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# The European Union's Constitutional Crisis – Causes and Consequences

*The rejection of the treaty establishing a European constitution by French and Dutch voters has thrown the EU into a deep crisis. What developments in the EU contributed to these referenda results? What consequences are to be drawn for the continuation of integration and the integration goal, the governance of the EU-25 and the further planned enlargements? What flaws are there in the present draft constitution and how can these be dealt with?*

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## After the French and Dutch Referendums: What Is to Be Done?

On 10 July 2005, Luxembourg became the 13th country to ratify the Treaty establishing a Constitution for Europe (TCE). With this, it could be said that a majority of the 25 member states had ratified the Treaty, including one (Spain) by referendum. Yet the negative results of the French referendum on 29 May and the Dutch referendum on 1 June had already made it virtually impossible for the Treaty to come into force.

The European Council, meeting on 16 and 17 June, declared that these developments "did not call into question the validity of continuing with the ratification processes". Three countries did proceed to ratify the Treaty in the following weeks: Cyprus and Malta, by parliamentary decision, and Luxembourg, by referendum. Yet most of the countries which had foreseen referendums soon announced that these would be postponed. Although it apparently cannot be buried, there is a general consensus that the Constitutional Treaty as such is effectively dead.

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It remains to be seen whether this so-called "constitutional crisis" is only a crisis about the Constitutional Treaty, or represents the surfacing of a more fundamental conflict about the very bases of the European Union. The June European Council declared a sort of cooling-off period, and "agreed to come back to this matter in the first half of 2006 to make an overall assessment of the national debates and agree on how to proceed." This contribution offers some preliminary thoughts as to what can be learnt from what has happened and what can be done next.

### What Went Wrong?

Immediate reactions to the negative referendum results ranged from denial among Euro-believers to triumphalism on the part of Eurosceptics. In between, some argued that the votes may have been against the Constitution but were not against Europe. The June European Council thus stated that, "We consider that these results do not call into question citizens' attachment to the construction of Europe." For others, the negative result was not against the Constitution at all, since most people did not know much about it:

as so easily happens in referendums, people vote for all sorts of reasons, including hostility to incumbent governments.

A large proportion of people clearly did not make their decision in the referendums in relation to the actual content of the TCE. This seems to have been true in the Spanish as well as the French and Dutch referendums, and for those who voted in favour as well as those who voted against.

In Spain, *Eurobarometer* conducted a factual test on its respondents consisting of six true/false questions about the content of the Constitution. There was no significant correlation, however, between the level of knowledge and the decision to vote in favour or against. Even "for those who knew most about the contents of the Constitution, opinions about it mattered much less than general opinions about the European Union".[1]

In France, the lack of information seems to have been an important factor, particularly for young people, in determining whether or not to vote. However, the fact that people did or did not feel that they had sufficient information clearly did not play a decisive role in how those who did turn out voted. The main reasons given for voting *Non* were overwhelmingly of a broader nature, above all the fear of negative effects on employment; opposition to what was seen as an excessively liberal approach, especially in the context of further enlargement; not enough "social Europe"; protest at the President and government; and concern about the accession of Turkey.[2]

In the Netherlands, however, a lack of information was the single reason most often given for voting against the Constitutional Treaty.[3] This feeling then turned into resentment at not being taken seriously. Dutch citizens had not been consulted over the introduction of the euro or the enlargement of the Union. They were now being asked to give their approval to a long and complex document, without knowing either what this would change in the present situation or what the consequences would be of not adopting it. Dutch attitudes were also shaped by broader issues which, although some people recognised hostility to the national government or political parties as a factor, were indeed about Europe. Money was a key issue in various respects. In the months preceding the referendum, the press gave much attention to the negotiations concerning the financial perspectives, inevitably highlighting the fact that the Dutch are the highest net contributors per capita to the budget. The Netherlands had been one of the countries most angered by the apparent double standards employed over the Stability and Growth Pact. Dutch citizens had felt the impact of the changes in national fiscal policies introduced to comply with the rules, and resented the fact that France and Germany seemed to think that they did not have to do the same. And there was a lingering feeling that the euro had contributed to a large increase in prices. Concerns about enlargement and the accession of Turkey also influenced decisions. None of this, however, is directly related to the content of the Constitution.

Better information campaigns by the national governments which chose to call these referendums may have helped. However, the problem is a broader one of concern to all member states, and one which goes back some years.

The Nice summit in December 2000 adopted a declaration calling for "a deeper and wider debate about the future of the European Union". Each member state and candidate country was encouraged to carry out a national campaign during 2001. Efforts were certainly made. Yet one year was inevitably too short a time to bring about any broad and deep change in popular understanding. Almost no increase in real public or political debate occurred, one exception perhaps being Ireland, where special efforts were made following the negative result of the first Irish referendum on the Nice Treaty.

The European Convention was an important innovation in broadening participation in preparing major treaty changes, notably by bringing in the national parliaments and involving not only member states but also candidate countries. It started with a "listening" phase, holding hearings and opening an internet forum for contributions. Yet there is little evidence that these kinds of input actually contributed much to the negotiations, and there was little broader public awareness of what was going on and what it might mean for citizens.

In mid-2005, we seem to be facing the same situation yet again. The June European Council called for a "period of reflection" before coming back to the issue in 2006.

[1] Flash Barometer EB168, The European Constitution: post-Referendum survey in Spain, March 2005, pp.19, 18.

[2] Flash Barometer EB 171, The European Constitution: post-referendum survey in France, June 2005.

[3] Flash Barometer EB 172, The European Constitution: post-referendum survey in The Netherlands, June 2005.

"This period of reflection will be used to enable a broad debate to take place in each of our countries, involving citizens, civil society, social partners, national parliaments and political parties. This debate, designed to generate interest, which is already under way in many member states, must be intensified and broadened. The European institutions will also have to make their contribution, with the Commission playing a special role in this regard."

It is essential that this challenge is now given the time, resources and attention it deserves.

Some characteristics of the Constitutional Treaty itself contributed to the problems of popular perception. The final text was too long and detailed to achieve its "constitutional" ambitions; gave confusing impressions about its nature; and obscured the important practical advantages of some of the substantive changes agreed. Substantive problem-solving, as in the case of the Area of Freedom, Security and Justice (see below) tended to be obscured in the public debate by high-profile institutional innovations such as the election of a President of the European Council; to be lost amid the mass of details included in the full Constitutional Treaty; or to be associated with politically driven pressures for deeper unification.

More generally, the text was very far from the short and simple statement of principles which was originally proposed as the basis for creating a new consensus. Simplification, one of the key mandates at Nice and Laeken, proved very far from simple.

The constitutional text does offer some fairly uncontroversial improvements, for example those regarding the clarification of the delimitation of competences between the Union and the member states. In the end no major change was made to the distribution of competences as recognised by the case law. It is an advance in itself, though, that the different kinds of competences are defined, and the substantive spheres in which they are applied are listed, in the constitutive treaty of the Union. It is generally seen as an advance in terms of clarity and honesty to state for the first time in primary law, as the TCE does in Article I-6 that, "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States".

Yet simplification can also lead to complication. In the end, the Convention and the subsequent IGC were not much different from previous processes. The same need to find compromise over complex issues between a large number of actors meant that the text ended up seeming just as long, detailed and complicated as what it was intended to simplify. Rather than producing a short statement of principles and rules which would be complemented by detailed agreements of a non-constitutional nature, the "Constitution" ended up as a document of nearly 500 pages (in the official edition produced in 2005). Moreover, the attempt simultaneously to reduce the number of instruments and procedures and to introduce a more refined hierarchy of acts resulted in a system which is not in fact much simpler than what exists today, at least in terms of popular comprehensibility. (Imagining just what would be involved in the transition from the present system to the new one, especially as we continue to increase the number of official languages, may also help understand why such massive systemic changes have never been adopted in the past!) Where complexity must be dealt with, too much simplicity may not be the best response.

Moreover, the final text had to take into account the pressures from actors who saw the constitutionalisation process as an opportunity to help build a stronger and more explicitly political Union. One consequence was that the European construction which emerged from the text seemed to be acquiring most of the trappings and powers of a state. Quite apart from an anthem and a flag, the Union would have "citizens", "laws", a "President", a "Minister for Foreign Affairs", a currency, a "common defence", to state only the most obvious. Some of these terms, notably the "Minister", seem to reflect terminological choices deliberately intended to give a state-like impression. The hope of some was clearly that the process of approving such a construction would actually inspire many people to feel more like citizens of a European polity. The danger was that others would be more alarmed and react negatively – even though this imagery does not fully reflect the reality of either the process or the treaty.

### What to Do Next

Although it would certainly be politically very difficult just to abandon the "constitutionalisation" process altogether, there is little alternative to having quite a long period of reflection before starting any renewed effort at overall reform of the Union system.

It is hard to imagine a successful replay in the near future of what was expected to happen in the recent process, with 10 or so countries holding popular referendums. According to the July 2005 standard Eurobarometer, support for even the *idea* of a European

Constitution has dropped from an EU average of 68% in autumn 2004 to an EU average of 61% in spring 2005. Only 58% on average favour "European political union". Moreover, renewed ratification efforts could, as in the Netherlands, prompt further explosions of latent frustrations of a broader nature. In spring 2005, an average of 51% of people across the EU say that they know only a bit about the EU, and another 19% that they know little or nothing. A majority also feel that it would not matter anyway: an average of 53% feel that their voice simply does not count in the EU.[4]

One of the main priorities now must be to generate sufficient confidence and consent among citizens to make possible a new kind of permissive consensus in the future. This will take time as well as resources. Moreover, we need not only to wait for the dust to settle after the referendums and the arguments over financial perspectives and social and economic models. We also need to let the Union settle into its enlarged – and more or less definitive – membership. Unless it is reasonably clear who "we" are, it is hard to decide what "we" want to construct together. Here, of course, the main question is whether Turkey will become a full member or not. Finally, this public debate should aim to establish a clear distinction between issues of "constitutional" choice, and policy options which can be pursued within the constitutionalised parameters.

That said, it would not be a good idea to do nothing while this debate takes place. As indicated below, some things can be done without treaty amendment. The key question, pending a next round of general reform is which, if any, of the changes which do require treaty amendment should be pursued separately.

**Possible Changes without Treaty Amendment**

There are a few changes which do not require treaty amendment. Indeed, the European Defence Agency which figures in the TCE has already been established by joint action of the Council.

Regarding the Commission, the main structural change introduced is to reduce the number of Commissioners to two-thirds the number of member states starting with the second Commission appointed under the terms of the TCE (although the European Council, acting unanimously, could alter this number). Even without the TCE, there is already a commitment to reduce the number of Commissioners. Article 4 of the Nice "Protocol on the enlargement of the European Union" stipulates that, once the Union has 27 member states, "the number of Members of the Commission shall be less than the number of Member States". The precise number is to be fixed by the Council, acting unanimously. Assuming that Bulgaria and Romania enter the Union as expected, a reduction can thus be achieved anyway if the member states agree to do so.

Some of the changes concerning Council business can also go ahead anyway. The 2002 Seville European Council agreed on the creation of a General Affairs and External Relations Council (GAERC) which in practice meets in two parts, with the rules of procedure explicitly stating that member states can send any minister to the General Affairs Council. The definitive creation of a separate General Affairs Council and Foreign Affairs Council (TCE, I–24) would contribute to both a better coordination of Council business and greater consistency in external relations. This could be agreed by the Council, which adopts its own rules of procedure.

According to the Protocol on Subsidiarity and Proportionality attached to the TCE, national parliaments must receive directly all legislative proposals. Each parliament has two votes (one per chamber where appropriate). Within six weeks, the parliamentary chambers may emit reasoned opinions indicating that the proposal does not respect the principle of subsidiarity. If one-third of the votes (one quarter in the case of the area of freedom, security and justice) are opposed, the Commission or other originating body must "review" the proposal. This principle could be implemented by other means, albeit with less legal weight (as could the involvement of national parliaments in the evaluation of Eurojust and Europol).

Some changes in the decision-making system could be achieved by other means. Indeed, some are likely to be pursued in the context of renewed consideration of the Commission's proposal to amend the system of "comitology" – that is, the set of procedures under which the Commission must consult committees composed of representatives of the member states when adopting implementing acts under delegated powers. These procedures are defined by the Council under Article 202 of the Community Treaty. The TCE introduced a distinction between "legislative" acts and "non-legislative" binding acts in two senses. First, in terms of the nature of the instruments, there would be laws and framework laws, on the one hand, and regulations and decisions, on the other. Second, in terms of the nature of the procedure, there would be an "ordinary legislative procedure" (i.e. codecision by Council and Parliament on the basis of a Commission proposal) on the one hand, and, below this, two new

[4] Eurobarometer 63, July 2005.

sub-categories of non-legislative acts: "delegated regulation" and "implementing acts". The concept of "delegated regulation" would apply where the Commission was empowered by the legislator to amend or supplement non-essential elements of the law, under the supervision of the legislator and subject to revocation of the delegation. "Implementing acts" of the Commission (or the Council) were to be those where uniformity was required at European level for the application of laws. Since Maastricht, the European Parliament has been pressing to have equal rights with the Council in supervising the implementation by the Commission of laws adopted under codecision. The 1999 Comitology decision gave the European Parliament a right of information and a limited right of scrutiny – meaning that it can complain that the Commission has exceeded the powers delegated to it, but not control the content of the measure. The TCE system would give the Parliament and Council equal rights of control over "delegated regulations" adopted on the basis of "European laws" or "framework laws". This equality is one of the main aims of the Commission's proposal, presented in December 2002 and already amended in 2004 following Parliament's opinion. Under this proposal, all measures implementing an act adopted under codecision would be subject to an amended regulatory procedure giving the Parliament equal rights in the control phase. If the TCE is not to come into force, there will be strong pressure from the Commission and the Parliament to pick up the negotiations in order to move in the same direction as the TCE.

### Cherry-Picking and Consensus-Building?

Proposals have been made to go ahead with a shorter text, limited to most of the first part of the TCE and including the main institutional innovations. Yet this option – independently of how public opinion might react – would not solve some of the main substantive problems caused by the pillar structure, and would have the practical disadvantage that the text would not replace the old treaties but co-exist alongside them, thus creating much complexity and legal uncertainty.[5]

There has also been talk of using the expected accession of Croatia to introduce at least some of the institutional changes. This would not mean just taking advantage of an accession treaty to do much more than would normally be required and expected. The Nice accords only foresee a Union of 27 members. The accession of Croatia, as the 28th member state, would in any case oblige the Union to review many institutional provisions.

Beyond this, it may be suggested that separate processes should take place to prepare partial treaty amendments in a few areas which are of high priority and salience, and where the amendments can most clearly be debated publicly as options for collective problem-solving in the spirit of subsidiarity. Proposals for change should clearly take the form of arguments to show that existing structures and practices are dysfunctional for the achievement of shared objectives, and are so to an extent that outweighs the sovereignty/subsidiarity costs of joint action. This would make it possible both to deal with some of the substantive problems which require treaty adjustment and it could also serve as a model for more informed public debate, as well as exploration of new patterns of differentiated cooperation.

One obvious candidate would be communitarisation of Police and Judicial Cooperation in Criminal Matters (the "third pillar"). Combating organised crime and drug trafficking is one of the fields in which there remains most widespread support for European action.[6] Terrorism has tragically again come directly onto the European agenda in July 2005 with the London bombings. As indicated above, quite clear options and arguments can be presented regarding the costs and benefits of European-level action in dealing with such threats.

This seems to have been the case for the near-revolutionary changes agreed concerning the third pillar. This was a policy area of high priority for all member states. Current arrangements, however, are manifestly inefficient and ineffective. The fact that the Area of Freedom, Security and Justice is spread across pillars means that actions may have to be split in order to use different legal bases. The third-pillar provisions are weak. The fact that initiatives can be presented by any one member state makes it all the harder to pursue a coherent strategy, while the need for unanimity means that decisions tend to the lowest common denominator. As for instruments, conventions have little impact given the need for (and frequent lack of) national ratification. The framework decisions and decisions introduced by the Amsterdam Treaty cannot be enforced in the same way as Community instruments. The Com-

[5] Sebastian Kurpas: Should ratification proceed? An Assessment of Different Options after the Failed Referenda, CEPS Policy Brief No.75, June 2005.

[6] Eurobarometer 63, July 2005.

mission does not have the right to initiate infringement procedures. The instruments do not have direct effect, such that citizens cannot take legal action in the event of non-application. Many of these problems would be solved by the TCE. There is a single legal basis (the Constitution). The whole area comes under the automatic jurisdiction of the European Court, except for the validity and proportionality of law-and-order operations. While the Commission does not have the exclusive right of initiative, one-quarter of the member states are required to present an initiative. The Commission's normal rights to control fulfilment apply. At the same time, it is one of the areas in which differentiation is already accepted. The various opt-outs and opt-ins concerning the UK, Ireland and Denmark are retained in the TCE.

Another candidate may be the European Security and Defence Policy, for which public support also remains very high, with an EU average of 77% in 2005 (although support for a Common Foreign Policy is somewhat lower).[7] This could also be the subject of EU-wide debates on the basis of rational presentations of the stakes, and the costs and benefits of different options.

[7] Eurobarometer 63, July 2005.

**Conclusions**

The French and Dutch referendums have derailed the process of formal "constitutionalisation" of the European Union. The Constitutional Treaty in its present form cannot be ratified.

A period of reflection and of debate lasting several years is required before there is any further attempt at overall reform of the constitutional structure of the European Union. In the meantime, some changes can be carried out without treaty amendment and without much controversy. It should also be considered to pursue changes in a small number of high-salience areas in which improved European responses are dependent on treaty amendment, and in which it may be possible to carry out a model debate about the merits and requirements of European-level action.

In a long-term perspective, the referendums may not prove to have been a negative step in the deepening of European integration, if such deepening is understood to mean greater public involvement in the process. For this to be the case, however, adequate time, resources and attention must be given at all levels and by all relevant actors to ensure informed public participation in the future. Otherwise, the next round could bring a really deep crisis.

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# Subsidiarity to the Rescue: Why the "Early Warning System" Should be Salvaged from the Constitutional Treaty

The future of the European Union's Constitutional Treaty was recently thrown into doubt by its rejection in referendums in France and the Netherlands. The European Council, in an acrimonious meeting in mid-June 2005, failed even to agree on whether the ratification process should continue. The question now arises whether it would be legitimate to salvage parts of the unratified Treaty that do not entail a change in the EU's institutional structure. I would argue that one such item can and should be implemented immediately – the subsidiarity "early warning system".

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The purpose of the early warning system is twofold – to enhance the democratic legitimacy of the EU's legislative process, and to improve the compliance of EU legislation with subsidiarity.[1] Subsidiarity is the principle that the EU should not act when action at the national level is more appropriate. The idea is to turn national parliaments into "subsidiarity watchdogs", allowing them to raise objections to those EU legislative proposals which they believe violate the principle.

[1] For more on the subsidiarity early warning system, as analysed within a constructivist theoretical framework, see I. Cooper: The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU, in: Journal of Common Market Studies, forthcoming.

If within six weeks one third of national parliaments object, the institution that made the proposal – usually the Commission – must formally review it, after which it may be withdrawn, amended or maintained unchanged. This new procedure is significant in that it would for the first time give national parliaments a voice in the day-to-day governance of the EU.

My purpose here is to make the case for the early adoption of the early warning system, and to respond to possible objections that such a move would be illegitimate or ill-advised. Opponents of the Constitutional Treaty will likely object that this amounts to sneaking elements of it in through the "back door". Yet because the system is advisory it would be entirely legitimate to put it into practice even in the absence of ratification. Furthermore, there is ample precedent, as is demonstrated below by a review of the history of subsidiarity in the EU. In the early 1990s, a number of subsidiarity-related reforms, mostly of a political or administrative character, were put into practice well before they were codified in the Treaty.

Proponents of the Constitutional Treaty, on the other hand, will worry that "cherry-picking" the most attractive parts of the Treaty will obviate the need for its ratification. Yet that document is increasingly unlikely to become law, at least in its current form, given the scale of its rejection by voters in two founding member states. It now seems that the EU faces a period of "reflection" – i.e. prolonged constitutional uncertainty. The best thing that European leaders can do at this moment is to initiate whatever positive, concrete reforms they can to revive public confidence in European integration. The early warning system is one such measure. Its early adoption would immediately open up the European legislative process to greater parliamentary, and thereby public, scrutiny. In this way it would at least lessen the EU's – perceived or actual – "democratic deficit", which was one reason that so many people voted "No".

### A Brief History of Subsidiarity in the EU

In many ways the present predicament is reminiscent of that which followed the Danish "No" to the Maastricht Treaty in 1992. As it happens subsidiarity, a key principle in that treaty, had a role in resolving the crisis. In December of that year, the European Council at Edinburgh seized on Maastricht's subsidiarity provisions as a means to reassure sceptical voters that the nascent EU would not be a federal superstate. The United Kingdom – holding the Council presidency in the second half of 1992, just as in 2005 – was a strong advocate of setting out detailed guidelines for the application of the principle, to supplement the appealing but vague formulation in the Maastricht Treaty. The sceptical Danes, placated by this and other blandishments – including reassurances on citizenship, the EMU, and defense policy – reversed themselves and voted "Yes" in a second referendum in 1993.

Even if it is arguable that subsidiarity "saved" Maastricht, it seems unlikely that it could single-handedly rescue the Constitutional Treaty. But another lesson may be drawn from this episode. European leaders decided to immediately implement their subsidiarity reforms, without waiting for the Maastricht Treaty to be ratified by all member states. For example, the Commission promptly undertook a review of pending legislative proposals for subsidiarity compliance, and withdrew some of them on that basis. Furthermore, the subsidiarity guidelines set out in the Edinburgh European Council conclusions were put into practice in the early 1990s; only later did they become law, when codified in a protocol to the Amsterdam Treaty. The Amsterdam Protocol merely had the effect of retroactively giving legal standing to an already existing set of institutional practices.

The relevant passage in the Maastricht Treaty regarding subsidiarity is the second paragraph of Article 3b:

"In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of scale or effects of the proposed action, be better achieved by the Community."[2]

The meaning of this passage is often misunderstood. It is often thought that subsidiarity is a principle that regulates the *allocation* of competences between the EU and the member states. In fact, it regulates the manner in which the EU exercises its *existing* competences. What it requires is that in areas where competence is shared between the EU and the member states, the EU must refrain from acting if action at the national level is more appropriate. (In areas of exclusive EU competence – which, unfortunately, are not codified in the Treaty – subsidiarity does not apply, because EU action is assumed to be necessary.) EU action must meet two tests, that of *necessity* (the action of member states acting alone is insufficient) and *comparative efficiency* (the objectives can be better

[2] Article 3b (now 5) TEC.

achieved by action at the EU level). Together with proportionality,[3] its "sister principle", subsidiarity imposes on the EU what may be called a *norm of self-limiting governance*, requiring it to exercise its legislative powers with self-restraint.

While the Maastricht definition of subsidiarity would seem to be an elementary principle of good governance, the Treaty does not say how it should be applied or enforced. One might suppose that the task of enforcement would fall to the European Court of Justice, but in the years since Maastricht the Court has been stubbornly unwilling to review Community legislation for alleged violations of subsidiarity.[4] Arguably, the main obstacle is that the questions attendant to a subsidiarity review – concerning not the strict legality of Community action, but its appropriateness in a given circumstance – are the kind of essentially political questions that are conventionally matters for the discretion of legislative institutions rather than courts.

The approach of the Edinburgh European Council, which was eventually codified in the Amsterdam Protocol, was to treat subsidiarity more as a political than a legal principle. It established a set of procedural guidelines that were intended to change the EU's legislative culture by compelling the Community's political institutions – the Commission, the European Parliament and the Council of Ministers – to take subsidiarity seriously when deciding whether and how to legislate. These require the political institutions to give due consideration to subsidiarity and proportionality at each stage of the legislative process – that is, whenever a measure is initiated, amended or adopted. The Commission, as the institution which formally proposes legislation, must do four things: it must consult widely before proposing legislation, justify the relevance of its proposals with regard to subsidiarity, minimize the financial and administrative burdens of legislation, and submit an annual report to the other institutions on the implementation of Article 3b (Art. 9, Amsterdam Protocol). The justificatory requirement is particularly strict:

"For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying that it complies with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, whenever possible, quantitative indicators" (Art. 4).

The European Parliament and the Council of Ministers, in their turn, are enjoined to consider Commission proposals, as well as any suggested amendments, for their compatibility with Article 3b (Art. 11).

Is there any evidence that these post-Maastricht subsidiarity rules have had an effect on the governance of the Community? The Commission – not necessarily an unbiased observer – insists that they do, in its annual reports on the application of the principles of subsidiarity and proportionality, published under the title "Better Lawmaking".[5] For example, these reports demonstrate that there has been a steady decline from year to year in the number of Commission proposals for new legislation, which have been cut by half since 1990.[6] Further, each annual report uses examples from the year to illustrate how subsidiarity is being applied – also noting occasions when the various EU institutions have put forth quite different interpretations of subsidiarity, and how these disputes were resolved. To demonstrate the effects of proportionality, the reports point to EU actions which employed the least burdensome means sufficient to achieve the desired purpose: examples include framework instruments that leave member states as much latitude as possible, common minimum rules, mutual recognition, and recommendations. An instance of this governance philosophy is the Open Method of Coordination, as embodied in the Lisbon Strategy for improving EU competitiveness, characterized by the loose coordination of national policies rather than pan-European legislation. In addition, the reports emphasize the extent to which the Commission has engaged in wide consultation – in the form of Green Papers, White Papers, communications and reports – as it canvasses for opinions before proposing new legislation. In sum, these annual reports make the case that there is a "new legislative culture"[7] in the EU, congruent with a general philosophy to "do less, but do it better".

[3] "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty". Article 3b (now 5) TEC. For an argument as to why the early warning system should be expanded to encompass proportionality, see I. Cooper, op. cit., Section V.

[4] A history of the ECJ's cases that touch on subsidiarity may be found in A. Estella: The EU Principle of Subsidiarity and its Critique, Oxford 2002, Oxford University Press.

[5] See e.g. the eleventh of these reports, Better Lawmaking 2003, COM 770 final. Available at http://europa.eu.int/eur-lex/en/com/rpt/2003/com2003_0770en01.pdf. For a general overview of the Better Lawmaking reports, see G. Azzi: Better lawmaking: The experience and view of the European Commission, in: Columbia Journal of European Law, Vol. 4, No. 3, 1998, pp. 617-28. See also R. von Borries, M. Hauschild: Implementing the subsidiarity principle, in: Columbia Journal of European Law, Vol. 5, No. 3, 1999, pp. 369-88.

[6] The number of proposals in 1990 was 787; in 2002 it was 316.

[7] Better Lawmaking 1997, p. 9. Available at http://aei.pitt.edu/archive/00000925/01/subsidiarity_COM_97_626.pdf.

Even so, there are two fundamental weaknesses in the Amsterdam Protocol's "political" approach to subsidiarity. While it requires that the Commission justify its legislative proposals in subsidiarity terms, it does not provide a political mechanism through which the Commission's legislative proposals could be *challenged* purely on subsidiarity grounds. The European Parliament and the Council of Ministers are enjoined to take Article 3b into account not as a separate consideration but "as an integral part of the overall examination of Commission proposals" (Art. 11), and so any specific concerns about subsidiarity will tend to be subsumed within their deliberations on the substantive merits of legislative proposals. Furthermore, the review of subsidiarity compliance under the Amsterdam Protocol does not involve any institutions that have a strong interest in a robust defense of the principle. The European Parliament, as a "supranational" institution, should be expected to generally share the pro-European views of the Commission. In theory the Council of Ministers, the "intergovernmental" institution, should be more vigilant but in practice the focus of its negotiations is on the substance of the proposal rather than its compliance with subsidiarity.

As will be argued below, the great merit of the Constitutional Treaty's early warning system is that it overcomes these weaknesses of the Amsterdam Protocol. It is a continuation of the post-Maastricht approach in that it would require political institutions to exercise an *ex ante* check of EU legislation for subsidiarity compliance. However, it improves on existing subsidiarity policy in two ways. First, it creates a political mechanism to vet Commission proposals *specifically* for subsidiarity compliance. Moreover, it enlists a hitherto uninvolved set of political institutions that have a strong interest in a robust interpretation of the principle – national parliaments – as "subsidiarity watchdogs".

## The Early Warning System in the Constitutional Treaty

The early warning system was devised by the Convention on the Future of Europe, which drafted the Constitutional Treaty. The broad mandate of the Convention, spelled out in the Laeken Declaration,[8] was to compose a document that would bring the EU "closer to its citizens". The early warning system contributes to the achievement of this goal in two ways: it is intended to improve the subsidiarity compliance of EU legislation, and to enhance the democratic legitimacy of the EU by involving national parliaments in its legislative process.

The idea for the early warning system is in fact present in the Laeken Declaration, which suggested that national parliaments might be given a role within the EU's legislative process, specifically through "preliminary checking of compliance with the principle of subsidiarity". It is not surprising that the Convention embraced this idea, given that a majority of its full members, 56 out of 105, were national parliamentarians.[9] As the Convention process unfolded, its members worked out the system's details. The ideas of two Convention working groups, on the role of national parliaments[10] and subsidiarity,[11] were incorporated, after the broader Convention debate,[12] into the National Parliaments Protocol[13] and the Subsidiarity Protocol[14] to the Draft Treaty. The system met with general approval in the Intergovernmental Conference, and was preserved essentially unchanged in the final version of the Constitutional Treaty that was approved in 2004.

The Subsidiarity Protocol sets out the procedures for the early warning system as follows. When the Commission proposes new legislation, it will transmit the proposal not only to the European Parliament and the Council of Ministers as it does now but also to national parliaments. Any national parliament can within six weeks send to the EU institutions "… a reasoned opinion stating why it considers that the proposal in question does not comply with the principle of subsidiarity" (Art. 5). Except in cases of urgency, the EU institutions must not take up the legislation until after the six-week period has elapsed; furthermore, they must "take account" of national parliaments' opinions. Most importantly, if one third[15] of national parliaments raise objections, then the Commission is required to

[8] Available at http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm.

[9] There were two national parliamentarians from each member state and candidate state. The other Convention members were representatives from each national government (28), the European Parliament (16), the Commission (2), plus the Chairman and two Vice-Chairmen.

[10] Available at http://register.consilium.eu.int/pdf/en/02/cv00/00353en2.pdf.

[11] Available at http://register.consilium.eu.int/pdf/en/02/cv00/00286en2.pdf.

[12] See esp. the convention debates of 4 October 2002 and 18 March 2003. Transcripts available at http://www.europarl.eu.int/europe2004/textes/verbatim_021004.htm, and http://www.europarl.eu.int/europe2004/textes/verbatim_030318.htm. For summaries, see CONV 331/02, available at http://register.consilium.eu.int/pdf/en/02/cv00/00331en2.pdf; CONV 630/03, available at http://register.consilium.eu.int/pdf/en/03/cv00/cv00630en03.pdf.

[13] CONV 850/03, pp. 226-8.

[14] CONV 850/03, pp. 229-31.

[15] The threshold is lowered to one fourth for proposals concerning police cooperation and judicial cooperation in criminal matters under the Area of Freedom, Security and Justice.

formally "review" the measure, after which it has three options: "After such review, the Commission may decide to maintain, amend, or withdraw its proposal. The Commission shall give reasons for its decision" (Art. 6).

Of course, exactly how this will work in practice remains to be seen. In practical terms, the short six-week deadline demands attentiveness and a willingness to rearrange the legislative calendar: the system's ultimate effectiveness will depend on national parliaments' willingness and ability to produce a considered and timely response to Commission proposals.[16] Each national legislature is different, varying in its political culture, party system and constitutional structure, and so responses will vary. A more vigorous response may be expected from those national parliaments that are most vigilant with respect to EU affairs, or those that wish to assert their independence from, or control over, their respective national governments. Crucially, national parliaments must learn to shape the character of their deliberation and response according to the peculiar nature of the question posed by the early warning system, which requires them to judge the Commission proposal not on its substantive merits but solely on whether it violates the principle of subsidiarity.

Each national parliament must decide for itself how to reorganize its procedures to respond to Commission proposals. In fact, they have already begun to work out the details.[17] In most parliaments, the task of monitoring Commission proposals and drafting reasoned opinions will be delegated to a parliamentary committee on European affairs. In some cases, the committee will even have the power to formally adopt such opinions, though in most cases this will be done by the whole parliament. To allow for the possibility that the two chambers in bicameral parliaments might disagree, each national parliamentary system was allocated two "votes" – two for each unicameral parliament, one for each chamber in bicameral systems.[18] Thus in an EU of 25, the one-third threshold amounts to seventeen out of fifty votes, the equivalent of nine – or more precisely, eight and a half – national parliaments.[19]

The early warning system is advisory in that the Commission retains the power to maintain its proposal unchanged even if one third of national parliaments raise objections. Some members of the Convention had wanted the system to go further: they proposed that if two thirds of national parliaments raise objections, the Commission should be forced to amend or withdraw its proposal. This was known as the "red card" proposal, which would have supplemented the "yellow card" that is the one-third threshold. The "red card" was rejected on the grounds that it would downgrade the Commission's formal right to initiate legislation. Detractors may claim that this has rendered the system effectively "toothless". However, it is difficult to see how, even in the absence of the "red card", a proposal could prevail if a large majority of national parliaments were opposed to it.

In the historical process of European integration, it is national parliaments that have suffered the greatest loss of influence. They are left with little say over the formulation of EU laws, which are effectively passed over their heads. This, more than anything, is the root cause of the "democratic deficit" because, notwithstanding the work of the European Parliament, national parliaments are still the heart and soul of European democracy. The early warning system, at least in a modest way, redresses this loss. In effect, it would set up a dialogue – or more likely a sustained argument – between the Commission and national parliaments over how the EU should be governed. But it would also restore to national parliaments some influence over their respective governments, who currently have a tendency to negotiate with one another behind closed doors in the Council of Ministers and present the result to their parliaments as *a fait accompli*. By giving national parliaments an opportunity to intervene early and vocally in the European legislative process, the early warning system will give them greater influence in both national and European politics.

## Conclusion

Where do we go from here? The advisory nature of the early warning system presents an opportunity to European leaders in their present predicament. Because the system does not entail any significant change in the EU's institutional structure, it could eas-

[16] National parliaments will have some advance notice of the Commission's proposals in the form of preparatory documents, including the annual legislative programme.

[17] These developments are monitored by COSAC (the Conference of Community and European Affairs Committees of Parliaments of the European Union) and usefully consolidated on its website: http://www.cosac.org/en/info/earlywarning/overview.

[18] The early warning system gives equal weight to all member states regardless of population size, which is something of a boon for the smaller member states.

[19] For proposals concerning police cooperation and judicial cooperation in criminal matters under the Area of Freedom, Security and Justice, the one-fourth threshold amounts to thirteen of fifty votes, the equivalent of six and a half national parliaments.

ily be adopted on a voluntary basis, even if the Constitutional Treaty fails to be ratified. The Commission could immediately begin sending all new legislative proposals to the national parliaments, national parliaments could send reasoned opinions back to the Commission, and the Commission could take them into account, voluntarily reviewing those proposals which meet with objections from one third of national parliaments. The only missing elements would be those which bestow on national parliaments a binding "right to be consulted" – that the Commission must formally review the measure if one third of national parliaments object, and that non-urgent legislation must not be passed before the six-week consultation period has elapsed. Certainly, it would be better if this element of compulsion were in place and the early warning system were on a firm legal footing. Yet even its absence – which seems likely to endure given the troubles that afflict the Constitutional Treaty – the system could still get up and running. As an alternative, the early warning system could be given legal standing in an Interinstitutional Agreement, a quasi-constitutional document that may be passed without amending the Treaty that is in fact the appropriate legal agreement for procedural changes of this kind.

The idea of the early adoption of the early warning system will probably receive growing support in the near future. For example, in October 2005 there will be a meeting in London of COSAC (the Conference of Community and European Affairs Committees of Parliaments of the European Union), and the question of what to do about the early warning system in light of the current ratification difficulties will be high on the agenda there. As noted above, most elements of the system could simply be put into practice by the Commission and national parliaments themselves, acting in concert. Yet it would be preferable for such an effort be given a push from the top – i.e. the European Council. The presidency of that body is currently held, as it was in late 1992, by the United Kingdom, which has always been a resolute advocate of subsidiarity. Now, as at Edinburgh in 1992, the UK presidency could support a practical reform that gives concrete expression to that principle. What's more, it could do so secure in the knowledge that such an initiative would be entirely legitimate and supported by precedent. In short, the European Council, led by the UK, should endorse the immediate adoption of the subsidiarity early warning system, as a means to revive public confidence in the European Union.

J. Andrés Faíña*

# Counterpoint vs. Disharmony in the Constitutional Treaty: a European Paradox

The European Union (EU) has accomplished impressive institutional achievements. The unification of the domestic market, the monetary union and the recent enlargement are significant accomplishments. However, the Constitutional Treaty setting the new legal and political grounds has met with serious trouble in the ratification process and has been rejected in the French and Dutch referenda.

The usual criticisms of technocratic features and the separation between European politicians and their people have received a renewed interest. The Constitution seems to be a document made by politicians, officers and technocrats to serve their own interests instead of the interest of the majority of the people. But the problems of the EU deserve a deeper analysis and a more founded assessment. The aim of this paper is to contribute on the true value and significance of the EU and to analyse its recent problems in obtaining popular support.

### The EU as a Complex Political Subject

The EU is a system which is practically impossible to classify. This supranational system of governance is a compounded institutional device sharing features of very different systems. The EU can be seen as a framework with different levels: high, medium and low.[1] At a

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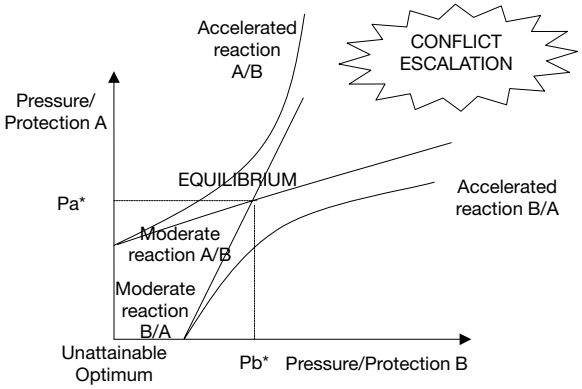
**Figure 1**
**Hobbes-like Features in Central Governments' Interaction Games**




high level, EU (primary law) has a constitutional nature. It is made of big rules (metarules) on constitutional subjects such as the attribution of competences, basic freedoms, free competition, no discrimination and the like. At the medium level, the political interplay of the institutions (Commission, Council, Parliament) shares some of the features of a federal government with a peculiar bicameral device. And at the low or "sub-systemic" level, the EU relies on complex and extremely technical negotiations run by civil servants and broad networks of experts and interested people. At this level, the EU appears as a dynamic technocracy with the Council of Ministers and the EP to some extent controlling the EC's decisions.

It is easy to criticise the technocratic content of the EU, but it must be remembered that the EU is made up of the most regulated economies in the world. Agreements to rightly tackle spillover effects require complex negotiation processes. The need to reduce transaction costs, together with the conflict of interests and uncertainty, leads to the appearance of agency relationships in the integration process. These kinds of procedures and practices are widespread throughout the EU decision-making process. But it is very difficult to keep people informed about them.

On the other hand, the EU is a supranational system of government supported by technical knowledge, and to a great extent it is also a case of social and political engineering aimed at controlling some of the worst outcomes of the perverse interplay among governments. The EU is a very important system of supranational government. It is subject to the rule of law and it is based upon a very well developed system of law. From this point of view it is very close to some kind of a federal system, but the EU is not a state and does not hold the coercive powers endowed on central governments. With regard to power, the EU is some kind of unidentified political object. The monopoly of coercion over a certain territory is one of the main distinctive features of the modern state. However, the EU almost completely lacks coercive powers and relies on the power capacities of its member states.

### The Community Method: Bridling Bad Interplay among Governments.

The international order generates problems with a certain Hobbes-like nature.[2] Central governments are monopolists of power in their own territories but they can gain advantage over their neighbours and favour their resident business by means of pressure and/or protectionist measures. The interplay of the measures and the decisions they take engenders a dangerous and wasteful strategic game. Pressures and/or protectionist measures lead to useless efforts and to inefficient market partitioning. But the optimum, to give up protectionism and restore full market competition, is an unattainable solution both for the one-period game and also for the repeated game it engenders when it is played through time. In the framework of the repeated game governments' time horizons are too short to support any credible equilibria not grounded on the use (abuse) of pressure.

Governments are faced with a dilemma of individual incentives that prevents them from relinquishing the exercise of pressure. The pressures and counter-pressures among governments are lead to rest points of best-replay mutual actions (Nash-Cournot equilibrium) and, at worst, they can cause escalations of conflict. This is shown in Figure 1, where both moderate and accelerated paths of best-replay actions are plotted to explain both the wasteful equilibria of reciprocal pressures and conflict escalation.

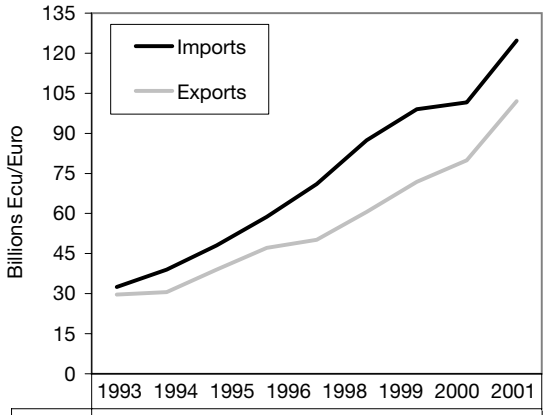
The solution is obtained by changing the rules of the game and setting up an institutional structure that disciplines central governments' powers and provides credibility to their commitments. More than fifty years ago the Schuman Declaration[3] started the process of building up a supranational community as a road to

[1] This is inspired by Peterson's framework. Cf. J. Peterson: Power, Decision and Policy in the European Union, Oxford 2000, Oxford University Press.

[2] J. Buchanan: The Limits of Liberty: Between Anarchy and Leviathan, Chicago 1975, University of Chicago Press.

[3] P. Fontaine: A New Idea for Europe: The Schumann Declaration 1950-2000, European Documentation, OPOCE- Luxembourg 2000.

**Figure 2**
**Flows of Trade EU15 and CEEC**




| | 1993 | 1994 | 1995 | 1996 | 1998 | 1999 | 2000 | 2001 |
|---|---|---|---|---|---|---|---|---|
| Imports | 32.5 | 39.0 | 48.1 | 58.7 | 87.4 | 99.0 | 101.6 | 124.8 |
| Exports | 29.7 | 30.6 | 39.0 | 47.2 | 60.6 | 71.9 | 79.9 | 102.1 |

Source: EUROSTAT. COMEXT

developing peaceful cooperative strategies among central governments of member states.

As Jean Monnet highlighted, the objective was to surpass mere international cooperation (with its lack of credible commitment) and create a "fusion of interests" into a community subject to the rule of law. The way to do that, the community method, was to share central governments' competences (areas of sovereignty) in an institutional supranational system: a supranational system guided by peaceful cooperation and the aim of promoting cooperative results based on agreement and on the exercise of civil and economic rights in the framework of market integration and free competition (there are, however, well-known exceptions such as is the case with agricultural market organisations).

### The EU and the Transition in Central and Eastern Europe

It is not necessary to stress the benefits that the community construction provides to the international sphere. The most important one is the establishment of a centre for peaceful cooperation and economic and commercial freedom without any imperialist or military ambitions. This was historically at the very core of the Community start-up, but it has still remained very important in most recent times. German reunification and the transition in central and eastern European countries could not have been conducted to such a happy ending in the absence of the European Community.

The EU has shown the ability to lead in a soft way the challenge aroused by the end of the cold war and the transition from the old socialist systems of most economies in central and eastern European countries (CEECs). The support given through the European Agreements to release commercial flows and to engender credible expectations for structural reforms and accession to the EU has recently led to the big enlargement. It was a significant step towards overcoming decades of isolation and the terrible scars of the Second World War. The impressive and rapid growth of commercial flows between the EU and CEECs is shown in Figure 2. It provides clear proof of the ability of the EU and free trade to guide, under peaceful conditions, a dramatic change in the structure of international trade.

### The Institutional Achievements of the EU

A central consensus underlies the community building; it is the principle of working competition. Competition is not an anomalous process or a jungle, it is based on a very well defined system of law (property and contracts), specifically designed to achieve cooperative outcomes. It is a competitive game designed to provide and support the best achievable cooperative outcomes. The idea of a shared "Common Market" has become the driving force of European integration. It depends positively on the potential benefits associated with free movement across a single and enlarged market.

The Common Agriculture Policy fell into the trap of an inefficient price support mechanism and its reform has put a heavy dead-weight on the EU. However, it was able to alleviate this problem and set up new and ambitious goals. In the late eighties two main lines were started: enlargement towards less developed countries in southern Europe and the reforms towards the unification of European markets. The Single European Act (SEA 1987) and the European Union Treaty, Maastricht (1992), laid the grounds for the single market and monetary union and shaped the present balance in the functions of the EU's system of government.[4]

Cohesion policy was introduced to foster competitiveness and economic development in regions with structural problems. It is an investment policy made compatible with competition policy. It helps lagging regions to exploit their competitive advantages so that closer integration into the large European market has favoured the catching up and convergence of most lagging areas in the EU.[5] Such an investment policy is

[4] Padoa-Schioppa Report : Eficacité, stabilité et équité. Une stratégie pour l´évolution du système économique de la communauté européenne", Brussels 1987.

very well suited to the enlargement. The EU is offering the CEECs a powerful development strategy which is based on a successful combination of market competition and development policy.

The achievements of the Community method are visible and spectacular. The Single European Market and the European Economic Space agreements, the monetary union and the enlargement to 25 member states contribute a lot to competition and financial stability. Nevertheless, there is still a lot of work to do with trade and regulatory barriers in the domestic market of the EU. There is a strong asymmetry in the EU domestic markets for goods and the service sectors. And the latter in spite of their position as the main sources of value added in modern economies, are still subjected to legal barriers. There is no general freedom to provide services across the domestic borders of the EU. The proposed directive on cross-border services provision in Europe has fuelled strong opposition by affected interest groups and public opinion has been addressed with shocking images like "Polish plumbers". The sector has an increase in sensitivity due to fears of adverse side-effects over the quality of regulations and also on labour markets and industrial relations.

### Bad Performance and Fears in Core European Economies vs. Accelerated Changes in the Global World

The effects of the single market, monetary union and enlargement are being jeopardised by stagnation and bad economic performance in core economies in the founding countries: Germany, France and Italy. The integration perspectives in the EU are gloomed by growing difficulties in these core economies and a serious problem of competitiveness affecting most countries in the euro area.

This is in sharp contrast to recent changes in the global economy. Progress in transport and information and communication technologies have brought about world platforms and open networks interconnecting hundred of millions of computational systems and communication terminals (around 800 million internet users and 1000 million mobile phones). A new era began in the last decades of the 20th century and it is now rapidly inducing deep changes and engendering a new borderless world. The main driving forces of the new economy (Ohmae's "4 Cs": communication; capital/investment; company/industry; consumers/clients) are mostly intangible and able to move without frontiers.[6]

The key to success lies in the ability to reach the rest of the world's supply of resources – capital and company – and market demand. Only a few prosperous regions in the world can rely upon their own domestic resources, but the flows of capital, know-how and entrepreneurial abilities linked to FDI have become the driving force of very rapid growth in developing countries. To a certain extent the old model of the nation state is being replaced by regional areas as centres of attraction for investment and entrepreneurial assets. The case of China is remarkable, with its dynamic large regional areas (from Liaodong in the north-east to the mouth of the Zhu Jiang – Hong Kong – in the south) concentrating most of the FDI in Asia and pushing economic growth with annual rates of around 8%. In only a few years China's GDP will reach the size of the largest European economies such as the UK and Germany.

The trends in the global economy are spreading an increasing concern about so-called social dumping and unfair competition from enterprises in countries with very low labour costs and hard working conditions. We must be prepared to face deep changes affecting old traditional industries and services in developed countries. This is a threat coming mainly from outside the EU. But these fears have been even more exacerbated by the enlargement and the recognition of Turkey as a candidate country.

In the absence of meaningful competitive differences, the process of factor price equalisation linked to economic integration and cross-border competition poses the question of the sustainability of the institutional systems of high salaries and fringe benefits, that is to say the main features of the continental model of industrial relations supported by collective bargaining on pay and working conditions. This raises again the question of whether competition in the institutional and regulatory systems of wages and working conditions could appear as a collateral effect of free competition and trade.

Labour is also able to migrate through communication platforms. It can be "imported" from the rest of the world. The cross-border outsourcing of business

[5] A. Faíña and J. López: European Regional Policy and Backward Regions: Implications towards EU Enlargement, in: European Journal of Law and Economics, Vol.18, 2004, pp. 5-32. For a rather critical vision of cohesion policy, cf. Sapir Report: An Agenda for a Growing Europe. Making the EU Economic System Deliver, Brussels, July 2003.

[6] K. Omahe: The Invisible Continent, 2000, HarperBusiness; and by the same author: The Next Global Stage, 2005, Wharton School Publishing.

procedures has also become a global phenomenon. That is the case of back office services of American and European enterprises in India (Bombay, Delhi, Bangalore). It is also the case in central and eastern European countries or even in Ireland and Holland.

Barriers to the movement of persons and workers are being erected and reinforced at the external borders of the EU. And even within the EU, the free movement of labour has been foreclosed for Poland within a transition period which can be extended up to 2011. The problem with restrictions on the free movement of labour is their effectiveness. Clandestine employment can be harassed, but there are problems with migration flows, parallel processes and many different ways to sidestep restrictions (self-employment, the practice of charging for fewer hours than actually worked). Concern over these topics has spread to large segments of the population.

### Costs of Supranational Action and Limits to Integration

Supranational decision-making generates costs[7] (the costs of Europe itself), which are the outcome of:

- the loss of political influence from being included in a larger supranational jurisdiction
- the difficulties and problems of bringing together, under a common jurisdiction, people with different economies, histories and cultures.

As the supranational collective action is not costless there is an optimal level of integration. Once this optimal balance of costs and benefits is reached, the incentives to move forward in the integration process disappear. So it must be realised that people's demand for integration has its limits.

People's support or demand for Integration is linked to the assessment of the expected costs and benefits, which in turn depend very much on the shape and structure of the rules governing the supranational system and on people's expectations about the future working of the system.

The bad performance of the largest economies among the founding states has shed a lot of gloom and trouble over people's confidence in their future in an enlarged and more competitive market. That may be the cause of people's political reticence concerning integration. The assessment of expected costs and benefits is highly sensitive to the competitive advantage of lower labour costs and hard working conditions, the main competitive advantage of less developed countries.

Under such circumstances the demand for integration loses its driving force and citizens are unwilling to reinforce powers and attributions of supranational institutions, especially if they lose more political influence over the integration process. This can only be dissipated by changes in the rules reinforcing transparency and accountability and conferring people more influence over the guiding of the process. At the present stage, the guiding of the process is attributed to the European Council and it is difficult to envisage changes to increase control on such extremely important subjects as the future accession of fearsome candidates such as Turkey.

### A Supply Driven Process

Central governments can be interested in tying their own hands to credible commitments to attain the optimum by relinquishing useless pressures and protectionist measures. The central governments themselves have initially promoted the integration process. The integration supply could even exceed the demand by the public or even other political sectors. That was the case when the national French Assembly rejected the Treaty on the European Defence Community in the early fifties and the process of European Integration was guided through the Rome Treaties in 1957.

Central governments are still the main providers of integration supply. On the one hand, only they can formally start the constitutional changes involved in attributing competences to a supranational jurisdiction. And on the other hand, they are strongly interested in going ahead with arrangements reciprocally beneficial. The central governments are aware of international problems and have done their homework at the European Council. The Convention has enlarged the number of people involved in the new constitutional proposal and has drawn up the main text of the new Constitutional Treaty finally approved by the Intergovernmental Conference.

Central governments have a strong interest in preserving a high degree of political influence over the integration process. The institutional setting for maintaining control over the European Union has been moved from the Council of Ministers to the European Council. The European Council has no legislative functions but it is placed at the head of the EU. It

[7] Cf. A. Faíña, A. García Lorenzo and J. Lopez Rodriguez: Decision-making in a Deepening European Union, in: European Union Review, Vol. 8, Nos. 1-2, 2003, pp. 53-64; and by the same authors: European Integration From the Agency Theory Perspective, in: European Journal of Law and Economics, forthcoming 2005.

is empowered to define the general political direction and priorities thereof and to provide the Union with the necessary impetus for its development (Art. I-21 Constitutional Treaty).

High levels of integration are incompatible with intergovernmental unanimity and the decision-making processes have to be streamlined with voting rules further removed from the veto and easy blocking minorities. The extension of qualified majority voting is crucial in the enlarged EU25 where consensus and relative unanimity has become ever more difficult to attain.

The reinforced legislative roll of the European Parliament is also an important step forward. It exercises, jointly with the Council, legislative and budgetary functions and functions of political control and consultation and elects the President of the Commission. But it is still difficult for the relevance of the EP in the complex decision-making process of the EU to be perceived by people. The MPs are elected under nation state arguments and the electoral competition is mainly a contest among national political parties. The main lines of representation are limited to the politicians from the political parties in the central government and their main alternative choices in the opposition. The political groups in the European Parliament[8] are not yet capable of articulating their interests on a European scale. This could certainly help to foster the debate. But it is impossible to balance with any kind of opposition the monopoly power of the European Council "to define the general political directions and priorities thereof and to provide the Union with the necessary impetus for its development". Taking into account the high costs of collective action and the actual distribution of power it is still impossible to set up a real alternative to central governments' and heads of states' capabilities to guide the EU. This is a big European paradox.

**The Objectives of the Union: Lack of Credibility?**

According to Article I-3 of the Constitutional Treaty the European Union combines free competition, solidarity and cohesion under the paradigm of the "social market economy". On the one hand the EU offers its citizens an internal market where competition is free and undistorted. On the other hand the main aims of the Union are sustainable development, based on balanced economic growth and price stability, and a highly competitive social market economy, aiming at full employment and social progress.

These are beautiful statements and aims, but there is a problem of balance between the social and the market dimensions in our systems of mixed economies. The real point is just a matter of implementation and there are a lot of things to be decided. The problem is exacerbated by the bad economic performance in the large founding states. The weak expectations and the lack of people's confidence in their future in an enlarged and more competitive market throw serious doubts on the compatibility of further market integration and the continental model of industrial relations with high salaries and fringe benefits supported through organised collective bargaining. This is bad news for the political support for the Constitutional Treaty. Wide sectors traditionally in favour of European integration can become reluctant to support it.

The Constitutional Treaty was positioned in the centre and could be rejected from both sides of the range of opinion in favour of European integration:

- the traditional one, which wishes market integration but attempts to reduce and redefine EU attributions
- those traditionally in favour of further integration who do not trust the soft social provisions contained in an integration treaty because they fear losing the welfare conditions of the continental models of industrial relations.

The system of the social market economy and the community method of integration, the most emblematic European achievements, seem to be in potential conflict. The stake of the Constitutional Treaty is to make them compatible, but it implies far-reaching reforms – a hard task to promote a global competitive agenda as a central goal of the European Union.

The bad results of the French and Dutch referenda hinder the process of ratification of the Constitutional Treaty, but they also question the foundations of the previous agreements in the European Council. They raise doubts about the capability of the EU to find its way ahead. The EU is entering into a dangerous dynamic because of the increasing difficulties to reach unanimous decisions in an enlarged community and the risk of blockage at the top level of the European Council. The whole process can be negotiated again and again and perhaps could be readdressed on different grounds. That was the (lucky) case with other community crises. But time is running out and Europe must find its way on the new global stage.

[8] A remarkable exception was the adoption by the European Parliament (February 1984) of Altiero Spinnelli's visionary report on a "Draft Treaty on European Union". The Commission suggested reinforcing the role of European political parties. COM(2001) 727 final.

Stefan Voigt*

# Crisis – What Crisis? After the Failure of the Draft Constitution, Europe Needs Thorough Discussions – and a New Focus on Integration

The draft for a European Constitution will not enter into force because the French and the Dutch populations voted against it and neither France nor the Netherlands will thus ratify it. Changes in European primary law – and the enactment of the draft would be such a change – need to be ratified by all member states. The view expressed by some European politicians that the draft had already been ratified by so many member states and that their votes could not be ignored misses the point: the decision rule is unanimity and as soon as one state does not vote in favour of a proposed change, unanimity is not reached and the proposed changes will thus not take effect. Attempts to keep the ratification process going nevertheless indicate that some politicians might be willing to break the rule of unanimity or at least to put pressure on those countries that turned the draft down the first time around. Either interpretation is alarming.

After the French and the Dutch voted the draft constitution down, talk of a European crisis soon emerged. Not only would the badly needed reforms of the decision-making rules not come about soon, but the entire project of European integration would be under review again. One often mentioned symptom of a crisis is that politicians and populations alike would demand more openly than ever before that Europe improves their lot, i.e. that the European integration process makes them better off than without the process. To an economist, this is definitely not the symptom of a crisis, but rather a symptom of rationality: European integration only makes sense if it makes all the participants better off than in the case of no integration. Insisting on increased net utility is thus highly welcome. If European integration makes only some groups or populations better off – and others worse off in turn – it is a huge exercise in redistribution and should be stopped sooner rather than later.

Talk of a crisis also seems inappropriate as this has not been the first proposal for a European Constitution that was never ratified (just think of Saint-Simon and Victor Hugo in the 19th century, but also of some proposals made during the 20th century such as, for example, the one passed by the European Parliament in 1984) and it will probably not be the last. In terms of constitutional economics: a number of politicians had the hypothesis that they had created a draft that was able to generate support from all 25 EU member states. Their hypothesis has been empirically refuted – and another group of people can now try to do a better job.[1]

The defeat of the draft constitution should, however, be interpreted as a warning shot against all politicians who were involved in drafting the document or in endorsing its qualities: at least two populations did not believe that the implementation of the draft would have improved the status quo. The argument that politicians simply "forgot" to explain all the advantages of the draft constitution to their respective constituents might contain some grain of truth but surely does not contain the entire truth. Rather, it is yet another sign of a general trend that is not unique to politics at the European level: citizens feel estranged from politics and there is a secular trend towards ever lower participation in all kinds of elections. Formulated differently: politicians are more and more isolated. This seems to be especially true for members of the European Parliament as their activities are hardly comprehensible to most European citizens; the activities of the MPs appear opaque and unclear.

In the remainder of this contribution, I will argue that from an economic point of view, the content of the draft constitution is highly problematic and its failure thus welcome. I will further argue that the European Union is a unique way of providing public goods and that conventional ways of producing constitutions for nation-states may not be adequate. Closely con-

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[1] James Buchanan: Positive Economics, Welfare Economics, and Political Economy, in: Journal of Law and Economics, Vol. 2, 1959, pp. 124-138.

nected with this observation, the hypothesis will be developed that the era of technocratic policy-making is definitely over in the European Union, and that this must also be reflected in the way the European Union produces its basic document.

### The Draft Constitution Constitutionalises Inadequate Policies – and Should be Scrapped

According to the Declaration of Laeken, the end of the Cold War constitutes a "real transformation clearly calling for a different approach from fifty years ago, when six countries first took the lead". The aim was thus nothing less than to find a new approach for an enlarged European Union. The Declaration further stresses that the Union should refrain from interfering in every little detail of the lives of its citizens. Efficiency, transparency and democracy should be increased. In particular, the division of competence between the Union and the member states should be clarified, simplified and adjusted. This could lead to "restoring tasks to the member states" as well as assigning new competences to the Union.

By and large, these are very laudable goals but the Convention failed miserably to achieve them. Although the Declaration of Laeken explicitly mentioned the possibilities of reallocating certain tasks back to the level of the member states, not one such reallocation can be found in the draft. Quite the opposite. The rule of unanimity in the Council means that any member can prevent policies from being implemented. Every member thus enjoys a veto option. The rule of qualified majority voting (qmv), in turn, means that some 70% of the Council votes are sufficient to push a policy through. Increasing the importance of qmv can thus be expected to lead to more legislation being passed by the Council. The draft constitution proposes reducing the areas for which unanimity is necessary from 84 to 37. This means that there are 47 policy areas in which substantially *more* legislative activity at the European level would have to be expected.

In economics, there are at least two different approaches that are used to ascertain the optimal level at which a public good should be provided.

- Fiscal Federalism as developed, for example, by Oates[2] and recently surveyed by the same author.[3] This approach centres around border-crossing externalities and economies of scale in the provision of public goods. It is firmly based on welfare-economic premises and is interested in the optimal allocation of government tasks at various government levels. This approach is often close to the assumption of a benevolent dictator who is omniscient regarding the preferences of its subjects.
- The "Calculus of Consent" as developed by Buchanan and Tullock.[4] This is explicitly based on the individualistic premise and does away with the assumption of a benevolent dictator. It provides a criterion for the correct level of providing public goods as well as for adequate decision rules once the decision concerning the level of provision has been made.[5]

Fiscal federalism has often been criticised by adherents of the second approach for its constructivistic basis and its naïve optimism regarding the behaviour of governments. This discussion will not be reiterated here. Instead, it will be shown that drawing on either approach leads to fairly similar results, namely that a number of policies currently allocated to the European level should be relocated to the member state level.

Adherents of fiscal federalism argue that policies where economies of scale and/or externalities are predominant should be allocated at the Union level. Alesina and Wacziarg[6] and Alesina, Angeloni and Etro[7] have argued that the Union might suffer from a centralisation bias. They argue that under the specific circumstances in the EU, social as well as agricultural policies should be allocated to the level of the member states. On the other hand, they argue that defence and foreign policies as well as environmental issues should be dealt with more at the European level.[8]

Alesina, Angeloni, and Schuknecht[9] have used survey data provided by Eurobarometer to inquire into citizen preferences concerning the level at which a

[2] W. Oates: Fiscal federalism, New York 1972, Harcourt.

[3] W. Oates: An Essay on Fiscal Federalism, in: Journal of Economic Literature, Vol. 37, No. 3, 1999.

[4] J. Buchanan and G. Tullock: The Calculus of Consent – Logical Foundations of Constitutional Democracy, Ann Arbor 1962, University of Michigan Press.

[5] Buchanan and Tullock introduce (1) decision-making costs as the costs necessary for bringing about decisions concerning the provision of a public good and (2) external costs as those costs that those individuals have to bear who find themselves in the minority. They call the sum total of these two costs interdependence costs. These can vary depending on the level at which public goods are provided. Buchanan and Tullock propose providing public goods at that level at which interdependence costs are minimised. Assuming that the decision concerning the level of provision has been taken, that decision rule should be used that minimises interdependence costs.

[6] A. Alesina and R. Wacziarg: Is Europe Going Too Far?, Carnegie-Rochester Conference on Public Policy, 1999.

[7] A. Alesina, I. Angeloni and F. Etro: The Political Economy of International Unions, NBER Working Paper No. 8645, 2001.

[8] Representatives of the second approach would possibly argue that the interdependence costs of foreign policy are clearly higher at the European level than at the nation-state level and that it should, hence, be provided by national governments.

number of public goods should be provided. It is quite instructive to compare economic reasoning with the preferences of European citizens articulated in Eurobarometer surveys. Out of nine policy domains delineated by the authors (international trade; common market; money and finance; education, research and culture; environment; business relations (sectoral and non-sectoral); international relations; citizen and social protection), citizens would prefer that education, research and culture as well as agriculture (a sub-area of sectoral business relations) be dealt with at the national level, whereas money and finance, environment, and international relations should be dealt with at the Union level. It is amazing how closely citizen preferences are in line with economic reasoning.

The question is: why do actual policies deviate so drastically from citizen preferences as well as from economic wisdom? Constitutional economists would seek the answer in the rules that define the incentives of politicians broadly delineated. If the rules that enable and constrain politicians reward things other than following citizen preferences, politicians will do other things. For them, it appears to be more useful to keep a completely bizarre agricultural policy alive that not only prevents the reallocation of resources into more productive uses but also prevents the economic development of poorer countries in other parts of the world. Currently, the decision-making competence is based on a chain of principal-agent relationships: the citizens electing national parliamentarians, national parliamentarians electing national governments, national governments deciding on European policies (as the Council), and the Commission implementing these policies. Principal-agent relationships are characterised by the problem that the principal cannot monitor the behaviour of its agent without cost – and that agents can thus use their position in order to increase their own utility and not that of the principal. The longer the principal-agent chains, the more severe can the problem of slack be expected to be. Transparency is very low in this institutional setting and accountability for policy results is correspondingly low.

If the current institutional structure is problematic, why did the Convention that created the draft not propose a better structure? Why did its members not make the actors at the European level more accountable to the citizens? Why, instead of returning some competences to the member states, did they even increase competences in the areas of, for example, social, industrial and health policies? Because the composition of the Convention was flawed: an old rule concerning the creation of constitutions says that those who are to be actors under the constitution should play no role in its creation because that would create incentives to unduly broaden their own competences. This rule was not honoured as representatives of the Commission as well as members of the European Parliament played a decisive role in creating the draft.[10]

Until now, the critique of the draft constitution centred around the inadequate allocation of competences between the various government levels, in particular the European vs. the nation-state level. But the Convention also failed with regard to the other goals named in the Declaration of Laeken. No mechanism insures European citizens against the ever-increasing regulation drive of Brussels-based Eurocrats and the structure of the draft is everything but transparent.

A new attempt at creating a constitution for Europe should take both economic wisdom and citizen preferences seriously. But all federally organised entities seem to be subject to the danger of creeping centralisation. The principle of subsidiarity thus needs some constitutional teeth. Although the Convention was innovative with regard to this issue by proposing the creation of the right of one third of the national parliaments to question whether centralising certain policies was in line with the subsidiarity principle it is doubtful whether this procedure would substantially reduce creeping centralisation: if national parliaments have doubts concerning the compatibility of EU legislation with the principle of subsidiarity, they were to be given the right to take the case to the European Court of Justice (ECJ). Given that the ECJ has been the most consistent actor in extending the competence of the Union,[11] it seems very doubtful whether this provision would have proved effective.

The European Constitutional Group[12] has proposed the creation of a special court that would *inter alia* have the competence to review whether European organs have exceeded their competence. The proposal is to create a court made up of members of national supreme courts. Of course, one could argue that the national justices might have an interest in a

[9] A. Alesina, I. Angeloni and L. Schuknecht: What does The European Union do?, NBER Working Paper No. 8647, 2001.

[10] Cf. also R. Vaubel: Die Politische Ökonomie des Europäischen Verfassungskonvents, in: Wirtschaftsdienst, Vol. 82, No. 10, October 2002, pp. 636-640.

[11] S. Voigt: Iudex Calculat – the ECJ's Quest for Power, in: Jahrbuch für Neue Politische Ökonomie, Vol. 22, 2003, pp.77-101.

[12] European Constitutional Group: The Constitution of the European Union, 1993, downloadable from: http://admin.fnst.org/uploads/1207/legal text.pdf.

sub-optimal level of integration as more integration means fewer competences at the nation state level. It might thus make sense to think about an independent organ made up of independent experts. One should also think about appointing some economists as they have a lot to say about the optimal allocation of competences.

Other possible safeguards include the option to get rid of the concept of shared competence contained in the draft. According to that concept, legislative competence remains with the member states as long as the EU refrains from using its competence. This concept would thus open the door for ever more centralisation – even without having to change the text of the contract. The draft previews this possibility for eleven "principal areas". Among them are such important areas as agriculture and fisheries, certain areas of social policy, common concerns with regard to health and so on. It is well known from federally organised states that shared competences lead to the blurring of transparency and accountability. The same is true for the "supporting, coordinating or complementary action" which could easily be misused to centralise policies in areas such as health, industry, tourism and so forth. Both categories of competence should thus be entirely scrapped.[13]

An even more radical safeguard is to rethink the role of the *acquis communautaire*. Although it literally only summarises the currently valid legislation of both the European Community and the European Union, it is often interpreted as "integration achieved so far". This interpretation implies that any re-allocation of competence to the member states is a retrogression. Hence, it constitutes a ratchet effect: anything that has ever been done at the European level cannot be delegated back to the level of the nation-state. Such an interpretation prevents empirical insights concerning the optimal level of the provision of some public good being put into practice. This interpretation is thus also a measure against rationality. It would seem that the exact opposite would be a far better principle: competences are only delegated from the nation-state level to the European level for a limited number of years. When the specified time-period has passed, they are automatically re-allocated to their former level unless there is unanimous consent to prolong the provision at the European level.

### The Uniqueness of the European Union Means that New Instruments Concerning Genesis and Content of a Constitution Ought to be Tried

Especially among political scientists and sociologists, it is *en vogue* to claim that the era of the nation-state is over and that the era of the post-nation state has begun. Although this tune is by no means new[14] and can be criticised on various grounds, there seems to be consensus that the European Union does not – and ought not – have the institutional structure of well-known governance forms such as nation-states. Instead, the European Union would be an unique entity *sui generis*. This means that standard answers given to constitution writers wanting to write a constitution for a nation-state might simply be non-applicable and thus irrelevant.

Until now, the term constitution has been used in its economic delineation as the basic rule set according to which the provision of public goods and their financing is secured. In that sense, Europe has long had a constitution and the current discussion is concerned with changing some of the relevant decision-making rules. In colloquial language, the term constitution is used in a slightly different sense: it is the basic document that contains the finality of the entire project, its most important values, possibly the myth of its founding, its geographical borders and so on. One important aspect of constitutions is their longevity, at least as an intention.

But if the European Union is an entity *sui generis*, the optimal contents of a constitution might be less than clear-cut. It could be completely inappropriate to recommend institutional arrangements that have proven beneficial at the level of the nation-state, simply because the European Union is no nation-state. The same could hold for the modus of bringing constitutional rules about as well as for the allocation of the competence to change them. Over the last 50 years, Europe has had a constitution in the economic sense of the term which has been changed quite a few times: just witness the various changes of "Maastricht", "Amsterdam" or "Nice". The evolution of the European constitution has been a piecemeal, trial-and-error process. Since the European Union is still a huge ex-

[13] On top of these two very problematic categories of competence, the draft contains a flexibility clause that would enable the Council, the European Parliament and the Commission to add new competences onto the European level without having to seek a ratification by all member states. It is thus a clause that is quite close to the "competence competence", i.e. the competence to change the legal basis of one's own work.

[14] A survey is provided by S. Voigt: Das Konzept der nationalstaatlichen Souveränität und die Theorie der Wirtschaftspolitik, in: H. Berg (ed.): Theorie der Wirtschaftspolitik: Erfahrungen – Probleme – Perspektiven, Schriften des Vereins für Socialpolitik, Vol. 278, Berlin 2001, Duncker & Humblot, pp. 55-78.

periment, it seems advisable not to create any irrevocable rules. Quite on the contrary, it seems advisable to institutionalise error-correction mechanisms that would enable the member states to correct errors as soon as they have been identified. There are various possibilities for institutionalising such a mechanism, one of which would be the sunset-legislation already briefly described above.

This perspective on integration is hardly compatible with the colloquial notion of a constitution which emphasises the longevity of its rules. In other words, it seems necessary to improve upon the currently existing constitution (as delineated in economic parlance), but it seems premature to want to write a constitution in the colloquial sense of the word. Before this can be done, one would not only need better knowledge concerning the effects of various instruments when used on a supra-national level, but also on the finality of the Union, its desirable geographic borders etc. But this ought to be the result of a broad public discussion in which many parts of the European societies are included – and not confined to technocrats.

### The Age of Technocrats is Over – and It Should also Show in the Genesis of a European Constitution

At the nation-state level, the traditional separation of powers has been supplemented by numerous good governance mechanisms that are to secure the transparency of political decision-making, the accountability of policy-makers, the participation of citizens within the legislative period etc. It would be ironic if such instruments were not implemented at the European level just after they spread at the nation-state level.

Until now, European integration has, however, primarily been the occupation of a politico-technocratic elite. The results of the referenda in France and the Netherlands, however, seem to attest to the fact that the era in which populations trust in the wisdom of their politicians and accept everything proposed to them is over. In the past, many constitutions were created with the goal of ending serious crises such as a lost war, a civil war, a putsch or a revolution and this pressure often provided a good excuse for not having the citizenry at large participate in the process of constitution-making.[15] Fortunately, today's Europe is in no such crisis. There is no hurry at all to create a European constitution. This lucky situation should be used in order to have large parts of the population participate in the process.

One obvious means towards that end is to organise referenda on a draft. It has been shown[16] that the use of referenda increases the knowledge of the population concerning those policies that have been subject to referenda. But if it is known during the entire process of drafting a constitution that the result will be subject to a referendum, this greatly increases the incentives of the drafters to take the (purported) preferences of those populations into account that will be using a referendum. In other words, the incentives of the constitution drafters to take the preferences of their constituents seriously are dramatically increased and the principal-agent problem described above is somewhat alleviated. As the EU is a supra-national entity, the modus of ratifying changes in its treaties still falls within the competence of the member states. The petitum in favour of referenda in the ratification process is thus not directed at the drafters of a European constitution, but rather at the national governments. For them, it might be completely rational to make referenda mandatory: if during negotiations with other governments, a government can point to the requirement to have the results confirmed via referenda, this requirement improves its threat potential *vis-à-vis* governments from countries that do not have mandatory referenda. Although referenda thus have important advantages, they have the disadvantage of occurring only after the drafting has finished and their effects are thus limited.

In order to have the populations at large participate in the drafting itself, it is necessary to rethink the composition of the Convention that would be drafting a European constitution. This time around, many people endorsing additional centralisation were involved. As the results of the referenda show, they had lost touch with the citizens for whom they proclaimed to be writing their draft. Next time, a constitutional Convention should be conceived that would assemble Europe's brightest minds. This would supposedly increase the legitimacy of the draft as well as increase the chances that they might create a proposal which would be met with unanimous consent.

[15] See Hume's Essay "Of the Original Contract", in: D. Hume: Essays – Moral, Political, and Literary, ed. and with a Foreword, Notes, and Glossary by: Eugene F. Miller, Indianapolis 1777/1987, Liberty Classics, p. 474: "… and were one to choose a period of time, when the people's consent was the least regarded in public transactions, it would be precisely on the establishment of a new government. In a settled constitution, their inclinations are often consulted; but during the fury of revolutions, conquests, and public convulsions, military force or political craft usually decides the controversy."

[16] M. Benz and A. Stutzer: Are voters better informed when they have a larger say in politics? – Evidence for the European Union and Switzerland, in: Public Choice, Vol. 119, 2004, pp. 31-59.