



A democratic future for the European Union

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Lars Anell has published *Recession – the Western Economies and the Changing World Order* (1981); *Individens frihet och framtidens välfärdssambälle* (together with Ingvar Carlsson, 1985); *På spaning efter tillväxtens rötter* (2006) and *Europas väg – förening och mångfald* (2009). In 2014 he published *Democracy in Europe – an essay on the real democratic problem in the European Union*.

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Preface

Some years ago, I published an essay – *Democracy in Europe* – in which I tried to frame the discussion about the real democratic problem of the European Union. My basic proposition was that the analysis must embrace both the legitimacy of supranational decisions in Brussels and the vitality of democracy in Member States. There are good reasons why sovereign states cede power to the Union in order to take decisions together with other Member States, but the democratic deficit is unavoidable and important. The decision-making process in Brussels is not part of a polity where proposals are debated and contested and, in particular, there is no sovereign that can be brought to account. Thus, competences should be lodged in Brussels only when the gain can compensate for a loss of democratic content at the national level that can be explained to the electorate – and it should take place in broad daylight. The Heads of State and Government, in the Laeken Declaration, feared that a “creeping expansion” had transferred competences to the Union which rightly belonged to the Member States, but they stopped short of mentioning the real danger. If the national political agenda is significantly diluted, we put at risk the democracy of the nation state. Democracy is not only a set of rules – it must have content. Political parties must have reasons to debate and contest matters that people really care about.

The alleged constitutional principle of the Union actually advises that matters should be resolved at the lowest possible level by people who know the lore of the land. By implication, competences should be transferred upwards only when it is necessary. However, the formulation of the principle of subsidiarity in the Lisbon Treaty is inexcusably weak and it has never trumped the political ambitions of the European political elite.

The present text is an effort to look at the interplay between a future Union and the democracy of Member States. It is therefore opportune that the Commission, in a White Paper on the Future of Europe, has issued an invitation to discuss how the EU should evolve. Rich food for thought is provided in the form of five scenarios that span the full political gamut from dystopia to eternal bliss with the realistic options squarely in the middle. Without too much

damage three of the five scenarios can form a common ground to build on.

There is a need to deepen the analysis in respect of three key issues – institutions, democracy and the federal issue. In the White Paper, the Commission takes for granted that form will follow function. This assumption is too optimistic. In particular, it is necessary to define the role of the Commission and the European Court of Justice (ECJ) in a future Union. Democracy is tightly linked to the federal issue. In a full-fledged federal state like Germany or Switzerland, it does not matter, from a democratic point of view, if the competence is held by *Länder* or cantons or is the prerogative of Berlin or Bern. The decision stays embedded in a national democracy with strong legitimacy. If Member States cede power to Brussels the national political agenda is reduced and the quality of the decision is impaired by the democratic deficit. All these issues are afflicted by the fact that practically all matters in the EU are constitutionalized. The Lisbon Treaty mentions almost all known human activities. The consequence is that Member States in the Council of Ministers can challenge a verdict of the Court, known for its activist stance, only if they are able to change the treaty, which is regarded as impossible. The Court is therefore practically immune from democratic interference. Such an outcome was never foreseen or intended by the political lawgivers.

The essay, which could be mistaken for a pamphlet, ends with an effort to sketch a future for a democratic and prosperous Union to be proud of. It must be embedded in and embraced by a vibrant and vigilant democracy in its Member States.

I have benefitted from comments by Margit Endler, Eva Nisser, Michael Sohlman, Birgitta Swedenborg, and especially so, from Karin Anell, Ina Ganguli and Nils Lundgren. Responsibility for the final text rest with me.

Vejbystrand, August 2017.

“Impoverished, overladen with barriers that prevent the circulation of her goods but are no longer able to afford her protection, our disunited Europe marches towards her end. Alone, no one of our countries can hope seriously to defend its independence. Alone, no one of our countries can solve the economic problems of today. Without a freely agreed union our present anarchy will expose us tomorrow to forcible unification whether by the intervention of a foreign empire or usurpation by a political party”.
Message to Europeans from the Congress of Europe in The Hague,
March 10, 1948

”But, – you see, a bank or a company can’t do that, because these creatures don’t breathe air, don’t eat side-meat. They breathe profits, they eat the interest of money. If they don’t get it, they die the way you die without air, without side-meat. It is a sad thing, but it is so. It is just so.”
John Steinbeck in *The Grapes of Wrath*

“Most people with principled stances don’t survive for long.”
Julian Assange

A democratic future for the European Union

The White Paper on the Future of Europe, presented on the first of March 2017 by the President of the Commission, Jean-Claude Juncker, is an invitation to an honest and wide-ranging debate on how Europe should evolve in the years to come. The purpose is to find a safe passage towards democratic legitimacy and prosperity for Europe *and* the Union. Fortunately, it is surprisingly easy to bring a logical order to the discussion if we accept the need for flexible integration. However, we need also to extend the discussion to embrace institutional issues and explore the federal organization of responsibilities.

The five scenarios

The White paper begins with a very brief but useful description of Europe's position in a changing world. For instance, it is unavoidable that our share of global production and population will continue to fall substantially. Measured as median age we will soon be considerably older than any other region in the world and the working age population is shrinking. The Europeans do not appreciate their Union – only a third of the citizens trust the EU while half of them did so ten years ago. On the sunny side, it is noted that Europe is home to the most equal societies in the world and some of the very best universities.^[1] European companies hold a substantial part of all patents – especially for renewable energy technologies.

The introduction is followed by five scenarios sketching out possible futures without indicating any clear preferences. They should not be seen as detailed blueprints or policy prescriptions. In several regards, they overlap and are therefore neither mutually exclusive, nor exhaustive.

The first scenario – *Carrying on* – has been referred to as business as usual. It is nothing of the sort. The general development of the Union follows the trajectory outlined in the document *New Start for Europe*, issued by the Commission in 2014, and the Bratislava

1 In this area Brexit will have a devastating effect. Of the five European universities among the world's fifteen best, four are in Britain and one in Switzerland.

Declaration agreed by the remaining 27 Member States in 2016. The Union is substantially strengthened in respect of financial supervision, border control and on foreign policy it is hoped that the Union will speak with one voice more often than not. Progress is made towards a common asylum system. The single market is strengthened and significant investments in digital, transport and energy infrastructure is part of a common strategy focussing on growth and jobs. An interesting, but understandable, feature is the lack of ambition to deal with the serious flaws of the European Monetary Union (EMU). Progress on improving the functioning of the single currency is only “incremental.”

There is a strong emphasis on the fight against terrorism and defence. Member states “decide to pool some military capabilities and to enhance financial solidarity for EU missions abroad.” They will also deepen defence cooperation in terms of research, industry and joint procurement. The Union will be able to assume international leadership in areas such as climate, financial stability and sustainable development.

No doubt this scenario is the Commission’s preferred *realistic* option. However, it rests squarely on the assumption that decision making can be speeded up. There is an interesting note of caution against going too far. EU legislation should be continuously updated and obsolete provisions discarded but also regularly checked “to see if it is fit for purpose.”

The second scenario – *Nothing but the Single Market* – is curious in more than one respect. In fact, not even the Single Market is left standing. Only the free flow of goods and capital is intact. Unhindered movement of workers and services “is not fully guaranteed.” Apart from trade, relations with third countries become increasingly bilateral. The underlying assumption is obviously that the process is driven by a strong and widespread wish to dismantle legislation that does not pertain to the Single Market, but there is no explanation why this is the case, or why it is not done in an orderly fashion based on agreed criteria and priorities. If the aim of this scenario is to illustrate what must be avoided at all cost, it lacks credibility.

The description of each scenario ends with a review of “pros and

cons.” The *Nothing but the Single Market* scenario earns no pros while the *Carry on* – alternative is rewarded with only pros.

The third scenario – *Those who want more do more* – could also be called flexible integration. The idea is simple and straightforward. If some countries want to enhance integration among themselves they should be allowed to go ahead as long as the “status of other Member States is preserved.” The less adventurous countries should also have an opportunity to join in later. The Commission illustrates the possibilities in respect of defence, internal security and justice – and argues forcefully for the perceived advantages. In my view, there is no need to provide examples. In this case it is the principle that is important and the only restriction is our lack of imagination. Those who want to do more in areas of their own choice should be allowed, maybe even encouraged, to do so as long as the two principles are observed. The “enhancers” should, again in my view, have access to the Commission’s services and be free to choose whether they want to make internal disputes subject to the arbitration of the European Court of Justice (ECJ).

It is interesting that the Commission has outlined a vision that has many attractive features.

The Commission’s conclusion is that in this scenario “the unity of the EU at 27 is preserved while further cooperation is made possible for those who want.” It can’t be said much better than that.

Swedish politicians of different stripes have paid generous lip service to the fourth scenario – *Doing less more efficiently* – but no government representative has advocated these principles audibly in the halls of Brussels. It is interesting that the Commission has outlined a vision that has many attractive features. Priority is accorded to innovation, trade, security, the management of borders and, in particular, high-tech clusters and excellence in research and development (R & D). Less attention will be paid to regional development, public health, employment and social policy. The reason given is that the

Union is perceived to contribute only limited added value in these areas. However, it is not clear what this retreat could amount to. EU institutions have an operational role only in respect of regional policy. This activity has often been hailed as a great success and an important demonstration of European solidarity. It is also clear that the poorer Member States will not allow the treaty bound funding to be scratched from the budget. Public health, employment and social policy are largely a responsibility of national authorities. As long as these issues are discussed by ministers in Brussels but decided on and executed at the national level, there is no need to change the division of responsibilities. In any case, paying less attention to these areas in Brussels will not release resources worth mentioning for other purposes.

The boldest step is taken regarding foreign policy and defence. “The EU speaks with one voice on all foreign policy issues; a Defence Union is created.” These issues will obviously have to be treated with great care and ingenuity. There are already several forms of enhanced defence and security cooperation. The most important is of course the North Atlantic Treaty Organization (Nato), of which a large majority of Member States are members, along with the United States, Canada and Turkey. In another context, but not in this scenario, the Commission observes that if a European Defence Union is created it will be in “full complementarity” with Nato. Great Britain and France are engaged in a number of bilateral military undertakings. In May of this year, France and Germany announced that they would soon start to develop a new military fighter jet and there are no prizes for guessing who will dominate this partnership. Unknown to most of us, Sweden’s National Defence Radio Establishment (FRA) is in close cooperation with the American National Security Agency and the British GCHQ to spy on other countries’ communications over optic fibre networks.^[2] The Swedish government has recently decided to join the Joint Expeditionary Force, composed of seven Nato-members and led by Great Britain. Very soon the Union will only have one permanent voice on the UN Security Council and it belongs to France. It may, on the face of it, look like a simplification.

2 Deakin (2017).

It is of course a troubling fact that a defence union and excellence in R & D will be less impressive when the country with the strongest armed forces and the best universities is about to leave the Union.

The only difference between the third and the fourth scenario is that, in one of them, enhanced cooperation is carried out by shifting alliances of the willing, while, in the other case, it is the creation of all 27 Member States.

The fifth and last scenario – *Doing much more together* – implies that “cooperation goes further than ever in all domains.” However, apart from defence and security, it is not clear what *all* Member States would do over and above what is achieved in the *Carry on* scenario. The level of ambition is higher in R&D but the result depends on whether private actors will invest. One interesting addition is that citizens will have more (unspecified) rights derived directly from EU law. However, the decisive steps towards deeper integration regarding fiscal, social and taxation matters are taken only by the members of the Eurozone. The title prompts one to believe that this is the dream scenario of the European political elite. But in the text presented by the Commission, this vision is not given a fair hearing and it ends “not with a bang, but a whimper”. There is the risk of “alienating parts of society which feel that the EU lacks legitimacy or has taken too much power away from national authorities”. However, the illustrative snapshot to demonstrate this danger is beside the point. It refers to a situation where people have difficulties to identify the responsible European authority when they want to stop an EU-funded wind turbine project from being established in their own backyard. Certainly no one is willing to grant any EU body the authority to decide *where* a project of this kind should be executed on a sovereign nation’s territory.

The five scenarios are brief and the few concrete examples serve merely as illustrations. The purpose is obviously to stimulate a wide-ranging debate on the Union’s future. It is therefore worth noting that there are a few common characteristics.

The most important item in the EU budget is not mentioned at all. Since 2003, the Common Agricultural Policy (CAP) has been turned into a system, which, over the current seven-year period,

distributes some 355 billion euro in cash from landless taxpayers to those in possession of arable land without an obligation to produce anything edible. No one has ever contested that this is a transfer of income and wealth from the poor to the rich. This program – The Holy of the Holies of European integration, based on the three guiding principles of fraud, inefficiency and waste^[3], and shielded from accountability by the ECJ^[4] – is left untouched in the five scenarios. Even in the *Nothing* but the *Single Market* scenario, where things fall apart, the CAP is kept out of harm's way.^[5]

None of the five scenarios address the basic flaws of the EMU. Since the aim of the White Paper is to stimulate a discussion, this is probably a wise decision, but it gives rise to some ambiguity whether proposals concern all members or only those that are in the Euro-zone.

As far as wanted reforms are concerned, the Commission attaches pre-eminent priority to defence and security. Existing cooperation in these areas is basically left intact even in the dystopian second scenario. In all others, there is substantial progress.

Brexit is mentioned, but its consequences are not addressed (which is understandable). However, Angela Merkel's "call to arms" would be a lot more credible if effective defence and security cooperation could continue with Great Britain.

Institutions are not addressed in any scenario. The Commission expects that "the form will follow the function." This is a vain hope. There are at least two problems that must be addressed head on – the role of the Commission and the competence of the European Court of Justice.

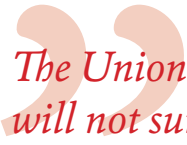
The way one defines the Commission has consequences for the

3 To the best of my knowledge, the three principles were coined by Martin Wolf, chief economics commentator at the *Financial Times*.

4 The Court has actually decided that European taxpayers are not allowed to obtain information about who receives agricultural cash grants – often amounting to millions of euros. The integrity of the farmers takes priority.

5 It is an interesting fact that the CAP is almost always unmentioned in reports which purport to present a vision for the future of Europe. Since the beginning of the Union, more than half of the budget has been allocated to agriculture and 80 per cent ends up in the hands of the 20 per cent richest land owners. The reason that CAP is not discussed is that scholars take for granted that it is beyond redemption because it is so firmly captured by strong vested interests. Sometimes academic freedom amounts to no more than voluntary chains.

governance of the Union. Some well-respected scholars are convinced that the proper way to deal with the democratic deficit is to let the Commission usurp a more political role on the basis of the composition of the European Parliament. In support of this stance, it is claimed that there is an ongoing trend in this direction crowned with the success in the nomination of a *Spitzenkandidat* for the presidency of the Commission. I would regard arguments based on what has happened during the last 10–15 years as weak, at best. The point of departure must be that the Commission performs an indispensable function as guardian of the treaties and impartial spokesman for the European value added. In many important negotiations, the Commission acts as a facilitator and arbitrator. The formal monopoly to put forward proposals gives it an underestimated power of the pen. None of these functions can be reconciled with a politicized Commission that is the captain of one of the teams. The Union will not survive without a European civil service which is widely accepted as both effective and impartial. The situation today is not altogether satisfactory. A move in the wrong direction could spell disaster.



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The problem of the ECJ runs deeper. It is widely accepted that the Court, early on, assumed an activist stance to the extent that some scholars came to regard it as both a court and a legislator. For quite some time this role was accepted and appreciated, since it solved political problems and produced useful additions to the *acquis communautaire*. Now, as a result of a number of more controversial decisions, it has become a severe problem, since no legal scholar seems to be able to indicate the outer boundaries of the Court's competence. This becomes a sinister brew in combination with a constitutional treaty that covers all walks of life in a language that is less than crystal clear in 24 varieties. As a consequence, we have allowed the ECJ to be the final arbiter of several sensitive political matters, such as the financing of public service, access to health care and social housing

A slippery slope

The Commission suggests, in the White Paper, that matters where common action can add only limited value, or where there is a mismatch between decisions and implementation, could be left to the Member States. In the fourth scenario – *Doing less more efficiently* – the “EU27 stops acting or does less in domains [...] such as regional development, public health, or parts of employment and social policy not directly related to the functioning of the single market.”

It is therefore astonishing that concern about division of responsibilities is conspicuous by its absence in the Commission’s recent proposal to erect a European Pillar of Social Rights. It focuses on the very essence of the European welfare state and the heart and soul of national democracy – “equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion.” It is a pet project of Jean Claude Juncker, who wants to make the EU an AAA-rated social project. He would like to “put social priorities at the heart of Europe’s work” and “hopes to see the Pillar endorsed at the highest political level before the end of the year.”^[6] It is not clear how 20 principles will be given operational shape and be implemented since, according to the press release, it is a “joint responsibility of Member States, EU institutions, social partners and other stake-holders.”

The proposal from the Commission has been welcomed in many quarters. The Swedish government seems to favour the idea that the social rights we have enjoyed for a long time should be extended to citizens in poorer Member States. Several representatives of trade unions have declared themselves happily surprised and scholars, with impeccable progressive credentials, are pleased that the Commission has finally realized that the Union cannot only be a market serving corporate interests. For instance, Torsten Müller and Thorsten Schulten hope that the proposal for fair wages will pave the way for a “European minimum wage policy which promotes the idea that all minimum wages should be set at a living wage level.”^[7]

6 This must refer to the European Council and is another example of how the Council of Ministers is left out of the loop.

7 Müller and Schulten (2017). See also Hefferich (2017) and Crespy (2017).

The point is not whether paid parental leave, fair labour standards and decent pensions are good things or not – the question we must address (and come back to) is at what level and by whom these issues are to be deliberated and resolved. This is the very issue in a federal state and it is even more important in a quasi-federal organisation like the EU. When competences are transferred to Brussels they leave the sphere of national democracy; in a proper federal state like Germany or Switzerland they stay in the democratic sphere.

Politicians in Sweden and in other rich Member States may be in good faith when they recommend that the 20 principles of the Social Pillar shall apply to all. Another reason could of course be that costly social reforms will diminish competition from low cost production. But that is beside the point. More important is that all the 27 democratic Member States should be free to decide what kind of welfare state they want and can afford.

It is important to assess to what extent a transfer of competence to Brussels can produce European added value (i.e. an output which we can only realize together with 26 other countries) but the key issue is the impact it will have on democracy in the nation-state. The Social Pillar is a clear and present danger in this respect. Only a small part has yet been imposed on Member States by acts of EU legislation and it is not clear what will happen after it has been endorsed by the European Council.

It sounds nice to say that the Pillar of Social Rights is a “joint responsibility of Member States, EU institutions, social partners and other stakeholders,” but it is not true. The ultimate responsibility rests with the nation-state. This is where citizens can (still) exercise their rights and where a government has the obligation and the means to provide services or financial remuneration.^[8] If the rights were incorporated in EU legislation, the ECJ would become the final arbiter of citizens’ rights and democratic governments’ obligations.

When the proposal to create the Social Pillar was presented in

8 The British Prime Minister, David Cameron, claimed, when he was trying to convince the electorate that Britain should remain a member of the EU, that “paid holidays, maternity rights, equal treatment for the millions of people working part-time, protection for agency workers, even equal pay for women at work [...] all could be at risk if we left”. Every adult citizen, of course, knows better.

Stockholm at an SNS seminar in April, it was repeated *ad nauseam* that the Commission did not intend to impose anything on unwilling Member States, and certainly not on those outside the Eurozone. It is difficult to discern this promise in the press release:

“The European institutions will help to set the framework and lead the way forward for the implementation of the Pillar, in full respect of the Member States’ competences and social dialogue traditions. A number of principles and rights included in the Pillar will require further legislative initiatives to be effective. Where needed, existing EU law will be updated, complemented and better enforced.”

It is very hard to see why EU law must be *better enforced* if the Social Pillar is a voluntary scheme.

An adoption, by the European Council or the Council of Ministers, of the Commission’s proposed Pillar of Social Rights does not automatically confer new competences to Brussels (with the exception of extended rights to parental leave). Neither is it only an effort to polish the Commission’s credentials as a champion of social welfare. The problem is that the 20 principles cover issues that constitute the essence of social matters and, as expressed by Amandine Crespy, the process envisaged “blurs responsibilities and channels of accountability by conflating regional, national and EU competences”. It is perfectly all right if Brussels investigates best practice modes of delivery of social services or provides comparative statistics, but it should be made clear that full responsibility for organization and implementation stays in the hands of the regional authorities and governments, which have the power to tax and finance social services.

Giving Brussels the authority to implement the Social Pillar will dramatically increase the inclination of an already slippery slope. Even an weak application of the principle of subsidiarity should stop, in its tracks, this attempt by the Commission to take over the regulation of the European welfare state.

It is useful to remember that large swathes of social and economic matters have already been transferred to Brussels, with or without democratic oversight. Governments can provide social housing for

citizens only to the extent that the Commission and the Court do not consider that it disturbs the market. The Court has also firmly established that an EU citizen can seek health care in any Member State even though the Lisbon Treaty seems to say exactly the opposite.^[9] The Euro-countries, for which the Social Pillar is “primarily conceived”, have not only handed over responsibility for the exchange rate to ECB, but have also ceded their sovereignty with regard to fiscal policies. If, in the future, social policies will also be dictated from Brussels, there will be precious few issues that will engage the electorate in these countries. Jürgen Habermas sees it as the coming of a “post-democratic autocracy” in which no one can be held accountable.^[10]

9 The relevant text of paragraph 176.8 of the Treaty on the Functioning of the European Union (TFEU) reads: “Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organization and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources allocated to them.”

10 Quoted by Hennette et al. (2017)

Democracy at risk

Democracy does not figure prominently in the White Paper and it is never mentioned as a problem. However, the need to strengthen the democratic legitimacy is obvious, and the Commission does acknowledge that the scenario where all are *Doing much more together* is hardly possible without a robust popular mandate. In order to frame the discussion of the Union's democratic deficit and the relationship between Brussels and nation states we need to consider it in a broader perspective.

When this new millennium was born, a majority of sovereign states, for the first time since we were hunters and gatherers, were democracies. Our hope that progress would continue has been dashed. Since the turn of millennium there has been an ominous regress. Even governments in Member States have used authoritarian methods to secure their grip on the levers of power. At the time of writing the Parliament in Poland has passed a law that will give the Minister of Justice unlimited discretion to appoint members of the Supreme Court.^[11] In the United States, democracy is squeezed between popular opinions created by dark money and a president openly hostile to a free press.^[12] Powerful governments almost certainly finance organized hacking to sway elections in genuine democracies with a toxic mix of embarrassing truths and fabricated facts – aided and abetted by the indiscriminating net. History, and in particular European history between the wars, teaches us that that the dark forces did not win because of what they promised, but because the people were fed up with what they had. This is arguably the most dangerous threat to democracy. However, it falls outside the purview of this short essay. We shall focus on the political welfare of the genuinely democratic Member States of the Union.

The content of democracy – the sphere that is directly or indirectly governed by political decisions that derive their legitimacy from

11 The major part of the decision was vetoed by President Andrzej Duda and sent back to the Sejm.

12 In July this year, the department of justice in Washington demanded that the host of a perfectly legal website should hand over all available information, including photos, of all “visitors”. The frightening aspect is that some legal scholars believe that the request may be upheld by the courts.

properly elected parliaments – has been considerably reduced over the last fifty years in all Western democracies. Several factors, some of them inevitable, have been conducive to this development.

Globalization has fundamentally changed the balance of power between governments and companies – and, in the same direction, between trade unions and employers. Efforts to tax too hard or regulate too strictly can affect, in particular, multinationals' decisions to choose more welcoming environments. In small countries, governments must tread with caution in order to keep companies at home. There is an abundance of tax havens that allow individuals and companies to hide their assets anonymously, some of them in the United States and in EU Member States. Large unions in the private sector must consider how agreements on future wages affect the competitiveness of their employer.

Technology has made many natural monopolies unsustainable. This applies with special force to public broadcasting – long gone are the days when we all saw or heard the same programme and discussed it around the water-cooler the next day. An increasing number of people are spoon-fed news that harden the views they already have. Governments and parliaments still have responsibility for energy supply, mail distribution and telecommunications but the providers are now often private companies and the prices are set by the market. In some instances, a private monopoly – distribution of electricity in Sweden is a good example – has been substituted for a public one.

Privatization of services in the public sector has accelerated after the neoliberal revolution that gained force in the 1980's. In one respect, this has actually enlarged the democratic remit. The responsibility for health care, education and care for the elderly rests squarely with the government, but the task is now more challenging since it includes regulation, supervision and evaluation of private providers. The "school market" is particularly attractive for profit motivated actors since the customer must "buy" and the government is obliged to pay.

In democracies, several important missions have always been



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assigned to experts beyond the direct reach of political influence. The independence of courts is a mainstay of a democratic polity. The granting of patents and authorization of new drugs are best left in the hands of people with the necessary skills. Monetary policies in nation-states and in Europe have been handed over to experts. There is, since the neoliberal revolution, a near consensus among politicians and economists that central banks shall be independent (because reigning majorities are prone to fiscal profligacy in election years). At first flush, it seems eminently reasonable that finance ministers and central bankers should coordinate their activities – now fiscal and monetary policies are often at loggerheads. Be that as it may – the effect is that no government can be held responsible for the deluge of cheap money from central banks, which has brought about an immense transfer of wealth from savers to borrowers. Countries in Euroland have accepted a tight ordoliberal straitjacket for fiscal policies, with the Commission as supervisor and the ECJ as the final arbiter

Now, in order to focus the discussion on the democratic challenge in the EU, it is useful to set out the premises:

1. We must consider both the democratic legitimacy of the Union itself *and* the vitality of national democracies. It is not a zero-sum game – rather the opposite (see item 6).
2. The formal requirements of a genuine democracy include freedom of speech and association, secret elections, transparency and accountability. But there must also be content. Political parties must contest matters people care about. Elections must, at least potentially, have visible and meaningful results. People must see a link between the act of voting and the governance of the realm.^[13] A choice between alternatives is good for the vitality of the system. It is of great value if a political career is attractive for talented young people.

13 There are many reasons why fewer people bother to vote or join political parties. However, it is inevitable that the lack of content must take part of the blame. The Brexit referendum may be illuminating. Some 3 million people, who had not voted in the general election in 2015 and rarely took part at all, finally found a reason to go to the polls. Incidentally, four of five of them voted to leave the Union (enough to sway the referendum).

3. The democratic deficit of the Union concerns both the formal deficiencies and the lack of content. The major shortcomings are lack of transparency and accountability. There is no visible link between democratic elections and output and there is no way to pinpoint who is responsible. In nation-states, it is generally agreed that the government will be accountable for everything that happens during its term of mandate. This option is not available in the Union since there is no known sovereign; neither is there a fixed term of mandate since the composition of the Council of Ministers changes in step with the outcome of elections in each of the 28 Member States. The political arena is almost empty. There are no competing pan-European parties and the electorate is not presented with programmes related to the Brussels agenda. The European Parliament is not a parliament in any sense of the word. No party or individual member of the European Parliament can put forth a proposal. In order to have any meaningful influence on legislation the political factions must reach a common position, which practically eliminates a debate.

4. The twin democratic deficits of the Union cannot be remedied in the short run and the long-term solution is a full-fledged federal state. The efforts underway to politicize the Union will aggravate rather than solve the problem. This stark choice is beautifully illuminated in two recently published books by two eminent German scholars. The law professor and former member of the German Constitutional Court, Dieter Grimm, is severe in his criticism of the EU's democratic deficit and lack of legitimacy. The solution is to strengthen the authority of the nation states as a foundation for European cooperation.^[14] Professor Ulrike Guérot, in her recent book, *Warum Europa eine Republik werden muss!*, takes Grimm's assessment of the Union's democratic shortcomings one step further. Her censure of its democratic deficit is ferocious. As the title of her book gives away, her solution is different. What prompts her to opt for a federal state is that we cannot live with the present undemocracy – and the nation state is considered to be a relic of the past. Her solution is a *Flucht nach vorne* – the subtitle of the book is *Eine politische Utopie*.^[15]

14 Grimm (2017).

15 Guérot (2016) is thoroughly fed up with the EU but it is not clear which is worst – the

5. The democratic backbone of the Union is the Council of Ministers. It is the only institution that can lay claim to decent democratic legitimacy. The distribution of votes in the Council and the requirements for a majority in different cases have been carefully negotiated and agreed upon among the Member States. Decisions by the Council are often criticized, not only by British tabloids, but generally accepted as legitimate. The institution is dominated by ministers from the world's most democratic nations and all its decisions have been prepared with great care, involving civil servants from all Member States. Even the voice of a small country can be heard above the din in Brussels and often finds a sympathetic audience for pleas concerning politically sensitive matters.

It is therefore alarming that so many competences have been transferred to, or are shared with, the European Council,^[16] intergovernmental ad hoc institutions, the European Central Bank (ECB), the Court and the Parliament. For citizens in Euroland, it must be well-nigh impossible to figure out where decisions on fiscal and monetary matters are taken and, in particular, who is accountable. A substantial part of the stuff democracy is made of has been placed beyond the reach of popular interference, in the hands of the Commission, the Bank and the Court. Stephanie Hennette, Thomas Piketty, Guillaume Sacriste and Antoine Vauchez have, in a paper published online by *Social Europe*, tried to localize the 'government' of the Euro Area. They find it hard to

sorry state of EU; the impotence of the nation state; the devastating effects of neoliberalism or the hopelessness of it all. The EU is "kaputt"; the blueprint was wrong from the beginning and what Europe needs is nothing less than a "Copernican turn." The nation state is a relic of the past – it can neither protect, nor inspire its citizens. "Power, market and money" (Macht, Markt und Geld) have laid waste the welfare state. Europe is now made up of markets without a state and economies without democracy. It is impossible to free oneself from the impression that this extremely dystopian perception of Europe is intended as a motivation for her vision of an ambitious European Republic leading the way to global democracy.

16 This is the official name of the meetings of Heads of State and Government from the Member States. According to the Lisbon Treaty, this body has no legislative function.

“identify the democratically accountable ‘institution’ which today implements European economic policies. We are indeed aiming at a moving and blurred target. Characterized by its informality and opacity, the central institution of that government, the Eurogroup of Finance Ministers of the Euro Area, operates outside the framework of the European treaties and is in no way accountable to the European Parliament, nor to national parliaments. Worse, the institutions that form the backbone of that government – from the European Central Bank (ECB) and the Commission to the Eurogroup and the European Council – operate following combinations that constantly vary from one policy to the other.”^[17]

6. A transfer of competences from the national level to Brussels^[18] impoverishes the democratic system in nation-states and increases the democratic deficit of the Union. Fewer issues will be debated and contested by political parties in general elections and decided by winning coalitions in national parliaments. The unavoidable EU deficit will apply to more matters. In addition to this simple mathematical fact there are several other drawbacks. Politicians at the national level have richer information and can accommodate local conditions. They care about consequences because they will be held accountable. Their decisions have (at least in Western Europe) a high degree of legitimacy in the sense that they are accepted also by those who wanted another outcome. When competence is transferred to Brussels, decisions will be taken further away from an environment rich in information and experience (and vested interests) – and, in most cases, one size must fit all Member States.

If the general thrust of these six premises is accepted some conclusions follow logically:

a. The status of the Council of Ministers as the principal legislator of the European Union must be strengthened or, at least, not further undermined.

b. The principle of subsidiarity must be the guiding principle

17 Hennette et.al. (2017). They also find it difficult to explain how this system of governance was established. It “evolved in a blind spot of political controls, in some sort of democratic black hole.”

18 The expression “Brussels” stands for a transfer of competence to EU institutions where decisions are taken by a majority of Member States; intergovernmental ad hoc bodies and non-elected bodies like the ECB, ECJ and the Commission.

to realize the Commission's wish to establish "a clearer division of responsibilities" between Brussels and national governments. A first basic requirement is that any transfer of competence takes place in an orderly fashion based on a well-considered and transparent decision.

c. It is sensible to remember and heed the warning, issued by the Heads of State and Government in the Laeken Declaration^[19], against a creeping expansion of the Union's competences under the guise of democratic oversight.

The future of the EU must be democratic – and it can only be democratic on the basis of vibrant national democracies. Only in the nation state is there a visible link between the electorate and the sovereign and, consequently, effective means to bring responsible politicians to account. It is therefore imperative that democracy in the nation – state is not further impoverished.

Many people of a cosmopolitan inclination *want* the nation state to be a relic of the past, such as Professor Guérot, or at least that it should give precedence to a supranational organization. It is a respectable position but we cannot afford to neglect the risks involved. The welfare contract is still national as far as the financial obligations are concerned. No Western European electorate has expressed a willingness to change this situation any time soon.

19 In December 2001, the Heads of State and Government adopted the Laeken Declaration, which was intended to serve as terms of reference and guidelines for the Convention that was charged with the task of drafting a Constitutional Treaty. The document is one of the most interesting official EU texts. It is surprisingly open-minded and self-critical to the extent that it entertains the possibility that some competences should be restored to Member States. There may even be a need to provide national governments with "guarantees that their spheres of competence will not be affected" and the Convention is invited to consider how "a creeping expansion of the competence of the Union or [...] the encroachment upon the exclusive areas of competence of the Member States" can be prevented. The Heads of State and Government advised the members of the Convention to reflect upon what should be included in a basic text that would be very hard to change and what could be contained in ordinary legislation. Unfortunately, the Convention, and in particular its Praesidium, would have none of it. We are therefore left with a text that covers all walks of life, subject to the interpretation and judgement of the European Court of Justice, whose decisions are without appeal.

The federal issue

There is no model for how a federal state comes into existence. The Swiss started with the three “urcantons” on the meadows of Rütli in 1291.^[20] The association gradually expanded as new cantons felt the need for a common defence against the Habsburgs. In North America, the thirteen original states fought together for their independence from the British Crown. In both cases, the integrating force was “high politics”^[21] – defence against a common enemy and the need to regulate external relations. In the British colonies in North America, the states never had any of the competences vested in the Union.^[22] Another common feature was that the cantons and the states developed organically in parallel with the union they were part of.

The European project does not emanate from high politics. The mundane task of the ECSC was to regulate the coal and steel industries and the EEC created a common market for goods. In between the birth of these two organizations the venture into high politics – to create a defence union – was thwarted by the French National Assembly in 1954. The European Union is, still, primarily an organization that regulates the economic life of Member States. The only truly federal component is the legal order. The common trade policy is a modest expression of high politics – the common foreign and security policy is embryonic. Yet the EU has the same need to define the competences that should be vested in the union.

Another important and unique characteristic of the EU is that it is the creation of fully democratic nation-states – in many cases independent since the Middle Ages. All competences vested in the Union have been ceded by nation-states.^[23]

Given the political importance of the federal challenge and the fact that, in many quarters, it is a four-letter word, it is important

20 Historians have been unable to confirm exactly where and when the pact between Uri, Schwyz and Unterwalden was sealed but the tradition is strong.

21 Anell (2002)

22 A decisive federal step was taken when Washington assumed responsibility for the “national” debts of the thirteen states.

23 In one version of the proposal for a Constitutional Treaty, presented by the Praesidium of the Convention, it was stated that the Union derived its competences from the Constitution. It was corrected and explained as an editing mistake (which it was not).

to spell out what we mean. The task is to decide whether a decision should be taken at the federal or the national/local level. There is no reason to assume *a priori* that one level is better than the other. Neither shall we take for granted that some issues naturally belong to the union or to the nation state. The task is to set out the criteria for the division of responsibilities. One obvious criterion is the added value of a change. A competence or responsibility shall not be moved from one level to another unless there is a gain in some form. The other aspect to consider is the impact at the losing end. Thus, the federal issue is strictly a matter of where and by whom political issues are resolved. The importance or emotional quality of a policy does not of itself decide its rung in the federal hierarchy.^[24]

A complication is that the “trade” is not made in the same currency – at one end of the bargain there may be an estimated and measurable economic output and at the other a loss of democratic content and quality. It may well be, that a decision at the federal level produces added value but not enough to compensate for the loss at the local level. It would be an advantage if shop hours were the same all over Europe (which was once suggested by the Germans according to uncertain sources) but it was deemed that we could live without it. The obvious but small measurable gain of time-saving could not motivate the loss of a sovereign right to regulate shop hours. Thus, there is no neat and tidy solution. We have to rely on the common sense of our political representatives. However, we have a right to demand that decisions of fundamental importance for the national democracy must be taken in broad daylight. We must avoid the creeping expansion of Brussel’s competences that the Laeken declaration warned of.

Subsidiarity is the key principle in all federal states and it is never treated in a pragmatic fashion. Whether the lower rung is made up of *Länder*, cantons, provinces or states, they defend their constitutional prerogatives as a matter of hard principle. The EU is not a federal state but the relationship between Brussels and Member States has the same quality and is far more explosive. A transfer of competences

24 If the principle of subsidiarity was actually applied there would of course be a strong presumption that matters be resolved at the lower level and the burden of proof on those who wanted to move competences “upstairs.”

to EU institutions implies that an issue leaves the genuinely democratic sphere of a nation-state. This is not the case if it takes place in Germany or Switzerland. The federal competence is then strengthened at the expense of *Länder* and cantons but the issues concerned are still deliberated and resolved in a democratic comfort zone. One main constraint on Angela Merkel's activities in Brussels is that she is prevented from accepting a compromise that would impair competences that belong to *Länder*. The argument is also used when she wants to be prevented from agreeing with the French.^[25]

The Swedish attitude to the federal issue, as I understand it, is pragmatic but misguided. Each case is assessed on its merits. Policies we consider important, such as those regulating working time and environmental standards, should be decided in Brussels and implemented across Europe. This approach is worse than naïve. It leads logically to a situation where matters that the Swedish electorate care most about are subject to supranational majority decisions.^[26]

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The legal structure of the Union is basically federal. The court in Luxembourg is the Supreme Court within its own jurisdiction. This is as it must be, since some institution has to be the final arbiter regarding matters covered by EU-legislation. But there are two problems.

The first is that legal scholars are unable to tell us where the boundaries of the Court's competence are. The legal scholar Koen

25 The French dominated the development of the EEC but has, in particular since the unification of Germany, lost ground. It is a neglected fact that Paris has reasons to welcome Brexit since it will rebalance their relations with Germany.

26 In a paper published in March of this year, the Swedish government presents its ambitions regarding EU-cooperation (Regeringens övergripande prioriteringar för EU-arbetet 2017). At a very general level, it is clear that priority will be given to employment and inclusive growth; climate-energy-environment; and migration. Since many of the issues addressed in the document are almost exclusively the prerogatives of national governments, it is surprising that there is not even a hint of a principled approach to how competences should be distributed. Thus, "a more social Europe should be given a bigger role in the EU cooperation" and "coordination of social welfare systems should be developed." It is also surprising that Sweden seems to embrace "A common security and defence policy that comprises an effective capability to deal with crises and can manage both external and internal security."

Lenaerts has pointed out that there is simply “no nucleus of sovereignty that the Member States can invoke, as such, against the Community.”^[27] The former German President and President of the Constitutional Court in Karlsruhe, Roman Herzog goes even further. He claims, in an article written together with Lüder Gerken, that the ECJ deprives Member States of basic competences by “inventing legal principles that form the basis for later decisions.”^[28] Opinions may differ on specifics but it is an established fact that the judges in Luxembourg give themselves great latitude to interpret what the founding fathers of the Union actually meant (or wanted). The Brexiteers referred to the ECJ as a rogue court. That is a stretch, but some restraint would be desirable from a democratic point of view.

In another context, I have discussed a case in which a Swedish court asked the ECJ for a so-called preliminary ruling concerning the use of jet-skis in the northern archipelago during the short hatching season.^[29] The judges in Luxembourg discussed at some length the non-existing problem of discrimination before advising the Swedish colleagues to consider the potential sales effect of the limited restrictions on the use of jet-skis. The ECJ apparently takes on a responsibility for the expansion of the market *per se* which comes close to Roman Herzog’s accusation of inventing legal principles.

The European Council in Laeken asked the Convention for a short text which would contain what one expects to find in a constitution – the fundamental values underpinning society; the rules of governance and accountability; division of competences; legal order and protection of civil liberties. The rest should be treated as normal legislation. The reason was that constitutions are, by intent, very difficult to change. The Convention delivered a 350-page tract that had a kind word to say about any known human activity, including a promise not to regulate the religious life of common people (art. 17 in TFEU). The Lisbon Treaty we now have contains the lofty principles about freedom and equality but also bureaucratic minutiae which in most countries would not be given legal status of any kind. For instance, on numerous occasions one finds that advisory or other

27 Quoted by Weiler (2004), p. 287–88.

28 Herzog & Gerken in EU Observer, 10 September, 2008.

29 Anell (2014), p.44–45.

bodies are established. In article 151 of the Treaty on the Functioning of the European Union we find that Member States “believe” that something might happen. Normally constitutions deal with *how* and by *whom* a country is governed. The Lisbon Treaty,^[30] like the Rome Treaty, is filled with instructions of *what* should be done, not seldom expressed as wishes to be fulfilled in a more blessed future.^[31] For instance, article 223 in TFEU orders the European Parliament to “draw up a proposal to lay down the provisions necessary for the election of its members by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States” – well aware that such an agreement requires unanimity. In a democracy, the *whats* are taken care of by the winning coalition that emerges from free elections – it is not ordained by the constitution. Much of what is now in the Lisbon Treaty will soon be obsolete. If we stick to the rules we would need to change the Treaty to clean up the mess.

It is important to understand why the “*überkonstitutionalisierung*” is at the heart of the Union’s democratic deficit. Neither the Council of Ministers, nor the Commission can in effect challenge decisions of the Court which are based on an interpretation of the Treaty. If Member States find that the ECJ arrive at a decision beyond the intentions of the lawgivers – as was the case when it gave citizens access to health care abroad – their only alternative is to change the Treaty. In practice, this option is not at hand. It takes a long time, it requires unanimity and the new text has to be ratified by all parliaments. When the economic crisis hit Europe the Lisbon Treaty did not allow the urgent measures deemed necessary. In this particular case, the Eurozone countries might have been able to get their act to-

30 Since the Lisbon Treaty was finally agreed in Lisbon it takes its common name from the capital of Portugal. The short first part is called Treaty on European Union (TEU). The main part of the text contains the Treaty on the Functioning of the European Union (TFEU).

31 According to hard and clear rules the Constitutional Treaty was rejected in 2005 when first the French and then the Dutch people turned it down with overwhelming majority and high turnouts. It may be emblematic of democracy in Europe (then – ?) that not one member of the political elite for a moment considered the option to accept the verdict of the people. At a seminar in Stockholm in 2007 the invited panellists referred to the “failed referenda” and discussed how the French and Dutch governments could “get off the hook.” The political elite’s disregard, bordering on contempt, for popular opinion is discussed in my essay *Democracy in Europe* (p. 21 – 29).

gether but they could not wait since immediate action was required. The response was to “forget” some provisions in the Treaty and create a new hybrid organization based on a combination of intergovernmental commitments and EU law.

The most important effect of the constitutionalisation is that competences are gradually transferred to Brussels as a consequence of the Court’s interpretation of the TFEU of the Lisbon Treaty beyond the oversight and control of any body, democratic or not. Degrading the TFEU to what it ought to be – secondary legislation – would have a salubrious effect on the democratic health of the Union. The Council of Ministers could challenge an interpretation of the Court by a majority resolution. The Commission could initiate legislation to rein in the learned judges in Luxembourg. The Court would lose “constitutional” powers it was never intended to have. It would, of course, still have the duty to interpret all secondary legislation but a majority in the Council of Ministers could correct a wayward Court. Together these corrections would significantly change the balance between the law and democracy.^[32]

In this context, it is useful to remember what the German scholar Fritz Scharpf has insisted on. There is an asymmetry between negative and positive integration working in favour of deregulation and privatization. The Court can, and has done so on many occasions, liberalize a market with a stroke of the pen. This is the negative route to an ever closer union.

32 By all indications, the founding fathers of the European project intended to draft a Treaty that would bind the Member States only, as was then and still is the case in Gatt/WTO. It is important to note that many decisions by the Court have, after some consideration, been welcomed by the Member States. That is probably also the case with the decision to create pan-European access to medical and health care. The paragraph about health care (168.7 in TFEU) says that Union action in this field “shall respect the responsibilities of the Member States for the definition of their health policy and for the organization and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them”. It therefore came as a surprise to a most, if not all, Member States when the ECJ gave European citizens generous opportunity to turn to hospitals abroad for the care they wanted. (Anell 2014, p. 42) When the decision was taken, it was highly controversial but it is no longer audibly questioned. Most governments see the advantage of using underused capacity in other Member States. The most obvious case of integration by law is the Cassis de Dijon decision in 1979. It spelled out the principle of mutual recognition which paved the way for the internal market.

On the other hand, positive efforts to regulate the market by, for instance, establishing noise levels for lawn movers or environmental standards for chemical products, take years to produce and negotiate.^[33] This, independent of whether the law is constitutional or not, again give the Court the upper hand.

The second problem is more acute. Already in 1963, in the *van Gend en Loos* case, the ECJ established the principle that individuals could have the right to appeal to the court to gain rights denied by the national jurisdiction. The judges referred to the preamble of the Rome Treaty since it, in their opinion, expressed the will of the legislator. This verdict “gave the EU-law to the people” according to the American scholar Roy H. Ginsburg.^[34] As a consequence, private companies or public authorities are obliged to provide the required services or cash payments dished out by the ECJ. So far, the effects on the public purse have been negligible.^[35] This will no longer be the case if the entitlements under the Social Pillar are defined by the Court. Also, the fifth scenario – *Doing much more together* – would aggravate this problem. Without spelling out the scope, the Commission states that citizens will be accorded more rights “directly from EU law.”

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Decisions on the allocation of competences must be guided by the added value of taking an issue to the higher level and the political vacuum created below. The arguments in favour of a strict application of subsidiarity are quite strong. This philosophy, with deep catholic roots, tells us that matters should be dealt with at the lowest possible level. The local community has a number of advantages. The inhabitants have intimate knowledge and experience of what is at

33 When the incumbent American President recently announced that he had done more, during his first hundred days in office, than any of his 44 predecessors, he gave top billing to United States’ withdrawal from the Paris Agreement on climate. This feat is obviously easier to achieve than to provide decent and affordable health care to the American people.

34 Ginsburg, p. 118.

35 It could be argued that the effects of agricultural subsidies are more than marginal.

stake; they will enjoy or suffer the consequences of all decisions; they can assess the cost in relation to the expected outcome and those that took the decisions are not far away. Furthermore, the content of local democracy is vital for the cohesiveness of society. The further from this “thick” environment the issues are resolved, the more diluted and abstract is the information. The decision-makers no longer have “skin in the game” and it becomes more difficult to identify the ones to blame or praise.

A strict application of the principle of subsidiarity entails an effective alignment of decisions on the rights of citizens and the responsibility to provide the necessary resources. In the nation-state one and the same body performs both these functions. The parliament decides on the taxes that are necessary to pay for the entitlements it has provided for the citizens. It is obvious that it would be dangerous if a non-elected body in Luxembourg, beyond democratic control and appeal, would decide on matters that would have significant effects on what national treasuries must pay.

It is no good saying that we have simply pooled the solemn right of the Swedish people to tax themselves with a fraction of influence on the conditions in the Union. In an arithmetic sense, it may be argued that we give up 100 percent of our exclusive right to decide on a certain matter in exchange for a small part of the right to influence the decision at the supranational level. But this argument only blurs the issue since the quality of the decisions and the currency differs. It is easier to see it for what it is. We accept a loss of sovereignty^[36] because the gain is substantial and the impact on national democracy is acceptable. Thus, it should be a well-considered decision to give up part of our sovereignty in exchange for an output that cannot otherwise be obtained (or, at least, is very difficult to realize). As a member of Gatt until 1994, and after that WTO, we are *de facto* obliged to bind our tariffs and accept a number of provisions regarding state aid and subsidies.^[37] The bargain is that all other members are subject to the same discipline which give companies with production in Swe-

36 There is an important academic discussion about the definition of sovereignty. Many scholars and the German Constitutional Court consider that competence, but not sovereignty, has been ceded to the ECJ.

37 The regulation of the internal market is a mixture of WTO provisions and EU law.

den predictable access to the markets of the world. There was never any effort to conceal the fact that we had ceded sovereignty by pretending that we had pooled it with other countries. This transfer of competence was facilitated by the fact that the issues concerned rarely figured prominently in the national political debate. And we never tried to disguise the loss of sovereignty as a share of an immensely larger pool. The commitment made by a member of Nato is of a completely different order. According to article 5, all partners “agree that an armed attack against one of them in Europe or North America shall be considered an attack against them all, and consequently they agree that if such an attack occurs, each of them [...] will assist the Party or Parties so attacked.”^[38] In exchange for collective security, the Parties to the treaty have given up the sovereign right to decide whether they want to go to war or not.

The Commission states the obvious when it says that “a clearer division of responsibilities helps European citizens to better understand what is handled at EU27, national or regional level.” Even more important is that decisions, whenever possible, should be taken by people who have easy access to relevant information and care about the consequences because they will be held accountable.

A narrative worth telling

It did not surprise anybody that the Tories were unable to present a decent set of arguments which presented European integration as a positive achievement. The leadership of the party were in favour of staying in the Union, but it was all too evident that the Prime Minister David Cameron, and several members of his cabinet, loathed most of what took place in Brussels. The *Remain* campaign relied almost exclusively on what came to be called Project Fear. The Chancellor of the Exchequer, George Osborne, produced a stream of studies which showed that average households would lose a significant share of their income until 2030. A parade of the world’s leading lights were invited to tell the British people what kind of misery could be expected if they chose a future in splendid isolation. The

38 The first and only time that Nato has invoked article 5 was after the 9/11 attack against the United States.

impression was that the only reason to stay was that it was dangerous to leave.

However, also parties with a more pro-European outlook have been unsuccessful in their efforts to “sell” the Union. As already mentioned, the White Paper informs us that only one third of the citizens trust the EU today while half of them did so ten years ago. One reason for this failure is that Member States do not share the same vision of the future Union.

The original six Founding States had markedly different reasons for initiating the project. Some motives were obvious and clearly stated – others could not be mentioned publicly, at home or abroad. All were wrapped in European rhetoric.

Given their horrendous legacy, the compelling reason for Italy and, what was then, West Germany to join the European Coal and Steel Community (ECSC) in 1950 was the opportunity to enter again the brotherhood of independent nations as equal partners. The Italian Prime Minister, Alcide de Gasperi, stressed in private conversations, but not necessarily in public three other motives for Italy’s membership of the European Economic Community (EEC). The government in Rome wanted a large open labour market for some two million people who could not be employed at home; economic and political integration would “dilute” the strength of the Italian communist party; and the deeply religious de Gasperi also wanted to free his Christian Democratic party from the tutelage of the Vatican.

Public opinion mattered only in France. It was evident that the National Assembly would only ratify an agreement to join the EEC if a number of stringent conditions were met. This made it possible for the French to drive a hard bargain and extract important concessions from the other five countries. It included substantial contributions to French overseas territories but the top priority was agriculture.^[39] However, the saying “industry for Germany and agriculture for France” is only half-true. The government in Bonn did not need a

39 The recently published *Histoire mondiale de la France*, edited by Patrick Boucheron (2017), tells the story of the French by stringing together some 150 events, which have defined their nation. Neither the Schuman Declaration, nor the process from Messina to the Rome Treaty bears the contemplation of the editor and his team of coordinators, but the Common Agricultural Policy (CAP) is invited in.

common agricultural policy but once it was agreed, it insisted on generous support for small family farms (the mainstay of political support for the Bavarian christian democrats) and the combined markets of the six was never enough for the German industry. France and the Netherlands wanted a common agricultural *market* shielded from competition from third countries. They did not want a high level of domestic support, since their farmers were highly competitive inside the Community. The unfortunate compromise was a prohibitively protected market with generous subsidies for all farms.

A conservative British government applied for membership of the EEC for the first time already in 1961. Harold Wilson's Labour government tried again in 1967. Both efforts were vetoed by President de Gaulle (against the will of the "unconsulted" other five Member States). It was left to the Tory Prime Minister Edward Heath to lead the British, together with Denmark and Ireland, into the Common Market. The motives were primarily economic. Although it was clear and openly admitted that the short-term negative effects on income and balance of payments would be significant there was overwhelming support in Great Britain for membership since it was expected to pay off in the long run. The Danish and the Irish were attracted by the common agricultural policy. After the ensuing enlargements of the Union more than half of the Member States receive annually a net financial contribution big enough to define their priorities.

The narratives produced by EU institutions are too marred by pure propaganda and fake facts to be effective. It is simply not true that CAP has been an unmitigated success – it has never delivered on the core objectives. It has been hard to establish a robust correlation between financial support from regional funds and economic development. The British scholars Harold Clarke; Matthew Goodwin and Paul Whiteley have drawn attention to the surprising circumstance that, apart from the special cases of Ireland and Luxembourg, the economic growth rate fell in all Western European countries from the day they became members.^[40] The Cecchini report promised that the creation of the internal market would spawn an era of majestic growth. It did not materialise. As late as May 2008, the Commission

40 Clarke; Goodwin and Whiteley (2017).

waxed lyrical about the EMU, since it ensured that all the economies in the Eurozone “work harmoniously together” and the “single currency itself also acts as a protective shield against external shocks [...] Existing coordinating mechanisms mean that decisions can be taken quickly and smoothly – both in good times and in the event of economic and financial difficulties.”^[41] But the fault lines in the Eurozone were evident in the statistics collected by the ECB and the Commission long before the crisis.^[42] At the time of writing, Euroland has – unlike every other comparable country – only just returned to the pre-crisis level of production – and the pre-crisis performance was worse than in any comparable economy, save for Japan.

Even worse is the frequent use of the nuclear argument. In all solemn EU declarations, and in innumerable academic tracts, the Union is given credit for successively longer periods of peace – 70 years in the White Paper. Some observers may think that Nato, which came into existence more than a year before the Schuman declaration, and the deployment of hundreds of thousands of American soldiers on European soil close to the borders of the Warsaw Pact, was more important. Not only did it provide democratic Europe with a credible defence against the threat from the Soviet Union – it would have stopped any non-communist country from the mere thought of taking up arms against a neighbour. But it is only if one posits that the Union is the guarantor of European peace and security that it becomes legitimate to see every kind of obstruction of the process towards an ever-closer union as an existential threat.^[43]

When opinion polls predicted an uncertain outcome of the referendum on the Maastricht Treaty, *Le Monde* warned, in an editorial, that a

41 Marsh, p. 44.

42 Marsh places the responsibility squarely with the Commission and the ECB because they had access to all the facts and figures that showed the rapidly deteriorating situation for Greece and other vulnerable countries.

43 In my book *Europas väg – förening och mångfald* I have discussed at some length, the origins of the widely held view that it was the creation of ECSC and the EEC that prevented a new conflagration in Europe. It is, of course, said in the Schuman Declaration in 1950 that, by placing the responsibility of the coal- and steel industries in the hands of the High Authority, “any war between France and Germany becomes not only unthinkable, but materially impossible” but the facts to corroborate this statement are thin on the ground. All European politicians concerned, even de Gaulle, were united in their opinion that the security of the continent depended crucially on the presence of American troops close to the borders of the Soviet empire (p. 370 – 72).

Non would be as bad for Europe as had been the nomination of Hitler as *Reichskanzler*.^[44] Both the French and Dutch government used the nuclear argument to bring the electorate to heed and accept a Constitutional Treaty that *The Economist* recommended for the waste bin. Ordinary citizens were informed that the EMU was not solely about a single currency and a more dynamic economy but, more importantly, about peace in the twenty-first century. The argument was also used to inform Swedish voters of the ramifications of a No to the Euro. When it became clear that he could actually lose the referendum Cameron warned his audience that a British withdrawal could jeopardize European security.

Another less than convincing argument for European integration is the bicycle theory. Almost every member of the political elite has more than once – in earnest – pointed out that the project is actually a process with an uncertain destination. Jacques Delors famously called the Union an UPO – an Unidentified Political Object. It is compared to a cyclist, who must keep pedalling to avoid falling to the ground. Everybody who has been on a bicycle knows that it is easy to use the brakes in order to stop and then put down a foot to catch one's breath. It is difficult to understand why the Union would fall apart if it enters a phase of consolidation. But the theory allows the argument that the answer to any problem is “more Europe.”^[45] If we return to the realm of empirical evidence, it is clear that every time a proposal has been subjected to popular scrutiny and rejected, it has been because of “too much Europe.” Think about it for a moment – have we climbed a bandwagon that cannot be stopped by democratic means? If so, unfortunately, the process has continuously bestowed Brussels with new competences. As recently as May this year Angela Merkel voiced her concern, with reference to the travails of the Eurozone, that “standing still means regress.”

Another less than convincing argument for European integration is the bicycle theory.

44 *The Economist*, July 5, 2003.

45 Remember that an essential part of the definition of populists is that they have simple answers to complex problems.

When things go awry and popular discontent is manifest, the conventional wisdom in Brussels is that the Union must come closer to the people. The White Paper affirms that “the EU’s positive role in the daily life is not visible if the story is not told locally. Communities are not always aware that their nearby farms, their transport networks or universities are partly funded by the EU.” This goes against the grain of the Lisbon Treaty and it is not true. Agriculture, transport and universities are not financed from Brussels. EU institutions distribute funds provided by taxpayers in Member States. Some countries get back more than they put in; others get less. The most consistent, and certainly most visible, argument by the Brexit campaign was that Britain paid so much and got so little. It is probably correct that the several thousand micro-projects – often costing less than 100 000 SEK – that are financed through EU’s Social Fund create fan clubs among recipients (and the many thousands of consultants who helped them get it). A more detached observer would probably question the value of Brussel’s meddling with matters which should be on the agenda of the parish meeting.

The Heads of State and Government, in the Laeken Declaration, advised against “European institutions inveigling their way into every nook and cranny of life.” It is about time that the European political elite realize that citizens are aware that many forms of international cooperation add value to their lives even if it is not visible in the immediate neighbourhood. The EU internal market is the world’s largest economy with common policies for competition, public procurement, state aid and product standards. It is easy to understand that it contributes to a significant reduction of transaction costs even if we do not actually see it on a daily basis. There are many areas where countries, in theory, could go it alone but where, in practice, joint action is the only feasible mode of operation.

It seems that we are trying, at the same time, to do too much and too little. The Union is not a panacea or miracle but neither is it a failure. It is time to go back to some simple facts. It is *sui generis*, but that does not mean that it is a venture into the unknown.^[46] The

46 Guérot (2016) makes an interesting observation. Since the European project is *sui generis*, it becomes immune to the criticism that can be directed against a normal political organization (p. 60).

Union should certainly be held to a high standard, but there is no reason to pretend that “more Europe” is always the answer. The pros and cons of proposals should *a priori* carry the same specific weight. The view that fiscal policy should remain a national prerogative is not *per se* an expression of xenophobia. Condescension – and there was an abundance of it from the Remain camp in Britain – is not a potent weapon in a democratic debate.

It is outright dangerous to concede the moral high ground to the cosmopolitan *Weltanschauung* that embraces unbridled globalization and deregulation of national markets. The present president of the United States declared that he would put “America first.” Stripped of its Lindberghian legacy it should be self-evident that an elected head of state is expected to take care of the nation’s interest. However, the fact that Hillary Clinton did not say it with the same force became a serious liability in several constituencies in states which she narrowly lost. Angela Merkel is the only European politician with an undisputed international status but her electorate does not doubt that she puts Germany first – as she should. Part of the trick is that Germans still pretend that their national interests smoothly align with the way Europe is bound to evolve. Helmut Kohl’s mantra was that he wanted a European Germany. In a speech in September 2014 Angela Merkel reversed the order when she explained that what’s good for Germany is good for Europe.^[47] President de Gaulle, of course, did not pretend; neither did Margaret Thatcher. The major net receivers of funds from Brussels frequently make concessions conditional on that the money keep coming. The representatives of American states are not ashamed to turn the budget process into a pork barrel war. It is pure hypocrisy to pretend that the EU is radically different. Andrew Moravcsik made a valid point when he remarked that the most surprising thing one can say about the Union is that it is normal.^[48]

The EU is predominantly shaped by compromises between national interests, but proposals put forward by governments are regularly presented as if they, in the main, serve European objectives. This grandstanding should cease since it plays into the hands of the xenophobic extremists. Parties which want to close borders and leave

47 Quoted by Wirtén (2017), p.128.

48 Moravcsik (1998), p. 4–5.

the Union draw a large part of their support from the people who feel that they have been let down by a political elite who accord higher priority to cosmopolitan values than to the care of and attention to domestic welfare.

An increasing number of people probably regard themselves as citizens of the world and would welcome the end of the Westphalian era (as did the philosophical founders of the European project). The problem they overlook, at their peril, is that the social contract is still predominantly national. Everyone is entitled to her or his European dream but it is necessary to think twice about how we go from here to there. Thus, it is incumbent on the supporters of a federal state to explain how we reach the end station without derailing the project. My cautious approach has always been that we should move at historical speed and be guided by tangible and tested results.^[49] The EU cannot and should not give up its bent for international action but, as matters stand, the project must appeal also to people living in places far away from Davos and Brussels.

The effort to make the EU into something more than it is has meant that we have lost sight of its simple and powerful *raison d'être*.

It allows countries to achieve something that they cannot do on their own

If we were to accept the strictest version of subsidiarity – in Brussels only when it is (absolutely) necessary – the internal market would still pass the muster with flying colours. It is not possible for a single country to extend its “domestic” market unless it merges with other markets. Part of the bargain is all legislation pertaining to product standards, competition legislation, public procurement and state aids. In all other fields it is, in theory, possible to go it alone but in several cases cooperation is clearly to be preferred. The reason is primarily the economic size of the Union and the soft power that comes with it. Sweden cannot put paid to the shenanigans of multination-

49 The illustrious group of former prime ministers who were the alleged authors of the Berggruen report wanted a Swiss-like federal state, but that it should come into its own at a break-neck speed. None of the members of the group advocated anything like a federal state when they were still in power and had the possibility to do something (see Anell 2014, p. 60–61). It is worth recalling that it took a hundred years and a bloody civil war before the Americans started to say that the United States “is” instead of “are” (White, 2017)

als like Google, Amazon and Microsoft to avoid paying taxes and restrict competition. If a small country tries hard to pursue corporate and individual tax-dodgers they may simply pack up and leave, but no big company can afford to stay away from doing business in all of Europe. The EU recently demanded that Google should pay fines amounting to 2.4 billion euros which significantly dented its recently reported quarterly profit. The company will probably appeal, but it will not leave Europe if it loses. Small countries are wont to speak up about corruption in Russia and abuse of human rights in China and Saudi Arabia – authoritarian countries can punish less than correct behaviour without breaking international rules. The EU could protect Member States from being discriminated against by thin-skinned dictators. Sweden participated as an independent country in the Uruguay Round and defended its interests with some success. However, the possibility for a small country to be pro-active and gather support for its ideas depend solely on the strength of its arguments – a commodity which is severely underpriced in international fora. In the area of climate change not even the EU's soft power is enough.

Other areas where European cooperation is mandatory if we want to see an effective outcome include fight against terrorism and international, organized crime. Protection against digital warfare becomes more effective at the European level both because of resources and the possibility to retaliate.

The Net has exposed companies and households to a wide variety of fraudulent activities that are practically risk-free because the perpetrators cannot be identified and apprehended. A common practice is to send invoices for alleged services to a large number of individuals and companies, knowing that a healthy profit is guaranteed since a big enough minority will pay. Those who resist are pestered with threats of legal action. There is seldom any opportunity for individuals to get in touch with the company that has dispatched the invoice. Swedish police recently closed its investigation



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of a company that sent false invoices to small companies since it was impossible to identify the “entity” which issued the claims. The solution near at hand is to establish that anyone who wants to place a financial claim on a third party must be properly registered with an EU authority in such a way that the owners and managers can be held responsible and reached by the directly afflicted “customers”. It is perfectly possible to let Brussels be in charge of registration and supervision while Member States are free to decide on the penalties.

In fact, there is a very concrete and topical example of potential joint action that could be very rewarding. Trade policies are an exclusive union competence, and the Member States have agreed to implement a Union Customs Code (UCC) in order to facilitate online exchange of information between the Commission, national authorities and firms. The legislation is common, and its substantive provisions entered into force on 1 May 2016. The hands-on implementation, which should be completed 2020, is the responsibility of each Member State. Thus, costs, which are substantial, will be higher when 27 new IT-systems have to be developed. More important is arguably that enforcement may be less than uniform. It looks very much like a template of a practical, non-political task that all Member States could and should do together.^[50]

The list of tasks for the Union also includes climate change, transborder pollution, investment in scientific infrastructure, asylum policies, tax evasion and peace keeping – maybe even the moral global leadership pledged in the Laeken Declaration. Many, but not all, Member States would add defence and security.

Admittedly, it is not easy to strike a perfect balance between competences which belong to the Member States and matters which they should do together in Brussels – and opinions differ. It is sometimes argued that the EU should be in charge of major issues and leave the nitty gritty to national capitals or regional institutions. This advice does not even take us in the right direction. The main responsibility for the Union is the preservation and development of the internal market which includes certification of all products – and product

50 Based on Information from Per Nilsson, Deputy Head of Sweden’s Customs Authority.

standards *are* details. The rules of the democratic game, on the other hand, must remain a national prerogative.

The EU may not be able to claim that it has saved the peace of Europe but it is the guarantor of democracy and human rights on the continent. It was not part of the message from Rome, but it is now an established fact that membership is conditional on democracy and respect for human rights. Greece could join only after the military junta had left. Spain and Portugal became members as newly minted democracies. The more demanding task was the Eastern enlargement. It hasn't been and isn't frictionless, but it is not a mean feat.

As the custodian of democracy in Europe, the Union cannot absolve itself from the duty to protect a system where people, parties and opinions matter more than corporate money or worse. Europe's political scene is still dominated by parties able to organize and articulate the opinions of the electorate and politicians acting on their convictions. However, many parties are in bad shape and almost all are becoming weaker and less able to represent the popular will. Membership is shrinking in almost all European countries and the privilege to represent the people in parliament attract fewer talents. It may well be that the political ground is shifting beneath our feet. Most of us are relieved that Emmanuel Macron and his *En Marche* emerged victorious in France but what we saw was also the moral collapse of a political order – only a minority bothered to vote and established politicians abandoned their earlier affiliation in droves in order to stay in the sun. The tools to deal with the situation are in the hands of Member States but the legal order of the Union should be protected from the “creeping expansion” of the American litigious system and the pervasive influence of dark money.^[51]

The political elite of Europe will never be satisfied with a Union that consists of the internal market and the low-hanging fruits of co-operation. However, we need not belabour this point. The question whether the internal market is enough or not is irrelevant – there is no viable European project without it. And the competences that a reasonable interpretation of subsidiarity would allocate to Brussels are more than enough to build a future Union to be proud of.

51 Mayer (2016) is the outstanding report on dark money in the United States.

Thinking the unthinkable

In the Laeken Declaration, the European Council recommended that the Convention charged with the task of drafting a Constitutional Treaty for the Union, should take a fresh look at the division of competences, and pointed out that this could imply that certain tasks could be restored to Member States. The Chairman of the Convention, Valéry Giscard d'Estaing, commenced his assignment with a *phase d'écoute*, after which he declared that he had not heard a word from anyone that competences should travel back to nation-states. If this was true, which is quite possible, it must, in retrospect, be seen as a missed opportunity. The Convention was satisfied with a principle of subsidiarity that lacks legal bite and the issue of competences was never seriously discussed.

The *acquis communautaire* is the intellectual achievement of the Union. It includes the legislation that has been agreed, unanimously or by different kinds of majorities, among the Member States. The very thought that it could be reduced was for a long time unthinkable. In this perspective, it is both surprising and refreshing to read documents like the Laeken Declaration and the White Paper. The Heads of State and Government mention in particular that the Union meddles with matters that rightly belong to the authorities of the Member States. The White Paper addresses the issue in a more underhand fashion. In the fourth scenario – *Doing less more efficiently* – “the EU27 stops acting or does less in domains where it is perceived as having more limited added value, or as being unable to deliver on promises. This includes such areas as regional development, public health, or parts of employment and social policy not directly related to functioning of the single market.” When new tasks are chosen, says the White Paper, there should be a better alignment between promises, expectations and delivery. The changes will free resources for the policies that should be executed with greater efficiency, and protect the EU from being blamed for the failures of the Member States. The example given is the car emission scandal where the EU was expected to act, but did not have the tools to do so “in a direct and visible way.”

The White Paper underlines that, whenever possible, decision,

delivery and responsibility should be closely and visibly aligned. This is the case in nation-states where parliaments legislate, provide the means for execution and take full responsibility. National politicians seldom praise the EU for much, but are prone to let it take the blame. International organizations with supranational power have always been a convenient way for politicians to allow themselves to be prevented from doing things they want to be prevented from doing. Thus, the Commission's wish to lay bare the line of responsibility is easily understood.

As already explained (p. 11), it is unlikely that reduced responsibilities will release significant resources. The task of the EU is primarily to regulate the economic and, increasingly, the political life of member states. The budget contains substantial amounts for agriculture and regional development – and a puny allocation for research. EU institutions have an operational role only in respect of regional policy. However, the more important reason to transfer certain domains back to the member states is that it will enrich democracy at both ends.

Today there is a strong reluctance in many capitals to cede more authority to Brussels and several leading politicians have indicated that some competencies could be restored to nation-states. The Dutch government has scrutinized the legislative pipeline of the Commission and suggested that several proposals should be revised, dropped altogether or restored to the national governments. The German Constitutional Court has been increasingly reluctant to accept legislation that impair the competences of the *Bundesrepublik* and its *Länder*.^[52]

The fourth scenario invited us to consider in what areas we should be satisfied with less. The Commission's reason is primarily that the EU contribution has limited value. We can do better than that. If a competence is transferred back to where it belongs there are multiple advantages. The national democracy is enriched and the Eu-

52 The German Constitutional Court has on a number of occasions assessed whether Germany's membership in the EEC, the EG and the EU is compatible with its constitutional law. It has always found a way to accept what is politically unavoidable. The 145-page decision on the Lisbon Treaty is to a large extent based on wishful thinking and addresses, in my view, the wrong democratic problem. Still, it is clear that the Court would be reluctant to accept a further shift of power from Berlin to Brussels.

ropean democratic deficit shrinks. The quality of governance is likely to improve and, if not, the culprits can be apprehended.

The Commission, in the White Paper, states the obvious when it says that “a clearer division of responsibilities helps European citizens to better understand what is handled at EU27, national or regional level.” Even more important is that decisions, whenever possible, should be taken by people who have easy access to relevant information and care about the consequences because they will be held accountable. This, of course, is nothing but one of many ways to formulate the principle of subsidiarity – the putative constitutional backbone of the Union. If taken seriously and executed in an orderly fashion, a restoration of competences to Member States would increase democracy both in Brussels and in nation-states.

It is easy to make a long list of issues that should be restored to Member States if we apply the strictest version of the principle – “only when it is necessary.” The most obvious candidate is agriculture, which has added not limited, but negative value. As already said, since 2003 owners of arable land receive a cash grant per hectare without any obligation to sow or reap. If we accept the present level of support as the highest level admissible, we can leave it to national authorities to decide if less is more. Ministers of finance are well aware that subsidies for some are taxes for others. Generous support for agriculture is bound to have negative effects for the competitiveness of industry. This is particularly important in Eastern Europe, where agriculture still accounts for a significant part of GDP and employment. One of the most harmful effects of the Common Agricultural Policy in all Member States is that subsidies are internalized in the price of land. Furthermore, what we call agriculture is not the same creature in southern Portugal as it is in northern Finland and Sweden. If agriculture was liberated and returned to the national agenda it would substantially enrich the domestic polity. Political issues do not come more local und context dependent than agriculture. National governments would be able to shape policies that are adequate at the local level from a social, economic and environmental perspective.

Also, regional cooperation could be designed to enrich national democracy and promote greater economic efficiency. Most people

would accept a duty for rich Member States to support poorer regions in the south and east. However, it is simply ludicrous that rich net contributors to the EU-budget send money to Brussels, engage in negotiations to claw back as much as possible and receive it in a way that distorts economic incentives and interferes with local democracy.

The criteria for reordering responsibilities, chosen by the Commission, are adequate and would be fully satisfactory with one addition – it is necessary to provide special protection for domains that are indispensable for a vital democracy. Freedom of expression and association are necessary, but democracy must also deal with and have consequences for matters that people care about, like working conditions, functioning of the labour market and provision of social services. Even more important is the need to protect the quality of the democratic debate. A free press and an independent and strong public broadcasting service (which is practically extinct in the United states) are beacons of enlightenment when we are inundated with fake news financed from inexhaustible sources of dark money. It is an affront to common sense and decency that the Lisbon Treaty restricts the role of public service and public support for many voices in media to what the market will allow. According to Protocol 29, which forms part of and has the same legal status as the Treaty, “the system of public broadcasting in Member States is directly related to the democratic social and cultural needs of each society and to the need to preserve media pluralism.” The rules of the game are then fleshed out in the operational paragraph:



Even more important is the need to protect the quality of the democratic debate.

“The provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting and in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading

conditions and competition in the Union to an extent which would be contrary to the common interest, while the realization of the remit of that public service shall be taken into account.”

At best, public service organizations can achieve what no one else can – a narrative of reality that all political actors have to relate to. They must not necessarily accept it, but they will have to take it as a point of departure for the democratic debate. The indispensable condition for a vital democracy is that we, to a large extent, share the same perception of the world around us. It is therefore an abomination that the ECJ will be the judge, without appeal, of what public service is in “the common interest”. Governments can finance public service only as long as it “does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest.” This leaves an indispensable part of our democracy in the hand of the Court, which has a sinister tendency of siding with the market.

A more logical order

A quick glance at the five scenarios presented by the Commission tells us that two of them can be dropped. Recent events have taught us that a disintegration process cannot, with absolute certainty, be ruled out. However, in a constructive discussion about the future of EU, the dystopian scenario, *Nothing but the Single Market*, has little to contribute. The fifth scenario, in which EU27 are *Doing much more together*, is deemed unrealistic in the White Paper. It is also difficult to see, even for a committed federalist, what it has to offer that is not already in the first (*Carrying on*) and third (*Those who want more do more*) scenarios. If we allow, or even encourage, alliances of the willing to push ahead, without waiting for the slowcoaches, it goes without saying that enhanced integration will be realized far easier and quicker in many areas with several participants. It is reasonable to assume that the pioneers have a more solid popular support for giving up national competence in exchange for tangible rewards of joint action. Successful cooperation that gives rise to added value will probably attract those which have waited and seen. If we disregard the practical problems of managing a possibly large number of separate legal and institutional entities it is difficult to see any advantage in opting for the fifth scenario. Moreover, it rests on the assumption that “there is far greater and quicker decision making at EU level” which is a pipe dream. If we allow more ambitious Member States to enhance cooperation among themselves we get, almost certainly, the maximum amount of voluntary integration on offer. Should we enforce a strict rule that all Member States must do everything together, at the same time, stasis is the likely result.

This leaves us with three scenarios and they can easily collapse into one. The given foundation is the *Carrying on* scenario. It contains a highly ambitious and optimistic reform agenda that will be pursued by “27 Member States and the EU institutions”. Part of it is within reach, if the Union can get its act together in fields such as climate change, sustainable development, the fight against terrorism and organized crime, investments in scientific infrastructure and – fingers crossed – asylum policies. Some countries will have problems

with deepened defence cooperation but it will, no doubt, be possible to pool military capabilities for peacekeeping operations. Some of the reforms, such as those concerning public finances and capital markets, are intended only for the Eurozone countries.

In some areas, it will be difficult to convince all 27 Member States. This problem is easily addressed if we accept that *Those who want more* are free to do so. The need for flexibility is obvious but not accepted by all Member States. Some governments argue that they do not want to be relegated to the B-team. This comparison with team sports is misguided. All young footballers make every effort to qualify for the superior team. The reason that Sweden and Great Britain do not “play” in the alleged A-team, the Eurozone, is that they do not want to, even though they are more than qualified. It is difficult to understand why some Member States which are not ready for, or keen on, a particular form of enhanced integration are, at the same time, unwilling to let others go forward.

In the beginning it was strictly forbidden, or very difficult, for groups of countries to strike out on their own. But one size never fitted all – not even when they were only six. President de Gaulle did not accept the automatic transition to majority decisions agreed in the Rome Treaty and forced the other five members to accept the Luxembourg compromise to protect “vital national interests.” Margaret Thatcher secured a custom-made scheme for the calculation of the British contribution to the common budget when they were twelve.

The 19 members of the Eurozone are a world apart from the other countries. They have accepted a German ordoliberal philosophy and are subject to strict supervision of the Commission and the ECJ. They send their budget *proposals* to the Commission for scrutiny and, if they stray from the narrow path, they may end up in the Court and have to accept its decision without appeal. If the yardstick measures the degree of integration, then the Eurozone is the A-team. But if the competition is about employment and economic growth, the B or C-teams win hands down. Sweden and Great Britain chose a less demanding economic straitjacket.

The question actually boils down to why the less ambitious should want to, or be allowed to, prevent others from going ahead and trying out enhanced cooperation in different areas. It goes

without saying – but the Commission has still, to dismiss any doubts, said it – that no form of cooperation, among a select group of Member States, can take place at the expense of the others.^[53] The Schengen Area is a perfect example. It does not deprive citizens of non-Member States of any rights. On the contrary, it is an advantage also for outsiders to be able to travel in a large area without borders.^[54] Another condition, also mentioned by the Commission, is that all Member States must be allowed to join when they want and are qualified. On these conditions, it is hard to see why enhanced integration should not be generally allowed or even encouraged. Why, for instance, should Spain be allowed to thwart negotiations about patent cooperation? Why should we not allow countries to introduce the Tobin tax even if we and the British do not like it?

Admittedly, the British suspicion that they may be served *faits accomplis* pre-cooked in the Eurozone is not without foundation but, as explained below (footnote 54), this is not an enhanced integration. The EMU was intended for all and mandatory for those that qualified. A regular form of closer cooperation is regulated in the Treaty by the condition that it cannot affect the status of Member States that chose not to take part.

It is useful to spell it out, since it probably does not go without saying. Enhanced integration in a particular field should not be seen as the natural end station for all Member States. There are rich opportunities for regional cooperation which should not be delayed or complicated by non-participants. Whether there is a need to set out provisions for leaving a joint cooperation is best left for the “enhanced” Member States to consider.

The arguments in the White Paper in favour of scenario 3 – *Those who want more do more* – are quite powerful. It is difficult to see that

53 There is actually no need to say this since it is firmly established in the Lisbon Treaty (TFEU articles 326 – 334).

54 EMU is a more interesting illustration. On the face of it there is no reason to object when some countries adopt a common currency and coordinate fiscal policies. Both Swedish companies and citizens benefit when they can use the euro in 19 countries. However, the policies adopted by Eurozone countries have led to a miserable economic development which has hurt Swedish exports. But EMU is not strictly enhanced cooperation. It was agreed, as part of the Maastricht Treaty, and intended for all Member States as soon as they qualified. Several legal experts hold the view that Sweden has acted contrary to the Treaty since it was mandatory to join for all qualified Member States (Eriksson).

any of the more ambitious goals can be realized without resort to flexible integration. And we get a lot of information and practical experience if we encourage the more adventurous Member States to test uncharted waters before the more cautious ones are ready to get under sail.

Placed in a historical context it is obvious that Europe's spectacular ascendancy to undisputed world domination was based on institutional competition. Nation-states, big and small, tried out different modes of operation and learned from each other. The more open and democratic states were better at embracing best practice from others – drawing the laggards into their slipstream. It was most evident in warfare, but widely practised also in peace. The welfare state is a genuinely European invention.^[55]

The White Paper has a decidedly positive take on flexible integration. However, this option is accepted in the Lisbon Treaty with a frigid heart. The detailed provisions, spelled out in the Treaty on the Functioning of the European Union (TFEU) (articles 326 – 334), contain all the necessary conditions which protect the status of non-participants, but article 20.3 in the Treaty on European Union (TEU) states that enhanced cooperation is a last resort that can only be accepted after it has been “established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it.”

Scenarios one – *Carrying on* – and three – *Those who want more do more* – is already a strong combination. The fourth scenario – *Doing less more efficiently* – adds another dimension – the idea that EU institutions should do less in some fields in order to focus “attention and limited resources on a reduced number of areas”. However, the problem is not that we need to free resources for other purposes. The urgent reason is to take the principle of subsidiarity seriously in order to save nation-states from democratic anaemia.

55 There is a substantial, and rapidly expanding, body of academic research that emphasizes the economic value of institutions like effective and impartial public administration, protection of private property and transparent tax legislation.

The way ahead

The White Paper is a useful text to provoke a long-delayed debate about the future of the European Union. In Sweden, we have devoted an inordinate amount of time to discuss Brexit and, with obvious *Schadenfreude*, the problems the British are likely to face. However, to state the obvious, we are not members of the United Kingdom. The relevant question is why the British, and particularly the English, chose to leave and what kind of union we want to stay in.

When Prime Minister David Cameron announced that the citizens of the United Kingdom would be asked to tell him if they wanted to remain in the EU, he also indicated that it would be in a reformed Union. Opinion polls indicated that the electorate was strongly in favour of such an option but it was also evident that it would not be satisfied with cosmetic changes. Cameron's efforts to negotiate the wanted reforms fell far short of expectations. But the wish to reform is strong. It seems that a common position is emerging among the EU27. People in all Member States want to stay in a *reformed* Union. This was certainly the message from the first meeting between Angela Merkel and Emmanuel Macron. No doubt, it will soon be apparent that both people and governments in Member States have projected their wishes and dreams on the promised reforms. We will, hopefully, soon see different views emerge about how Europeans would like to see the Union evolve. This is an opportunity for Sweden to define its position and contribute to the open-ended invitation in the White Paper.

A good start is that we largely share the Commission's view, even if it is not explicitly stated in the White Paper, that the *Carrying on* scenario is a useful point of departure. Some of the new undertakings envisaged could and should be done in common by all Member States. It would be in Sweden's interest to add tax evasions and research infrastructure to the list of desiderata. An optimistic interpretation of this scenario takes us well beyond the existential angst. In other fields, we should encourage alliances of the willing, on the basis of the conditions set out in the third scenario (*Those who want more do more*), to explore possibilities to deepen integration. In many cases it would be advisable to extend cooperation to third countries.

For instance, efforts to protect wolves and develop their gene pool would require participation by Russian and Norwegian authorities. Defence cooperation, as has been explained above, presents a particular challenge, not only because some Member States may be reluctant to commit themselves. The fourth scenario – *Doing less more efficiently* – provides another building block. It puts the spotlight on the need to think hard about the division of competences and by implication on the principle of subsidiarity. A clinical application would send many issues back to the Member States but already a re-nationalisation of agriculture and a reform of regional policies would be a boon to democracy and economic efficiency. Together these three scenarios provide a good foundation for a *reformed* Union.

At least since the lukewarm reception of the Maastricht Treaty in France and its narrow defeat in Denmark, it has been a staple of European rhetoric that the Union must be more democratic. In practice, it has evolved in the opposite direction. As attested by the Heads of State and Government, Brussels has been bestowed with new competences at the expense of Member States and the Convention failed miserably in its mission to draft a treaty for a more democratic community. The Eurozone places severe restrictions on the fiscal freedom of Member States and the proposed Social Pillar is at least a potential threat. We shall take the liberty to assume that the reformers have an earnest wish to change the course.

The White Paper does not deal with institutions. The fig-leaf excuse is that they will adapt or be adapted to whichever scenario is chosen. This is a vain hope. The Commission will not voluntarily retreat to become a mere bureaucracy; the Court is unlikely to define the limits of its competence and the European Council will not willingly abide by the rules of the Treaty.

A discussion of a reformed Union cannot neglect the fact that the institutions are ill adapted to a Union whose legitimacy must be based on the democracy of the Member States. The problems we need to address are a legacy of the past. The philosophical grandfathers of the European project blamed narrow-minded national politicians for the disastrous first half of the nineteenth century. They put their trust in impartial professionals who were aloof from the fray of sectarian politics. The Schuman Declaration in 1950 placed the

governance of the ECSC in the hands of nine high-ranking elderly gentlemen (High Authority) with the power to regulate and tax the coal- and steel industries and take decisions that “will bind France, Germany and other members.”^[56] When the European project was extended to become the European Economic Community in 1957–58, it was obvious that democratically elected representatives from Member States must have the final say. The Council of Ministers became the legislator of the Common Market. The High Authority was replaced by the Commission. It has a near-exclusive right to prepare all legislative acts. The Council of Ministers can only “request the Commission to undertake any studies (it) considers desirable for the common objectives, and to submit to it any appropriate proposals.” Members of the Commission are supposed to act as impartial European civil servants and stay away from the commotion of party politics. The Lisbon Treaty admonishes Member States to respect the independence of the commissioners and to refrain from trying “to influence them in the performance of their task.” The European Council (i.e. the Heads of State and Government) came into existence in the mid-seventies, but was first mentioned in the Single European Act in 1987 and became fully recognized only in the Lisbon Treaty, which adds that it “shall not exercise legislative functions.”

There is no neat and tidy prescription for how these institutional shortcomings can be rectified. The appetite for a treaty revision is nil. Otherwise, the Heads of State and Government could act on the advice they gave the Convention to draft a short constitutional text and let the rest be traditional legislation that the Council of



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56 It is a commonplace to claim that it was a stupid mistake of the British Labour government not to join the ECSC. The fact is that they were not, like the Germans, informed in advance about the Schuman Declaration. Even so, after having just nationalised the coal mines and the steel works it is a bit thick to expect that the government should hand them over to a group of unelected experts beyond the reach of the popular will.

Ministers could change with a stroke of the pen. The first part of the Lisbon Treaty, called the Treaty of European Union (TEU), fits the bill rather well while the content of the long-winding Treaty on the Functioning of the European Union (TFEU) is, at best, normal legislation which, according to the *Carrying on* scenario, should be “checked regularly to see whether it is fit for purpose. Outdated legislation is withdrawn.” In fact, in no Member State has this kind of provisions been accorded constitutional status and much of it is already obsolete. As shown above, if the TFEU were to become normal legislation it would tilt the balance of power in favour of the Council of Ministers. It would also be an advantage if the Treaty conveyed a more realistic and reasonable picture of the relationship between the Council of Ministers and the Commission.

If a revision of the Lisbon Treaty is ruled out, we are confined to discuss what can be achieved within its legal framework. One important change is actually supported by the existing text. It is probably a vain hope that the Heads of State and Governments voluntarily should retreat to what the Treaty prescribes, but it would improve transparency if the function of the Council of Ministers as the principal legislator was more firmly established. The main advantage is that the decisions in the Council of Ministers is the result of an organized bureaucratic process, which gives ample opportunities for Member States to voice their concerns. The origin of the European Council was that the German Chancellor Helmut Schmidt and the French President Giscard d'Éstaing were fed up with the bureaucrats in Brussels – and it still is a body dominated by the major states.

The illusion that the Union can be democratized by moving more competences to the Commission and the European Parliament (EP) must be laid to rest. The Commission cannot become a government of Europe. In fact, it cannot even speak with authority on behalf of the Union in sensitive matters like Brexit or relations to Russia. Europe cannot have an un-elected government that could not be unseated by a parliament. And a politicized Commission would undermine its legitimacy as an impartial European civil service. The powers of the European Parliament have been radically strengthened by successive treaty revisions – it started as a talking shop – but its power is still passive. It shares the power to enact legislation with

the Council of Ministers, but cannot put forward a proposal of its own. Successful negotiations with the Council of Ministers must be based on a common position – a compromise between the political factions. It might be that the Parliament would be a more powerful – and certainly more interesting – institution if it became the arena for a free-wheeling pan-European political debate.

The text of the Lisbon Treaty did not reflect the reality when it was drafted and adopted – and does it even less today. If it did, it would be untenable – it is absurd to imagine a European polity in which politicians were prevented from influencing the policy for which they will be held accountable. The commissioners, by and large, act as impartial servants of the European cause during office hours, but many of them keep their party affiliation and view a stint in Brussels as a qualification for a political career back home. National governments take every opportunity to influence the Commission and individual commissioners and, in many cases, the major states exert direct pressure to be submitted with legislation to their liking. The German government's protection of the car industry is well-known. It is no harm if the Commissioners listen to advice from all and sundry as long as they act in the interest of Europe. The European Council has never been content to provide only the "necessary impetus" allowed by the Treaty. Since the financial crisis broke, the Heads of State and Government practically run the Eurozone partly as intergovernmental cooperation. It is at the same time significant and out of order that the Commission intends to send its proposal for a European Social Pillar to the European Council for its endorsement.

There is a substantial corpus of EU legislation and there is no gainsaying that it must be interpreted and adjudicated by a legal institution. However, the ECJ has allowed itself too great a latitude to discern what the lawgivers actually meant or intended to achieve. The British did not so much want to get rid of the EU legislation as the exclusive right of the learned judges in Luxembourg to tell them what it meant. The Brexiteers talked about a rouge court. That may be a stretch, but the problem is real and it is compounded by a flawed Treaty that covers all political areas.

It is accepted that EU law takes precedence over secondary

legislation but it is disputed whether the Court has the authority to define its own competence. The Germans are particularly averse to *Kompetenz-Kompetenz*. Politicians should in general stay away from interfering with the mandate of courts in general and constitutional courts in particular, but at least in one respect the ECJ must be restrained. Member States must enjoy wide discretion to take measures to strengthen the domestic democracy. As long as these measures are taken in obvious good faith they shall be allowed. This would be a most welcome “impetus” from the Heads of State and Government.

It would be a great step towards a reformed Union if enhanced cooperation among a select group of Member States is openly embraced and it is self-evident that its terms and conditions should be notified to the Commission. As long as the provisions suggested by the Commission for *Those who want to do more* are adhered to, there is no reason to hold back the ambitions of those who really want an “ever closer union”. In addition to the arguments already put forward, one could add that it is often good to call a bluff. Members of the European political elite have often claimed that national slow-coaches (due to unfortunate outcomes of referenda) should not be allowed to hinder the process of integration, but it is hard to see that they have a popular mandate for their ambitions.

For flexible integration, the road from having been formally prohibited to cold-hearted acceptance has been bumpy, and it is still morally suspect in many quarters. No country has, to my knowledge, been a champion of the cause. The British record as a Member State is littered with red lines (absolutely unacceptable to Her Majesty’s government) and opt outs, but they have often demanded to be at “the heart of Europe.” We need to take matters a step further and elevate enhanced cooperation to what it is – a perfectly normal solution which in many cases is the only possibility to push ahead.

Democracy in Europe is not on its last legs but the threats are real. The first line of defence against the dark forces of faked and fabricated facts, post-modern relativism and paid acolytes, is the open debate where many contestants challenge the best arguments of their opponents within hearing distance of an attentive *demos*. In an effective democracy, fake news vanish, like trolls, when they are exposed to the sun. The funds available for the production of

custom-made alternative truths appear to be inexhaustible. The role of public service and a free press become crucial. Their first order mission is to shape an honest and problematic discourse as a basis for the democratic conversation. It is not a new phenomenon that political parties interpret “facts” in different ways but so far, at least in Sweden, they have been forced to relate to a common perception of reality. This situation is sustained by tomes from Royal Commissions with massive empirical data and a flow of popularized research reports. This information is important but reaches only the already well advised. The wider democratic debate depends crucially on effectively staffed political parties, a free press and public service. In some Member States, traditional parties have collapsed and they are significantly weaker all over Europe. We still have a number of national and local quality newspapers in Sweden but their traditional revenues are evaporating rapidly. Their revenues from advertising have decreased by almost one billion SEK over the last two years due to competition online, in particular Google and Facebook – a sum equal to the full financial public support for a free and many-voiced press. None of them have a science desk and muckrakers with ample resources are an endangered species.^[57] It goes without saying that government funding of radio and television, subsidies to printed media, generous contributions to civil society organisations and social housing programmes “affect trading conditions”. If they are disallowed or restrained, commercial broadcasters will earn more and dominant newspapers could eliminate competition. When there



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57 Also in Britain, the situation has changed dramatically. In 1964, national newspapers reached more than 80 percent of the adult population – a higher proportion than in any other country. Almost all of them, broadsheets as well as tabloids, were affiliated with a political party or organization. Now, less than a third of all households regularly reads a national newspaper – but they are still fiercely partisan (Evans&Tilley, chapter 5). The contribution of the British press to an informed conversation before and after the 2017 election was not necessarily positive (London Review of Books, No. 16, 17 August, 2017).

is a choice between the four freedoms of the market and the future of democracy, it is indispensable that democracy must prevail. An “impetus” in support of an open democratic debate from the Heads of State and Government would be most welcome.

The most important principle concerns the “federal issue”, i.e. at what level matters are dealt with and decided on. The preferred route is prescribed by the subsidiarity principle which, after all, is supposed to be the constitutional mainstay of the Union and guide how responsibilities and competences are allocated between the federal and the national level. The principle is simple – decisions should be taken in the nation-state whenever possible; in Brussels only when it is necessary. As already shown, there are several areas where it is impossible, or very difficult, to achieve what we want unless we join forces with other countries. This is the only reason why we should cede powers to Brussels. It has nothing to do with the importance or emotional value of the issues.

However, the present formulation of the principle is much too weak.^[58] Competences can be transferred to Brussels as soon as a majority of Member States consider it to be better in some unspecified sense. At a minimum, a decision must be based on circumspection, some kind of necessity test and democratic oversight.^[59]

When the Heads of State and Government discussed the future of the Union in Laeken, they unanimously agreed that it should *not* be a European “superstate”, which leaves all other options on the table. The common perception is that the EU is now a process without a defined destination. This position is no longer tenable. The evolution may not have an announced destination but the direction has been

58 The text in the Lisbon Treaty (TEU, article 5.3) reads as follows: “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by Member States, either at central or at regional level, but can rather, by reason of scale or effects of the proposed action, be better achieved at Union level”. It is important to note that the objectives are chosen on a case-by-case basis.

59 Miroslava Scholten and Daniel Scholten (2017) claim that they have discovered a new type of functional spillover that add to Brussels’ competences. The argument is that traditionally the EU had regulatory power while enforcement was the responsibility of the Member States. It is true that, depending on definitions, almost a dozen EU institutions have been established in order to enforce legislation. However, in no case is it a horizontal extension of EU competences and it seems reasonable to assume that if Member States have agreed to regulate a certain domain, they might as well enforce the rules effectively.

towards “more Europe”. It has unnecessarily reduced the vitality of democracy at the national level and we may have reached a point of no return. The idea of a “superstate” has been discarded but a federal state can come in many shapes. It is not a binary choice. The Swiss federation has vested very limited powers at the top. Almost no one outside this alpine redoubt knows the name of its prime minister. It is fully respectable to try to create a European federal state, but one would wish to know how competences are distributed. Even more important is a credible narrative how democratic legitimacy is transferred from where its roots are today to where it will grow in the future. The advocates of a federal state have a duty not only to tell the cautious majority what kind of federation it is but also how we get there without derailing the project. And a “federalization” of Europe can under no circumstances be led by the paternosterian delivery of new competences by the Court. Europe is home to the most democratic states of the world. Political parties still perform their indispensable role, the overwhelming majority of politicians are honestly committed to their cause and few are beholden to corporate money. There is an alignment between polity and *demos* at the national level. Anyone who remembers the rallying call of democracy should beware of cutting the umbilical cord between taxation and representation.^[60] We take a great risk if we force the pace of historic change against the will of the people. No sensible politician should put at risk what we have for something we do not yet know how to get. A reformed Union must base its legitimacy on vibrant and vigilant democracies united in their appreciation of the value added to their welfare by supranational cooperation.

60 Before independence, the people in the American states enjoyed the protection of the British Crown and had the highest living standard in the world, but the settlers did not accept being taxed by a Parliament in which they were not represented.

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