entry into force between consenting member states is not a viable option still holds true. A new institutional arrangement within a "United States of Europe" will require a new legal instrument.[19]

Before this is addressed in detail, however, it is important to note that the decision to establish closer cooperation between selected member states, beyond the procedures laid down in the Treaty, is not at all uncommon within the development of European integration. On the contrary, some of the most important integrative steps have been taken by only a small number of the member states. This has generally come about in two different ways: either the member states willing to cooperate simply concluded a separate treaty under public international law, or "opt-out" clauses were inserted into the European Treaties themselves. Important examples are the Schengen regime, the monetary union, and the European Security and Defence Policy already mentioned; but one could also cite Great Britain's refusal to participate in the common social policy. So far, none of these exceptions, in which enhanced cooperation was accepted, have endangered the existence of the Union as a whole; on the contrary, Schengen, the euro and even the ESDP developed such a force of attraction that member states from outside the original circle soon joined the fray. However, as a standard practice this is probably not recommendable, because it exacerbates the lack of transparency from which the European structures generally suffer. Again, the better solution would be to create a separate and transparent institutional setting that can accommodate the desire of certain member states to cooperate more closely and that, at the same time, establishes a clearly defined relationship with the others — and this is what the project of a "United States of Europe" should aim at. But the positive lesson to be learned from Schengen, the ESDP and the euro is that the establishment of closer institutional links between a few member states does not necessarily endanger the cohesion of the Union as a whole.

IV. Theoretical Concepts of Deepened Integration.

With this lesson in mind, we can now turn to the question of how these institutional links might be built and thus a "United States of Europe" organised. There are two levels on which to approach this question: first, there is the more theoretical problem of the general model to be chosen, and second, the practical difficulty of how this new entity can be fitted into the existing structures. Both of these aspects are dealt with in turn.

The idea of a differentiated integration dates all the way back to the mid-'70s, when first the former German chancellor Willy Brandt and then the Belgian prime minister Leo Tindemans submitted initial proposals for such a differentiation.[20] Since then, an impressive number of varied suggestions has been developed.[21] Without claiming to be exhaustive, seven of them shall be briefly considered here.

First, there is the concept of a "Europe *à la carte*", which is linked with the name of Ralf Dahrendorf, who first presented it in 1979. Dahrendorf defined it as "common policies where there are common interests without any constraint on those who cannot, at a given point of time, join them."[22] This concept foregoes a common goal set for all member states and instead trusts in a multitude of functionally limited arrangements among varying groups of member states. Its idea is, ultimately, to create a "market of possibilities," from which each member state may pick and choose until, by a process of "trial and error," the most appropriate arrangements for everybody have been found. However, this model is probably the one farthest away from the idea of a politically united Europe. That said, it provides an interesting lesson, for it demonstrates the danger that would lurk in extensive employment of the Schengen, ESDP and euro strategy: one must be careful with the creation of separate cooperation mechanisms outside the Treaties, because the introduction of too many of this kind would, in fact, result in a "Europe *à la carte*."[23]

A somehow softened version of this model is that of "Europe *à géometrie variable*."[24] This concept does not allow all the single member states to pick and choose freely, but instead already wants to differentiate them into groups. It is, however, related to the "*à la carte*" idea insofar as the composition of these groups may vary from sector to sector. Member states that go forward in certain areas of integration need not necessarily be front runners in other areas as well, and different groups

may have the same members. This would result in the definition of more and less progressive groups of member states for each sector of integration and the possibility, for the states, to choose which of the respective groups to join. Again, neither of these results can be expected to advance the idea of political unity.

A third model could be called "integration in layers." This concept does at least remain faithful to the idea of establishing common goals to be pursued by all the member states, which naturally implies consensus among them with regard to the further, general development of integration. It then allows some member states to forge ahead and to create a separate "layer" of deepened integration, at the same time keeping open, for the others, the possibility of their "opting in." The monetary union, with its establishment of certain criteria as prerequisites for participation, is the most prominent example of this strategy in practice.

The fourth concept — that of a "Europe of different speeds" — is very similar to this model, but more demanding. Not only does it call upon all member states to share the same common goals, it also rests on the assumption that all the member states continue to pursue these goals in all policy areas, albeit, as its name indicates, at different speeds. Thus, it essentially boils down to the granting of temporary exceptions to certain member states. It allows them to "opt out," but only for a limited period of time, its final idea being that eventually all the member states will once again find themselves, together, on the same level of integration. Although it is true that this concept also allows an indefinite delaying of the ultimate goal, it is important not to be taken in by the illusion that in a Europe of 35 or 40 member states all of them will, in the end, achieve an identical depth of integration in all policy areas.

The fifth model — "core Europe" — comes closer to the goal of creating a politically unified entity. Essentially a geographical partitioning of Europe, it aims, within a limited regional framework, to establish new fields of gravitation. The idea is that a small group of member states — not necessarily the six founding ones, although these are the ones with which the model is usually associated — should reach, on its own, a much deeper level of integration, while the others would remain on the periphery. However, if, as is hoped, the latter find themselves attracted to the core group, they could join it later, providing they fulfil the requirements of deepened integration.

The idea of a "core Europe" is developed further in the sixth concept, "Europe of concentric circles," in which Europe is again partitioned along geographical lines. In this case, however, the division is more complex than in the above model, which simply has a "core" and a "periphery." The idea, instead, is that of several groups or "rings" of member states around the core, with the degree of integration decreasing progressively from ring to ring the further away from the core one moves. This concept resembles the "integration in layers" idea; it just adopts a slightly different perspective by placing the member states that are not in the core group in different orbits around the core.

Finally, seventh, there is the idea of a European federal state. Ever since the empire of Charlemagne fell apart more than one thousand years ago, many philosophers and political visionaries have dreamt of its resurrection, and a federal state is probably the modern formula that corresponds most closely to this vision. But even the most ardent European "integrationist" has to admit that the prospect of eventually establishing a European state seems rather dim. Did not the Constitutional Treaty fail, in the end, because of its name, which reminded many European citizens too much of their own state structures, and made them want to ensure that these were not replicated at European level? Coming back to the challenges explained at the beginning, though, one important point has to be emphasised again: to make Europe capable of political action as a unified entity there will have to be not only the development of new structures, but primarily support for this development on the part of the citizens. Therefore, if it is indeed true that too many of these citizens are somehow afraid of the terms "constitution" and "state" in the context of European integration, then these terms would be better avoided.

But is it possible to do this without giving up the final goal of creating a truly politically unified Europe? This depends on what is in fact needed to achieve this goal, and what is needed are federalised structures of some kind to meet the challenges of the future. Such structures cannot be established with the participation of 25 or more member states. Consequently, there is a need for a federalised core within the current European Union. But this core does not have to take the form of a state. It could also be developed through one of the other models, excluding, of course, the "Europe à la carte or "à géometrie variable" models, and thinking not of a "Europe of different speeds", but rather of the "integration in layers" or the "Europe of concentric circles" models. If using these terms can further efforts to achieve the pivotal goal of making Europe strong and capable of dealing with the big tasks outlined above, then there is no need to cling to names. Names, in the end, do not matter; they are, as a German saying has it, nothing but noise and smoke. For this reason, the crucial question to be asked in this context is the following: How can a core Europe with

federalised structures — a "United States of Europe" as envisaged here — be established within the existing European Union? Any attempt to answer this question will have to take the following issues into account.

V. Practical Problems in Creating a "United States of Europe."

1. *The Participation of the Citizens.*

The first issue is directly related to the problem of winning the support of the citizens, and it concerns the procedure by which such a new entity may be founded and especially the extent to which the citizens should participate. In general, there are two ways of handling this process: referendum and ratification.

Ratification means concluding a treaty among the member states that are willing to take part and having this treaty ratified through the national parliaments. This method was the original choice for the establishment of the European Communities as well as for the foundation of the Union; it is, in public international law, the traditional means of formalising cooperation between states and, as regards the possibility of opposition on the part of the citizens, it is certainly the least problematical method. Bearing in mind the negative experiences with the referenda on the Constitutional Treaty in France and the Netherlands,[25] it would hardly be surprising to see European integrationists, in particular, resisting further referenda and calling for a return to the traditional treaty-making process.

However, in the context of a serious attempt to win popular support for an invention as momentous as a new "United States of Europe" — and as stated above, winning this support is probably indispensable for the success of the whole project —, the referendum challenge cannot be avoided, and perhaps need not even be feared. Moreover, there is one way of making this process a truly European one, thereby increasing, crucially, public awareness of the importance of the step and reducing the risk of a result determined more by national party politics than by the matter to be voted upon: there should not be separate referenda in each of the possible member states, as in the case of the Constitutional Treaty, but rather one referendum held on the same day in all the member states that are considering taking part. The votes may, of course, be counted separately to determine the will of each individual people, since none of the European peoples can be forced into a "United States of Europe" against their will, but it is vitally important that they be cast together.

2. *Defining the Federation's Relationship with the Existing Union.*

Supposing that the support of the citizens can be won in enough member states to start this project — with the question of necessary and possible participants to be addressed in a moment —, the next urgent problem would be how to reconcile this new entity with the structures of the European Union. Put this way of course, this question rests on a basic assumption: that the continued existence of the Union as such is desirable as a means of keeping the rest of Europe together and closely linked with whatever will emerge as its new core — in other words, that it is necessary to avoid any solution that would cause the existing Union to fall apart. Acceptance of this assumption, however, rules out the possibility of the "core states" simply leaving the Union and creating, totally anew, something different. Thus, for the future, the "United States of Europe" and the European Union must be considered as separate but intertwined entities.

A second assumption, while not really dependent on the first, seems equally inevitable. It concerns the *acquis communautaire*, i.e. the whole set of principles and rules, regulations and directives, primary and secondary law that has so far developed within the European Union. If a new "United States of Europe" were to try to change this by itself or to establish different legal frameworks in areas which are already encompassed by Community or Union policies — let's say the "core states" would like to establish a different competition regime or change the rules regarding state aid to enterprises —, then it is hard to imagine how this might be negotiated amicably with the remaining member states of the Union. But, in fact, deviations of this kind would not be really necessary. Because, as indicated at the beginning, the main problem with regard to the current state of the Union is not that the Union would pursue the wrong policies, but rather that, in too many areas, it is not sufficiently capable of conducting a coherent policy of its own. This has been demonstrated in relation to practically all the fundamental challenges it faces: economic and social issues as well as its foreign policy and defence structures, and even the fighting of criminal and terrorist activities. Therefore, a new "United States of Europe" should accept the *acquis communautaire* and continue to participate in the policies of the Union insofar as the Union is still able to exercise its competences.

If, however, as its central differentiating feature, a "United States of Europe" were enabled to formulate and conduct common policies in areas in which the Union for legal or political reasons cannot act, then this new

entity could relatively easily find its place within the Union. This hypothetical situation is perhaps best illustrated by the status the European Union currently enjoys within the World Trade Organisation. In the WTO, the Union is a member in its own right, as are its single member states, but it is generally accepted that because of its internal distribution of competences many trade policy issues are negotiated at Union level only. When it comes to voting, on issues for which it can claim exclusive competence, the Union votes *en bloc*, and its vote counts as the collective vote of all its member states. In the same way, a new "United States of Europe" could formally be integrated into the current European treaties as a new member and simply replace its member states in the Union's various decision-making procedures, its vote being counted as the sum of all the weighted votes of its member states.

Of course, the remaining member states of the Union would have to accept this, not only as a matter of comity, but as a legal requirement since the existing treaties would have to be modified accordingly. But it would indeed only be a modification and not a full overhaul of the treaties, because the *acquis communautaire* would remain intact and the competences of the Union in the various policy areas would not be touched either. All that would be required to accommodate a "United States of Europe" within the Union would be a formal extension of membership to the new entity and some institutional and procedural adjustments. And since the necessary changes could be limited to this, there is also a realistic hope that the rest of the Union would not stand in the way of this new entity, because there is no reason why the Union should not be able to preserve what it has already achieved. We would then end up with a federalised European core in the midst of a big common market extending at least from Greenland to Anatolia — and perhaps even further.

3. *A Special Problem: the Eurozone.*

However, defining the relationship between a "United States of Europe" and the European Union will not be the only reconciling that will have to be done. Since a coherent economic and social policy would be inextricably intertwined with monetary issues,[26] it is also necessary to consider the relationship between this new entity and the eurozone, unless of course the member states of both were identical, which is hardly likely. Moreover, this is a more complicated matter than integrating the "United States of Europe" into the Union, because the question of

whether political and monetary unification can be realised separately or must go hand in hand touches upon some of the most fundamental economic beliefs.

There are basically two lines of economic theory in this respect, albeit with many variations deserving names of their own: according to the "crowning" theory, a political union is the necessary prerequisite of any monetary union.[27] And the term is used literally: the political union first has to exist, so that it can subsequently be crowned by monetary unification. A slightly mitigated version of this theory allows political and monetary union to be realised simultaneously, but in both cases, a monetary union without political unification is considered doomed from the outset.

The opposite line does not see a compulsory link between political and monetary union. In its basic form, it sees political and monetary integration as two separate issues that can each exist independently.[28] The more optimistic version, which is usually given promising-sounding names like "engine" or "foundation stone" theory, even regards monetary unification as a possible means of achieving higher degrees of political unification later on.

Historical experience seems to support the first line more than the second one, as most currency unions that never received a political underpinning eventually failed.[29] The advocates of the "separation" theory in its several variations, however, argue that the European monetary union is something peculiar and — just like the European Union itself — historically unprecedented. This is certainly correct, insofar as the European model is characterised by specific features which, as a whole, have never existed anywhere else to date: a completely unified currency under the control of an independent central bank, a "no-bailout clause" to preserve the accountability of the participating states, a stability pact — although its reliability has become questionable —, and a Common Market founded on a unified legal framework for competition.[30]

But it would be pointless to try to resolve this fundamental dispute here, because the political development — be it, in the end, for good or for worse — has already circumvented it. The basic decision to run the risk of a separate monetary union was made at Maastricht almost fifteen years ago. When the European monetary union in its current shape was created, the decision was taken, at the same time, to try out a single currency in the absence of a corresponding political backbone. Unless the whole attempt breaks down, it is impossible to step back from this

decision, and the creation of a "United States of Europe" will not fundamentally alter the situation as it already exists. The eurozone will remain a separate group of states for the foreseeable future: it can be neither expanded to include the whole European Union nor shrunk to encompass only the states of a newly founded "core Europe".

Therefore, either the "crowning" theory is correct and thus the euro will fail anyway, regardless of what happens in the core, or the advocates of "separation" will be proved right, in which case there is no reason why the success of the monetary union should be endangered by the creation of a new political entity within it. So the "United States of Europe" will be related to the eurozone in very much the same way as the eurozone is related to the Union as a whole, and it will share its fate.[31]

4. Determining the Participants.

And so we come to the last question: who will be the possible participants in the project envisioned here? First of all, there is no kind of natural limitation as regards the "core" of Europe and, respecting the will of the peoples involved, it does not seem appropriate to define, round a table, who may and who may not become part of a "United States of Europe". However, it is possible to see an outline emerging:

a) The founding members of this new entity should already share the experience of monetary unification and thus come from the eurozone.[32]

b) Having stated that the "United States of Europe" need not be identical with the eurozone, it seems advisable to start with a smaller number of member states, although in the long run the new entity should at least be open to the rest of the monetary union and not a "closed shop" from the outset.

c) At least two of the bigger European states must be among the founding members, because otherwise the project would either be seen as an attempt by one big state to set up a new sphere of influence, or not be taken seriously at all.

In short, this brings us back to the original core of European integration: the six founding states, at least two of whose larger members must participate, but preferably all three and, it is to be hoped, some of the smaller states as well. Although it seems feasible to start a "United States of Europe" with just two of the big countries, any project of this kind that could not include the "Six" would be dogged by uncertainty from the outset. Beyond this group, however, it is not hard to imagine more states joining: not only some from the "old" group of 25, but perhaps the most

advanced of the ten new member states at some point as well. If the support of the citizens in these core states can be won, then a new milestone in the process of European integration might indeed be set.

NOTES

[1] Guy Verhofstadt, *Die Vereinigten Staaten von Europa*, 2005, pp. 7-10.

[2] For further reasons, see also Joachim Wuermeling, *Die Tragische: Zum weiteren Schicksal der EU-Verfassung*, Zeitschrift für Rechtspolitik 2005, pp. 149-153, 150.

[3] This hope was already expressed in: Ralph Alexander Lorz, "Zurück in die Zukunft", *Frankfurter Allgemeine Zeitung* of 24 November 2004, p.7.

[4] See, for instance: Erich Reiter, *Die Situation der EU in ihrer geplanten strategischen Überdehnung, Arbeitspapier des Österreichischen Instituts für Europäische Sicherheitspolitik*, December 2004; a very useful analysis can also be found in: *The EU's Search for a Strategic Role*, edited by Esther Brimmer.

[5] For a more in-depth study of the federal elements and the corresponding experience within the EU, see David McKay, *Designing Europe*, 2001, p. 8 onwards; as well as Stephan Mazan, *Das föderative Prinzip in der Europäischen Union*, 1996, passim.

[6] Rudolf Geiger, *EUV/EGV*, Kommentar, 4th ed., 2004, Art. 37 no. 2 onwards; Gereon Thiele, in: Christian Calliess-Matthias Ruffert (eds.), *Kommentar zu EG-Vertrag und EU-Vertrag*, 2nd ed., 2002, Art. 133 no. 5 onwards; ECJ, Judgment of 13 March 1984, Case 16/83, Rec. 1984, p. 1299 (Prantl).

[7] See under V. 3.

[8] See, for instance: Rudolf Streinz, *Europarecht*, 7th ed., 2005, no. 1043 onwards.

[9] Sharing this view: Thomas Oppermann, *Europarecht*, 3rd ed., 2005, no. 1641

[10] For this position, see the detailed explanations by Wilhelm Hankel et al., *Die Euro-Klage. Warum die Währungsunion scheitern muss*, 1998, passim.

[11] Verhofstadt *op. cit.* (note 1), p. 22.

[12] Among many noting this deficit: Bernhard Kempen, in: Rudolf Streinz (ed.), *EUV/EGV-Kommentar*, 2003, Art. 98 no. 3.

[13] German Federal Constitutional Court, 2 BvR 2236/04, Judgment of 18 July 2005.

[14] See Daniel Thym, "United in Diversity – The Integration of Enhanced Cooperation into the European Constitutional Order", 6 *German Law Journal*, no. 11 (2005), p. 1746; Marcus Höreth/Cordula Janowski/Ludger Kühnhardt, *Die Europäische Verfassung*, 2005, p. 96.

[15] The new provisions have somehow facilitated enhanced cooperation, as regards the reasons for it, the determination of the minimum number of participants (eight), and the exercise of powers of veto, but they have also built up some new barriers. For an analysis compare Claus Giering/Josef Janning, "Flexibilität als Katalysator der Finalität? Die Gestaltungskraft der 'Verstärkten Zusammenarbeit' nach Nizza", *integration* 2/2001, pp. 146-155; less critical towards the modifications is Klaus Hänsch, "Maximum des Erreichbaren – Minimum des Notwendigen? Die Ergebnisse von Nizza", *integration* 2/2001, pp. 94-101.

[16] Katrin Langner, *Verstärkte Zusammenarbeit in der Europäischen Union*, 2004, p. 19 onwards.

[17] For an overview of the benefits and feasibility of enhanced cooperation see Christian Deubner, "Verstärkte Zusammenarbeit in der verfassten Europäischen Union", *integration*

4/2004, pp. 274-287. An interesting array of possible fields of enhanced cooperation has been compiled by the Commissariat Général du Plan: *Perspectives de la coopération renforcée dans l'Union européenne*, 2004, 7ᵉ Partie : Une liste des thèmes potentiels pour les coopérations renforcées, p. 243. Thus, the currently limited practical impact of enhanced cooperation should not be misinterpreted as the absence of any potential.

[18] Deubner *op. cit.* (note 17), p. 285.

[19] Thomas Jaeger, "Enhanced Cooperation in the Treaty of Nice and Flexibility in the Common Foreign and Security Policy", *European Foreign Affairs Review* 7 (2002), pp. 297-316, 316, therefore speaks of "enhanced integration" rather than enhanced cooperation as the overall goal.

[20] Report of prime minister Leo Tindemans on the European Union, published in, for example: Deutscher Bundestag, 7. Wahlperiode, Drucksache 7/4969 of 3 April 1976, p. 17.

[21] For an overview of the manifold terms which are used in English alone see Alexander Stubb, "A Categorization of Differentiated Integration", *Journal of Common Market Studies* 34 (1996), pp. 283-295, 285; a detailed summary is also provided by Claus Giering, "Vertiefung durch Differenzierung – Flexibilisierungskonzepte in der aktuellen Reformdebatte", *integration* 2/97, pp. 72-83.

[22] Ralf Dahrendorf, *A Third Europe?*, Third Jean Monnet Lecture, Florence, 26 November 1979, p. 20.

[23] Compare Josef Janning, "Europa braucht verschiedene Geschwindigkeiten", *Europa-Archiv* 1994, p. 533; and Bernd Langeheine, "Rechtliche und institutionelle Probleme einer abgestuften Integration in der Europäischen Gemeinschaft", in: Eberhard Grabitz (ed.), *Abgestufte Integration*, 1984, p. 51.

[24] See, for instance: Commissariat Général du Plan d'Equipement et de la Productivité, *L'Europe les vingt prochaines années*, Rapport d'un groupe de prospective à long terme animé par Jaques Pelletier et Gérard Tardy, 1980, p. 211 onwards.

[25] A typical commentary with regard to this might be the one issued in a newspaper article by Georg Escher: "Now that the citizens have got that Europe, they voted against it", *Nürnberger Nachrichten* of 31 May 2005.

[26] See Verhofstadt (note 1), p. 22; and Ernst-Wolfgang Böckenförde, *Welchen Weg geht Europa?*, in: Ernst-Wolfgang Böckenförde (ed.), Staat, Nation, Europa, 1999, pp. 77 onwards,

[27] See, for instance: Wolfgang Wessels, "Die Wirtschafts- und Währungsunion. Krönung der Politischen Union?", in: Rolf Caesar/Hans-Eckart Scharrer (eds.), *Maastricht. Königsweg oder Irrweg zur Wirtschafts- und Währungsunion?*, 1994, p. 112.

[28] *Ibid.*

[29] The usual examples cited in this context are the German-Austrian Currency Union (from 1857 to 1867), the Latin Currency Union (from 1865 to 1927) and the Scandinavian Currency Union.

[30] This is, for example, emphasised by Markus Reupke, *Die Wirtschafts- und Währungsunion*, 2000, p. 79 onwards.

[31] The critical points in this regard are already showing within the EU's relationship with the eurozone; for instance, Sweden has recently made the criticism that the Council of the Ministers of Finance of the Union is rapidly losing ground compared with the more informal meetings of the ministers of finance of the eurozone. Cf. "Schweden moniert Einflußverlust der EU-Finanzminister", *Frankfurter Allgemeine Zeitung* of 25 January 2006, p. 13.

[32] The old idea that equality facilitates unity and therefore must be part of the rationale behind the European integration has already been stated by Walter Hallstein, *Der unvollendete Bundesstaat: europäische Erkenntnisse und Erfahrungen*, 1969, p. 33.

Federal Core and European Union

GIULIA ROSSOLILLO

1. *The Crisis of the Process of European Unification.*

For a number of years now, the European Union has been in a situation of severe crisis. Whereas European integration was a constantly evolving process up until the Maastricht Treaty, which even led to some European states' relinquishing one of the essential attributes of sovereignty — their currency — to a supranational entity, in the period since Maastricht these same states have proved incapable of proceeding towards unification. The Amsterdam and Nice Treaties, like the Treaty establishing a Constitution for Europe, have done nothing more than make minor changes to the mechanisms of Community law, and have failed to tackle the problems crucial to Europe's future.

Essentially, there are two such problems. The first is the fact that the European Union does not have a single economic and fiscal policy, but rather twelve economic and fiscal policies that the Stability and Growth Pact serves merely to coordinate. And this would continue to be true even were the Treaty establishing a Constitution for Europe eventually to come into force, as the latter goes no further than to reiterate that the "Member States shall coordinate their economic policies within the Union" (Art. 1-15). There is no historical precedent of any monetary union managing to survive in the absence of a political power with the capacity to impose a single economic and fiscal policy. Thus, unless this problem is dealt with, Europe's single currency runs the risk of growing weaker, even of disappearing.

At the same time, the fact that there is no European political power that can take economic and fiscal policy decisions renders it impossible, in these spheres, to make the specific choices needed in different economic phases, and forces the states to submit to rigid rules like those of the Stability Pact.

To this economic weakness — and here we come to the second

problem that Europe must confront — we must add the total absence of a European foreign and security policy. In this case, too, the states limit themselves to coordinating their foreign and security polices, which remain in their own hands, a situation that the Treaty establishing a Constitution for Europe simply endorses. Indeed, the "constitutional treaty" fails, first of all, to make provision for the creation of a European army, and instead only affirms that "The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements" (Art. 1-41). And for missions requiring the use of civil and military assets, it establishes that these should be provided by the member states. Thus, again, control of defence remains in the hands of the states.

Second, even the institution of the role of European foreign minister, hailed by many as an important step towards the creation of a genuine European foreign policy, does not really change things: appointed by the European Council, the Union Minister for Foreign Affairs is in fact nothing more that a representative of the Council of the European Union, whose foreign and security policy decisions are taken by unanimity (or by majority, but on the basis of decisions previously reached unanimously). When the member states fail to agree, his scope for action is thus negligible.

2. *The Reasons for the Crisis.*

The reasons for the crisis can be sought both in the new world balance that emerged after the fall of the Berlin Wall, and also in the progressively increasing number of EU member states.

With regard to the first of these aspects, it must not be forgotten that the division of the world into two opposing blocs and, for the countries of western Europe, the presence of the American superpower, on the one hand created conditions ideal for the development and strengthening of the process of European integration, but on the other, placed a limit on this process. Indeed, while the bipolar order guaranteed the existence, in Europe, of an area of peace and stability that favoured the creation of forms of cooperation and unification among states, it also meant that the states themselves were effectively relieved of the responsibility for managing their own foreign and security policy, which was instead

essentially shouldered by the American superpower. The collapse of this world order exposed the fragility of a Europe that was no longer used to bearing the international responsibilities that, as a major economic power, it should bear.

As for the question of enlargement, while the founder states of the European Coal and Steel Community and the European Economic Community, in the wake of the devastation of the Second World War, were united in their aim to create a political Europe capable of guaranteeing an area of peace and stability and of preventing the outbreak of further conflicts between the European states, this situation changed radically following Great Britain's entry into the EEC in 1973. Today — and this has been particularly true since the 2004 accession of ten new member states — there exist, within the European Union, two profoundly different visions of the nature and purpose of the process of European integration: according to one, the European Union is simply a free trade area that should not place further restrictions on national sovereignty and that must, potentially, be capable of enlarging to embrace other states; the other view, instead, raises the question of Europe's political integration.

Because of this clash of ideas, it has become impossible to advance the process of European integration any further than the compromise, plainly inadequate, embodied by the Treaty establishing a Constitution for Europe.

Consequently, the member states' contrasting positions on the war in Iraq, the crisis over the Stability Pact, the disagreements over the Union budget, and the lost referenda in France and the Netherlands are not the causes of the crisis, but only the consequences of a desperately difficult situation that has dragged on for years.

3. *Possible Solutions.*

We therefore need to look at how to find a way out of this crisis and to consider some possible solutions.

One option could be to leave the situation as it is, resigning ourselves to the fact that in a twenty-five-member Union, the text of the Treaty establishing a Constitution for Europe amounts to the best possible compromise.

This would of course mean giving up on any prospect of creating a political Europe and imply the further enlargement of the Union. But it is a solution that, ultimately corresponding to a maintenance of the status quo, would not lead to the creation of a common foreign and security, or

economic and fiscal policy, and would not therefore tackle the key problems of the process of integration.

A second option, which opposes the idea that all twenty-five member states must advance at the same speed, is to allow those states wanting to pursue integration (because they are convinced that Europe's problems will be solved only if it can be made to speak with a single voice) to form a vanguard, breaking away from the states that instead see the European Union as a free trade area.

This is not the first time the question of a vanguard has been raised: in the past there have been numerous proposals for the creation of a multispeed Europe. The most advanced of these may be traced back to two German Christian Democrats, Lamers and Schäuble, who, back in 1944, called for the creation of a federal core within Europe. But today, unlike in the past, a multispeed Europe has become an absolutely vital issue — the only choice capable of guaranteeing the process of integration a future. This is, indeed, the message conveyed, albeit in different tones, by a number of politicians (one might think of former German foreign minister Fischer, Belgian prime minister Verhofstat, and French foreign minister Douste-Blazy).

The solutions on the table may be divided into two categories.

In the first go those that maintain that a multispeed Europe could be formed within the framework of the current European Union, that is to say, on the basis of the existing Treaties — solutions, that is, in which all twenty-five member states together take the decision that the various states should be allowed to proceed at different speeds.

This is the category that embraces those who wish to exploit the provisions for enhanced cooperation contained in the Treaties. Enhanced cooperation is a mechanism, introduced by the Treaty of Amsterdam and partially modified by the Treaty of Nice, that allows any group of member states (a minimum of eight) wishing to implement more advanced forms of integration to do so, on condition that they comply with a series of restrictions, in place to ensure that the enhanced cooperation is compatible with the institutional framework of the Union.

The real limitation of this mechanism is that it does not allow those states wishing to proceed with an enhanced cooperation to do so freely: within the framework of the first pillar, the Commission can oppose any proposal for enhanced cooperation, the enhanced cooperation has to be authorised by the Council by a qualified majority, each single member of the Council has the faculty to request that the question be referred to the European Council, and finally the enhanced cooperation has to respect the institutional framework of the Union. Added to all this, enhanced cooperations cannot be implemented in relation to defence matters, one of the sectors in which a multispeed Europe is particularly necessary. It is thus a solution based on the fanciful idea that the decision to allow some member states to proceed more quickly than the others can be taken even with the agreement of those states that do not wish to move in this direction.

In addition to these limitations, there is another, even more serious one: the fact that the enhanced cooperation mechanism does not allow the creation of a true vanguard, i.e., a federal core. Indeed, the possibility for the states to decide, on a case-by-case basis, which enhanced cooperations they want to be part of would result in the formation not of a homogeneous group of more rapidly advancing states, but instead of a Europe à la carte.

In the second category, on the other hand, we find the solutions proposed by those who believe that member states wishing to do so should be allowed to transfer to a supranational authority the management of economic and fiscal, and of foreign and security policy, leaving behind those states opposed to more advanced forms of integration. Since economic and fiscal policy, like foreign and security policy, are central parts of state sovereignty, this decision would signify the creation of a federal state among the members of the Union wishing to take part — of a federal core within the European Union's confederal structure.

This is clearly a very different solution from the first one described, because it would give rise to a new entity endowed with sovereignty, and thus with the character of a state. It is equally clear that it is a solution that the existing Treaties do not — indeed, could not — envisage.

The creation of a federal core would thus demand a break with the past. In other words, the process of creating a new federal entity would have to unfold outside the procedures envisaged by the Treaty establishing the European Community and by the Treaty on European Union.

Moreover, the fact that the transition from a confederal to a federal form implies a break with the past is shown by a historical precedent that, while belonging to the far distant past, nevertheless provides some insights useful for the present. I refer to the transformation of the American confederation into the United States of America. Indeed, the Articles of Confederation, which governed relations between the thirteen former British colonies following their independence from Britain, could be modified only with the consensus of all thirteen of the confederation's member states. But the founding fathers of the American federation, in order to resolve the severe crisis facing the confederation, rather than

following the revision rules contained in the Articles themselves, decided to propose a new text that would come into force upon its ratification by at least nine states. The American federation was thus born of a break with the previous regime.

4. *The Federal Core.*

Let us now consider what might be the stages in the constituent process leading to the formation of a new sovereign entity within the European Union, and which states should be part of this vanguard.

As regards the first aspect, it is feasible that the decision to form the core might be taken, by the states wishing to be part of it, through the signing of a treaty which would establish the fundamental characteristics of the new entity (its federal character, its bodies, its powers in the spheres of economic and fiscal policy and foreign policy and defence) and entrust a constituent assembly with the task of drawing up its constitution.

But it is difficult to imagine that the creation of the federal core might stem from the force of will of entities other than those states that are to be part of it. First, it is impossible that this initiative might stem from the Community institutions. This is because these, by definition, represent all the member states of the Union and it would not be in their interests to encourage some states to create a more advanced form of integration that would ultimately undermine the whole Community machinery. What about the citizens, then? Certainly, there would have to be some form of democratic legitimisation of the new federal entity, but in the wake of the decision to create the federal core, who, if not the states wishing to be part of it, should make the decision to consult the citizens on this issue?

And so we come to the question of which states should be part of the federal core. Some maintain that the vanguard should be made up of the eurozone countries, others that it should be a smaller group than this, and others still that it could comprise both countries from within and from outside the eurozone. In this regard, I feel that it is necessary to distinguish between two groups: one comprising the states that could be involved in the initiative to form a federal core, and the other the states that will actually become part of it.

While it is difficult to predict which states might decide to become part of the federal core, a number of considerations can be advanced with regard to the other aspect, that of the initiative that will bring about its formation. The formation of a federal core within the European Union would, in fact, mean the creation of a new state entity. Certainly, it will

need a strong political will to overcome the obstacles and to create this new entity, capable of resolving the problems that Europe must confront — a strong political will that, for historical reasons, could well reside among the politicians of Europe's six founder member states, and in particular among the politicians of France and Germany, the two countries that have always been the driving force behind the process of European integration. Clearly, this project could then be open to any member state in favour of it and prepared to submit to a federal constitution, and thus to divest itself of its sovereignty: it would, from its very creation, be a core open to all the states wishing to be part of it.

5. *Relations between the Federal Core and the European Union.*

With regard to the relations between the federal core and the European Union, a solution would have to be found that allowed the co-existence of these two entities. Indeed, if one accepts the idea of creating a federal core, one has to ask oneself whether this new entity would replace its member states within the European institutions, and whether the European Union could retain its current structure.

In relation to these questions we can make a series of general observations.

From the point of view of international law, it is conceivable that the new state (the result of a fusion of pre-existing states) could take over from its members within the organs of the European Union (in the Commission, for example, the federal core would have a single representative taking the place of those of its member states) and thus replace its member states in the Treaty on European Union and the Treaty establishing the European Community. Indeed, although most of the EU member states failed to ratify the Vienna Convention on Succession of States in respect of Treaties, and although there have been few such fusions of states over the years, as a general rule, any new state born of a fusion between two or more states is automatically granted entry into an international organisation of which these states are already members. But in this regard, the historical precedents are quite different from the situation that would arise upon the birth, within the European Union, of a federal entity resulting from the fusion of several EU member states, given the considerable influence that newly created entity would immediately wield upon entering the international organisation, i.e., the European Union.

The first problem that arises thus relates to the nature of the new

federal state: it is clear that its creation would upset the institutional equilibrium of the Union, because this new EU member state would carry far more economic and political weight than the other members of the Union.

At the same time, it is difficult to imagine that the new state, a sovereign entity, would be willing to submit to the restrictions imposed by the Stability Pact (should the core not be made up solely of eurozone countries), or to accept the forms of cooperation that currently exist within the sphere of foreign and security policy.

The second problem is that outside the federal core there would remain all the states that are opposed to political integration and that, even now, are not particularly well disposed to the various forms of integration, other than the strictly economic ones, that already exist. It is thus predictable that, following the creation of a federal core, the bonds between the states that are not part of it will weaken progressively until the European Union becomes a free trade area.

It is thus likely that there would have to be some form of renegotiation of relations between the new federal entity and a European Union that would probably be somewhat different in nature from what it is now.

"Differentiated Integration": An Alternative Path to Classical Integration?

PETER ZERVAKIS

The European Union (EU) started out as an association of six countries with limited economic cooperation. Over the intervening decades, the EU has developed into a guiding political entity that is unifying the entire continent. Fifteen years after the political upheaval of central Europe, this voluntary joining together of sovereign nations, which is aimed at increasing their economic and political potential, can be seen to be the most compelling European idea since the Enlightenment. Nevertheless, the public's general ambivalence towards the future of Europe's constitution and institutional architecture is becoming increasingly evident — and indeed was so long before the failed referendums in France and the Netherlands. As a result, Europe's future must now be considered less a topic for rhetorical debate than a matter demanding concrete political planning and visible success. Economic and monetary union, structural reforms and the current integration of central and eastern European states into the Union all require a solid foundation.

Against this backdrop, key aspects of the Bertelsmann Foundation's International Relations Programme include: analysis of the European political situation and development of strategies for addressing integration policy issues. Our "Enlarged Europe" project, which brings together international and interdisciplinary analyses and proposals and recommendations for political practice, while at the same time communicating project findings to policy makers and the public, aims not to be academic so much as to propose a workable Europe.

The sustainability of the European Union's integration process rests upon its potential to reform and innovate at the same time. The Bertelsmann Foundation's proposals for systemic change of the EU are intended to

combine exploitation of a European political opportunity with a realistic approach: i.e., the opportunity to define the objectives of a federalist and democratic European Union with the realistic formulation of concrete proposals for its development within a precisely defined timeframe. Thus, the core objectives governing the EU should include: improving transparency, strengthening democratic legitimacy, structuring the institutional system to serve more than twenty-five member states, and guaranteeing a stable balance between the Union and its members by clearly defining the delineation and division of powers and competences between the various actors on the national and on the EU stage.

The Concept of "Differentiated Integration".

In the context of EU enlargement, Europe's growing heterogeneity is influencing the willingness and the capacity of member states to integrate further. Enlargement and deepening of the EU seem to be difficult to accomplish together, and require the urgent introduction of higher levels of differentiation and flexibility. "Differentiated integration" or flexibility is an expression used to define any set of arrangements, within (or even outside) the EU's institutional order, that represents a departure from the principle that all member states must move towards the same objectives at the same pace. Flexibility may apply to the European project's participants, objectives, pace, or any combination of these. "Core Europe", "variable geometry Europe", "multi-speed Europe", "European vanguard", "opt-out", and "Europe à la carte" are flexibility concepts[1], as is "enhanced (or closer) cooperation."[2] Calls for greater flexibility have been prompted by the frustration felt by certain member states within a system that obliges the convoy to move at the speed of the slowest ship.

"Differentiated integration" became a key topic of debate with the 1996/97 Intergovernmental Conference.[3] Its origins, in fact, go back much farther, to the founding of the EC itself. The debate on differentiation has, however, been much clouded by the huge number of terms used to describe forms of European integration other than the ideal type, in which all participating countries, in principle, operate in accordance with the same rules and policies and in virtually identical ways. Differentiation is the most straightforward, but also the most politically neutral (and actually quite sterile), term used to denote variations in the application of European policies, or variations in the level and intensity of participation in European policy regimes.[4] Many other terms have been coined, most of which seek to prescribe or proscribe a particular preference with regard

to integration, or to convey a particular metaphor for the process of integration.

The case for greater flexibility has been strengthened by the imminence of further enlargement and the accession of member states unable, however willing, to match the pace set by the leaders. On the other hand, there are concerns about the overall coherence and consistency of the Union, the equal sharing of financial burdens, the homogeneity of Community law, fair competition, and the principle of non-discrimination between citizens of the Union. Differentiated integration exists when closer cooperation is established between consenting member states in selected policy fields, preferably within the EU (but also outside it, through recourse to the classical instrument of intergovernmental cooperation if there is no alternative method available, as was the case at the start of the Schengen regime, and with the Bologna process aiming at establishing a European Higher Education Area[5]). Indeed, when a new project goes beyond the legal competences of the European Community, the EU member states are not required to embark upon it all at the same time. However, different groups of states can cooperate more closely and advance together, as long as they keep their group basically open to other member states willing and able to cooperate with them in the given policy area. In certain areas, such as monetary policy (economic and monetary union), internal policy (Schengen, the Prüm Treaty, the G6 informal grouping of interior ministers) and social policy (the Social Charter), stalemates have been avoided through recourse to differentiated integration. Thus, flexibility is a pragmatic choice, made in order to avoid stalemate situations, and it has not yet given rise to new splits within the EU. Indeed, as a working tool, differentiated integration has contributed to increased efficiency and constructive problem solving in the interests of all the member states.

Therefore, EU members that want deeper integration in certain policy areas, such as interior and justice policy, foreign policy and defence, economic policy, research policy, and so on, should be allowed to ally with groups of states sharing similar interests. Forms of differentiated integration are, in principle, applicable across the whole political spectrum, but they can also include closer cooperation initiatives, or be restricted to specific issues. Unfortunately, since the addition of the Treaty of Amsterdam to the Treaty of Rome, the institutional provisions for flexibility have been so strictly worded that it is virtually impossible for 'closer cooperation' initiatives to take place. In particular, it is hard to see how a few member states could voluntarily cooperate more closely in

an area already covered by the Treaties without affecting "Community policies, actions or programmes." Also the flexibility article says nothing about how any costs arising from "enhanced cooperation" will be met, nor does it specify a role for the European Court of Justice. Generally speaking, most initiatives in the framework of differentiated integration (and the present Austrian Presidency has counted over seventy dossiers currently before the Council) are mainly intergovernmentally organised and rather lacking in transparency, showing an inherent tendency to exclude the European Parliament from the decision making, thereby deepening the democratic deficit.[6] At the same time, the flexibility article does not really affect any voluntary arrangements, present or future, amongst member states (and sometimes also non-member states) wanting to collaborate on specific projects, such as the European Space Agency or the Bologna process, that lie outside the framework of the Union. The Schengen Agreement is, to date, the only example of a "flexible" collaboration concept which started outside the Treaties and has gradually been incorporated into the *acquis communautaire*.

The Importance of "Differentiated Integration" in the Debate on the Future of Europe.

There are five key reasons why flexibility has become a last resort, to be vigorously promoted in this time of uncertainty and debate over the future of Europe:

1. *Growing differences among EU member states.* It is a common sense observation that there have always been substantial differences between EU member states and, in fact, among regions or social groups within the single member states.[7] This was true even in the original and close-knit Europe of the Six. From the outset, therefore, and under certain circumstances, the Treaties accepted the existence of objective differences between member states, and accordingly allowed a certain degree of differentiation in the national application of Community rules. Hence, special protocols were attached to the Treaties and special clauses were added to some legislative acts, or different ways of implementing directives were accepted (usually the granting of more time). This, then, is the origin of the term differentiation and the explanation for its periodic recognition by the European Court of Justice. Problems over this strategic concept arise only when differentiated application of a policy by one member state has negative repercussions on other member states.

2. *The EC/EU is just one of many frameworks of European cooperation.* From its beginnings, the EC was only one of many European frameworks for policy cooperation. It coexisted with a variety of other (formal and informal) forums that had different memberships (Benelux, WEU, groupings in the fields of science and technology). It was this situation that gave rise, in the late 1970s, to the term "variable geometry," used to describe the "idea of a method of differentiated integration which acknowledges that there are irreconcilable differences within the integration structure and therefore allows for a permanent separation between a group of Member States and a number of less developed integration units."[8] Again, this was not a problem as long as the groups' spheres of action did not coincide, any occasional contradictions being tolerated, temporarily, by all the parties concerned. However, as the policy scope of the EU expanded and the membership of the club was progressively enlarged, these contradictions, or conflicts, became an increasing problem. This prompted supporters of a strong EU to argue that the Union should become the primary and predominant forum for policy cooperation, absorbing other European forums, such as the WEU or the Council of Europe. But it also caused some subgroups to insist on retaining, in relation to certain objectives, a distinct identity, examples being the Nordic Council and the narrower Schengen and eurozone groups.

3. *Divergence as a Concept that Specifically Accepts Differences.* If divergence is a form of difference it can refer, in EU terminology, to different levels of economic performance or to different socioeconomic patterns. Within the context of the common and later the single market, the question for policymakers was whether and how to compensate for the economic divergences between regions, or countries, in particular through budgetary transfers (since the mid-80s with the help of cohesion policies). A similar debate was started, and remains strong, with regard to economic and monetary union. The whole philosophy of accepting divergence is based upon the notion that all the member countries should try to attain convergence of performance and of policy outcomes — a notion that has always contradicted the assumption that not all member states would actually manage to converge, either because of their particular economic situation or because of their distinct public policies.[9]

4. *EU Member States Caught Between Parity and Leadership.* The founding rules of the EC gave each member state a form of parity within the decision-making process, to counterbalance Germany's historic weight as a major European power. Nonetheless, issues of power, lead-

ership and relative influence have always fired political debate in Europe, the crux of the problem being how, beyond the weighted voting formula adopted within the Council of Ministers, might power differences be taken into account in the way the EC/EU establishes its agenda and reaches decisions. In other words, should the special relationship between France and Germany be regarded as a "driving force" for the integration of the wider group, or, to use a less diplomatic expression that reflects the view of the eurosceptics, the "axis" of integration.[10] For many years, while the EU member states recognised the influence wielded, informally, by Paris and Bonn/Berlin, they were clearly resistant to any suggestion that this "tandem" might be formalised — turned into sort of governing directorate.[11] As the size of the EC/EU has increased, the question has re-emerged, raising various hypotheses: a "multi-tier" construction, in which some of the most integration-minded member states are organised in a first league, while others are left to follow; the concept of "concentric circles" according to which Europe is organised in a "circle of shared law" (the Union's member states), an "adjacent circle" (countries outside the EU waiting to join it), and "more select circles" of greater cooperation (the currency circle, the defence circle, etc.).[12] The debate was stepped up when enlargement was agreed upon and raised the possibility of a widened EU, numbering 27 member states or more. Fears of either a dilution of integration (wider but weaker) or a breakdown of the EU institutions under the weight of numbers have strengthened the case for the formation, within the Union, of a group ("noyau dur" or "Kerneuropa") of more important countries that can act as a driving force.[13]

5. *Integration or Europeanisation of the Member States.* How pervasive and how invasive should integration be for the member states? The problems with national implementation are obvious. The difficult question is how the concept of differentiation, or flexibility, can be rendered operational, given the reasons for its presence in the debate and the mixture of arguments in favour of its development. The constitutional reforms envisaged by the successive European Treaties, from Maastricht to Nice and beyond, extended the EU's scope and authority to an extent that left some governments unwilling to accept all of the consequences, and that provoked vociferous public dissent, which was particularly strong in some member states, for example the United Kingdom. Therefore, a number of "opt-out" and "opt-in" clauses, as well as a series of special protocols and declarations, were added to the TEU, which also embodies the principle of subsidiarity as a counterweight to the centrali-

sation of power within the EU institutions. So Britain and Denmark can practise singularity. These modifications also implied a break with the long established practice of one set of policies applicable to all member states. Therefore, in the mid-90s the UK government was convinced of the benefits of "flexibility" as an operating principle for the EU. But its critics warned that flexibility would lead to the creation of a "Europe *à la carte*", at the expense of collective discipline and of solidarity.[14]

One approach to the problem of the practical implementation of flexibility could be to ask the question: from what common basis should it start? Is there a minimum set of core policies to which all EU members must subscribe and on which there can be no room for manoeuvre? If there is, does it correspond to the *acquis communautaire*, or to something less than that? The EU's formal documents tend to insist on the maintenance of the *acquis communautaire*, even though the sustainability of this position is not clear. Is there scope for variation in relation to the core policy of the single market, so as to allow for local 'differences of taste' (e.g., beer sold only in bottles and not in cans, as in Denmark)? Or to allow differences in the way products are processed (differentiated social and environmental processes), as long as the product in question conforms to minimum essential requirements in order to be able to circulate freely? Another problem is whether EMU should be part of the set of core policies, even though it may be beyond the reach of some current and potential members.

A second approach could be to focus on the question of the so-called hard-core countries. The term "hard core" implies that some member states are more important or committed, and more integration-minded than others. It is proposed that these countries should therefore carry more weight and should be allowed to advance faster than others, or to be pioneers in particular spheres of cooperation. It is usually suggested that this European hard core will include France, Germany, and the Benelux area, initially united in an economic and monetary union. Although this would give these states more political power with regard to the pursuit of a common defence as a priority objective, it would be logical to seek the participation of the UK as a necessary and not just a desirable component. But this is contrary to British European policy and the specific weight of British military capability.

A third approach to this question is to consider whether a vanguard or pioneer group should, in practice, advance, leaving the others irretrievably behind. The members of the Bertelsmann Foundation are tempted to argue that the slower or the more reluctant member states should always

find the door to their participation open; the pioneer group need not be exclusive. This is the view behind the suggestion that any such group, comprising less than the whole EU membership, should be bound by the Treaties and open to late joiners. Yet as the EMU rules already reveal, there is scope for excluding late joiners, precisely on the grounds that they are too different or divergent (as the UK found when its diplomatic representatives suddenly found themselves barred from EMU meetings in the Council).

Conclusion.

Thus, we can see that the differentiation concept is associated with a broad spectrum of ideas, ranging from sensible political solutions for the management of local differences, to solutions relating to the more general question of power and relative influence within the EU. The policy and political choices of some of the member states have long been made; this applies, in particular, to the five countries that seem to be ideal candidates to constitute the core (even though this assertion can be seriously questioned following the failed referenda in France and the Netherlands). But for the other member states the choices are much more difficult. "Differentiated integration" appears quite promising in certain areas (i.e., in relation to security and defence, common rules for the taxation of businesses, and research and development), because it could result in a sufficiently clear, and workable, institutional design for the EU. Certainly, the differentiated integration concept, failing to offer a clear political vision,[15] has some shortcomings. Therefore, one might hope to see the EU developing into a polity characterised by federalism, yet without becoming a federation (=state).[16] If the EU adapts specific federal tools in selected policy areas and works according to federal principles, it might, while not being a traditional federal state, turn into a "federal polity," comprising features of dual and of cooperative federalism. This federal polity could then have an institutional federal pact as its legal document (Constitution). As long as European integration has an open *finalité* and remains borderless, it is an ongoing process with scope for many variations to come.[17]

NOTES

[1] Brandan Donnelly and Jo Shaw, *Flexibility and the Future of the European Union*, London, Federal Trust Report, 2005, pp. 7-9.

[2] See Katrin Langner, *Verstärkte Zusammenarbeit in der Europäischen Union. Stärkung der Integration oder hin zu einem Europa von mehreren Geschwindigkeiten?*, Frankfurt/Main, Peter Lang, 2004.

[3] See Desmond Dinan (editor), *Encyclopaedia of the European Union*, Houndmills, Macmillan, 2000, pp. 137-140.

[4] Even the European Commission has included the term "differentiated integration (flexibility)" into its official Glossary (*Institutions, Policies and Enlargement of the European Union*, Luxembourg, 2000, p. 26) and uses it to define "...a process of integration in which the Member States opt to move forward at different speeds and/or towards different objectives, in contrast to the notion of a monolithic bloc of States pursuing identical objectives at a single speed."

[5] See Peter A. Zervakis, "DerBologna-Prozess – Politische Vision oder pragmatische Antwort?", in *Politische Studien*, 2004, 55, 393, pp. 105-116.

[6] Olga Ilona Niemi, *Perspektiven der Ratspräsidentschaft in einer erweiterten Europäischen Union*, Frankfurt/Main, Peter Lang, 2005, p. 21.

[7] The Enlarged Europe Project in the Bertelsmann Foundation has initiated the mapping of diverging national interests in different policy areas. The first results are expected shortly: see www.bertelsmann-stiftung.de.

[8] Glossary (footnote 4), p. 69.

[9] Peter A. Zervakis-Dominik Hierlemann "Wie geht es weiter, Europa?", in *Europäische Rundschau*, 2005, 3/3, pp. 69-71.

[10] Peter A. Zervakis-Sébastien von Gossler, "40 Jahre Elysée-Vertrag: Hat das deutsch-französische Tandem noch eine Zukunft?", in *Aus Politik und Zetgeschichte*, 2003, 3-4, pp. 12-13.

[11] Josef Janning, "Leadership coalitions and change: the role of states in the European Union", in *International Affairs*, 2005, 81/4, pp. 821-833.

[12] Glossary (footnote 4), p. 29.

[13] See the most recent pamphlet by the Belgian prime minister Guy Verhofstadt , *The United States of Europe. Manifesto for a new Europe*, London, The Federal Trust, 2006.

[14] The Glossary (p. 33) refers to "the idea of a non-uniform method of integration which allows Member States to select policies as if from a menu and involve themselves fully in those policies; there would still be a minimum number of common objectives."

[15] Heinz Theisen, *Die Grenzen Europas. Die Europäische Union zwischen Erweiterung und Überdehnung*, Opladen, Barbara Budrich, 2006, p. 215.

[16] See Martin Nettesheim, "Die konsoziative Föderation von EU und Mitgliedstaaten", in Burkhard Heß (editor), *Wandel der Rechtsordnung*, Tübingen, Mohr Siebeck, 2003, pp. 31-34.

[17] See Peter Leslie, "Finalité, Federalism, Flexibility", in Peter A. Zervakis-Peter J. Cullen (editors), *The Post-Nice Process: Towards a European Constitution?*, Baden-Baden, Nomos, 2002, pp. 215-236.

ABOUT THE AUTHORS

CHISTOPHE CHABROT, Professor of Public Law, Université Lumière, Lyon.

RALPH ALEXANDER LORZ, Professor of German and Foreign Public Law, European Law and Public International Law, Heinrich-Heine Universität, Düsseldorf.

GIULIA ROSSOLILLO, Professor of European Law, Università di Pavia.

PETER ZERVAKIS, Bertelsmann Stiftung.

INDEX TO VOLUME XLVIII (2006)

Some articles from recent numbers:

2002

Editorials
The Tragedy of the Middle East.
Culture and Power.
Mario Albertini.

Essays
Ugo Draetta, Europe in 2002.
John Pinder, Mario Albertini in the History of Federal Thought.
Salvatore Veca, The Ethical Foundations of Politics.
Tommaso Padoa-Schioppa, A European Economic Constitution.

Notes
World Order and Climate Change.
The New American Policy for Defence and Security.
Building Europe or Writing a "Constitution"?

Viewpoints
Sovereignty, Self-Government and Global Government: A World Feder-
    alist Perspective.

Federalism in the History of Thought
Alexander Hamilton.

2003

Editorials
The Road to Peace.
For a Federal Pact Among Europe's Founder Member States.
The Return of Protectionism and Europe's Responsibility.