

European Constitutional Group

December 1, 2015

Open Letter to the President of the European Council

Dear Mr. Tusk,

The European Constitutional Group has discussed the report of the Five Presidents of the EU institutions and the suggestions of other European leaders such as President Hollande and Finance Minister Schäuble. We have also taken into account the areas recently identified by Prime Minister Cameron and looked at the UK demands in terms of their broader conformity with the interests of the EU as a whole. We have developed the ideas first set out in our "Proposal for a Constitution of Europe" (1993) and applied them to the current situation. Our main purpose was to discuss how the EU can best respond to the divisions that now undermine a Union whose basic purpose is to heal division.

We are especially concerned about the divisions that stand in the way of cooperative solutions to the challenges facing the Union

today. Some divisions of course are of long standing. Others have been provoked by recent actions of the Union itself. In particular, policies to overcome the sovereign debt crisis have raised doubts about the rule of law. Further divisions will be stimulated by some of the proposals being circulated for reform. Proposals to share risks, to introduce a common tax or to increase tax harmonization are all made in the name of solidarity. In our view they risk having the opposite effect.

First, current proposals for reform, especially in the eurozone, shift the emphasis from public goods to risk sharing. Insurance has benefits but it also has costs, notably in terms of moral hazard. The costs may easily exceed the benefits. If negligence is to be avoided, subsidiarity must prevail.

Second, past policies to overcome the sovereign debt crisis have raised doubts about the extent to which the rule of law is still respected by the European institutions. We believe that the Court of Justice has to be reformed and that the citizens and the national parliaments have to be given more say. The ultimate protection against a breakdown of the rule of law is the right to withdraw. There ought to be more room for opt-outs.

Resulting from this discussion, we have developed two groups of recommendations that are attached to this letter. First, those addressing the alarming gap that has opened up between the Union and its citizens. Our recommendations are aimed at reducing the distance between the EU and its citizens by making possible enhanced direct citizen participation, by giving greater powers to national parliaments and by placing the agenda-setting role in the hands of the Member States themselves. Respect for the rule of law will be enhanced by judicial procedures less prone to political bias.

The second group of proposals aims to improve the long term economic growth prospects of the Union. In this area our proposals aim to improve opportunities for the young, to reduce inter-generational friction, to reduce the burden on future generations, to lower costs of doing business in the EU, and to reduce strains on welfare budgets.

We fully recognize that the two agendas – the political and the economic – are linked in practice. It would be a mistake to see hardening political attitudes, growing intolerance and polarization in the EU as just linked to the financial crisis and poor economic prospects in the EU. It also is linked to remote, elitist political structures.

We also recognize that, while some of our recommendations are about better observance of the existing rules of the EU, and others are about the interpretation of existing Treaty provisions, there remains a need for fundamental Treaty change, including a review of the role of the European Court of Justice itself. In our view the Council of Ministers should appoint an expert group, with a membership entirely independent of the EU institutions, under your Presidency, to draw up a list of necessary changes including alternatives. Such a body could report by end 2016.

In our view the recommendations we attach are vital to heal the divisions within the EU, to restore fair play and to nourish the reciprocity between Member States that is essential for the Union to flourish.

Yours sincerely,

ECG members.

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Attachment: ECG Recommendations

## A. MEASURES TO REDUCE THE DISTANCE BETWEEN EUROPE AND ITS CITIZENS.

1. A qualified minority of national parliaments should be able to block any new proposed EU measure (issue a red card) on any grounds including excessive cost or uncertainty of impact. Their decision shall not be subject to review by the ECJ.
2. The role of the Commission should be redefined in accordance with a separation of powers. To this end its quasi-judicial powers (in competition and trade policy) and its oversight role in relation to fiscal policy should be assigned to independent bodies; its right of legislative initiative should be re-assigned to the Council of Ministers and the European Parliament.
3. Disputes involving the principles of subsidiarity and proportionality shall be decided by a Court of Review whose members are delegated for a limited period from the highest courts of the Member States. They will be chosen by lot from those members of the highest court who have had judicial experience outside the court.

4. In the event of disputes between members and non-members of the eurozone, any Member State should be able to bring action against the EU, its institutions and agencies including any disputes related to the location of service providers. Any such action shall be arbitrated by a special tribunal whose ruling will be accepted by the parties as final. The tribunal shall be composed, on a case by case basis, of a member of a constitutional body of the member state bringing the action, a member of the ECJ and a chairperson from a constitutional court of a jurisdiction outside the EU.

5. A qualified group of citizens in a qualified minority of member states (one percent of the voters in at least 5 member states) or a qualified minority of the national parliaments should be enabled to trigger an EU-wide referendum to oppose any EU measure – including budgetary measures. The referendum shall be supervised by an independent body that shall determine procedures, qualifying majorities and the wording of the question. The costs of shall be borne from the EU budget. The need for greater flexibility in the way that the Union respects the preferences of its citizens should be recognized in its common provisions (TEU Art.1).

## B. MEASURES TO RESTORE GROWTH AND EMPLOYMENT PROSPECTS.

1. In order to reduce the costs of doing business in the EU, a qualified minority of national parliaments of the Member States should be able to propose the revocation of any existing EU directive or regulation. The proposal should require only a simple majority for approval in the Council of Ministers. The decision of the Council should not be subject to review by either the European Parliament or the ECJ.

2. The breach in the Treaty of the no bail-out provisions (TFEU Art. 125) must be repaired. Members of the Eurozone that persistently violate the provisions of the Treaty against excessive deficit financing (TFEU Art.126) should automatically cease to be members of the Eurozone without losing their membership in the Union. Member states that are not members of the Eurozone should be under no obligation to provide financial support for the zone.

3. The debt reduction necessary for some member states should involve an orderly resolution process where only obligations owed to the Bretton Woods institutions are accorded preferred status.



4. The ECB should stop buying government bonds. It should not finance government budget deficits.
5. The Union should give equal recognition (under TEU Art. 4) to currencies of member states other than the Euro.
6. The Union should not introduce a tax of its own or intensify tax harmonization as this would aggravate the burden of taxation.
7. In order to speed up the negotiations on TTIP the EU should (under Art.218) look to the consent of the European Parliament on a 'fast track' basis involving only the principle of consent or non consent to the agreement as a whole.
8. In recognition of the strain on budgets of increased flows of people within the EU and between the EU and the outside world, any member state should be able to institute a 'step –back' provision to limit flows from whatever source. A step-back procedure would preserve the principles of the Schengen area, the free movement of people and non-discrimination on the grounds of nationality, but allow for derogation at the discretion of the Member State concerned.

**Annexes.**

1. Reform Proposals of the Five Presidents and Others.
2. UK areas of concern.
3. Summary of the legal text of the "Proposal of a Constitution for Europe" (ECG 1993).

## Annex 1. Reform Proposals of the Five Presidents and Others.

**Synopsis of current proposals for reforming euro-area governance**

Proposal	Proposer(s)	Arguments in favour	Arguments against
1. "Euro-area Fiscal Stabilisation Function"	5 Presidents	macroeconomic stabilisation	Keynesian fine-tuning
2. "Euro-area Treasury"	Trichet, 5 Presidents, Hollande, Coeuré, Schäuble	same	same
3. "Euro-area Parliament"	Hollande	control of Euro-area Treasury	majority from over-indebted countries (286: 210)
4. "Full-time Presidency of Euro-area"	5 Presidents	centralisation	decentralisation
5. Commissioner coordinating macroeconomic policy	Macron, Gabriel	macroeconomic stabilisation	Keynesian fine-tuning
6. Euro-area tax: surcharge on VAT, fin. transaction tax, corporate tax	Monti-Committee, Schäuble	same	tax competition, vertical tax externalities
7. Minimum corporate tax	Hollande, Schäuble	level playing field	tax cartel, different needs
8. Harmonisation of labour law, e.g. minimum wage	Hollande, Macron	level playing field	regulatory cartel, different needs
9. European unemployment insurance	Padoan	risk sharing, stabilisation	moral hazard, different needs
10. Economic coherence as additional target of monetary policy (ECB)	Rajoy	not only price stability	lack of predictability
11. "Single European Capital Markets Supervisor"	5 Presidents	centralisation	specialisation
12. "Euro-area Deposit Insurance"	5 Presidents, Guindos, Padoan	risk sharing, level playing field	moral hazard, competitive distortion
13. ESM credit line to Single Resolution Fund	5 Presidents	risk sharing	moral hazard
14. Independent competition authority	Schäuble	separation of powers	
15. Independent guardian of the treaties	Schäuble	same	

## Annex 2. UK Areas of Concern.

### (i) Immigration.

A concern for most if not all member states. Addressed by recommendation B.8. above.

### (ii) Sovereignty.

Addressed in part by group A of the recommendations above (red card procedure etc).

### (iii) Relationship between Euro ins and euro outs.

Addressed in part by Recommendations A.4. & B.5.

### (iv) Competitiveness.

Addressed by Recommendation B.1.

## Annex 3. "Proposal of a Constitution for Europe" (ECG 1993):

### Summary of the Legal Text

***A PROPOSAL FOR A EUROPEAN  
CONSTITUTION***

***Report by the  
EUROPEAN CONSTITUTIONAL GROUP***

***December 1993***

***European Constitutional Group***

***Members***

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The Group wishes to acknowledge the work of Michael Upton, Advocate, Scots Bar, Edinburgh and Clerk to the Law Reform & Legislation Committee of the Scots Bar in Part III of this report.

**A PROPOSAL FOR A EUROPEAN CONSTITUTION****PART I INTRODUCTION AND SUMMARY****Tab 1a Introduction****Tab 1b Summary of Main Points****PART II PRINCIPLES AND THEIR APPLICATION****Tab 2a Statement of Constitutional Principles****Tab 2b Institutional Choices****Tab 2c Consolidated Statement of Proposals****PART III LEGAL TEXT****Tab 3a The Constitution****Tab 3b Table Relating Existing Treaties to the Constitution**

## SUMMARY OF MAIN POINTS

This paper summarises the main constitutional proposals of the European Constitutional Group. It also outlines the key considerations underlying the Group's discussions of selected points of importance.



### ***1 Principles (Tab 2a)***

A durable constitutional structure for the Union must be founded on solid constitutional values. The Group puts forward ten principles that should underpin constitutional arrangements for the European Union. (Subsequent page reference numbers are to pages in Tab 2a).

**(a) The Proposals:** Particularly important among the ten constitutional principles proposed by the Group are the following:

- : The starting point of the constitution must be a clear recognition of the fundamental importance of the value of individual liberty. Liberty is not conferred by government. The legitimacy of Union structures rests on powers flowing up from the people (page 2).
- : There must be a better definition of Union purposes (page 3) together with a clear demarcation of jurisdictions (page 9).
- : The rules that govern the exercise of Union powers should differ according to the different areas for collective action (page 4).
- : Constitutional defences must be incorporated against the growth of central bodies. It must also allow for shifting perceptions of what is best done collectively by the Union so that powers can be adjusted (page 8).
- : The constitution should provide for a strong system of institutional checks and balances (page 10).

These principles are intended to ensure that Europe's constitutional arrangements are based on popular support. A structure imposed from above will not last.

### **(b) Key Considerations - The Choice of Values:**

The Group considered alternative values to individual liberty as the founding principle of the constitution. Alternatives include expressions of social harmony in Europe (such as 'cohesion') and the value of European unity itself.

The tragedies experienced by Europe in this century owe much to philosophies that have emphasised the collective over the individual. The Group concluded that the constitution could not afford to repeat this mistake. European unity is a strongly desirable objective but only insofar as it provides for a Europe where individual freedoms can flourish. An emphasis on the individual is fully compatible with recognising the value of those voluntary associations in society based on community, locality, region and nation on which social harmony in Europe can be built.

## ***II Institutional Arrangements (Tab 2b)***

The institutional proposals of the Group are based, first, on achieving a clear separation of powers between the Union institutions and, second, on a recognition that the separation of powers will not by itself achieve the decentralisation and diffusion of power in the European Union that is an essential requirement for a free society. The proposed arrangements for the distribution of powers and the attribution of responsibilities in the Union address both aspects. (Tab 2b outlines the reasons for these choices and Tab 2c gives further detail in certain areas).

### **(a) The Proposals** Institutional highlights of the report include:

- : provisions to strengthen the role of the Council of Ministers vis à vis the Commission. New voting arrangements are proposed to make sure that the Council of Ministers can function effectively with larger membership (Tab 2b pages 2-6).
- : a two chamber parliamentary review process with delegates of national parliaments introduced as a formal element into Union procedures for legislative review. The purpose is to strengthen the legitimacy of collective action in the Union. The Chamber of National Parliamentarians would have a constitutional role so as to better preserve the balance stipulated in the Union constitution between collective action by the Union and individual measures by the Member States. The directly elected Chamber of the Union would also gain extra responsibilities (Tab 2b pages 7-9). (See also Tab 2c pages 7-8).
- : a new judicial body (the Union Court of Review) which will help guarantee the maintenance of a diversified system of law applicable within the Union. The aim is to improve the quality of constitutional adjudication in the Union. Union law under the existing Court of Justice would be applied as superior law within a defined and limited area between international law, national law and other applicable jurisdiction such as that provided by the European Convention on Human Rights. A system of diversified law is much more likely to offer protection to individuals and to a decentralised system of Union government than according a dominant role to a single Court such as the Court of Justice that has a vested interest in the extension of a single superior law (Tab 2b pages 11-14).
- : a new independent Competition Authority for the Union. The intent is to achieve a more transparent and impartial system in the Union and the Member States against the abuse of market power and against distortions to the market provided by State and Union regulation and aids (Tab 2c page 8).

**(b) Key Considerations****The Separation of Powers:**

In discussing institutional arrangements in the Union the Group considered how best to achieve a clear separation of powers. It has long been considered desirable that constitutions should provide for a clear separation of powers between those that exercise the executive function in the sense of giving political direction, those in the legislative branch that subject legislation to scrutiny and review, those that exercise judicial powers, and those that administer. The purpose is first to ensure good government - for example that justice is not politicised and that administrators remain impartial. Secondly separation helps ensure that each branch will act to keep the other in check and acting within its powers. Thirdly it enables responsibility to be sharply defined.

Such a separation is not achieved under present arrangements. In particular the Commission exercises a mix of judicial, political, administrative and legislative functions. The arrangements proposed by the Group in order to achieve a separation of powers are illustrated in Chart A. Their purpose is to achieve a clear attribution of responsibility.

**The Diffusion of Powers:**

The Group also considered the related issue of how the distribution of powers could best be made compatible with a system of decentralised powers in the Union. The separation of powers does not by itself achieve a diffusion of powers. This is because the different branches of a Union structure can work together to accumulate powers at the centre. For example under present arrangements the Court of Justice, the European Parliament and the Commission can all act together to extend the powers of the Union.

In order to achieve a diffusion of powers the Group's proposals envisage a more prominent role for the regions within Member States and through the Committee of the Regions. But the key issue is the role of the institutions of the nation state (governments, parliaments and judiciaries).

The Group considered that the way in which the role of the institutions of the Member State is articulated has an intimate connection with the preservation of individual liberties in Europe. The Member State is and will remain an important focus of voluntary association within Europe; in most cases the institutions of the Member State have an inherited legitimacy that can in turn help legitimise collective action by the Union; they provide a natural building block for a system where powers are delegated from the bottom up rather than conferred down from the top; and by maintaining alternative approaches to issues of public policy they can contribute to the evolution of best practice in Europe and to the preservation of minorities that may be right. In each of these roles the Member State can help maintain a system of diffused power in Europe essential for individual liberty. It would, in addition, be foolish not to take advantage of those constitutional arrangements that they possess to protect the freedoms of their citizens.

The institutional proposals of the Group thus build in the role of the governments of the Member State to provide political direction in the Union, national parliaments (together with the Committee of the Regions) to help ensure that the Union legislates in accord with the provisions of the constitution and members of national judiciaries in the Union Court of Review who will see that Union competencies are not exceeded. The proposals are illustrated in Chart B.

### ***III Processes and Powers (Tab 2c)***

A constitution that is based on proposed outcomes is inherently fragile since no system of government can guarantee outcomes. The emphasis has to be on process. This includes clearer definitions of what can be best done by the Member States acting collectively together in the Union, those policies that are better framed in a broader international framework and those that are best left to individual Member States.

#### **(a) Proposals**

Among the proposals in the report on the powers and procedures of the Union are the following: (page references are to Tab 2c unless otherwise stated).

- : the powers and procedures proposed in relation to the external commercial policy of the Union, foreign, security and defence policy are framed in the context of the international rule of law. (pages 11-12)
- : On social policy the report proposes that the Union will benefit more by learning from a diversity of national approaches. Social aims and aspirations can then be framed close to those who are the intended beneficiaries and in the light of the different social traditions of the Member States and varying individual preferences at different income levels. The aim should be to learn from best practice. (page 13)
- : it is proposed that the "subsidiarity" procedures agreed at the 1992 Edinburgh Council become entrenched within the constitution. While the procedures will have a general applicability, the Chamber of Parliamentarians supported by the Committee of Regions would have a special responsibility in seeing that they are observed. This will help ensure that powers within the Union are exercised in a manner that reflects the distinctions in the constitution between what is best done by Union members acting together and what is best left to the Member States.(pages 6-7).
- : the proposals provide for a strong fiscal constitution as well as a clear monetary constitution. The objective is to prevent abuse by the Union of its powers to spend and to help ensure that fiscal transfers do not become a source of friction in the Union and an obstacle to enlargement. It would be deception for the richer Member States to hold out the prospect to the poorer that they will finance a comparable level of social welfare across the Union. Improved standards of living must be earned through productivity gains. (Tab 2c pages 12-13; see also Tab 2b pages 15-17).
- : more flexible arrangements to accommodate new Member States are envisaged. In this way the opportunities in Europe presented by the end of the Cold War will not be squandered by the appearance of new types of barrier in Europe. (page 5).

**(b) Key Consideration - Effectiveness of the Union**

The Group considered the proposed powers and procedures in conjunction with its proposed institutional arrangements in order to assess whether the total sum of its proposals would enable the Union to act effectively in necessary areas.

The key components in the improved system of checks and balances are the Chamber of Parliamentarians, the Union Court of Review and the entrenchment of the subsidiarity procedures.

At the same time, the proposals facilitate action in the Union

- : by containing clearer definitions of when Union action is necessary;
- : through the role of the Chamber of Parliamentarians in sorting out unnecessary legislative proposals;
- : by improving decision-taking procedures in the Council (particularly in the context of removing market barriers);
- : by a clearer delineation of the separate responsibilities of the different institutions of the Union.

The new decision-taking procedures proposed for the Council and Parliament provide for a better articulation of the views of the smaller as well as large Member States of the Union. They enable action to be taken while protecting the rights of minorities.

The progress of the Union is not a matter of facilitating the promulgation of laws by some far-seeing elite. The more the Union can be tied together by the institutions and experience of voluntary association the less it will need the bonds of central law and regulation. The greater the scope in Europe for best practices to evolve through the discovery process of the market and through the vitality of competing jurisdictions the less the Union will be prone to the failures of even the best orchestrated system of central government. No Union will last, however imposing its central authority may appear, unless its powers and institutional arrangements flow upwards from the consent of individuals.

#### ***IV Structure of the Union Constitution (Tab 3a)***

A final recommendation of the report is that the main contents of the Union constitution should be accessible to any interested reader. The existing Treaties are impenetrable. The next round of institutional and other changes cannot take the shape of a further set of amendments to an already twice amended Treaty of Rome. Therefore the final part of the Group's report puts its constitutional proposals into legal form.

The legal structure of the Union presented in this report will be seen in some Member States as 'Federal' and in others as 'Confederal' since the terms are used in different senses within Europe. Implicit in the report is the view that collective action in the European Union has unique features. Mere transplants from other systems are not possible or desirable. What is proposed has been guided by what is thought to be the best form of Union most suited to Europe's special character.