

Resilient National Institutions, the EU Treaties and Good Governance

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Summary

One explanation for the failing upward convergence among EU member states is that the EU lacks a shared administrative model. Because of this, member states have converged in some policy areas while continuing to struggle in others. Creating resilient national institutions cannot be achieved through top-down legislation; it also requires bottom-up (subsidiarity-based) involvement. Hence, in line with the EU's motto, 'Unity in diversity', upward convergence requires accepting differences as the starting point for initiating processes that stimulate national ownership of common values and objectives. Successful EU policy areas highlight the importance of cooperation in establishing good governance values and convergence. The treaty should therefore prominently acknowledge 'unity in diversity', while the European administrative procedures law should emphasise good governance principles as the basis for continued cooperation. Member states may not become identical, or even move in the same direction, but what matters is that our national institutions and actions are trusted. Moving towards a focus on bottom-up convergence processes will require a new role for the Commission.

Keywords EU values – Good governance – Limited treaty change – Administrative procedures law

Introduction

A strong EU demands strong member states. Weak legal, democratic and economic institutions at the national level result in lower growth for the EU as a whole, dysfunction in the internal market and, worst of all, the erosion of trust. Resilient national institutions are essential to enable the EU to address the changes in our economic and geopolitical environment. The struggles with the EU's fundamental values (as laid out in Article 2 of the Treaty on European Union) are the most visible in this regard, as we have seen countries backsliding, along with the criteria for fiscal stability and economic convergence, as public debt has remained, on average, far above the maximum of 60% of GDP set by the EU. The lack of ownership on the part of member states regarding the EU's common objectives and the related difficulties in enforcement are also evident in other areas, such as nature preservation. The EU has attempted to stimulate upward convergence through various additional policies, budgetary incentives and informal benchmarking, but with little effect. A new approach is required even though the EU seems to have run out of ideas.

It is a tall order to expect a clear diagnosis and path forward to address the persistent problems in delivering upward convergence. This contribution begins with a simple question: why do some EU policy areas that initially suffered from severe crises now stand among the global leaders in terms of competitiveness and standard-setting? It is time for a profound examination of the causes of our successes and failures. As argued below, we need to reconsider the relationship between the member states and the Union as defined in the treaties. Two suggestions are especially important. First, we should include respect for differences between the member states in the treaties. Second, we should specify and elaborate in the treaties what is currently listed in Article 41 of the EU Charter of Fundamental Rights regarding good administration being a fundamental right. Article 41 limits the applicability of good administration to the institutions and bodies of the EU, but this good governance principle could also be extended to the member states. In this way, both the EU and the member states would benefit from a cohesive body of law on administrative procedures to which they are all bound.¹

¹ For a discussion, see D.-U. Galetta et al., *The General Principles of EU Administrative Procedural Law*, European Parliament, Directorate-General for Internal Policies, PE 519.224 (Luxembourg).

Politicians and officials often prefer to discuss policies (the ‘what’) rather than governance (the ‘how’) and may lean towards centralised EU solutions over subsidiarity-based options. In contrast, private-sector management typically requires a thorough examination of structures and a preference for decentralisation when strategies fail.

Centralisation, self-government and ownership

The first step in this analysis is to question whether it is realistic to impose high expectations. The desire in the EU to agree on outcomes, for example, net-zero emissions by 2050 or earlier, tends to overstate what is known about these outcomes, while leaving little room for the unavoidable changes that may arise in technology, geopolitical trends or democratic preferences in the meantime. Without delving into specifics, EU objectives tend to be very ambitious, leaving scant accommodation for the significant national differences that inevitably exist. A clear example is the criterion imposed on eurozone members of having a maximum state debt of 60% of GDP; this threshold may be high for a country with weak institutions but low for a country that retains the trust of capital markets even when it has state debt of 90% of GDP. Other ambitious and problematic examples include the objectives of the complex and uncertain Green Deal targets or ensuring respect for the EU’s fundamental values.

These EU ambitions are far from being matched by the institutional capabilities necessary at the national level to manage the required reforms, or those at the EU level needed to enforce the agreements. Moreover, member states differ markedly in their preferences and cultures, as highlighted by national debates on issues such as abortion, gay rights, support for nuclear energy and commitment to nature preservation. The starting points and political dynamics vary from one member state to another. Nevertheless, the EU has abandoned its earlier successful approach of setting minimum standards (such as mutual recognition) and has gradually replaced it with that of creating maximum harmonisation.² With higher and more granular requirements, EU legislation has become overly complex and fragmented, as discussed in the recent Draghi Report.³

Full harmonisation among the EU states has become increasingly difficult with the widening and deepening of the agenda—member state ownership of EU policies and ambitions can no longer be assumed and the limitations of top-down legal enforcement have become clear. The recent elections in the Netherlands in 2023, along with the European elections in 2024 and similar democratic trends in France and Germany, among others, have highlighted the political apprehension surrounding what is perceived as EU legislation that is imposed from above and hard to change. With its ambitious centralised goals and limited administrative capacities, the EU risks overestimating the degree to which societies can be designed at will.

This leads to two inferences. The first is that adaptation processes that begin from actual situations in member states are more important than prescribing static end results. The second is that fostering ownership of EU policies and objectives is crucial, which means that differences between countries and their national dynamics, cultural specificities and values must be respected as the starting points for change. This is central to the relationship between the member states and the federal level, and raises questions about the suitability of the current treaties and whether the EU is effectively working towards a common good governance system (comparable to the Administrative Procedures Act in the US).

² S. Weatherill, ‘The Several Internal Markets’, *Yearbook of European Law* 36 (2017).

³ M. Draghi, *The Future of European Competitiveness*, European Commission (Brussels, 2024).

Reform one: clarify the ‘ever closer union’ clause in the Treaty on European Union

A federal constitution or, in the case of the EU, a constitutional treaty defines the relationship between the central and the state levels and the essential values upon which a federation is built. The constitutions of federal systems differ due to their specific historical contexts.⁴ The original American constitution was concise, with a preamble of 52 words and a body of 7 articles that defined the original distribution of power while emphasising the protection of the self-government of states (as famously discussed by Tocqueville).⁵ In contrast, the EU treaty is much longer and reflects the original German constitution. By defining the fundamental rights that apply to all citizens, the German constitution reached beyond the *Länder* (states) and addressed the citizens with the aim of forming the German state. Following the German tradition, the tone of the EU treaty similarly embodies the concept of an ever closer union between the member states (deeper integration). However, ‘ever closer union’ can also be understood in terms of being a well-organised horizontal construct, as in the American form of self-government combined with a commitment to manage interdependence. Without clarity regarding the nature of the treaties, the notion of ever closer union has obscured the essential questions related to national space, minimum national obligations and how to manage interdependence. The European setup has gradually limited the space available and tolerance of diversity. Yet, in practice, self-determination arises by default as member states struggle to take ownership of or to fulfil EU agreements. Although regarded as a founding principle, the EU treaties offer little guidance regarding the meaning of subsidiarity.⁶

As the EU widens and deepens, the growing number of common ambitions and the regulatory framework are clashing increasingly with the insufficient quality of the national institutions and the lack of genuine support for European goals. Recognising the importance of diversity in preferences and capabilities calls for the expansion of self-government. Self-government does not, however, imply independence; rather, it represents the first step towards managing cooperation.

Reform two: cooperation and the strengthening of weak ties

There is a range of European policy sectors that work well and in which all member states operate as partners. For example, airlines service their highly complex planes in more or less all member states. This underlines that independent, technically advanced and well-monitored national aviation agencies can operate with comparable standards and recognised professional values. The same applies for, among others, the entire food industry. Other sectors, however, continue to suffer from serious gaps in the convergence of national institutions. This allows for a comparative perspective and the opportunity to draw out the lessons learned. Although officials and politicians have a tendency to dislike comparisons, arguing that ‘my field of work is different and more difficult’, in fact, many areas face comparable challenges. The differences between successful and unsuccessful policy areas in terms of establishing convergence can be linked to the quality of the EU’s system of multilevel governance.

The economic sectors that now operate at the frontiers of global competitiveness did not achieve their positions easily. They had to adapt to global challenges, converge on common standards, redefine public and private institutions to foster innovation, implement and enforce legislation on issues ranging from environmental to competition rules, and overcome crises. Highly advanced sectors, such as medicine, the silicon chip industry and the EU’s complex food sector have all grappled with profound crises. Similarly, the two widely divergent

⁴ T. Kleinlein, ‘Federalisms, Rights, and Autonomies: The United States, Germany, and the EU’, *International Journal of Constitutional Law* 15/4 (2017).

⁵ Evidently, the legal structures of both federations have been elaborated through laws that sit alongside the constitution (e.g. the Bill of Rights in the US).

⁶ A. Schout, *EU Subsidiarity as an Antidote to Centralisation and Inefficiency*, Martens Centre (Brussels, 2022).

areas of national statistics and inspections of slaughterhouses were so poorly organised that they triggered major EU-wide crises. Poor EU statistics led to the economic crisis at the end of the 2000s, when Greece had to admit that its data on public deficits were falsified, while the inadequate quality of slaughterhouses contributed to the devastating ‘mad cow’ disease crisis in the 1980s and 1990s. The current high standards in these areas should not overshadow the profound crises that each had to overcome. In addition to mad cow disease, the fragmented European food industry and its poor inspection regime continued to struggle for a while, with issues such as high levels of dioxin being found in chickens. Now, thanks to a subsidiarity-based European food safety system, agricultural exports benefit from highly regarded quality standards, irrespective of the member state that produces and inspects the food. Similarly, internal market access for medicines previously suffered from deep fragmentation, with national governments protecting their own producers and imposing strict constraints on medicines from other member states, while the Commission was limited in its ability to act for legal and political reasons. The introduction of a network-based medicines agency resulted in a modernised European medicines market. Importantly, each of these areas was forced to turn a corner in terms of integration due to these adverse events and crises.

One of the previous problems with integration in these areas was related to enforcement, which was frustrated by politicisation and the lack of an agreed-upon European enforcement model. Improvement in European enforcement played a key role in binding the member states together. The successes in these sectors resulted to a large extent from the establishment of team-based monitoring systems. Networks of independent national monitoring agencies were created, centred around EU agencies. They developed common rulebooks and agreed on standards for inspections, transparency, the division of labour and teamwork. Furthermore, the Commission does not conduct inspections on its own; monitoring also relies on teams of national inspectors who inspect each other and write reports that are, with some delay, published on the network’s website. Team-based working has contributed to common standards and learning, while the expectation of transparency has enforced the independence of the inspectors.

These mechanisms have enabled highly different countries to agree on common standards and foster active cooperation at various levels of government. Such cooperation not only results in standardised procedures but also ensures that inspectors cultivate shared professional values of independence and transparency. Systems may differ, but working methods and professional values converge. This indicates that subsidiarity-based agency networks make a difference.

These mutual inspections are linked to a combination of first- and second-order monitoring. First-order control is ensured because all national agencies inspect their own national systems, while team-based mutual inspections, alongside those of the Commission, supervise the national inspectorates (second-order control). Thus bottom-up convergence in terms of systems and values is indeed possible, despite the varying starting points of the member states. Top-down enforcement would be unlikely to achieve this level of collective resilience among the national institutions that deal with permanent innovations, changes in consumer preferences and shifts in geopolitical relations.

One explanation for the emergence of convergence and collective resilience is that decentralised networks pressure the actors involved at all levels to experiment, write guidebooks, participate in inspections and learn to work with shared professional values. In other words, a multitude of experts at different levels of government must continuously demonstrate their quality and trustworthiness to broad groups of peers. This concept is known as ‘the strength of weak ties’. The strength is not derived from one committee or another, but rather from the creation of many bilateral and multilateral links that connect the member states within EU governance systems. In these networks, officials are compelled to prove themselves as valuable colleagues

with shared professional values and to fight off national politicisation.⁷ Hence, the significance of subsidiarity lies not only in keeping tasks close to national welfare functions but also in facilitating trust-building through multilayered ties.

The successful areas, therefore, can help to clarify what good governance involves: subsidiarity-based agency networks, the separation and decentralisation of enforcement tasks, and transparent reporting. Moreover, we can see that in such areas the European Commission plays a different role, functioning more as a manager than as a standalone policymaker and supervisor.⁸

Missed networking opportunities

Many EU networks, however, offer little more than opportunities for information exchange and have hardly any institutionalised role. Systems for first- and second-order monitoring do not exist in many policy areas. For instance, national public investment systems are important for ensuring national competitiveness and effectively utilising EU investment funds. Nevertheless, despite the billions invested from EU budgets, there is no system for mutually assessing these investment systems. Moreover, the *ex post* auditing of EU funds presents a significant missed opportunity for networking. The European Court of Auditors does not operate as a networked organisation and, therefore, contributes little to building a reliable and transparent European auditing culture.⁹ In economic governance, the role of the Directorate-General for Economic and Financial Affairs in monitoring national competitiveness and economic reforms is largely disconnected from the (under-used and under-developed) networks of national fiscal and productivity boards. Another example is the Commission's impact-assessment system, which does not engage with national assessment systems in either the writing or the quality control of Commission assessments. This contributes little to activating national impact systems, solidifying the value of independent impact assessments across the EU, or establishing common methodologies for assessing the administrative burdens of national and European policies.

There are many areas, both visible and less so, where EU networks are under-used. As a result, common values of good governance and best practices will not emerge. Setting up effective links with and between member states demands effort. There is typically considerable distrust, both among member states and in the Commission, regarding the will and abilities of member states. For example, a senior Commission official referred to the member states as 'a basket of rotten apples'.¹⁰ Moreover, both member states and the Commission are reluctant to accept agency structures that are distant from governments. Additionally, striking bilateral political deals with the Commission often appears more attractive to national politicians than building transparent inspection networks. Finally, the importance of cooperation is easily underestimated. As an example, when a police officer from an institutionally strong member state was asked whether he would join a network meeting, he declined on the basis that everything was working well in his country.¹¹ This response dangerously misses the point about the strength of weak ties.

⁷ In his famous book *Making Democracy Work*, Robert Putnam presents trust as a 'moral resource' that increases when it is used. The more people have to cooperate, the more they—and their colleagues—are forced to be reliable. Trust, he notes, is a public good that, like all public goods, tends to be undervalued and under-used. R. Putnam, *Making Democracy Work: Civil Traditions in Modern Italy* (Princeton: Princeton University Press, 1993).

⁸ Schout, *EU Subsidiarity as an Antidote to Centralisation and Inefficiency*.

⁹ A. Schout, *Cohesion Policy: A Management Audit*, Clingendael Research Paper (The Hague, 2024).

¹⁰ Schout, *EU Subsidiarity as an Antidote to Centralisation and Inefficiency*, 8.

¹¹ A. Schout and M. Luining, *Rule of Law Policy: Ambitions Without Strong Networks*, Clingendael Research Paper (The Hague, 2018).

Step three: formalising good governance principles

Accepting considerable margins for self-government is a starting point for managing interdependence. To facilitate multilevel cooperation, it would be beneficial to establish an agreed framework of good governance in European administrative law. Related discussions were once on the EU agenda but have gradually faded from view. After the implosion of the Santer Commission, the EU began to seriously debate the issue of good governance. The agenda included, among other topics, fact-based integrated impact assessments, EU agencies, transparency and networks. The 2001 White Paper on European governance¹² had a major impact, particularly on the use of integrated impact assessments and on the transparency of EU documents. However, discussions on EU agencies proved to be too sensitive, resulting in a weak *Joint Statement on a Common Approach for Agencies* in 2012.¹³ The ambitions for good governance, depoliticisation, and the use of agencies and networks were overshadowed by political ambitions from the Juncker Commission onwards. The ‘how’ of good governance gained a reputation for technocracy, shifting the focus to the ‘what’ of (ambitious) policies. As it stands, the EU has not yet succeeded in unifying the heterogeneity of national approaches to administrative law and administrative values. Paraphrasing Monnet, nothing lasts without well-defined multilevel institutions.

Conclusion

Many changes have been attempted to make national institutions more resilient, but upward convergence has not materialised in traditionally weak areas. The first step proposed in this contribution is to acknowledge that member states are different and that acknowledging these differences is essential to enabling member states to take ownership, to creating tailor-made policies and to promoting mutual learning. Self-government, however, does not equate to independence. The second step is to establish common administrative values and procedures through intensified cooperation (harnessing the strength of weak ties). Currently, EU policy areas are governed in highly ideocratic ways. These differences in part stem from the lack of an administrative model and a lack of clarity in the treaties and administrative law regarding the relations between the EU and the national level. The EU needs to renew the process to establish shared governance values. After the fall of the Santer Commission, there was broad agreement that new governance standards and methods needed to be introduced. The next Commission should revisit the good governance agenda, and this time ensure buy-in from the member states. Further enlargement will place additional pressure on the EU’s polity to define national leeway as well as good governance standards. The EU’s administrative models need to be ready and implemented by then.

Moreover, the European Commission should critically examine the areas in which networking can be strengthened. Instilling good governance values is not just a matter of high-level political debates about administrative law. It is also about starting pragmatically at the grass-roots level of day-to-day policies. This will require that the Commission takes on a managerial approach rather than its traditional hierarchical and legal roles.

Strengthening the Union’s governance fabric and social capital will not solve all problems related to the lack of convergence, nor will it prevent leaders such as Viktor Orbán from mounting challenges. Yet, it will place the EU as a whole on a more engaged footing. The time is ripe for reconsidering the treaties and for establishing nascent European administrative procedures accordingly.

¹² European Commission, *European Governance: A White Paper*, White Paper, COM (2001) 428 final (12 October 2001).

¹³ Council of the European Union, *Joint Statement of the European Parliament, the Council of the EU and the European Commission on Decentralised Agencies* (18 June 2012).

	Programme 1	Programme 2	Programme 3
	Reconsidering good governance	Improving monitoring and enforcement	Addressing good governance in the member states
Project 1	<p>Change the spirit of the treaties from maximalist integration to self-government. ‘Ever closer union’ should be complemented by ‘unity in diversity’. This would help all parties to accept that ownership of EU ambitions demands respect for differences and that mutual recognition should often suffice.</p>	<p>Specify the principles of first- and second-order control by learning lessons from policy areas that are both effectively and not effectively monitored and enforced. The former include food safety and European statistics, while the latter includes economic governance.</p>	<p>Use comparable impact-assessment systems to study to what extent and how EU good governance topics have worked their way into the member states. Have innovations in governance at EU level seeped into new procedures and values at the member state level? To what extent has the Commission’s impact-assessment system been copied in the member states?</p>
Project 2	<p>Revisit the White Paper on European governance from 2001. Work closely with national authorities towards a Good Governance Mark II project to ensure buy-in from the member states.</p>	<p>Set up teams for examining the effectiveness of monitoring and enforcement systems to ensure mutual learning and building of common values throughout the EU. Moreover, entrust independent and national experts with formulating the appropriate roles and designs for agencies. The Nordic model is a logical point of reference.</p>	<p>Evaluate the choice of instrument in the ‘better regulation guidelines’. It was originally intended that instruments would be kept as light as possible. To what extent have EU and national policies respected this preference? (See also the Draghi Report on over-regulation and fragmentation.)</p>
Project 3	<p>Adapt the treaties and administrative legislation. This should be supervised by the president of the Commission in coordination with the European Council.</p> <p>A first step for the president should be to consider why the previous debate on good governance stalled.</p>	<p>Acknowledge that the new ways of working will demand new—more managerial—functions for the European Commission, which has previously been reluctant to work with EU agencies and national authorities.</p>	<p>Adapt the administrative procedures law by specifying the standards of good governance.</p>

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