

The European Union—A Federation or a Confederation?

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Abstract: *The question about the essential nature of the EU (a federation or a confederation?) is a fundamental yet controversial issue, which has provoked plenty of debate. The fact that different attitudes are frequently accompanied by equivocation and manipulation with concepts and terms, which carries an undisguised political (more often than not a populist) connotation, is particularly annoying. The article seeks to analyse, primarily from the legal point of view, the current developments in the EU, first and foremost in the light of institutional competence. There is an obvious trend towards increased competence of the Union which makes it possible to conclude that the European Union is moving towards a federation, being more a federation than a confederation even today. Taking into account the understandable interest of the nation states, the EU could be called the United National Democratic States of Europe in the future. It would definitely not refer to a classical model of a federal state (à la the USA). Naturally the peculiarities, culture and traditions of a nation state—the national identity as a whole—could not be ignored. It unarguably is a phenomenon the novelty and many-sided essence of which deserve consistent and thorough scientific analysis, in spite of the relative delicacy of the problem. Therefore it has quite often been carefully alleged that the EU is a “union of states which lies between confederation and federation” (Laffranque, 2006, p. 151).*

Keywords: *competence of the Union, European Union, federation and confederation, sovereignty*

1. Introduction

This rhetorical and in many respects over-politicised issue becomes topical, time and again, for different reasons or occasions. Estonia experienced it at the end of the 1990s and the beginning of this century, when the long and complex negotiations on Estonia's accession to the European Union were underway (1998–2002). The issue culminated before the referendum held on 14 September 2003, when two thirds of the voters said 'yes' to the accession and relevant constitutional amendments, but one third was negative towards the EU. The threat that Estonia, which had recently restored its independence, would be deprived of its sovereignty again was the sceptics' main argument. The fiercest critics of the movement even threatened that the former dictate of Moscow would be replaced by the Brussels' one. Why could Estonia not be a truly independent and sovereign country, such as Switzerland, for example, or why could it not follow either Norway or Iceland as a role model—were the most often asked questions. The author's answer would be: unfortunately Estonia is neither Switzerland nor Norway: its level of development compared to either of these countries is very dissimilar due to several reasons. The geopolitical location of Iceland, compared to that of Estonia, is completely different (the distance from the main continent provides certain advantages and also audacity which, by the way, manifested itself in the act of recognising the newly restored independence of Estonia). Furthermore, the probability that any of the abovementioned countries would deem it necessary to join the EU one day cannot be excluded either.

With regard to the particular dispute—a federation or a confederation—the importance of the formal meaning of concepts (names) should not be overestimated. For instance, the official name of Switzerland is Swiss Confederation but in reality it is a typical federation (26 cantons and a bicameral federal parliament). The Soviet Union considered itself as a federation which consisted of union republics but, as a matter of fact, it was a unitary state based on a single-party political system. The problem lies in the whole essence and organisation of the state, not in its name.

In the debate about Estonia's accession to the EU—whether the decision was a right one or not—the author's own preference has always been, and he has also encouraged everyone else, to approach the issue as a dilemma: if it was not a right decision, what could have been a reasonable alternative? The emphasis has been placed on the word *reasonable* here. Regrettably, there have not been any sensible or well-reasoned answers yet.

Without letting himself to be disturbed by the pre-election tactics of different political powers or other narrow interests, including psychological-emotional means of influencing (a fear of being deprived of statehood, a threat of being controlled by foreign powers again, etc.), the author is trying to objectively analyse the principal characteristics of a federation and confederation—their essence in terms of differences and similarities from institutional as well as functional aspects. A unitary state and a classical international institution will be excluded, as it is evident that regarding the structure and relationship between its constituent countries the European Union is neither of them. It is essential to get to the heart of the problem and comprehend where the union, which had only six founder members in 1952 (currently 27), is heading for, and which way should this structure be seen and evaluated as a whole. The question which option is better—a federation or a confederation—should be discarded here, as the answer always depends on specific circumstances which could be entirely different in time and space. In the author's opinion federations can be totally different in terms of internal coherence, and the same applies to a confederation. Some contrasting examples could even be given: in the USA, which is a federation, the capital punishment, the death penalty, is applied in 37 states out of 50; at the same time all the EU Member States have signed up to the European Convention on Human Rights, which has abolished the capital punishment.

A few concepts, closely related to the topic, should also be clarified before dealing with the main issue: a state's *sovereignty* and *independence*.

Pursuant to Chapter I, Section 1 in the Constitution of the Republic of Estonia, the country is an independent sovereign democratic republic wherein the supreme power of the state is held by the people; Section 2 stipulates that Estonia's independence and sovereignty is interminable and inalienable.

Estonian Encyclopaedia refers to sovereignty as absolute political (involving domestic as well as foreign policy) independence from other countries (EE, 1996). One can conclude here that independence and sovereignty are the same, as if they were synonyms. However, in Chapter I of the Constitution of Estonia these concepts are used separately. Therefore a certain inconsistency can be identified here. What do these two concepts actually mean, where does their difference lie?

According to classical theories, a present-day state as a differentiated organisation has three characteristics: a territory, nation and organisation of public power. Actually, the fourth characteristic has increasingly often been mentioned in the field-specific literature—an actual ability to be a full subject of international communication, that is, a subject of international law.

The concept of sovereignty has not been explicitly included in the Constitution of the Estonian Republic but the meaning has been hidden in the first paragraph of Chapter I, which stipulates that the supreme power of the state is held by the people. The sovereign of a country is people as the supreme power—people as citizenry, not as population, ethnosc or just a big crowd of people.

Sovereignty could principally be approached in two dimensions: internally, inside the country it refers to the monopoly of the public power, which manifests itself in the establishment of relevant rules which apply to every person who is lawfully staying within their territory. In other words, a state has established the legislative, executive and judiciary power. It has a head of state and requisite inspection mechanism, including state audit office, legal chancellor, ombudsman, etc. These institutions enable a country to execute itself as a state. That kind of internal dimension of sovereignty is a country's independence.

However, an independent country also executes itself externally: diplomatic relations, participation in international organisations, etc. Herein the independent sovereign states respect other countries' independence, their sovereign rights and interests; they possess equal rights to conclude agreements with them, etc., which all represent the external dimension of sovereignty—a country's independence. This is a country's ability to execute its independence as independently from external factors and influences as possible. Internationally, sovereignty indicates a country's immediate subordination to international law exclusively, not to any other subject of international law (a foreign country or international organisation). Although it should be admitted that in the present day world not a single state, including the superpowers, can enjoy absolute independence. Everything is increasingly interconnected: energy resources, environment, climate changes, security and demographic problems, the influence of mass destruction weapons (who starts first will die second), etc.

In the light of the aforementioned considerations it can be concluded that Estonia's decision to join the EU (on 1 May 2004), the primary law of which—the founding treaties and treaties of accession, also legislative acts of institutions and the judgements of the European Court of Justice, are much more binding (superiority and direct applicability) documents than any other external communication—actually refers to the fact that Estonia voluntarily and legally abandoned a part of its sovereignty, which definitely sets limits to the country's independence as well.

At this point one cannot ignore a significant aspect: in addition to the issue about the EU accession, the referendum also involved some amendments to

the Constitution of the Estonian Republic. The bill included four articles; two of them were given more weight, the rest had a more procedural meaning. Article 1 of the amendments stipulates that “Estonia may belong to the EU on the assumption of adhering to the underlying principles of the Constitution of the Estonian Republic”, which refers to the principles stated in the preamble, and also in Chapter I of the Constitution of Estonia. It is a so-called protection clause, a kind of “tranquiliser”, which was targeted at the euro-sceptics and, first of all, the undecided voters to influence them before the referendum. At the same time, Article 2 of the amendments provides that “upon Estonia’s accession to the European Union the Constitution of Estonia is applied taking into consideration the rights and duties arising from the Treaty of Accession”.

Immediately before the referendum on accession to the EU the author argued that

there is a certain variance between the aforementioned two Articles. As to its essence, Article 2 will prevail, as the underlying document for the accession treaty is a principal article of the agreement establishing the European Economic Community (Treaty of Rome, 27 March 1957), Article 10 (formerly Article 5), which stipulates: “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty”.

This Article is considered to be the strictest one in primary law and pursuant to that Article the Constitution of Estonia will be applied. The European Court of Justice will be the exclusive authoritative interpreter of the law and assess whether a Member State has acted in accordance with the objectives set by the Union. If there appears to be a legal non-compliance with the objectives set by the Union and a Member State does not take appropriate measures, the European Court of Justice may apply sanctions on the basis of the proposal from the European Commission.

Naturally, we are not entering a unitary “super state”, with which those who say ‘no’ to Estonia joining the EU to frequently frighten people. The EU has never been and will never be a unitary state. It has been excluded as well by the founding treaty as by the treaties of accession, and also considering the composition and structure of the European Union. Indeed, if most people

vote ‘yes’ in the referendum, we will join a composite state, which has long democratic tradition and respect for human dignity (or anyway it is the union which is striving for that). It would be strategically wrong to wait for the “next train” (Bulgaria and Romania in 2007), because we would lose valuable time and eventually arrive at the same station. My idea is that those who say ‘yes’, and those who say ‘no’ should, as much as possible, avoid tendentiousness and ambiguity in reasoning. Not only tactics with a taste of propaganda but a future oriented promising strategic decision, critical for Estonia, is at stake. Indeed, any citizen who respects him/herself should not abstain from making that decision.

A few years later (on 11 May 2006) the Constitutional Review Chamber of the Supreme Court presented an opinion on interpreting Article 111 of the Constitution of the Republic of Estonia. The issue arose due to the alleged need for holding a referendum on euro adoption. The opinion of the Supreme Court declares that the EU law is applied in the areas over which the EU has an exclusive competence or a shared competence, if there is an inconsistency between the Estonian laws, including the Constitution of Estonia, and European Union law. In other words, there prevailed the position of a clear majority of the Constitutional Review Chamber of the Supreme Court (two judges were of a different opinion), which suggested that the Constitution of the Estonian Republic will be applied only to extent not inconsistent with the EU law (RT, 2006).

The decision is entirely logical as all the European Union legal acts include a clear principle: the EU law is superior to the national law, including the constitution of a Member State. However, in practice there has not been any precedent yet that the European Court of Justice has proclaimed an article of a Member State constitution to be inconsistent with the principles of the EU legislation. Perhaps, that may also result from the delicacy of the issue. At present, the reader would be interested in the past and future development of the EU, rather than its titles, the system of symbols, or some other exceptional phenomena.

2. The development of the EU—a federalist trend

Today’s EU has not been created out of nothing. The idea of unifying Europe resulted from the sad consequences of the World War I and World War II. In 1923, the Austro-Hungarian count and diplomat Richard Coudenhove-Kalergi initiated the pan-European movement with an aim to create the United States of Europe (excluding Great Britain and Russia). In 1929, the Foreign Minister of

France Aristide Briand put forward an idea of a European Federal Union within the framework of the League of Nations. The idea also attracted some interest in Estonia where the slogan of a literary group *Noor Eesti* ('Young Estonia'), "Let us be Estonians but also become Europeans," became widely known (decades later the idea was often repeated by Estonian President Lennart Meri). Kaarel Robert Pusta, Johan Laidoner, Ants Piip and other Estonian state officials were involved in the activities of the "Estonian Society of Paneuropean Union". The UK Prime Minister Winston Churchill's speech delivered on 19 September 1946 in Zurich, where he clearly voiced that a kind of union should be created in Europe, was definitely a significant landmark in the development of the EU.

The idea of the union became much more explicit when the then French Foreign Minister Robert Schuman presented a declaration on 9 May 1950, which included a proposal to found a European Coal and Steel Community (ECSC) with an obvious intention to subordinate the essential warfare industries to an authority higher than a state. Today, Europe Day is annually celebrated on the 9th of May, which can also be regarded as the date of birth of the European Union. The treaty, which became effective in 1952, was concluded for 50 years but it has already ceased to be valid due to the greatly changed nature of the European Union. A Frenchman, Jean Monnet, who was an intellectual father of the Schuman's plan, and who became the president of the High Authority of the ECSC, also played a significant role in the pre-history of the EU. The next important milestone were the treaties concluded on the initiative of the Benelux countries in 1957 that gave birth to the European Economic Community (EEC) and to European Atomic Energy Community (Euratom)—the treaties of Rome, which became effective on 1 October 1958.

The three communities were known as the European Communities (sometimes referred to as the European Community or EC). All three were established by the same six founder members—France, Germany, Italy, Belgium, the Netherlands and Luxembourg. Former enemies in war stretched out their hands for reconciliation, buried the hatchet and started to collaborate. It was a decisive turning point in the European history, which were followed by extensive quantitative (enlargement) as well as qualitative (collaboration and deepening of competence) developments. In 1973, the United Kingdom, Ireland and Denmark (the referendum in Norway was against), in 1981 Greece, and in 1986 Spain and Portugal joined the Union. In 1987, Single European Act entered into force, common institutions, which had been established for 12 Member States, became increasingly efficient and more and more organisationally and legally binding.

In 1992, the Maastricht Treaty was concluded; a pause occurred after that. Only

after the positive decision of the Federal Constitutional Court of Germany and the support provided by the second referendum in Denmark the treaty became effective on 1 November 1993. The community also earned a new name—the European Union. Shortly after that, in 1995, there was a new wave of enlargement when Austria, Sweden and Finland joined the Union. Norway had a second try, but people voted against the EU once again. The most extensive enlargement took place on 1 May 2004 and involved the accession of ten new Member States—Hungary, Czech Republic, Poland, Slovakia, Slovenia, Estonia, Latvia, Lithuania, Cyprus and Malta. Three years later, Bulgaria and Romania followed. A promissory note has been given to Croatia, and there are more candidate countries in the waiting list. Turkey's accession is a more complex issue: first of all it is related to human rights' violation.

In parallel with the EU enlargement process, constant qualitative changes were underway, which was an indication of developments towards more intensive and efficient cooperation. European Parliament introduced direct election in 1979, which can be considered an important milestone in the EU development. The Single European Act (1987) marked a start towards a political union by changing the decision-making procedures in the EU institutions; it increased adopting decisions by qualified majority voting instead of unanimity. The same act also created the foundations for the Court of First Instance (CFI).

The Maastricht Treaty made the EU operate as a building which is covered with the same roof and supported by three pillars: I – European Communities, II – Common Foreign and Security Policy III – Justice and Home Affairs. While the first pillar involved the competencies the Member States had handed over to the supranational institutions—the ones which had become the exclusive competence of the union (EC, ECSC, Euratom, etc., the EU founding treaties and treaties of accession)—then the second and third one rather represented the cooperation between the Member States themselves. It is also notable that the Maastricht Treaty provided the citizens of the EU Member States with an additional common citizenship institution, created the position of European Ombudsman, set up the Committee of the Regions and led to the creation of the single European currency, the euro.

The Treaty of Amsterdam (1997) incorporated judicial cooperation in civil matters, also asylum procedures and immigration policy into the first pillar of the EC, that is, they became an exclusive competence of the Union.

The Treaty of Nice (2001) brought along crucial institutional changes, which made preparations for the biggest wave of enlargement (2004). Together with

the Treaty of Nice the Charter of Fundamental Rights of the European Union was signed, although it was not given legally binding status first. However, referring to its content is was a constitutional act. The Nice Treaty also reformed the jurisdiction—it provided an opportunity to establish specific judicial panels to exercise judicial competence in certain specific areas. The need to regulate the competence between the Union and Member States more specifically became more urgent, the need to elaborate a Constitution for the European Union was more and more heard (Laeken Declaration of 15 December 2001).

On 28 February 2002, an inaugural session of the Convention on the Future of Europe was held. Differently from previous intergovernmental conventions, the delegates of national parliaments and the European Parliament, also the EU candidate countries, including members of the Estonian government and parliament, participated in this event. The work of the convention was intensive, lasted for several years and was concluded by the Treaty establishing a Constitution for Europe (actually a constitution), which was signed on 29 October 2004. The treaty proposed a number of changes, including the weightiest ones: the treaty introduced the EU citizens' initiative and an option to leave the European Union; a proposal to create a position of EU President and Minister of Foreign Affairs was made there; it launched the European Neighbourhood Policy; legal regulations acquired new forms—European laws and framework laws; a proposal was made to include the supremacy of the EU law imposed by the practice of the European Court of Justice in the treaty; it adopted double majority voting rules for adopting decisions in the European Council; it strengthened national parliaments' involvement in the legislative process. There was no doubt that the ultimate aim of the signed treaty was to pave the way for the European Union as a federation.

Unfortunately not all the Member States were ready for that kind of radical changes. The referenda held in France and the Netherlands in 2005 responded negatively to the Treaty establishing a Constitution for Europe. Most of the Member States ratified the treaty in their parliaments (Estonian Riigikogu on 9 May 2006). In addition, the referenda in Spain and in Luxembourg responded positively. Although the constitutional treaty that had provoked a lot of discussions still failed in its final stage—the treaty would have been effective if all the Member States had unanimously approved it. New opportunities and compromises had to be found.

The intergovernmental conference, which started on 27 June 2007, adopted a decision to continue efforts to reach an agreement: a Reform Treaty was a goal at that time. The agreement was reached on 18–19 October and the document, officially known as the Treaty of Lisbon, was signed on 13 December 2007.

Once again, the Member States faced a ratification process in their national parliaments, and a need to conduct a referendum. The majority of the states said 'yes' (Estonian *Riigikogu* ratified the Treaty on 11 June 2008; there were 91 affirmative votes and 1 negative vote). A day later the Treaty of Lisbon failed at a referendum held in Ireland (53.4% of the voters opposed). As a double referendum upon the same issue could not be conducted within a year, there was a delay again. Consultations continued and in the repeat referendum held on 2 October 2009 in Ireland the majority (67.13%) supported the Treaty. The last obstacle had to be removed: President of the Czech Republic, Vaclav Klaus, an outspoken opponent of whatever centralisation, made several efforts to jeopardise the ratification in national parliament, and delayed signing a relevant law. In the morning of 3 November, the Constitutional Court of the Czech Republic announced that the treaty was in conformity with the constitution of the country; the president signed the law on ratification the same day and also promulgated it. Now the road was open. The Treaty of Lisbon became effective on 1 December 2009.

The Treaty of Lisbon is made up of a consolidated version of the Treaty on the European Union (preamble and 6 divisions, 55 articles in total), and a consolidated version of the Treaty on the Functioning of the European Union (preamble and 6 parts which are divided into titles, 358 articles in total). The Treaty also contains 37 protocols and 2 annexes which are an integral part of it. There are 55 declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon on 13 December 2007. In addition to the two abovementioned treaties, a consolidated version of the Euratom Treaty is also applicable as one of the Union's founding treaties (Laffranque, 2010, pp. 13–22).

The development trends in the European Union will be covered below, the competences of the institutions, the Union and Member States are also analysed.

3. The main characteristics of a state and the EU institutions

A classical approach regards three common elements—a territory, population and institutions of power—as characteristics of a state. In the current context a reader's primary interest is a state as an institution, as a political subject regarding the aspects of communication, both internal and external; it even does not matter whether it is a unitary or a federal state, the constituents/federal states, states or cantons of which have different levels of sovereignty. In addition to *krays* and oblasts, the composition of the Russian Federation comprises several

republics, such as the Republic of Tatarstan (Tartarstan), the Chechen Republic, the Republic of Dagestan, etc.

The article presents a comparative analysis of a federation and a confederation; its purpose is to identify differences between these two, and to provide an answer to the question about the essential nature of the modern-day European Union.

First, the territory. Obviously no one will argue that the territory of the EU is a clearly defined geographical space with fixed and strictly guarded frontiers (including the terrestrial borders, waters, and airspace as well). Within the Schengen Area the borders between the Member States have been completely abolished.

Every person holding the nationality of a Member State is a citizen of the Union. Therefore the people as citizenry have also been clearly defined. In addition to free movement of persons, all citizens are eligible to vote in the elections to the EU Parliament and to the local authorities in the Member States.

With regard to institutions of power, the legislative, executive and judicial authorities of the EU can be distinguished according to several specific differences.

European Parliament, which is directly elected every five years by the EU citizens (currently the number of deputies is 735, plus the president), is like a parliament of a federal state—all the components are represented as proportions of the population, the deputies are organised into fractions and committees according to their functions (fields of activity). It is true that the Parliament has not fully exercised its legislative competence to the Treaty of Lisbon. The situation has been referred to as a “deficit of democracy”, though there is a clear trend towards the elimination of this shortcoming as the percentage of legislative acts adopted under Ordinary Legislative Procedure, former Co-Decision Procedure (jointly by both Parliament and the Council) is steadily increasing and approaching 95 per cent of all legislation across 84 policy areas (Hardacre, 2011, p. 86). The Parliament appoints the Commission, expresses a lack of confidence in it (or in a member of the Commission) if necessary, approves the EU budget, and exercises the function of political control and consultation as laid down in the founding treaties.

A **European Ombudsman** is elected by the European Parliament and is empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies (with the exception of the Court of Justice of the European

Union acting in its judicial role). He or she examines such complaints and reports on them. The Ombudsman is elected for five years and submits an annual report to the European Parliament on the outcome of his inquiries. The Ombudsman is completely independent in the performance of his/her duties. In the performance of those duties he/she neither seeks nor takes instructions from any government, institution, body, office or entity, strictly following the EU law. In many ways the EU Ombudsman can be compared to the relevant positions in the Member States (Chancellor of Justice in Estonia) in terms of their functions and competence.

The **European Council** provides the necessary impetus for the development of the EU and defines its general political direction and priorities. Unlike in the past, the competence of the Council includes making legally binding decisions, although the Treaty of Lisbon clearly states that the European Council does not have legislative function. The Council comprises the heads of states or government (decided by a Member State) alongside its own president and the president of the Commission. The High Representative of the Union for Foreign and Security Policy, the Foreign Minister for the EU is also involved in the work of the European Council, the heads of the Member States are accompanied by their foreign ministers.

The European Council is usually summoned four times a year by the president, an extraordinary session is held, if necessary. If it is not indicated otherwise in the founding treaties, the Council takes decisions by consensus. The Council elects the president by qualified majority for the period of two and a half years, renewable once. He/she chairs the European Council and drives forward its work and ensures its continuity. After each of its meetings, he/she presents a report to the European Parliament and represents the Union on issues concerning external communication (Common Foreign and Security Policy) without prejudice to the responsibilities of the Minister for Foreign Affairs. The President of the European Council may not hold any national mandate at the same time. The Belgian Prime Minister Herman van Rompuy was chosen to be the first permanent President of the European Council. Figuratively speaking, the European Council could be regarded as a collegiate president of the European Union.

The **Council of the European Union**, which is composed of several configurations of national ministers, one from each Member State, (the exact membership of the configuration depends upon the topic under discussion) actually represents a legislative institution. It has passed (increasingly under co-decision with the Parliament) regulations and directives that Member States are obliged to transform into national law. The number of votes each minister holds depends on the population of their Member State.

The **European Commission** is set up for five years. The Commission is headed by the president (José Manuel Barroso since autumn 2003), which can be compared with a position of a Prime Minister in a government. Members of the Commission (commissioners, including the deputy presidents) are in charge of relevant policies and can be compared with ministers. They are attended by main directorates (the ministries). A general director's position would be comparable to a chancellor of a ministry. The Commission makes legal proposals to the Council that will review them (increasingly along with the Parliament) and make the final decision. The Commission reports to the Parliament. The decisions are adopted by majority vote. Therefore, it is quite obvious that the status, competence and functions of the Commission as a whole are in many ways comparable to the competence and functions of the government of a federal state.

The **Court of Justice of the European Union** has been made up of the Court of Justice and General Court (previously known as Court of First Instance), since the Treaty of Lisbon became effective. The courts are composed of one judge per Member State. In addition, alongside the general court it also comprises the Civil Service Tribunal as a specialised court (7 judges), which as a first instance court is called upon to adjudicate in disputes between the European Union and its civil service.

The Court of Justice can sit in chambers (3 or 5 judges), Grand Chamber (13 judges) or it may decide to sit in full, if the issues raised are considered to be of exceptional importance (e.g., removal of the Ombudsman or a commissioner). Sitting as a Grand Chamber can happen when a Member State or a Union institution so requests, or in particularly complex or important cases. The Court of Justice gives rulings on the cases brought before it (actions for failure to fulfil a Member State's obligations, actions for the annulment of a measure adopted by an institution, actions for a failure to act on the part of a Union institution, appeals on judgments given by the General Court). The Court has a special role in giving preliminary rulings to the national courts of the Member States in disputes with regard to the interpretation and implementation of EU law. With this function the Court ensures uniform implementation of the Union law in all Member States; if the national court does not take the preliminary ruling into account, due to the complaint the dispute will eventually reach the judicial decision made by the Court of Justice. National courts, understandably, try to avoid that kind of precedents. Therefore, giving preliminary rulings serves as an efficient instrument for ensuring uniform legal system throughout the EU.

In addition to the abovementioned functions, the Court of Justice has the exclusive power to interpret the EU law which will create common legal space within the Union. Therefore it can be contended that, figuratively speaking, the Court of Justice is like a 'state within a state', a guarantee of consistent legal space, which is an important characteristic of a unitary state. At the same time, harmonisation of laws regarding different legal policies, such as strengthening budgetary discipline, improving cooperation on transnational criminal justice, speeding up legal proceedings, and also unifying and harmonising substantive law, are still underway. The issues about criminalising certain acts within the EU, such as establishment of minimum rules for defining criminal offences and imposing penalties on dangerous transnational crimes, including drug-related crimes, firearms smuggling, money laundering, corruption, counterfeiting legal tender, child abuse, cybercrime, and organised crime have also been brought forward.

The **European Central Bank** and the national central banks of the Member States constitute the European System of Central Banks (ESCB) which defines and implements the monetary policy of the EU. The primary objective of ESCB is to maintain price stability and support general economic policies of the Union. The European Central Bank has the exclusive right to authorise the issue of banknotes within the euro area. The Bank is independent in executing its responsibility, which the institutions, bodies and establishments and the governments of Member States honour. The Governing Council of the European Central Bank comprises all the members of the Executive Board and the presidents of the national central banks of those Member States which have adopted the euro. The Executive Board of the Bank comprises the President, the Vice-President and four other members, who are appointed by the European Council by qualified majority voting on a recommendation from the Council of the European Union after it has consulted the European Parliament and the Governing Council of the European Central Bank. The term of office for the members of the Executive Board is eight years and it is non-renewable. The Central Bank annually reports to the Parliament, Council and Commission on the ESCB activities and monetary policy in the current and previous year.

The **Court of Auditors** is in charge of auditing the EU and it was created in 1975. The Court is composed of one citizen from each EU state. Any member of the Court of Auditors is independent in fulfilling their responsibility. They are appointed on a recommendation of their Member State by the Council of the European Union, after it has consulted with the European Parliament, for a renewable term of six years. The Court checks all the revenue and expenditure accounts, receipts to account and legality of expenditure. On-the-spot checks in

Member States are also carried out in cooperation with local auditing institutions. At the end of the budget year the Court submits a report which is distributed among the relevant institutions of the Union. The Court assists the parliament and the Council in exercising their authority to check the implementation of the EU budget. The functions of the Court of Auditors are actually comparable with relevant controlling bodies in Member States, including the National State Audit Office.

In addition to the main institutions, there are also advisory bodies in the EU, first of all the European Economic and Social Committee and Committee of the Regions. All Member States are represented in them (public organisations in the first one; representatives of regional and local authority in the second). Both committees advise the Parliament, the Council and the Commission and are independent in their responsibilities.

4. The competences of the European Union and the Member States

The Treaty of Lisbon underlines universal principal values and the values of the European Union, which the Union follows in order to achieve its objectives—enhance peace, its own values and prosperity of its people. These values are: freedom, democracy, equality and rule of law, human dignity, respecting human rights, pluralism, justice and solidarity.

The Treaty unarguably strengthens the European Union—it is provided with legal capacity, it is a uniform legal entity that can enter into agreements, join international conventions or become a member of an international organisation. Pursuant to the Treaty a legal basis has been formed for joining the European Convention on Human Rights, which means being bound up with the European Court of Human Rights. Full acknowledgement to the European Charter of Fundamental Rights, which has been granted equal legal force compared with the founding treaties, is also of great significance. Hence, for a first time in the history, an integral European system for the protection of human rights has been created, which provides each citizen with an opportunity to appeal to the European Court of Human Rights to fight any unlawful action of EU institutions.

The Treaty of Lisbon (as a treaty for the EU's functioning) stipulates the competences of the Union and the Member States. The EU has exclusive competence in the following areas: the customs union; competition laws to regulate internal market; monetary policy within the eurozone; the common

fisheries policy to protect the biological resources of the sea; concluding international agreements according to a legal act of the Union or for enabling the Union to exercise its internal competence, and also if concluding an agreement may influence common rules or change their scope of application.

The Union has a shared or joint competence with the Member States, if the founding treaties grant the competence to the Union, which neither falls under exclusive competence nor the principle of subsidiarity. The Union and the Member States' shared competences cover the following areas: internal market; the social policy arising from the European Social Charter (Torino 1961) and the Charter of the Union regarding the employees' social rights (1989); economic, social and territorial cohesion; agriculture and fishing (excluding the part under EU exclusive competence); environment; consumer protection; transport; pan-European networks (in the field of the infrastructure of transport, telecommunication and energy); energy; the area grounded on freedom, security and justice (the Union ensures the absence of border control and provides common asylum, immigration and external border control policies, and other law enforcement policies, which are based on the solidarity of the Member States); common public health prevention measures. It is important to mention that the Member States exercise their competences only insofar as the Union has not exercised its competences.

The Member States' exclusive competences include protection and improvement of human healthcare, industry, culture, tourism, education, professional training, youth and sport, civil protection, administrative co-operation. The fact that the Union may provide support and co-ordination or improvements for the European aspects of the abovementioned areas should be accentuated.

How to assess the relations between the competences of the Union and the ones of the Member States in the light of the Treaty of Lisbon? On the one hand, attention has been paid to the importance of the role of the Member States and citizen initiative. The treaty does not involve delegating new exclusive competences to the Union, the principle according to which the Union is not entitled to extend its competences, is still effective. Contrariwise, the Treaty on European Union (Article 48) states that the competences can either be increased or reduced. For the first time a Member State's right to withdraw from the Union (pursuant to their national constitution) has been regulated (Article 50). The withdrawal agreement between the Union and a Member State should be concluded and negotiated according to specific procedures.

In addition to increasing the role of the EU Parliament in co-decision procedures the Treaty of Lisbon also includes the obligation of national parliaments to

observe how the Union follows its competences, first and foremost the principle of subsidiarity. The parliament of any Member State may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the President of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. If a significant number of national parliaments (at least one thirds) oppose, the draft has to be reviewed.

The amended Treaty on European Union, in certain cases, enables citizens (public initiative) to make proposals for a legal act. Support from at least one million EU citizens, who represent a significant part of the Member States, is required.

Although these are comparatively soft measures, yet they represent an attempt to somehow balance the relation between the EU competences and the Member States' competences.

At the same time, compared to the previous ones the Treaty of Lisbon comprises several changes towards the increasing scope of competences of the Union. As it has already been mentioned, the European Council also has a full-time President who is appointed for a two and a half year term. Previously, the President was changed every six months, and the position was held by the leader of the presiding Member State. Furthermore, a new position was created regarding the Common Foreign and Security Policy—The High Representative of the Union for Foreign and Security Policy (Foreign Minister), who *ex officio* serves as one of the vice presidents of the Commission. The new position was first fulfilled by a British politician Catherine Ashton, the former Commissioner for Trade. It is quite obvious that these high positions indicate increasing centralised authority within the EU.

The special provisions on common foreign and security policy of the Treaty on European Union stipulate that all the issues regarding foreign and security policy, including the gradual formulation of common defence policy which could lead to common defence, are the competence of the European Union. In Article 24 of the same document it is stipulated that the Member States cooperate in order to enhance and develop mutual political solidarity. They refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.

However, emphasis should be laid on the fact that the decisions adopted with regard to foreign and security policy are made unanimously by the European Council and the Council of Europe, unless the Treaty provides otherwise;

adoption of legislative, i.e. legally binding acts is excluded. The amendments made to the voting procedures related to decision-making refer to simplifying the process of exercising the EU competences. There is a trend towards replacing the unanimity requirement (right of veto) by qualified majority voting (e.g., the articles regarding checks at external border and right of asylum, also setting up special courts, including the civil service court, etc.).

In several parts the former standard procedure (summoning a convention or intergovernmental conference) has been replaced by an ordinary legislative procedure (consensual decision of the European Council), which currently applies to the whole internal market (e.g., free movement of goods, persons, services and capital) and to legal regulation on common policies (e.g., agriculture, environment).

The mechanism of voting regarding the decisions adopted by the Council has evoked a lot of arguments throughout history (just here the interests of larger and smaller states often collide). It is a very delicate issue. Pursuant to the Treaty of Lisbon (Protocol No 36 on Transitional Provisions) the following procedure is valid until 31 October 2014: when a decision has to be adopted on the proposal from the Commission, at least 255 votes in favour are required from the total 345, and at least 14 Member States (18 countries, if the proposal has not been put forward by the Commission), who represent at least 62 per cent of the EU population, have to be in favour of it. In other cases a decision is adopted by 255 positive votes, which represents at least two thirds of the Member States. When a decision is to be adopted by the Council by a qualified majority vote, a member of the Council may request verification that the Member States constituting the qualified majority represent at least 62 per cent of the total population of the Union (approximately 310 million). If that condition is shown not to have been met, the decision in question will not be adopted.

According to the Treaty on the EU (Article 16) from 1 November 2014, a qualified majority is defined as at least 55 per cent of the members of the Council representing the participating Member States, comprising at least 65 per cent of the population of these states. A blocking minority must include at least four Member States, which failing the qualified majority is deemed attained. These amendments indicate that the Union, on the one hand, makes an attempt to take into account the interests of different Member States trying to balance them as much as possible, yet, on the other hand, the procedure of adopting a decision has become more simple—in place of the present three criteria, in the near future there will be only two to be met (the majority of Member States and their population or double majority).

The fact that while any references to the constitution for the Union (the Treaty establishing a Constitution for Europe had failed!) and the official symbols of the EU (the flag, anthem, Europe Day, motto “United in diversity”) were excluded from the textual part of the Treaty of Lisbon, a legal basis was created for establishing the EU Prosecutor’s position (dealing with offences against the EU’s financial interests) refer to a similar attitude. Unquestionably, the aforementioned efforts demonstrate the EU’s pursuit, hesitancy, differences of opinion, and also difficulties reaching a compromise, which could serve as a basis for consensus. It is obvious that the Member States do not want to give up their sovereignty, national-cultural identity, their status of being a subject of international law, and many other values which are very sensitive due to their historical-traditional and psychological-emotional essence, and truly important to people.

Nevertheless, anyone can realize, either independently or all together, that the sustainability and development of the European Union will gain more efficiency if the union as a whole is stronger and more competitive. That presupposes solidarity and unitedness. The financial and economic crisis, enormous debts and budget cuts in recent years have had a strong impact on millions of Europeans’ mental and material well-being, which inevitably has provoked pessimism and criticism of the EU. Still, is there anyone who could propose a reasonable alternative to the strong and unitary European Union? The author does not see any realistic alternatives. On the contrary, the EU is moving towards tightening the control over the Member States’ budget policies (European Stability Mechanism becomes operational on 1 July 2012). Furthermore, the prospect that one day there will be a need for more tightly regulated and uniform tax and social policy cannot be excluded, either. These would doubtlessly be very hard decisions. Foreign and security policy also fall under that category of decisions. Fortunately, there is no doubt that it is necessary to maintain and promote every nation’s cultural legacy, their language, ethnic peculiarities and uniqueness.

The interests of a whole and any single part of it can never completely overlap, although according to the author there is no insuperable conflict between them, either. Time has qualitatively changed: the world is much more compact and interconnected at global and regional level than it used to be, and many concepts and notions have acquired a new meaning. Although, priority should always be given to developing modern democracy—these principles should be observed in any society.

Dr iur Mario Rosentau, a teaching staff member at the University of Tartu, has discussed the same issue in his essay ‘Sovereignty in the European Union’,

which might be of interest here. He has classified the difficulties in perceiving the phenomenon of the European Union into the real ones (caused by the complexity of the phenomenon itself), and the conceptual ones. He writes:

The conceptual difficulty lies in the fact that the conventional and partly obsolete conceptual apparatuses encumber understanding the phenomenon of the European Union. For example, European president does not signify a head of the state; the European Commission does not represent a government, neither is the sovereignty of the EU national sovereignty, etc. However, can we be sure that traditional concepts will not transform in that kind of a situation? Is it possible that, all of a sudden, the head of a Member State, its government and sovereignty no longer carry the meaning which they used to have? It is worth pondering that national sovereignty might mostly be restricted by not understanding the new status: when an illiterate person, who was free among his/her peers, happens to be among the literate people, he/she can become free only by learning to read and write.” (Rosentau, 2003, p. 12)

And:

Already today the European Union represents a new model of interstate relations. The process of shaping the Union should also be continued in the same novel way. It is not important whether we call it a confederation or not. Condo democracy of the European nations or national states seems to convey the essence of the Union rather well. It is more or less certain that a conventional federation, which is characterised by exclusive competences of the central power, and the limited competences of the subjects of the Union, is suitable neither for Europe, which has been divided on national–territorial basis, nor for the possible future world order. (Rosentau, 2003, p. 15)

While reading the last paragraph, the author, on the one hand, spontaneously visualises the Russian Federation which has been divided on national-territorial basis and where the central power excludes any other structural organisation (separatism is the cruellest enemy of a state). On the other hand, he totally agrees that what really matters is the essence, the meaning of which does not change much depending on the form, or how we call it. It is also important that the form should be in harmony with its real essence, so that the general public could clearly and adequately comprehend both the form and the name. The author is mostly vexed by deliberate ambiguity, political manipulation with different

concepts, terms and other words. People (populace) should not be considered stupid, as if they did not understand the real situation and were not prepared to listen to the truth. It is definitely not so. Everything should be simply, logically, judiciously and, most importantly, honestly explained. This is what the people understand; it does not matter whether there is a period of economic growth or recession. Actually, it is obvious that the major part of the Constitution of the Republic of Estonia also needs revisions.

Finally, to answer the question formulated in the title of the article the author suggests that the reader should consider the possible answers below:

The European Union is:

- 4) a confederation with many/a few characteristics of a federation;
- 5) a federation with certain characteristics of a confederation;
- 6) not a confederation anymore, and not a federation yet—the EU is a supranational organisation;
- 7) a confederation which will never develop into a federation;
- 8) heading for a federation, being rather more a federation than a confederation even at present;
- 9) an organisation a proper name of which could be: the United National Democratic States of Europe.

The author himself would prefer points 5 and 6.

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