European Constitution: a ratification process with an uncertain outcome

The post-enlargement European Union is a very different entity from the Europe of Fifteen and, even more so, the European Communities of the founding fathers. That Europe is well and truly a thing of the past. The fall of the Berlin Wall led to the unification of the continent. The gap left behind by the disappearance of the east-west split was plugged by the United States, whose supremacy has been far from absolute since the attacks of 11 September 2001 but whose unilateralism is nonetheless dominant. In a context overshadowed by the globalisation of the economy, emerging economic powers such as China and India likewise confront Europe with fresh challenges. The main challenges facing the Union at the start of the 21st century are to come to terms with its latest enlargement and to find its rightful place in the world. The Constitution gives this Union new foundations, endowing it with new attributes but without replacing all of the existing ones. It makes the Union more democratic and contains a degree of progress, including in respect of social affairs.

The ratification process was officially launched in Rome on 29 October 2004, when the Heads of State and Government signed the draft Treaty establishing a Constitution for Europe. Its outcome was looking uncertain at the beginning of 2005, due to the holding of decision-making referendums in several countries, including France, where a no-vote could not be ruled out. It is significant that certain countries have decided to hold consultative referendums prior to parliamentary ratification. The first debates to take place, in late December 2004, confirmed the difficulty of looking beyond the national dimension of European issues. The opposition to the Constitution in France,
spearheaded by traditionally pro-European former leading members of the Socialist Party, reveals a degree of disquiet – not to say distrust – with regard to the Union. The process of putting the Union on a constitutional footing has only just begun, and this is probably the aspect least well understood by European public opinion. In the following paragraphs we shall examine the main features of the Constitution and the progress it makes in relation with social policy. Thereafter we shall outline the initial debates taking place in the ratification process at the end of 2004.

1. Major steps forward in the draft text

The Constitution contains four parts as well as the various protocols and declarations negotiated previously but also by the European Convention and the IGC (1). Part I contains the constitutional principles as such and some elements of simplification and clarification, such as the establishment of categories of competence, the simplification of legal acts and decision-making procedures, and greater involvement of national parliaments in overseeing the principle of subsidiarity. In that it groups together the constitutional elements thinly scattered across the European treaties or laid down by the Court of Justice, the content of Part I resembles that of a Constitution. A catalogue of fundamental rights has been added, following the incorporation of the Charter as Part II.

The values and objectives of the Union acquire a new status. They will be promoted by all of its institutions. The Union will act in respect with three fundamental principles in all of its actions: the principle of conferral, governing the limits of the competences conferred on the Union, and the principles of subsidiarity and proportionality, governing the exercise of these competences. The Constitution contains a flexibility clause enabling the Union to step in to attain one of the objectives set out in the Constitution where the necessary powers to do so have not been provided by the Constitution (Article I-18).

The simplification brought about by the Constitution consists in a reorganisation of the EC and EU treaties, which are merged into a single legal entity – the European Union – possessing legal personality (this will enable it to accede to the European Convention on Human Rights and to sign other international agreements and treaties or to be represented alongside the Member States in international organisations). Another aspect of clarification is the abolition of the dual nature of the Union, hitherto founded on the European Community on the one hand and, on the other, on the policies and forms of cooperation introduced by the Treaty on European Union. The three-pillar structure can therefore be abolished. Member States wishing to move ahead at a faster pace will be able to engage in enhanced cooperation among themselves. These principles emerged from the proceedings of the European Convention, the majority of whose members were MEPs and members of national parliaments; they were not contested by the Intergovernmental Conference (IGC). Nor did it question the inclusion of the principle of the primacy of EU law. This principle, established long ago by the Court of Justice (2), is confirmed and given a much higher profile than the indirect reference made to it in the Protocol on the Application of the Principles of Subsidiarity and Proportionality, annexed to the Amsterdam Treaty.

The institutional set-up is supplemented by the creation of the post of Minister for Foreign Affairs, who is at the same time Vice-President of the European Commission. With regard to European diplomacy in-the-making, the future Minister for Foreign Affairs, assisted by a European External Action Service, is a major innovation. He/she will chair the External Affairs Council, thereby lending greater coherence and continuity to EU policy-making. As Minister, he/she will be in charge of the common foreign and security policy and the common security and defence policy. As Vice-President of the Commission, he/she will coordinate the external dimension of Community policies. He/she will have to demonstrate uncommon political skill to represent both dimensions of EU diplomacy on the international scene. That means

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2 CJEC, Flaminio Costa v E.N.E.L., Case C-6/64, Judgement of the Court of 15 July 1964.
not only managing his/her “two hats” but also relations with the future President of the European Council, who will likewise represent the Union in the outside world “at his or her level and in that capacity” in the framework of the common foreign and security policy. The European Council becomes a fully-fledged institution: its President will be elected by the members of the European Council for a term of two and a half years, renewable once. Both Presidents will take up their duties on the day when the Constitution enters into force.

“National representation” within the European Commission is to be preserved until 2014. After that, the Commission will comprise a number of Commissioners corresponding to two thirds of the Member States, according to the principle of equal rotation. The principle of its President being elected on the basis of appointment by the European Council acting by a qualified majority is written into the text. The other members of the Commission will be appointed nationally, the President’s role being confined to allocating portfolios within the College of Commissioners. The text, in both its pre- and post-IGC versions, is far from perfect. Criticism is levelled essentially, but not exclusively (3), at Part III where the main amendments derive from the abolition of the three-pillar structure and the adaptation of the provisions to bring them into line with the new definition of legal acts and decision-making procedures defined in Part I (see Beaud et al., 2004; Collignon, 2002). Apart from the reorganisation of the provisions relating to external action and to the area of freedom, security and justice (see chapter in this edition of Social Developments concerning asylum and immigration policies), most of the other provisions in Part III – setting out the acquis of the Union – were not revisited by the Convention.

Part IV, comprising the General and Final Provisions, has undergone certain changes as compared with the original treaties. The conventional method becomes a permanent part of an “ordinary” revision procedure.

3 From an institutional point of view, there is the political rivalry between the President of the Commission and the President of the Council, as well as the respective roles of the latter and the Minister for Foreign Affairs on the international scene.
It introduces simplified revision procedures in the form of a passerelle clause, renamed “simplified revision procedure”, as well as a procedure whereby Part III can be amended without having recourse to an IGC, but also without having to convene a Convention. Neither the Convention nor the IGC managed to eliminate the requirement for unanimous voting in the IGC or in the European Council (see section 5).

2. Values and objectives of the Union

The Preamble to the Constitution refers to “the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality, and the rule of law”. Europe is no longer a purely economic undertaking: it “intends to continue along the path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived (…), and to strive for peace, justice and solidarity throughout the world”. Article I-2 establishes the values of “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

According to the objectives defined in Article I-3, the Union’s aim is to promote peace, its values and the well-being of its peoples. Internally, it “shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.(…) It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child”. The Union promotes “economic, social and territorial cohesion, and solidarity among Member States”. Finally, it “shall respect its rich cultural and linguistic diversity”. Externally, “the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter”. In general terms, a social clause included in Part III stipulates that all policies drawn up by the Union
must respect a number of social demands “linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health”.

2.1 A hybrid social dimension

The Constitution lends greater clarity to the distribution of competence between the Union and the Member States, dividing it into areas of exclusive competence, shared competence and competence to carry out actions to support, coordinate or supplement the actions of the Member States. Economic and employment policies are to be coordinated “within arrangements as determined by Part III, which the Union shall have competence to provide”. The situation nevertheless remains complex. Social policy belongs to the area of competence shared between the Union and the Member States “for the aspects defined in Part III”. In these areas, “the Union and the Member States may legislate and adopt legally binding acts (…) The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence”. A special article is devoted to the coordination of economic and employment policies: pursuant to Article I-15(1), amended by the IGC, “The Member States (and no longer the Union - author’s note) shall coordinate their economic policies within the Union. To this end, the Council of Ministers shall adopt measures, in particular broad guidelines for these policies”. Particular provisions apply to the States whose currency is the euro. According to Article I-15(2), “The Union shall take measures to ensure coordination of the employment policies of the Member States”. The IGC did not follow up in Part III the content of Article I-15(3), whereby “The Union may take initiatives to ensure coordination of Member States’ social policies”.

The inclusion of the open method of coordination (OMC) procedures in Part III confers a coordinating role on the Commission but not on the Union. The OMC is not enshrined in Part I of the Constitution. In the social fields, its procedures are introduced in Article III-213 (the Commission may take initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation). This article reproduces Article 140 of the EC Treaty, determining the way in which the Commission “shall encourage cooperation
between the Member States and facilitate the coordination of their action”. The European Parliament will in future be kept fully informed, a new element when compared with the original definition of the OMC adopted by the Lisbon European Council. No mention is made of the other stakeholders in the OMC, such as the social partners, regional authorities or voluntary bodies. Consultation in the Economic and Social Committee will involve “representatives of organisations of employers, of the employed, and of other parties representative of civil society, notably in socioeconomic, civic, professional and cultural areas”, which ought to enable voluntary bodies and NGOs to make their voices heard. A Declaration added by the IGC could give the impression that all the fields referred to in Article III-213 constitute supporting action only. Among these is employment. The reference to employment in the article on the coordination of economic and employment policies was achieved only after heated debate at the European Convention.

2.2 Democratic life of the Union

Part I of the Constitution contains a Title on the democratic life of the Union. The principle of representative democracy is upheld and placed on a constitutional footing; in other words, the current practices for consulting civil society are preserved. The role of the social partners and social dialogue is confirmed, as is – following the IGC – their contribution to tripartite social dialogue. Recognition is thereby granted to a practice which developed in parallel with the proceedings of the European Convention and which grants the social partners a role in the preparations for the Spring European Summits (Council of the European Union, 2003).

2.3 Popular right of initiative

One unique innovation of the European Constitution is to sanction a popular right of initiative, complementing but not substituting the national constitutions by adding a right which does not exist in some national constitutions. The Constitution enables citizens, provided that they collect one million signatures in a significant number of Member States, to ask the Commission to submit a proposal for a legal act in order to implement the Constitution (Article I-47(4)). This is a relatively small number: the European Trade Union Confederation alone has the capacity to mobilise more than 60 million people. This new right does
not place the Commission under any obligation or threaten its right of
initiative, but one can hardly imagine that it will ignore requests
expressed in such a way. Citizens are not being given a right which is
denied to the EU institutions: as the EC Treaty, the Constitution
recognises the right of the Council and the European Parliament to ask
the Commission to submit a proposal. Before the Constitution enters
into force, a European law will be needed to spell out the implementing
rules and the minimum number of Member States from which the
citizens presenting the petition must come in order to be able to
exercise this new right. The content of this text will be a key element in
assessing the true scope of this new right, which has the potential to
open up a new European public space for putting forward social,
economic or environmental demands but also ones related to
citizenship.

2.4 Decision-making procedures

The Constitution reduces the number of legal instruments (from 15
to 6). They are: European law, European framework law, European
regulation, European decision, recommendations and opinions. It draws
a distinction between legislative acts and non-legislative acts (executive
acts, i.e. European decisions of the European Council, European
regulations and decisions of the Council, and recommendations of the
Commission and the European Central Bank in specific cases). The
legislative procedure (the current codecision procedure) virtually
becomes the norm for the adoption of legislation. This takes the form
of a European law and a framework law (replacing the current
regulation and the directive). Generally speaking, unless the
Constitution stipulates otherwise, the Council acts by a qualified
majority. Some special procedures remain however.

2.4.1 Definition of qualified majority

The new definition of qualified majority voting (QMV), circumscribed
by procedures intended to prevent three large countries from forming a
blocking minority on their own, has been preserved, but the price paid
is an increase in complexity. This system will apply as from
1 November 2009 pursuant to Article 2(1) of the Protocol on
transitional provisions (4). A qualified majority is defined as at least 55% (and no longer 50%) of the members of the Council, including at least fifteen of them and representing Member States comprising at least 65% (and no longer 60%) of the population of the Union (Article I-25(1)). A draft decision reintroducing a formula based on the Ioannina compromise makes it possible to take account of opposition to the adoption of an act by a qualified majority, even if this opposition does not meet the conditions necessary for the formation of a blocking minority (5). This Decision will take effect on 1st November 2009 and will remain in force at least until 2014. Thereafter the Council may decide to repeal it. When the Council does not act on a proposal from the Commission or from the Union Minister for Foreign Affairs, “the qualified majority shall be defined as at least 72% of the members of the Council, […] comprising at least 65% of the population of the Union” (Article I-25(2)). This applies in the field of Justice and Home Affairs (JHA) when the Council acts at the initiative of the Member States; in the field of the common foreign and security policy (CFSP) when it acts at its own initiative; in respect of economic and monetary policy when it acts on a recommendation from the Commission or the ECB; when it rules on the suspension of a Member State’s rights or the withdrawal of a Member State from the Union; and when making various appointments.

2.4.2 Ordinary legislative procedure

The consequence of turning the ordinary legislative procedure into the general rule is that the Council acts by a qualified majority in codecision with the European Parliament, on the basis of a proposal from the Commission. This procedure is extended to many new cases (27), but some special procedures remain especially with regard to non-discrimination (Article III-124) and social affairs (Article III-210). The law or framework law establishing the measures needed to combat discrimination will require a unanimous decision of the Council and the
consent (rather than consultation) of the European Parliament. Only the basic principles of these measures will be determined in accordance with the ordinary legislative procedure. The article on social policy (Article III-210) is a carbon copy of the existing Article 137 TEC. It preserves unanimity in the Council and consultation of the European Parliament, as well as the possibility of having recourse to a passerelle clause in order to switch to ordinary legislative procedure voting in three of the four social policy areas excluded from it (protection of workers where their employment contract is terminated; representation and collective defence of the interests of workers and employers, including codetermination; and conditions of employment for third-country nationals legally residing in Union territory. Social security – quite rightly – is not affected). This article does not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

2.4.3 Social security for migrant workers

The progress made by the Convention in terms of extending QMV to cover certain aspects of taxation and budgetary provisions was overturned at the IGC. Other advances were maintained, but with the possibility of “emergency brakes” being applied (social security and judicial cooperation in criminal matters). As concerns social security for migrant workers, if a Member State considers that a draft text contravenes the fundamental principles of its own legal system, it can ask for the matter to be referred to the European Council. The European Council then has four months, either to send the dossier back to the Council, thereby terminating the suspension of the procedure, or to request the Commission to submit a new proposal. Unlike in the case of judicial cooperation in criminal matters, no provision is made for launching enhanced cooperation in respect of social security for migrant workers.

2.4.4 Services of general economic interest

The Constitution allows for the adoption of a European law with a view to establishing the principles and laying down the conditions for the operation of services of general economic interest, enabling them to fulfill their missions “without prejudice to the competence of Member States, in compliance with the Constitution, to provide, to commission and to fund such services”. As in the current EC Treaty, the derogation from competition
rules is maintained: “Undertakings entrusted with the operation of services of general economic interest (...) shall be subject (...) to the rules on competition, insofar as the application of such provisions does not obstruct the performance, in law or in fact, of the particular tasks assigned to them”. The European Commission announced in 2004 that it would refrain from publishing a proposal for a framework directive on services of general economic interest, on the grounds that the future Constitution would contain a better legal basis (CEC, 2004). At the start of that same year, the Commission had adopted the draft Services Directive (the Bolkestein Directive) which, if adopted as it stands, would have a number of knock-on effects on social services (see article by Éric Van den Abeele in this volume). The controversy aroused by this draft text has been so intense that it could compromise the positive outcome of the ratification process in France.

2.4.5 “Cultural” and “social” exemptions in external commercial relations

Lastly, less widely debated and yet directly linked to the foregoing, the Constitution classifies external commercial relations among the Union’s areas of exclusive competence. The Commission will conduct negotiations on the basis of guidelines adopted by the Council by a qualified majority and overseen by a committee of representatives from the Member States; the Council will conclude these agreements by a qualified majority on behalf of the Union. The European Parliament will be kept informed of the progress made in negotiations and, most importantly, the agreements concluded will be subject to its consent. The European Convention had added to the commercial spheres in which the Council acts by a qualified majority (§) trade in services, commercial aspects of intellectual property and foreign direct investment. At the end of the proceedings of the Convention, France managed to push through unanimity in the field of trade in cultural and audiovisual services “where these agreements risk prejudicing the Union’s cultural

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6 Changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.
and linguistic diversity” (the “cultural exemption”). Pursuant to Article III-315, unanimity likewise applies to the fields of trade in services (the IGC abolished the obligation that such agreements must entail the movement of persons) and foreign direct investment where such agreements include provisions for which unanimity is required for the adoption of internal rules.

At the request of Finland, in addition to the cultural exemption the constitutional text contains a “social exemption”. The Council acts unanimously when negotiating and concluding agreements “in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them”. Member States will have the opportunity to object to the “selling-off” of these services in the context of international trade negotiations under the GATS (General Agreement on Trade in Services), something particularly dreaded by the anti-globalisation movement. It remains to be seen what interpretation will be placed on the legally vague conditions serving to justify recourse to unanimous voting.

2.5 Fundamental rights

One of the main innovations of the Constitution is the incorporation of the Charter of Fundamental Rights as Part II. Another is the accession of the Union to the European Convention on Human Rights (ECHR), the consequence of which will be “to place the Union in a similar situation to that of the Member States, whose constitutions protect fundamental rights but which, in this area, are also subject to external monitoring by the European Court of Human Rights” (Bribosia, 2004: 213). The IGC amended the Constitution by tightening up the wording: “the Union shall accede to the European Convention on Human Rights” rather than “shall endeavour to accede”. Accession is facilitated by the abolition of unanimity. There is a Protocol laying down the principles to be respected by the accession agreement and a Declaration calling for a closer dialogue between the Court of Justice of the European Union and the European Court of Human Rights once the Union accedes. The Constitution says nothing, however, about the date of accession.

The incorporation of the Charter is one of the most symbolic aspects of the “constitutionalisation” of the Union, a process begun but by no
means completed by the Constitution. Its provisions will continue to impose constraints on the EU institutions and the Member States when they implement the law of the Union. It remains to be seen how the fundamental rights recognised in the Charter might help nudge the development of legislation in the direction of an EU human rights policy (De Schutter, 2004).

3. Economic governance

The Convention had slightly improved the governance of the euro zone by acknowledging the informal role of the Eurogroup and providing for the adoption of measures solely among the Member States whose currency is the euro. The aim was for those countries to reinforce coordination and surveillance of their budgetary discipline, to adopt among themselves broad economic policy guidelines compatible with those adopted by the Union as a whole, and to ensure the external representation of the euro. The IGC did not clarify the meaning of “unified representation” any more than the Convention had done. It did however confirm the separate status of the euro zone countries by authorising the Ecofin Council, confined to the countries whose currency is the euro, to adopt decisions relating to multilateral surveillance and excessive deficits. No new members will be admitted to the euro zone without the prior agreement of these countries. None of the ten new Member States participates in the single currency at present, but Lithuania, Estonia and Slovenia joined the European exchange mechanism on 27 June 2004 in preparation for their future participation. These countries aspire to join the euro zone in January 2007.

The Commission’s role in respect of multilateral surveillance has been somewhat increased. It will be able to send a direct warning to a Member State which departs from the principles jointly agreed in the broad economic policy guidelines. As far as excessive deficits are concerned, the Commission has a lesser role than it had in the Convention’s proposals. Contrary to the situation pertaining under the EC Treaty, the Commission will be able to address an opinion to a Member State where an excessive deficit exists or may occur, informing the Council accordingly. The Council will decide whether an excessive deficit exists on the basis of a proposal from the Commission (and no
longer a recommendation). The specific provisions applying to the countries whose currency is the euro authorise these countries to take decisions among themselves at this stage, without the country concerned being allowed to vote. At the next stage, the adoption of recommendations to be forwarded to the Member State concerned, as now the Commission will only have the right to make a recommendation (and not a proposal, as had been decided by the European Convention, the consequence of which would have been to require a unanimous vote in the Council to amend the content of the Commission proposal).

Finally, the IGC also drew up a Declaration reasserting its faith in the Stability and Growth Pact, suspended on 25 November 2004. In the meantime the Court of Justice has nullified the Council conclusions (7). The Commission has put forward new proposals with a view to carrying out a limited revision of the Pact. However, as implied by statements made at the end of 2004, the search for a compromise between the champions of budgetary discipline and those who advocate a relaxation of certain criteria – varying, it is true to say, from one national situation to another – constituted a genuine challenge for the Luxembourg presidency (first half of 2005). What was ultimately needed was to elaborate a set of rules respected across the board by the Member States and the Community bodies.

4. Enhanced cooperation

The Constitution could take the establishment of enhanced cooperation among Member States wishing to move ahead at a faster pace from the theoretical stage to the practical. Those States not desiring the progress proposed in terms of creating a genuine European criminal area will be able to remain outside of it, as will those not wishing to join in with the border, asylum and immigration policies. The Constitution paves the way for the establishment of enhanced cooperation in the former case; in the latter it leaves intact the derogations negotiated at the time of the

7 CJEC, Commission of the European Communities v Council of the European Union, Case C-27/04, Judgement of the Court of 13 July 2004.
Amsterdam Treaty by the United Kingdom and Ireland on the one hand and by Denmark on the other.

Generally speaking, recourse to enhanced cooperation will only ever be used as a last resort. Such cooperation cannot relate to the Union’s areas of exclusive competence. The number of countries participating is set at one third of Member States and no longer at eight, which in effect raises this number to nine in an EU of up to 27 Member States. As in the Treaty of Nice, a request to establish enhanced cooperation must be submitted to the Commission by the group of States concerned. Since it cannot relate to the Union’s areas of exclusive competence, the request – which must specify the scope and the objectives pursued through enhanced cooperation – is addressed to the Commission. The Commission can then submit appropriate proposals. If it chooses not to do so, it must justify its decision. The Council, acting by a qualified majority on the basis of a Commission proposal, then adopts a European decision to proceed with enhanced cooperation (Article III-419(1)). The consent of the European Parliament must be obtained (it is no longer merely consulted). Enhanced cooperation is aimed at furthering the objectives of the Union, protecting its interests and reinforcing its integration process. Any Member State wishing to participate in enhanced cooperation already in progress must notify its intention to the Council and the Commission.

With regard to economic governance, the Constitution allows for a relative differentiation of the decision-making process in the euro zone countries. The euro zone constitutes the highest level of integration among some of the EU Member States. Whilst it is the case that the launch of enhanced cooperation is probably the only way of reinforcing the integration process, a greater differentiation of the euro zone could be accompanied by the setting of more ambitious fiscal and social objectives between all or some of these States (e.g. a minimum wage). Since the IGC maintained the passerelle article, these countries could likewise decide (unanimously) to act by a qualified majority in areas where unanimity is required or to resort where appropriate to the normal legislative procedure in the context of enhanced cooperation. The Treaty of Nice made no such provision. Future participants are invited in a Declaration to state their intention to make use of this option when making their request to establish enhanced cooperation.
The significance of this provision is that Member States wanting to “reinforce [the] integration process” of the Union may do so, while those wishing to join in with ongoing enhanced cooperation must prove their desire to participate by forfeiting their capacity to block decisions.

The IGC reintroduced unanimous voting in the Council for the launch of such cooperation in respect of the common foreign and security policy. The exclusion from this mechanism of decisions having military or defence implications confirms – if confirmation were needed – the intergovernmental nature of the future defence policy. In this sphere the Constitution makes provision for a special type of enhanced cooperation described as “permanent structured cooperation”.

5. Revision procedures

The European Convention dismissed the option of setting out the policies of the Union in a distinct legal text, opting instead for a single text in four parts, Parts I and III of which could not be revised separately. As stated in Part IV, the Treaty will be subject to three different types of revision, but the unanimity requirement is not abolished for any of these revision procedures. Under the “ordinary” revision procedure (Article I-443), which perpetuates the conventional method as a democratic means of preparing large-scale revisions, the IGC must adopt the Convention’s recommendation “by common accord”. The amendments will not enter into force until they have been ratified by all the Member States in accordance with their respective constitutional requirements. From a political point of view, however, the inclusion of the European Parliament in the “constituent body” and the recognition of new powers in the procedures for revision of the

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8 In 2003, the Praesidium of the European Convention justified this decision on the grounds that “laying down different amendment procedures for Parts One and Three would mean re-opening discussion on the structure of the Constitutional Treaty, as it would give rise to requests for certain areas of Part Three to be moved to Part One” (European Convention, 2003: 10). In 1999, the report by a “group of wise men” created by the Prodi Commission prior to the 2000 IGC had advocated separating the existing texts into two parts requiring different revision procedures, with unanimity no longer needed for the second part comprising the policies of the Union (see von Weizsäcker et al., 1999).
Simplified revision procedures

In addition to the “ordinary” (or full) procedure, two “simplified” revision procedures have been inserted into Part IV. The first of these, contained in Article IV-444, relates to decision-making procedures; the other one specifically concerns the internal Union policies and action defined in Part III (Article III-445). In the case of a simplified revision of decision-making procedures, the European Council may, with the consent of the European Parliament, decide to move from unanimity to a qualified majority (except for decisions having military implications or in the field of defence) or to waive the general rule for the adoption of EU legislative acts by deciding to abandon the special legislative procedure in favour of the ordinary legislative procedure. The scope of this mechanism is however limited by the fact that a single national parliament is at liberty to oppose this new constitutional right of the European Council. The Constitution likewise contains a simplified revision procedure for the internal Union policies and action defined in Part III. But its use, which will avoid having to hold an IGC and also to convene a Convention, will still require a unanimous decision of the European Council, followed by ratification in each of the Member States. Changes introduced in this manner cannot alter the distribution of powers between the Union and the Member States. A degree of scepticism prevailed as to how possible it really will be for the European Council or the Council to use the existing passerelle mechanisms until such time as the Council in December 2004 successfully decides to activate the similar mechanism forged in respect of the area of freedom, security and justice (see article on Asylum and Immigration).

Under the “ordinary” revision procedure, the European Council will decide by a simple majority to convene a European Convention, within which the Parliament will be represented, along with representatives of the national parliaments, representatives of the Heads of State and Government and also of the Commission. The Council may decide by a simple majority not to convene the Convention, but this decision would have to obtain the consent of the Parliament, which thus has the final say concerning large-scale revisions of the Constitution. In future either the Parliament, the Commission or the government of any Member State may submit proposals for a revision of the Treaty: this applies both to an “ordinary” revision (the full procedure) and to a simplified
revision of Part III. These innovations should imbue European election campaigns with fresh dynamism. The principal outcome is that this text, even though it bears the name “Constitution”, will not have a fifty-year lifespan, as was originally predicted by the Chairman of the European Convention, Valéry Giscard d’Estaing.

6. The ratification process

The Constitution, a product of the revision procedure for the existing treaties, is itself still a treaty and will be adopted “by common accord” by “a conference of representatives of the governments of the Member States”. It must then be ratified by “the High Contracting Parties in accordance with their respective constitutional requirements”. Once the constitutional text comes into force there will be no change to this twofold requirement for unanimity among the Member States and national ratifications on the occasion of future “full” revisions of the Constitution. The IGC set the date of 1st November 2006 for the entry into force of the Treaty establishing a Constitution for Europe. Where the parliamentary method applies, the new Treaty will be adopted following the customary vote by the country’s parliamentary chamber(s) on a text ratifying an international treaty. This parliamentary process had already been completed by the end of 2004 in two countries, Estonia and Hungary (on 11 November and 20 December respectively). Where a referendum is held, the citizens will have a direct say on the text. This will be the case in France, Denmark and Ireland. In other countries the referendum will be for consultative purposes (Spain, United Kingdom, Netherlands and Luxembourg) and will be followed by parliamentary assent.

6.1 France

Prior to the holding of the national referendum, the French constitution will have been revised in conformity with the decision of the French Constitutional Council. The Council ruled that neither the name change (“Treaty establishing a Constitution for Europe”) nor the affirmation of the primacy principle necessitated a review of the French constitution (9). The reasons given to justify a prior constitutional review are not related...
to the legal status of the text, which remains a treaty in international law. Rather, they relate to the transfer of new powers to the Union in areas affecting the exercise of national sovereignty: border controls, judicial cooperation in civil and criminal matters, the future establishment of a European Public Prosecutor’s Office and the strengthening of certain powers (asylum and immigration). The various passerelle mechanisms allowing for procedures to be altered without national ratification (the transition from unanimity to a qualified majority or to the normal legislative procedure where QMV is not provided for) necessitate a review of France’s constitution. The same holds true for the simplified revision procedure, not entailing national ratification but leaving individual parliaments the option of objecting. This right to oppose a simplified revision as such likewise requires an amendment to the French constitution, as do the new rights granted to national parliaments. At issue here is the “early warning system” enabling national parliaments to monitor the enforcement of the principle of subsidiarity and the procedure enabling them, through their Member State, to appeal to the Court of Justice on the grounds that the subsidiarity principle has been infringed by a legislative act.

6.1.1 The French Socialist Party says yes

In France, the opposition to the Constitution from the far left, the far right and pro-sovereignty groups is part of a well-known anti-European stance. When hostility to the Constitution, spearheaded by some former leading French socialists, became a divisive factor within the Socialist Party, its first secretary François Hollande decided to hold an internal referendum. The yes-vote (59%) won the day on 1st December, on a turnout of 80%. But that did not entirely halt the spread of negative arguments in French society: criticism is levelled at policies currently being pursued within the Union but also at enlargement. There is moreover opposition to some of the economic provisions of the Constitution, even though these are identical to the ones in the existing treaties. The idea of “setting them in stone” in the Constitution (a term described as inappropriate) is deemed unacceptable. The “no” camp likewise plans to campaign against the Constitution by denouncing the proposed Services Directive (Bolkestein Directive), a document which has nothing to do with the Constitution. Some of the “no” campaigners also hail from groups opposed to Turkish accession, an issue which is
unrelated to the Constitution but splits French political circles down the middle, on left and right alike. This debate is reflected in the Constitutional law amending the French constitution, tabled in early January 2005 and according to which Turkey’s accession to the European Union will be subject to a referendum.

6.2 Denmark: the small Socialist People’s Party says yes

In Denmark there has been a change of attitude towards the European Union among members of the Socialist People’s Party (Socialistisk Folkeparti), a small party situated to the left of the Social-Democrats and formerly hostile to the country’s accession to the Communities (1973). The internal referendum held by this party on the Constitution resulted in a victory for the “yes” camp (10). Somewhat unexpectedly, 65% of its members took part in the ballot and a large majority of them, 64%, voted in favour. Thus the likelihood of a yes-vote winning the day at the national referendum is considerably increased, now that the “yes” camp has been joined by a small party which contributed to the rejection of the Maastricht Treaty – but also to the acceptance of the compromise enabling the country to vote “yes” in the second referendum on Maastricht. The Socialist People’s Party added its voice to the “political agreement on Denmark in an enlarged Union”, signed on 2 November by the parties belonging to the government coalition (the Liberal Party, Venstre, and the Conservative Party, Konservative Folkeparti) and those on the centre-left (the Social-Democrat Party, Socialdemokratiet, and the Radical Party, Radikale Venstre). As reported in Le Monde, the Constitution is described in this agreement as guaranteeing “more effective” operation of the EU, setting out “clearly” the aims of the organisation and in particular promoting “social progress and a high level of environmental and consumer protection” (11).


11 Le Monde, 4 February 2005.
6.3 Consultative referendums in Luxembourg, the Netherlands, the United Kingdom, Spain and Portugal

Luxembourg’s constitution does not rule out the possibility of holding a referendum on the European Constitution (12). Following a decision of the Council of State on 12 October 2004, a specific law was adopted for the purposes of holding this referendum. Voting will be compulsory for everyone registered on the electoral roll, but the result will not be legally binding. The Netherlands have likewise decided to hold a consultative referendum, even though the constitution makes no provision for it. There has recently been an upsurge in Euroscepticism among the Dutch population, which could result in a very high rate of abstention, with a turnout similar to that at the European elections (39.3%).

In the United Kingdom, the decision to hold a consultative referendum was announced as long ago as 19 April 2004, but in political terms Parliament’s hands will clearly be tied by the outcome. The debate hinges mainly on the consequences of a no-vote, which would be motivated by rejection of a European superstate, an image conjured up by the Eurosceptics. UKIP, the party which advocates UK withdrawal from the EU and obtained 16% of the vote at the European elections in June 2004, is busily campaigning.

In Spain, the Council of State asked the Spanish Constitutional Tribunal to verify whether the Treaty establishing a Constitution for Europe was in any way inconsistent with the Spanish constitution. As in France, the opinion of the Constitutional Tribunal related to the compatibility with the Spanish constitution of incorporating the principle of the primacy of EU law over national constitutions, and that of integrating the Charter of Fundamental Rights. The verdict of the Constitutional Tribunal was that the European Constitution and that of Spain were compatible and that there was no need to review the Spanish constitution. The opposite decision would have jeopardised the plan to hold a referendum, since a constitutional review would have been required, a cumbersome procedure entailing the dissolution of both Houses (Senate and Congress of Deputies) of Parliament (Cortes

12 Article 51(7) of the Luxembourg constitution.
generales) and hence the calling of a general election. The opinion of the Constitutional Tribunal thus paved the way for a referendum, held on 20 February 2005. Spain’s constitution allows for the King to call consultative referendums on political decisions of major significance. The last referendum held related to Spanish membership of NATO in 1986.

Portugal’s constitution does not provide as such for a referendum to be held in order to approve international treaties. However, matters of national interest which are to be the subject of an international agreement may be put to the population for approval. In such a case, proposed referendums are forwarded by the Assembly of the Republic or the government to the President of the Republic, who then carries out preliminary, mandatory, checks as to their constitutionality and legality. On 17 November the Parliament (Assembly of the Republic) adopted a resolution containing the question to be answered by the Portuguese people: “Concorda com a Carta de Direitos Fundamentais, a regra das votações por maioria qualificada e o novo quadro institucional da União Europeia, nos termos constantes da Constituição para a Europa? (“Do you agree with the Charter of Fundamental Rights, the qualified majority voting rule and the new institutional framework of the European Union, as established by the Constitution for Europe?”). Both of the parties in the ruling coalition, the PSD (Pardido Social Democrata) and the Partido Popular (CDS-PP), voted in favour of the text, as did the main opposition party, the PS (Partido Socialista). Nonetheless, on 17 December the Portuguese Constitutional Court ruled the question unconstitutional, primarily due to its lack of clarity, clarity being one of the conditions laid down by Portugal’s constitution (objectivity, clarity and precision).

6.4 Euroscepticism in Poland and the Czech Republic?

Poland was one of the new Member States with the lowest turnouts in the pre-accession referendum and at the European elections (59% and 20.87% respectively). It is also a country where the pro-sovereignty and populist lists obtained the highest number of votes in June 2004. President Aleksander Kwasniewski (SLD) is in favour of a referendum and would like it to be held in 2005 at the same time as the general and presidential elections. A debate about holding a referendum took place in the Sejm (Lower House of Parliament) on 2 December. The
Democratic Left Alliance (SLD) and the Social-Democrat Party (SPLD) believe that the Constitution is beneficial to Poland and necessary for the Union. The Civic Platform (PO) and the Law and Justice Party (PiS) are critical of the constitutional text, which is rejected by the League of Polish Families (LPR). Ratification would have more chance of success in Poland by means of a referendum than through the parliamentary method.

The situation in the Czech Republic is equally complex. Prime Minister Stanislav Gross was in an awkward position at the start of 2005, at the head of a government coalition incorporating the Social-Democrat Party (CSSD) and the Centrist Coalition (consisting of the Christian Democrat Union-Czech People’s Party, KDU-CSL, and the Union of Liberty-Democratic Union, US-DEU). Mr Gross is in favour of holding a referendum and would like it to take place in June 2006 to coincide with the general election. Under the Czech constitution, international treaties are ratified by Parliament unless a constitutional law requires that a referendum be held (13). The President of the Republic, Vaclav Klaus, who himself founded one of the parties currently in opposition, the ODS (Civic Democrat Party, an ultra-liberal and Eurosceptic party formed in 1991), declared in Berlin in November 2004 that he was “100% opposed to the European Constitution”. The ODS did call on the Czech people to vote for EU accession, but the party leadership decided to come out against the Constitution in December 2004. A text geared to the holding of a referendum in late 2005 was tabled in the Senate by the ODS on 13 January 2005. The adoption of such a law requires a three-fifths majority vote in both Houses of Parliament (14). Parliamentary ratification would be more problematical than the referendum method, since the government only has a wafer-thin majority (one seat) in the Chamber of Deputies.

6.5 What happens if ratification is rejected?

Should a problem occur, a Declaration annexed to the Treaty stipulates that “if, two years after the signature of the Treaty establishing a Constitution for

13 Article 10a of the constitution of the Czech Republic.
14 Article 39(4) of the constitution of the Czech Republic.
Europe, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council” (15). This Declaration reflects the pragmatic nature of the solutions found when Denmark and Ireland voted “no” in 1992 and 2000 respectively. If only a small number of countries were affected, the solution might be to hold a second consultation at the end of an as yet undetermined period. Were the Danish, British or Irish people to reject the Treaty, however, it would seem unlikely that their reasons for saying “no” could lead to the establishment of new derogations. These countries already have the benefit of derogations, and progress in respect of criminal justice cannot be imposed on Member States not wishing to be involved. The other question arising therefore relates to the desire to remain within the Union. Depending on the reasons for this no-vote, the European Council would look into the matter. When announcing the referendum to the House of Commons on 19 April 2004, the UK Prime Minister Tony Blair made it plain that the intention was for the British people to have their say about their country’s place in Europe. UK withdrawal seems not to have been altogether ruled out at this stage. At present the rules on admission are laid down by the EU Treaty, but there is no article permitting a Member State to withdraw unilaterally from the Union. The constitutional Treaty contains an innovation in this regard, introducing a procedure for voluntary withdrawal. There is however nothing to prevent the negotiated withdrawal of a Member State (or of more than one) at an Intergovernmental Conference which would consequently review the provisions of the European treaties. Such a revision, just like any other, would have to be subjected to national ratification procedures, with all the political difficulties which that could generate.

If the no-vote were to win the day in France, signifying a rejection of Europe headed up by the pro-sovereignty camp and the far right as well as by the champions of a more social Europe, the implications would be

15 Declaration No.30 on the ratification of the Treaty establishing a Constitution for Europe.
difficult to interpret. The latter group regards rejection of the text as a means of obtaining its renegotiation. One no-vote could lead to others.

The compromise reached by the IGC is already regarded in some quarters as going beyond what is reasonable. Such is the case in the UK’s view with respect to the incorporation of the Charter. Apart from the fact that renegotiation would seem extremely hypothetical, the agreement of the United Kingdom would be indispensable, and that country gives no sign of shifting the “red lines” it refuses to cross on social and fiscal matters and in respect of the passerelle procedures, as defined ahead of the IGC (16). If rejected by one or more countries of which France, the Union would not suffer an institutional crisis since the Treaty of Nice would remain in force. The consequence of that would be to keep in place the provisions decried by the backers of a more social Europe, depriving the Union of the scope for further progress which is inherent in the Constitution. The most likely consequence would be to put the Constitution on hold indefinitely, or even for it to be abandoned, plunging the Union into a period of existential uncertainty. Whatever happens, the question will be how to embark on early implementation of those provisions of the Constitution which rally the greatest consensus (e.g. with regard to the European External Action Service and the Minister for Foreign Affairs, or to the popular right of initiative).

**Conclusions**

The text of the constitutional Treaty goes too far for some and not far enough for others, but it does contain certain novel elements. In the social sphere, it introduces among the values and objectives of the Union some component parts of the “European social model”: respect for human rights, the social market economy, full employment, social progress, a high level of protection and improvement of the quality of the environment, measures to combat exclusion and discrimination, the promotion of social justice and protection, equality between women and men, solidarity between generations and protection of the rights of

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the child, economic, social and territorial cohesion, and solidarity among Member States. The incorporation of the Charter of Fundamental Rights and the inclusion of a social clause circumscribe and mark out these social aspects. The Constitution likewise contains some democratic elements enabling citizens to make their voices heard, by creating a popular right of initiative. New horizons are also opened up by the newly acquired right of the European Parliament to table drafts with a view to revising the content of the text.

The Constitution therefore introduces innovations on two points crucial to the development of democracy in Europe. In neither case is a blank cheque on offer: European democracy in all of its forms is merely adumbrated here, and the way in which it is put into practice will depend on the will of the European peoples to breathe life into a Constitution which provides only the first elements of a response. But it will not be the last European document. For numerous European citizens, belonging to the European Union is something self-evident, but since enlargement the Union has increasingly been seen as no longer providing guarantees – that much is obvious from the protests against the draft Services Directive. At a time when the globalisation debate is turning into a debate about democracy and social justice in the context of a globalised economy, the Union could make a significant contribution, provided that it escapes from the trap of copying the United States by importing its economic model characterised by labour flexibility, deregulation and privatisation – which in turn generates more exclusion (Rifkin, 2004).

The Constitution is better structured in social terms but in no way prefigures the content of EU policies, which entail increased amounts of complexity and heterogeneity in the wake of enlargement on 1st May 2004. One might in fact fear that this “constitutional moment” has arrived either too late or too soon. Too late, in that it perhaps fulfils the desires of a Europe of a different era, within which the goal of “an ever closer union” was shared by a majority of Member States. Too soon, since the enlarged EU is too young to coalesce around a project as abstract as that of endowing the Union with a Constitution, which symbolises the transition to another political dimension seen by some as undesirable.
References


