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Reform Spotlight

Historically Unique, Unfinished in Detail – An Evaluation of the Constitution

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Europe has a Constitution. Almost a year after the end of the deliberations in the European Convention, and following a failed first attempt to adopt the Constitution in December 2003 the European Heads of State and Government agreed on a new constitutional foundation for the enlarged European Union on June 18, 2004. The current Treaties together with the European Charter of Fundamental Rights are brought together into a single text including four parts and approximately 460 articles. Thus, the European Union, for the first time in its history, now has a Constitution laid down in a single document. Although this is by no means the end of history, and although a common constitutional identity must still be forged in Europe, the agreement reached in Brussels is a historic caesura in the European integration process. The Constitution brings the European Union to a higher level of integration and ties the member states together more closely.

Beyond its historic importance, the question remains of what concrete progress the "Treaty Establishing a Constitution for Europe" actually entails. In general, partisan bargaining behind closed doors, which came to dominate the final stages of the Intergovernmental Conference, had a price. In several points, the compromise that emerged from the negotiations is inferior to the draft proposed by the European Convention in July 2003. Nevertheless, the final result does revise the most important problems present in the Treaty of Nice, and it is significantly more promising than what would have been achieved with the usual procedure of an Intergovernmental Conference without a Convention.

Setting the Course for Europe's Future

The European Constitution contains three central strategic innovations:

- The appointment of an elected President of the European Council and the creation of the post of a European Foreign Minister are significant contributions to consolidating powers and improving political leadership in the enlarged Union. The personalisation of European policy strengthens continuity and visibility, and enhances the attribution of responsibility within the EU's political system.

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- By strengthening the European Parliament's rights of co-decision and its budgetary powers, the Union's institutional framework comes close to a two-chamber legislative system. The interaction between the Council of Ministers and the European Parliament will thus reflect the basic shape of constitutional order in many member states.
- The new constitutional foundation strengthens the EU's ability to evolve dynamically in the future. The greatest contributions to this dynamism are the extension of the possibilities for flexible integration and the establishment of simplified procedures for the reform of decision-making and many EU internal policies. In fact, in many fields constitutional reforms will be possible without an intergovernmental conference.

Beyond these general points, it is necessary to ask whether the EU, with its new Constitution in place, will become more transparent, more effective, more democratic and more capable of development. These are the four criteria for measuring the Constitution.

Incomplete Transparency

One goal of the reform process was to make the European Union more transparent, to bring the European project closer to Europe's citizens. A comprehensible basic document is an important step toward this goal. The Constitution offers considerable improvements. These include:

- the fusion of the existing treaties (except the Euratom Treaty) in one single document,
- the assignment of a legal personality to the EU,
- the categorization of competences, and
- the incorporation of the Charter of Fundamental Rights as Part Two of the Constitution.

However, concerning transparency and readability, the Constitution has some key weaknesses:

- Neither the European Convention nor the Intergovernmental Conference succeeded in producing a short, readable and concise constitutional document. The first part of the Constitution, with its basic provisions, is not sufficient to provide the citizens with a clear picture of the EU's political system. Instead, the European Union's rights and obligations, its goals and limits become apparent only after one has read approximately 460 articles, along with numerous protocols and declarations.

- The new Constitution's complexity is increased because important provisions, concerning e.g. the role of national parliaments, or the principles of proportionality and subsidiarity, are defined in additional protocols.
- On account of the incorporation of the Charter of Fundamental Rights into the Constitution, there is a considerable degree of overlap with the provisions of Part One, above all with the titles on Fundamental Rights and Citizenship and on Democratic Life. This not only weakens the clarity of the text, but differing formulations might also cause problems of legal and judicial interpretation.
- The new order of competences in the first part of the Constitution clarifies the division of responsibilities between the EU and the member states. Three categories clarify in which areas the EU has exclusive powers, which powers are shared between the Union and the member states, and in which areas the EU may only complement or support the member states. Special regulations were adopted for coordinating economic and employment policy or foreign and security policy. However, a clear-cut picture of who will be responsible for what in the future EU becomes evident only if one also reads through to the third part of the Constitution on the individual policy areas. The categories described in the first part are more like legal ornaments than solid bodies of law. Making things even more difficult, the provisions concerning the single policy areas, listed in the third part of the Constitution, are not itemized according to the system of competences spelled out in the first part.
- Finally, the Constitution does not go far enough toward establishing a clear division of powers that the Union's citizens can clearly understand. One of the Constitution's clear shortcomings is that, at the level of the Council of Ministers, it does not set out a clear and explicit distinction between a Legislative Council and other Council formations empowered with pure executive and coordinative functions.

Democracy With Loopholes

The new Constitution definitely reduces the democratic deficit in the EU – a deficit that had steadily grown in the last two decades. What specific progress does the Constitution offer in this area?

- EU citizens' indirect influence on the legislative process is strengthened by the fact that the fields in which the European Parliament (EP) will in the future co-decide with the Council of Ministers on an equal basis will double. Thus the Parliament, the only body directly legitimated by the Union's citizens, it clearly one of the winners of the Constitution. This is even more so, as the European Parliament will in the ordinary legislative procedure in principal enjoy the right of co-decision when the Council of Ministers takes decision by majority. This will close one of the biggest gaps in the chain of democratic legitimacy.

- The EP's rights are also extended by the fact that its budgetary powers will increase. The Constitution gives the EP full powers on the expenditure side of the budget. The final result of the negotiations provides that in case of disagreements between the Council and the Parliament both of them shall decide on a budget in the framework of a Conciliation Committee within 21 days; otherwise, the Commission shall submit a new draft budget.
- Citizens' direct influence on the policy formation process within the EU is strengthened by the introduction of a plebiscitary element in the Constitution. In the future, one million citizens coming from "a significant number of member states" can ask the Commission to submit proposals for European legislation on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution.
- The new Constitution makes democratic progress not only at the European level, but at the national level as well. Thus, it provides for an "early warning system" for the national parliaments, or for either chamber of a parliament in a bicameral system, to lodge formal complaints against proposals from the Commission that they believe are incompatible with the principle of subsidiarity.

This positive assessment should not, however, hide several open flanks of democracy that remain uncovered by the new Constitution:

- No genuine progress was made concerning the election of the President of the Commission. The Parliament's influence on the election is strengthened by the fact that the European Council is called to elect the Commission President "taking into account the elections to the European Parliament." Nevertheless, the right of proposal for the election of the President will remain the exclusive prerogative of the Heads of State and Government. Instead, the European party groups should nominate their top candidates for this office, the President of the Commission should be elected by a majority in the European Parliament and only then confirmed by the European Council. This would enhance the legitimacy and power base of the Commission and its President, encourage the personalization of European politics, and increase the significance of European elections as an electoral act with which EU citizens can exercise democratic control.
- Concerning the European Parliament's role in approving the members of the Commission, it is also regrettable that the procedure for nominating Commissioners does not end with an approval by the EP – as was proposed in the Convention's draft –, but with a decision of the European Council by qualified majority. This is nothing less than a reversion to the current provisions of the Treaty of Nice.
- It is basically a positive development that the number of parliamentarians in the EP shall in the future reflect the populations of the member states more closely. However, the principle of degressive-proportional representation that is supposed to

apply after 2009 is counteracted by the fact that the minimum number of MEPs per country will be six, rather than four, as proposed in the Convention's draft. The maximum number of national representatives is set at 96, so that Germany has to relinquish three of its present 99 seats. Under pressure from the smaller member states in the Intergovernmental Conference the total number of MEPs is increased to 750 from the 736 provided for in the constitutional draft. The haggle over the number of national parliamentarians revealed the deficit that the EU countries have not been able to agree to a binding formula for determining the number of seats that is independent of the number of member states.

Efficiency and Political Leadership – Much More Than Nice, Less Than the Convention

The success of European integration will largely depend on whether a European Union with 25 and more member states will be able to take decisions efficiently. The power to take action in a EU of 25 and more states will largely depend on whether the Union will have suitable political leadership structures to define strategic goals and to translate them quickly and appropriately into concrete policies.

- The introduction of new voting procedures in the Council of Ministers is particularly important for the effectiveness of an EU with 25 and more member states. After the first failure of the Intergovernmental Conference in December 2003 to resolve this question, the incorporation of the principle of double majority proposed in the Convention's draft into the Constitution is a step forward and will take effect from November 1, 2009. Compared with the system of triple-majority set down in the Treaty of Nice (states, weighted votes in the Council, population), the voting procedure laid down in the Constitution is a success. It increases the ability to form majorities able to take decisions and shape policies (shaping majorities) and limits the ability to form blocking minorities (see table in appendix).
- The extension of decisions taken by majority in the Council of Ministers is a step forward for the enlarged EU's ability to act efficiently. It is also positive that decisions in the Council of Ministers taken on the grounds of the ordinary legislative procedure will as a rule be decided by qualified majority. Exceptions to this rule, when Council decisions are to be taken on the basis of unanimity, will have to be explicitly listed. In the end, this will not only substantially improve the enlarged EU's ability to act. It will also help prevent unjustified crossover deals, for example, between milk quotas and tax issues.
- The introduction of a President of the European Council, elected by the Heads of State and Government, is another positive feature of the new Constitution. The President, who will serve a term of two and a half years, will prepare, chair and report on the meetings of the European Council and ensure, at his level – without

prejudice to the prerogatives of the Foreign Minister –, the external representation of the EU. This new office will improve the continuity, visibility and coherence of EU representation, both internally and externally.

- The creation of an EU Foreign Minister, combining the offices of the Commissioner for External Affairs and the High Representative ("double hat"), strengthens the Union's foreign policy profile and improves the coherence of EU external relations. The Foreign Minister is supported by a newly-created European External Service composed of civil servants from the Council, the Commission and the member states. The creation of this service will already begin in the next few months.
- Regarding the Commission's future effectiveness, the decision of the Intergovernmental Conference to reduce the number of Commissioners is a positive result. The formula laid down in the Constitution provides for the number of Commissioners to be set at two-thirds of the number of member states. However, the proviso remains that the European Council may change the number of Commissioners by a unanimous decision. In an EU-27, this would mean that the Commission would comprise 18 members, including its President and the EU Foreign Minister. Another praiseworthy aspect of this decision is that the distinction between "European Commissioner" and "Commissioner" without voting rights proposed in the Convention's draft, was not taken up in the final text.
- The extension of the Commission President's powers for determining the internal division of labor strengthens the Commission. This allows the President to shape the Commission on the basis of factual considerations and not merely on the grounds of national proportionality. His position in relation to the members of the college is also strengthened by the fact that the President can request individual Commissioners to resign.

Nonetheless, a number of items of the Convention's draft that would have further enhanced the enlarged Union's effectiveness were not incorporated:

- It is regrettable that the thresholds of the future voting procedure in the Council laid down in the Constitution are increased by 5 percent compared to the Convention's draft. The Intergovernmental Conference raised the quorum of states necessary for a qualified majority from 50 to 55 percent, and the population quorum from 60 to 65 percent. If a Council decision is not based on either a proposal from the Commission or the European Foreign Minister, a super-qualified majority requires that the states supporting a decision represent 72 percent of the EU's total population, compared with "only" 66 percent in the Convention's draft.

  It is also negative that additional conditions are added. Thus, a blocking minority in the Council must include at least four member states. The idea behind this additional criterion is to limit the weight of the most populous countries, most particularly Germany, France and the United Kingdom. If three of the largest member states set

out to create a blocking coalition, however, the rule produces a certain paradox. Such a coalition would represent more than 35 percent of the Union's population. But in accordance with the four-state rule, this three-member coalition would not be allowed to block a decision in the Council. Thus it is possible that a decision could be taken by a majority that does not meet the population criterion of 65 percent. It is not clear at present which rule would be more important: the population criterion or the four-state regulation. Furthermore, according to the Constitution a shaping majority must include at least 15 member states. But as the voting model decided on in the Intergovernmental Conference takes effect on November 1, 2009, and the EU will have probably enlarged to at least 27 members by that time, the additional clause is superfluous – 55 percent of the states will anyhow comprise at least 15 member states.

Compared with the Convention's original model, the model set down in the Constitution is a double setback. Firstly, the addition of supplementary conditions is a burden on clarity and transparency. Secondly, the increase of the population quorum and the state quorum makes it more difficult to shape majorities and easier to form blocking minorities (see table in appendix).

- In the case of the extension of majority decision-making in the Council of Ministers, it is unfortunate that the Constitution provides for a large number of areas where decisions will still be taken unanimously. Most prominent among these are tax harmonization, questions of social security, some areas of trade in services and intellectual property, some areas of environmental policy, anti-discrimination measures, European legislation on structural and cohesion funds (through January 1, 2007), some areas of immigration policy, and – with a few exceptions – the Common Foreign and Security Policy. Considering the coming conflicts over the division of funds in the enlarged Union, it is particularly regrettable that the Constitution, in contrast to the Convention's draft, retained the principle of unanimity for setting up a multi-year financial framework beyond 2013.
- The effectiveness and influence of the European Foreign Minister will be limited by the inadequate extension of majority decision-making in CFSP. One might also critically ask whether the Foreign Minster's hybrid role might potentially damage the Commission. It is possible that the Foreign Minister's loyalty will strongly lean towards the interests of the European Council. This could not only weaken the Commission, it could also bring it into a situation in which it bears the political costs for issues it is not really responsible for.
- As there are only a few concrete indications regarding the division of tasks, it is possible that in the area of foreign affairs there will be considerable disagreement on questions of competence between the President of the European Council and the new Foreign Minister, and between them and the President of the Commission. The

selection of appropriate candidates, and the personal chemistry among the holders of these three offices, will become crucial political questions.

- Considering the reduction of the Commission's size, it is unfortunate that this will only take place from 2014 onwards, and not in 2009, as the Convention's model for the Commission had proposed.

Capacity for Evolution – Light and Shade

The ability to permanently reconcile dynamism and stability will be decisive for the success of the European Constitution. Thus, the Constitution must on the one hand define a basic consensus, and on the other create the prerequisites for innovation and institutional adaptation.

- The Constitution is setting the course for Europe's future by specifying and extending the rules for flexible integration that were originally introduced in the Treaties of Amsterdam and Nice. The provisions governing the flexibility instrument of enhanced cooperation are combined in a more comprehensible form and special rules for particular policy areas have been (largely) eliminated. Nevertheless, it is unfortunate that the introduction of an enhanced cooperation in the area of CFSP will still require a unanimous vote in the Council. It is also unfortunate that the transition to majority decision-making within the framework of an enhanced cooperation, via a unanimous European Council vote, is excluded for military and defense questions.
- On the other hand, the introduction of new features in the field of the common defense policy (ESDP) is a positive development. Firstly, the Constitution provides for "closer cooperation" in defense. In the case of an armed attack, the member states take on the obligation to support one another militarily. Secondly, the Constitution provides for a "Permanent Structured Cooperation" for those member states whose military capabilities fulfil higher criteria. The decision to establish such cooperation may be taken by a qualified majority. It is, however, questionable whether the criteria contained in an additional protocol are defined ambitiously enough to prod the member states that participate in structured military cooperation into actually and sufficiently modernizing their armed forces.
- To ensure the EU's continued ability to develop, the constitutional foundation must also be able to enter into force. In this question, the Constitution provides that future fundamental changes must be ratified by all member states. If, within two years of its signing, the Constitution is ratified by four-fifths of the member states, but difficulties with ratification have arisen in certain EU countries, the Constitution merely says that the European Council should take up this question. More far-reaching proposals allowing the Constitution to enter into force even if not all member states have ratified it were defeated. Furthermore, there are no provisions for member

states that, even after repeated efforts, have not ratified the Constitution to be compelled to place their membership at disposal on the basis of Constitution's new provisions regulating a voluntary withdrawal from the Union. The fact that fundamental constitutional changes require ratification from all member states means that future reform efforts could fail if only a single state is unable to ratify. In an extreme case, a few thousand citizens could veto the approval of several hundred million citizens.

- In view of future constitutional reforms, it is unfortunate that it was not possible to bring together all constitutional provisions in one document and, conversely, to treat all the non-constitutional provisions separately in a special part of the Constitution. Thus, the opportunity was missed to provide the EU with the ability to amend the latter generally on the basis of a less complex procedure. On the other hand, it is very positive that the Intergovernmental Conference in the end was able to introduce an easier procedure for changing the provisions for internal policies in the third part of the Constitution. The unanimous decisions of the European Council necessary for such reforms only enter into force, if the member states have approved the changes according to their national constitutional requirements.
- One advantage for the evolution of the Constitution is the introduction of the so-called "passerelle clause." This provision gives the European Council the means to optimize decision-making processes within the EU. Thus, the European Council can on the basis of a unanimous decision introduce majority voting in areas of the third part of the Constitution that have previously been subject to unanimity. Similarly, special legislative procedures can be replaced by the ordinary legislative procedure. One cannot however judge from today's perspective to what extent the passerelle clause will be applied in particularly sensitive areas (e.g. tax policy or foreign policy). Nevertheless, the clause offers a chance to optimize certain provisions of the Constitution without a lengthy and complicated amendment procedure.

From the Intergovernmental Conference to Ratification

Now that the Heads of State and Government have agreed on a common text, the Constitution must still clear what is probably the highest hurdle. In the next few months, the text must not only be set in its final form, translated and signed. To enter into force, the EU's new fundamental document must be ratified in every member state. This process is particularly sensitive because national referendums will be called on the Constitution in a number of member states. These include Belgium, Denmark, Ireland and the UK, and will probably also include France, Luxembourg, the Netherlands, Poland, Portugal and Spain. Experiences in Denmark (Maastricht) and Ireland (Nice), as well as the increasing weight of Eurosceptics in many member states after the most recent European elections all point to the conclusion that failure in one or more of the referendums is a real possibility.

Convincing citizens and parliaments in all of the EU countries to approve the Constitution will not be an easy task. In the countries where ratification appears to be in danger, significant efforts will be necessary to communicate the Constitution's advantages in order to bring about a successful outcome of the national ratification processes. The most important argument will be that Europe will be far better off with a Constitution than without one.

	POSITIVE	NEGATIVE
Transparency	• fusion of the present treaties into a single document • incorporation of the Charter of Fundamental Rights • assignment of a legal personality to the EU • introduction of competence categories	• no short, readable and comprehensible constitutional document • transfer of important provision into protocols • Insufficient sytematique and precision of the competence categories • no clear distinction between a Legislative Council and other Council formations
Democracy	• co-decision procedure as the ordinary legislative procedure • extension of the cases in which the co-decision procedure is applied • extension of the EP's budgetary powers • stronger influence of the EP in the election of the Commission President	• right of the European Council to submit nominations for the post of Commission President → no "real" election by the EP • finalization of the nomination procedures of Commissioners by a qualified majority of the European Council and not by the EP • no consequent implementation of the principal of digressive proportionality concerning the number of MEPs
Efficiency + political leadership	• introduction of "double majority" as the voting procedure in the Council • extension of qualified majority voting • introduction of a President of the European Council • introduction of a EU Foreign Minister with an external service • reduction of the number of Commissioners (2/3 of the number of member states) • strengthening of the Commission President	• increase of the thresholds of "double majority"; state quorum from 50 to 55%; population quorum from 60 to 65% • additional conditions for a "double majority" • no majority voting in certain areas (i.a. tax harmonization, parts of the commercial, environment and migration policy; CFSP; multiyear financial framework) • vague definition of the division of labour between the President of the European Council, the Commission President and the EU Foreign Minister • reduction of the number of Commissioners only after 2014
Dynamism	• reform of the instrument of "enhanced cooperation" • new instruments of flexibility in the area of security and defence policy • simplified procedure for reforming the internal policies • introduction of the "passerelle-clause" as a simplified procedure for optimizing the decision-making procedures	• establishment of enhanced cooperation in CFSP requires unanimous decision • uncertainty in case ratification procedures fail • future fundamental constitutional reforms require ratification of all member states • no separation of the Constitution into constitutional and non-constitutional provisions

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Comparison of Blocking Minorities and Shaping Majorities According to the Models of Nice, the Convention and the Constitution

	Nice-Model (triple majority)			Convention Model (50:60)			Constitution Model (55:65; shaping majority at least 15 states; blocking minority at least 4 states)		
	EU-25	EU-27	EU-28	EU-25	EU-27	EU-28	EU-25	EU-27	EU-28
The Euro-12	B	B	B	B	B	B	B	B	B
The EEC-founders (BEL, GER, F, I, L, NL)	B	B	B	B	B	B	B	B	B
The 3 biggest	B	B	nB	B	B	B	nB	nB	nB
The “big” (GER, GB, F, I, SP, PL)	B	B		B	B		B	B	
The “big” plus Turkey (TR)			B			B			B
The big plus the necessary number of smallest states (state quorum)	B	B	B	B/S (+7 smallest)	B/S (+8 smallest)	B/S (+8 smallest)	B/S (+9 smallest)	B/S (+9 smallest)	B/S (+9 smallest)
The “small” (all but the big)	B	B	B	B	B	B	B	B	B
The “old” (EU-15)	B/G	B	B	B/G	B/G	B/G	B/G	B/G	B
The “new” (EU without EU-15)	nB	B	B	nB	nB	nB	B	B	B
The CEEC (8 in EU-25, 10 in EU-27)	nB	B	B	nB	nB	nB	nB	nB	nB
The Mediterranean countries (CY, SP, F, GR, I, P, MAL; TR in EU-28)	B	B	B	nB	nB	B	B	B	B
The Baltic Sea countries (DK, GER, EST, LT, LV, PL, SF, S)	B	B	nB	nB	nB	nB	nB	nB	nB
The cohesion countries (SP, GR, P, IRL plus CEEC-states plus Turkey)	B	B	B	nB	B	B	B	B	B
The transfer coalition of the EU-15 (A, BEL, GER, GB, L, NL, S)	B	B	B	B	nB	nB	B	B	nB
The NATO-countries (11 out of the EU-15 plus CZ, EST, H, LT, LV, PL, SK, SLO, plus BUL, ROM)	B/S	B/S	B/S	B/S	B/S	B/S	B/S	B/S	B/S
The “old Europe“ (BEL, GER, F) plus the neutrals (A, IRL, SF, S)	B	B	B	nB	nB	nB	B	B	nB
Sum of nB	4			17			11		
Sum of S	4			9			8		
Sum of S	40			28			34		

Legend: see overleaf

Nice-Model: triple majority: (1) states >50%; (2) weighted votes in the Council: >72,3% in EU-25; >73,9% in EU-27 and EU-28; (3) population: >62%
Convention Model: double majority: (1) states: >50%; population: >60%
Constitution Model: double majority: (1) states >55% (majority must comprise at least 15 states); population: >65% (blocking minority requires at least 4 states)

B: blocking minority
nB: no blocking minority
S: shaping majority

EU-15: Austria, Belgium, Denmark, Finland, France, Germany, Great Britain, Greece, Luxemburg, Netherlands, Italy, Ireland, Portugal, Spain, Sweden.
EU-25: EU-15 plus Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia
EU-27: EU-25 plus Bulgaria and Romania
EU-28: EU-27 plus Turkey

Country abbreviations: A: Austria; BEL: Belgium; BUL: Bulgaria; CEEC: Central and Eastern European Countries; CY: Cyprus; CZ: Czech Republic; DK: Denmark; EST: Estonia; F: France; GER: Germany; GR: Greece; H: Hungary; IRL: Ireland; I: Italy; L: Luxemburg; LT: Lithuania; MAL: Malta; NL: Netherlands; S: Sweden; SF: Finland; PL: Poland; P: Portugal; ROM: Romania; SK: Slovakia; SLO: Slovenia; SP: Spain; TR: Turkey.

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