

**Prof Dr Jaap W. de Zwaan**

em. Professor of the Law of the European Union

Erasmus University Rotterdam

The Netherlands

e-mail: dezwaan@law.eur.nl

## **Cleveringa lectures of 3 and 4 December 2019**

**Kosice and Bratislava, Slovak Republic**

### **EUROPEAN UNION COOPERATION**

#### **THE NEED FOR MORE INTERNAL STABILITY AND EXTERNAL AUTHORITY**

#### **CONTENT**

1. Introduction
2. Characteristics of European Union cooperation
3. Achievements
4. Shortcomings
5. Challenges and threats: external and internal
6. Is the present constitutional infrastructure sustainable?
7. How to remedy the internal challenges?
8. The support of the citizen
9. How to remedy the external challenges?
10. Other options to simplify EU cooperation
11. Final remarks

#### **1. INTRODUCTION**

In this lecture I like to discuss with you the achievements, but also shortcomings, of European Union cooperation; the –internal and external- threats and challenges we are confronted with these days in our globalized world; and, ultimately, the question how to adapt our present system of governance in order to secure a sustainable future for the European Union.

Actually, this is the right time to start such a discussion. On 1 December the new European Commission, under the leadership of Ursula von der Leyen, took office. In her discussions, more particular with the European Parliament, Mme Von der Leyen has hinted at future plan and priorities, to bring the Union further. In that context the new Commission President has proposed to convene a new 'Conference on the Future of Europe'. And, on 26 November the French President Macron and the German Chancellor Merkel launched a so-called non-paper –also- with a view to start, in the beginning of 2020, a 'Conference on the Future of Europe'.

### **Fundamental values**

European Union cooperation is built on fundamental values widely subscribed to in Europe. The reference here obviously in the first place is to the European Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe. However, also the European Union itself has developed its own legal framework, in treaty texts as well as by establishing the text of the Charter of Fundamental Rights, in the context of which principles like democracy, human rights and the rule of law are protected.

To underline the importance of the respect of human rights and fundamental freedoms, Leyden University in the Netherlands stimulates each year the organization of events, in the Netherlands and abroad, commemorating an important speech given in 1940 -during the German occupation of our country- by the –at the time- Dean of the Law School, Rudolph Cleveringa.

### **Cleveringa**

Indeed, on 26 November 1940 Rudolph Pabus Cleveringa read aloud a protest speech, denouncing the measure taken by the German occupation to remove all Jewish professors from their posts. One of these professors was Cleveringa's colleague Eduard Meijers, who should have been lecturing his students at that point in time.

Cleveringa was arrested by the German Security Services and remained in prison in Scheveningen, a district of The Hague, until the summer of 1941. Having listened to his speech, the Leyden students decided to go on strike, a step that Cleveringa had by no means encouraged them to take. The University was then closed down by the occupying forces.

In 1944 Cleveringa was again imprisoned, this time in Vught. After his release he became a member of the 'College of Trusted Men' that coordinated –at the

national level- the resistance against the German occupation. After the war he resumed his work at Leyden University until 1958, when he retired. He was then appointed member of the Council of State. Cleveringa died in 1980, at the age of 86, in Oegstgeest, in the direct neighbourhood of Leyden.

## **Freedom**

The speech of Cleveringa reflects the crucial importance of 'freedom' generally speaking and, more specifically in that case, of the freedom of thought, the freedom of speech and academic freedom.

In fact we are referring to the same fundamental values we had in mind when commemorating, this month, the Fall of the Berlin Wall on 9 November 1989. Indeed, the people of the former German Democratic Republic (GDR), and in a wider sense the peoples of the former Central and Eastern Europe –your country at that time being part of Czechoslovakia- were longing for freedom and independence, the freedom to make their own choices with regard to how to organize best their own society and security.

Now, what an achievement it is that we, 30 years later, belong to the same European family and community, all of us being members of the same multilateral organizations, the European Union and NATO. Congratulations to all of us!

## **2. CHARACTERISTICS OF EUROPEAN UNION COOPERATION**

European Union cooperation started after the Second World War and is traditionally been referred to as a 'peace' process.

The EU is a framework for cooperation between states. The main objective is to assure peace and stability on the European continent. On the EU agenda appear topics and policy domains having an international characteristic, the idea being that common problems are best to be solved commonly. The cooperation covers economic cooperation broadly speaking, monetary cooperation, foreign policy and defence as well as justice and home affairs cooperation.

Freedom, democracy and the rule of law belong to the values guiding us in the process to develop those common policies. And a common set of institutions can be made use of to develop and streamline that process.

By and large the EU can be defined as an international organisation, however an organisation showing, in the way it operates, a number of federal characteristics.

EU cooperation, as we experience it today, is beneficial for states, for business and, more particularly, for individual citizens. Think, in that last respect, for example at the prerogatives connected to the exercise of the fundamental freedom of movement of persons, such as access to the labour market of other member states; mutual recognition of diplomas and professional qualifications; and the principle of non-discrimination.

The Union possesses a unique governance infrastructure. Essentially three levels can be distinguished:

### **Member States**

It are the member states who determine –in treaty texts- the main rules and principles of EU cooperation: the characteristics of the organisation, its objectives, competences and policy domains, the role of the institutions, the decision making procedures and its legal instruments. They are, what in the German terminology is called ‘die Herren der Verträge’.

### **European Council**

The next level is the one of the European Council. That Council is composed of the heads of state and governments –so, the highest political level of the member states- and presided over by a permanent President. The Council handles, together with the President of the European Commission, crucial horizontal files and priorities, and establishes to that end political guidelines as to how and when to achieve those priorities. The European Council has no legislative role.

### **Supranational procedures**

The third governance level concerns the implementation of the treaty objectives in concrete texts of legislation and policy making, by applying so-called 'supranational' decision making procedures.

In that context the *European Commission* possesses an (exclusive) right of initiative, which means that it is up to the Commission, as the institution representing the general interest of the EU, to come forward with concrete proposals. Those proposals are submitted to the *Council*, representing the member states at ministerial level and, at the same time, to the *European Parliament*, representing the citizens of the member states.

In the course of this process the Council decides, as a general rule, by (qualified) majority, whereas the European Parliament acts as co-legislator. This means in practise that without an agreement between the two institutions, there will be no decision. This procedure is referred to as the 'co-decision' procedure. As a result the Council and the European Parliament decide jointly.

These supranational decision making procedures are not only unique in their kind, they reflect at the same time a democratic and efficient process.

### **3. ACHIEVEMENTS**

When analysing the activities of the EU over the years, many important achievements can be identified.

#### **Enlargement**

The first is enlargement. Started with 6 member states (my home country being one of the founding fathers), we have now arrived at the number of 28. When the United Kingdom will withdraw, we will be 27. However, still a number of countries -most of them located in the Balkan region- has a clear ambition to become member state once. So, the fact that there still are European countries applying for EU membership, demonstrates the attractiveness of EU cooperation.

#### **Scope of policy domains**

Originally the scope of EU cooperation was determined by pure economic objectives, such as the internal market, the customs union, common commercial policy, competition as well as agriculture and transport. Meanwhile, however, a number of complementary policy domains have been added to the list of EU policy fields, such as environment, research, energy, education and public health. And, since the entry into force of the Maastricht Treaty in 1993, the scope of EU cooperation has been further extended to broad areas such as economic and monetary cooperation (EMU), foreign and defence cooperation (CFSP) as well as Justice and Home Affairs cooperation (including asylum and immigration as two of the most fundamental dimensions of that area of cooperation).

So, the EU is involved, in one way or another, in practically all thinkable policy domains. As a result the scope of EU cooperation has extended from, originally, economic to now political cooperation generally speaking.

#### **4. SHORTCOMINGS**

Now, certainly, there are also shortcomings to be mentioned.

##### **Lack of visibility**

An important defect concerns the lack of visibility of EU cooperation, in particular for the citizen. EU cooperation is often experienced as an indirect process of policy making, in the context of which the national organs are visible, whereas the European players are less or not visible at all. That is in particular true for the Brussels infrastructure, so the Commission and the Council. Of course, in this discussion we must bear in mind that it are the member states themselves who have created this, little insightful, infrastructure.

##### **Lack of transparency**

Linked to the poor visibility of the EU cooperation process is the lack of transparency of the decision making process. Since that process implies cooperation and interaction, horizontally and vertically, between national and

European players, it is rather complex, difficult to have access to and, as a consequence, hard to explain.

### **Lack of knowledge**

On the other hand, we also must establish there does not exist enough knowledge in the member states about the Union, its institutions and the way they operate. Here clearly is a responsibility for the national authorities to improve and reinforce the European dimension of the national education systems, from primary school to university level, so across the board.

If this situation will not change, it can easily lead to a *lack of support from the citizen* for the process. That is a problem, and a serious one, that in time can undermine the confidence in and the stability of the EU structures.

Having said that, obviously also the *media* can play a role to improve the awareness of citizens about EU cooperation.

## **5. CHALLENGES AND THREATS: EXTERNAL AND INTERNAL**

Let's turn then to the challenges and threats the EU and its member states are facing these days. Actually, there are quite a few, external ones and internal ones.

### **External**

In the external domain we must think of:

- The geopolitical developments in the neighbourhood. I refer here to tensions and conflicts at practically all our external borders: Russia/Ukraine, Turkey, Syria/Iraq/Iran, Israel/Palestine, Saudi Arabia and Yemen, and the whole area of North Africa;
- The migration problem, which is a phenomenon of all times;
- International crime and terrorism;
- Climate change, including -in the wider sense- energy and environment;

- And, more generally speaking, globalisation. Here the focus is on the role of the EU on the world scene: the relationship with the United States with its unpredictable President (provoking trade conflicts and geopolitical tensions as well as hindrances of multilateral cooperation, in the framework of NATO and the EU for example); China (in this case we have to pay attention to the respect of WTO-rules, for example with regard to the possibilities for European investors to have access to the Chinese home market; the practices connected to Chinese investments in big projects in the Union; and the respect for human rights and fundamental freedoms); and Russia (here the reference is to its –often successful- efforts to create unrest in our common neighbourhood, the forms of hybrid warfare it practices and, also in this case, the respect for human rights and fundamental freedoms).

### **Internal**

There are also internal challenges and threats, such as:

- First and foremost, the employment situation in the EU and its member states, especially for young people. In this respect the remaining divergences in economic development and standards of living between the member states are of crucial importance;
- The impact migration has on local and regional societies. The references here are notably to social and cultural tensions, but also to illegal migration and crime;
- Other forms of international crime, such as fraud and corruption;
- Populism, nationalism and Euroscepticism. In this connection we must combat the tendency of politicians playing on emotions of citizens and practising one liners, regarding politically sensitive subject matters, such as migration and the financial crisis. Often the EU is blamed for negative developments in these areas;

- And the respect for the fundamental values of EU cooperation as embedded in Article 2 TEU, such as democracy, the respect of human rights and the rule of law. These crucial principles are to be considered the 'cornerstones' of EU cooperation. Without respect of these values the correct functioning of the governance system, not only in the member states concerned but also in the EU, will be put in danger. Now, unfortunately problems regarding the non-respect of these principles have arisen in several member states. They often concern the undermining of the independence of the judiciary and the media. However, also restrictions have been established regarding the freedom of education, the independence of research, as well as the protection of minority rights.

Apart from the subject matters already mentioned, two files deserve separate mention:

In the *internal* sphere I refer to *Brexit*, the endless story concerning a member state aiming to withdraw from the Union. Brexit obviously represents a drama for both sides, for the UK in the first place, but for the EU itself as well. In a world characterised by so many threats and challenges, it is a disturbing prospect that Europe will become so divided.

And, in the *external* context I like to mention *enlargement*. Recently, on 17 October, the European Council decided not to open accession negotiations with North Macedonia and Albania. I think that was a mistake. EU cooperation contributes to peace and stability in Europe. European states sharing these objectives, should in principle be enabled to take part in that process. We should therefore not wait with starting accession negotiations until the crucial conditions for membership –democracy, the rule of law and respect for human rights and fundamental freedoms– have been fully fulfilled. It is better to help these countries to meet these requirements and, in parallel, to organise the accession process in such a way that they can gradually be involved in EU cooperation, by applying a 'step by step' approach. First in policies connected to security (foreign policy, defence and migration for example) and only later in the economic domain. On the contrary, leaving such countries outside of our cooperation framework for too long, can only add to the unrest already widely existing at our external borders.

## **6. IS THE PRESENT CONSTITUTIONAL INFRASTRUCTURE SUSTAINABLE?**

All challenges mentioned concern serious issues and problems.

In that respect the question arises whether the present constitutional infrastructure of the EU is still an effective one. In this discussion we must realize that policy making at the EU level –and, more particularly, treaty making- is the result of the pursuit of consensus.

Now, in times of peace that is a comprehensible and suitable approach. However, we live in a turbulent world. We therefore have to reflect whether the rules and procedures as they stand now, are, with regard to the future, sustainable.

## **7. HOW TO REMEDY THE INTERNAL CHALLENGES?**

With regard to the internal challenges I want to focus in particular on the rule of law. In this file a prudent, but firm approach is indicated.

We should for example not accept that in member states –understand me correctly, not only in the (relatively) new member states, but in all member states- certain limits are exceeded, notably with regard to the independence of the judiciary and the independence of the media.

So far the European Commission has developed a fair policy in this area. In the framework of her approach the Commission in the first instance always prefers the format of the dialogue with the member state in question, so, informal consultations to try to solve pending problems. However –in case of need- the Commission does not hesitate to address the Court of Justice in Luxembourg. I think that is a correct approach.

### **Infringement procedure**

With regard to instruments available in that last respect we must point in the first place at the so-called infringement procedure, the procedure in the framework of which the Commission can bring a member state to Court because of assumed violations of its treaty obligations.

Also member states, by the way, can start similar proceedings, against another member state. However, in practise hardly use is made of this option. That said, perhaps it should happen from time to time, when the respect for the rule of law in the EU is at stake.

### **Article 7 TEU**

We also can refer to the procedure of Article 7 of the Treaty on European Union, the so-called ‘nuclear’ option. The application of this procedure may result in the suspension of membership rights of the member state in question, including its voting rights in the Council. However, Article 7 represents a political procedure which actually is less appropriate because of the decision making modalities it prescribes. Indeed, in order to determine *a clear risk of a serious breach* of –for example- the rule of law, one third of the member states, the European Parliament or the Commission have to take an initiative that, to be adopted, requires a *four fifth* majority in the Council. Notwithstanding the fact that, for obvious reasons, the member state in question does not participate in the voting, such a majority is difficult to obtain.

Still more importantly, in order to determine the *existence of a serious and persistent breach* of –the example being again- the rule of law, one third of the member states or the Commission must take an initiative that, in order to be adopted, requires *unanimity* in the European Council and the *consent* of the European Parliament. And, although also in this case the member state concerned does not participate in the voting, such a requirement is in practise practically impossible to meet. So, it is highly unlikely that sanctions, such as the suspension of voting rights in the Council, will ever be imposed.

It therefore is better to start in such situations fast track procedures –or, in the first instance, summary proceedings- before the Court of Justice in Luxembourg. Having said that and as is well known, that Court has in practise already duly demonstrated to be able to play a crucial role in this area.

### **General deficiencies**

Finally, in May 2018 the Commission has presented a legislative proposal to impose financial sanctions in case of established ‘*generalised deficiencies*’ of the rule of law in a member state. In the proposal the Commission presents

itself as the –in the first instance- competent authority to assess the situation in member states. Once a generalised deficiency being established, the Commission has to submit a concrete proposal to the Council, how to sanction best the member state in question. In fact, that proposal shall be deemed adopted, unless rejected –within a month- by a qualified majority in the Council.

Whereas the Commission proposal to adopt such a new sanction mechanism has -more or less- been accepted by the European Parliament, the draft instrument is still under discussion in the Council. Now, certainly, an instrument allowing to impose financial sanctions can be effective to prevent violations to occur in the first place. However, again, also when in the end the regulation will be adopted, the imposition of sanctions may in practise easily give rise to appeals before the Court of Justice. So, also in this case you may each time need an objective assessment provided by an independent court.

## **8. SUPPORT OF THE CITIZENS**

In parallel, in order to gain more support from the citizen for the process of EU cooperation, more *openness* and *accountability* has to be shown by national representatives, ministers in the first place: openness about what has been discussed, and achieved, during the Brussels negotiations, but –perhaps even more important- also about what they have not been able to achieve.

At the same time ministers should take responsibility for their activities in the Brussels arena, inter alia in their discussions with national parliaments. In other words, it must be possible to hold them accountable. A correct explanation and adequate communication are the key words in this process.

Finally, also the '*attitude*' of national politicians taken in Europe discussions is relevant. They must not simply act as national representatives, but as European politicians, being part of the *European system of governance*, and having a European mission and ambition.

By the way, what is true for national ministers is equally true for members of national parliaments.

## 9. HOW TO REMEDY THE EXTERNAL CHALLENGES?

Then with regard to the external challenges the EU –and its member states- are confronted with these days:

What the EU really needs to achieve in this area is more power, more ‘grip’ on international developments, actually some ‘hard’ power. Generally speaking the impression has arisen over the years that the EU performs too late and produces too little. A last dreadful example of a file where the EU, although an interested party, was completely absent in the debate, was the Turkish intervention –in October- in North Syria.

Ideally the impact of the EU in foreign policy should be similar to the authority the EU possesses in the domains of trade policy and monetary policy as well as, to a certain extent, in the areas of asylum and immigration or climate change. Why that is not so at this moment in time? So far foreign policy has essentially remained a national competence. However, such a status quo is not maintainable any more these days. Member states should understand that in a world full of tensions and unrest the EU and its member states should act as a unity, act timely and vigorously. Again, enough examples of files where such a common approach is desperately needed can be referred to: the conflict between Russia and Ukraine, the relationship with Russia generally speaking, Syria, Iraq, Iran, the relationship with China but also the relationship with the US, with its unpredictable President.

It is high time therefore that our politicians understand that our internal stability will suffer and -in the end- may collapse, when external pressures become too strong.

This means that the present rules and procedures, notably unanimity as the general rule for decision making in the Council, are not sustainable. Now, again, foreign policy is a politically sensitive area, each member state having developed its own historical relations with the outside world over the centuries. However, consensus as a general rule does not suffice anymore in the world where we live in today.

### **Majority voting**

Therefore, (much) more efficiency and effectiveness is needed. Of course, an obvious idea is to replace the requirement of unanimity by *qualified majority*, or possibly '*super*' *qualified majority*. Such an approach should be acceptable especially in cases where proposals for common positions are put forward by the High Representative of Foreign Affairs and Security policy, one of the Vice-Presidents of the Commission and, in that capacity, care taker of the general interest of the EU.

However, in light of the fact that member states do not like to be outvoted, especially not when that would occur on a regular basis, one may think, by way of additional option, at the option to *exempt* member states from the obligation to implement majority decisions, in case they can invoke -what in the past has been referred to as- 'vital national interests'. For such an approach precedents do already exist. An example is the concept of the so-called 'coalition of the willing', mentioned in (Article 42, paragraph 5, of) the Treaty on European Union.

### **An EU Security Council**

What also should be reflected about, is the establishment of a European Union Security Council, composed of:

- the President of the European Council as its President;
- the group of three member states, in the past referred to as the 'Troika', so, the current Presidency, the preceding Presidency and the successive Presidency;
- Germany and France as permanent members -after the UK withdrawal- however, without possessing a veto right;
- a group of other member states, four or five, on a rotating basis;
- the President of the Commission and the High Representative for Foreign Affairs and Security Policy.

From this group only member states should have the right to vote. With regard to decision making it could be provided that decisions are taken –also in this case- by a qualified majority when acting on the basis of a proposal of the High Representative, and by a –to be determined- 'reinforced' qualified majority in other cases. A blocking minority should include at least five member states that are not-represented in the Security Council. Just some ideas.

## **10. OTHER OPTIONS TO SIMPLIFY EU COOPERATION**

Furthermore two other options should be discussed, to simplify EU cooperation and, at the same time, to make EU cooperation more effective.

### **Enhanced cooperation**

The first idea concerns the simplification of the modalities of –what is called- ‘enhanced cooperation’. At present, in case of a deadlock in the Council after a reasonable period of negotiations about a concrete proposal of the Commission, a group of ‘at least nine’ member states can launch a request for enhanced cooperation, allowing them to adopt and implement the given proposal between themselves. In order to have that request approved, the Commission has to present a proposal, to be decided upon by the Council and the European Parliament jointly. However, after having obtained that approval and after having adopted the enhanced cooperation decision concerned, the content of that decision does not form part of the EU acquis. In other words, the decision only binds the member states involved.

That means, the application of enhanced cooperation requires a rather lengthy and complicated procedure, whereas the outcome is not satisfactory from the perspective of genuine European Union cooperation.

Therefore we could simplify the procedure, and for example do away with the preliminary procedure, in the context of which an initiative to start enhanced cooperation requires an approval of the Council and the European Parliament. Instead, a ‘confirmation’ by the Commission should suffice. Such a confirmation, by the way, will most probably not be difficult to obtain, since it is the Commission’s own proposal that got stuck in the ordinary stage of the negotiations in Council, and –by applying the principle of enhanced cooperation- can still be adopted.

More important, however, is that we should try to achieve that the content of the decision, adopted through the application of enhanced cooperation, belongs to the EU acquis. Such an outcome would indeed properly reflect the idea, embedded in the treaty, that enhanced cooperation contributes to the process of implementation of the treaty objectives. On the other hand, in order

to reinforce the ‘representativeness’ of the decision, the minimum number of member states participating in an exercise of enhanced cooperation, could be increased to, let’s say, *three quarter* of the number of member states. That indeed is a substantive, and representative, number.

And, of course, other member states may follow and subscribe to the decision concerned, once they are willing to do so. That means, no member state will be excluded from the cooperation area concerned.

### **Treaty amendment procedure**

Another issue that comes to mind concerns the simplification of the ‘ordinary’ treaty amendment procedure. At present a proposal to start negotiations to amend the treaty texts, can be decided upon by the European Council by simple majority. On the contrary, the results of the negotiations have to be agreed upon by consensus between all member states, as is the case with regard to the entry into force of the treaty amendments concerned. In short, the relevant treaty amendments have to be approved, and ratified, by all member states.

Now, of course, from a procedural point of view it is acceptable that negotiations to amend the treaties can start when (only) a majority of the member states agrees to such an idea. On the other hand, the requirement of consensus for an agreement about treaty amendments is not sustainable anymore in a union consisting of 28 -or 27- member states, and more when in future new member states will accede. In fact, it would mean that every member state possesses a right to veto new developments. The consensus requirement has therefore to be reviewed.

An alternative approach could be to allow the adoption of treaty amendments –and their entry into force- once, also in this case, at least *three quarter* of the number of member states –so, 21 out of 28 or 27- have agreed. Again, three quarter is a representative number. And, also in this case no member state will be excluded. That means that the other member states can always follow, once they are ready to do so.

## **11. FINAL REMARKS**

In this lecture I have presented some thoughts and proposals aiming to improve the *internal stability* and *external authority* of the European Union.

Most of the proposals will, politically speaking, probably not be easy to push through. This the more so since several of them require treaty amendment.

However, in the situation where we are living in these days, we have to provide for more flexibility in texts and procedures, developed in times in the past when there were less member states and the whole process of EU cooperation was easier to manage. Therefore, we must consider how to adapt certain elements of our present EU system of governance and, if necessary, amend the treaties for that purpose.

I am aware that politicians generally speaking are reluctant to enter into such discussions. They are concerned that, when explaining the intended reforms at home, in their national parliament or in the framework of a people's vote, objections may be raised, with as a possible consequence that the amendments concerned will not be approved and –because of the requirement, as it stands now, of consensus- never enter into force.

However, we should not be short sighted. Politicians often only have their own short term interest –namely, to be re-elected in the next elections- in mind, whereas they have a responsibility to rule their country from a long term perspective.

Something thus has to happen. Politicians should explain to their citizens what is best for their country –and the EU- on the longer term. Because, that is what governance means: communicate well with your citizens, give guidance and try to convince them!

In this process the academic world can make a useful contribution. Indeed, the academic level is well placed –as a laboratory where you can think 'freely'- to initiate debates and discussions about new approaches and changes. In short, the academy –the university- performing its role as the 'conscience of the society'.

Such a development can only confirm the relevance of the principles of freedom of speech and academic freedom, values where -in 1940- also professor Cleveringa in Leyden was standing for.

Thank you for your attention!