

THE HALT OF THE CONSTITUTIONAL PROCESS AND THE CONSEQUENCES OF THE POTENTIAL NON-ENFORCEMENT OF THE CONSTITUTIONAL TREATY

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ABSTRACT:

The article makes an inventory of the major innovations of the Constitutional Treaty and attempts to analyse what EU citizens lose with the potential non-ratification of the document. The outcome of the analysis is that EU citizens lose a more streamlined and transparent system of primary law enriched with important constitutional values (including the protection of minority rights), they lose an improved institutional balance and increased democratic input, as well as the reinforcement of the policies aiming at higher internal security and stronger external action. The rest of the policies will remain unchanged as the Constitutional Treaty did not substantially reform them. What citizens might win from the two negative referenda, however, is the high probability of the EU institutions' introducing more transparency and democracy into their daily functioning, coupled with the preparedness of both the institutions and the Member States to engage in a real dialogue with the wide public on the future of the European Union.

Key Words: Constitutional Treaty, democracy, rights, policies, European Union

LA PARADA DEL PROCESO CONSTITUCIONAL Y LAS CONSECUENCIAS DE LA POSIBILIDAD DE NO-EJECUCIÓN DEL TRATADO CONSITUTIONAL

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SUMARIO:

El artículo hace un inventario de las innovaciones principales del Tratado Constitucional y trata de analizar que pierden los ciudadanos de la UE si no ratifican el documento. El resultado del análisis es que los ciudadanos de la UE pierden un sistema transparente de derecho primario que es enriquecido con valores constitucionales importantes (incluyendo la protección de los derechos de las minorías), una balanza institucional mejorada, el insumo democrático aumentado, y también el reforzamiento de las políticas que aspiran a más seguridad interna y acción externa más fuerte. El resto de las políticas quedan sin cambios porque el Tratado Constitucional no las ha alterado suficientemente. Sin embargo, lo que los ciudadanos podrían ganar luego de los dos referéndum negativos, es la alta probabilidad de que las instituciones de la UE vayan a introducir más transparencia y democracia en su funcionamiento cotidiano, junto con la preparación de las instituciones, y sus Estados ocuparse en un dialogo real con el público sobre el futuro de la UE.

PALABRAS CLAVES: Tratado Constitucional, democracia, derechos, políticas, Unión Europea

1. INTRODUCTION

Since mid-June 2005 the European Union is in a “reflection period” as regards the ratification of the Treaty establishing a Constitution for Europe. The halt of the constitutional process (launched in Laeken, December 2001 and coming to a turning point in June 2005) gives plenty of opportunities for politicians, journalists, political scientists, and everybody interested in the future of the EU, to analyse the situation. The public debate is further urged and promoted by the European Commission¹ as well as by the Committee of the Regions², both calling for a multi-level dialogue on European matters (instead of just persuading the citizens).

As a contribution to the range of existing opinions and interpretations, and also to the (hopefully) upcoming debate, this article attempts to analyse the merits and the lessons of the European constitutional process from one major point of view – namely: what do we, citizens of Europe, lose with the failure of the Constitutional Treaty? As it is well known, the European Convention was convened and the Constitutional Treaty was formulated mainly with a view to bringing the EU closer to its citizens – nevertheless, the text was voted down by the majority of citizens in two founding Member States.

We would not like to analyse the very varied reasons that led to the rejection of the Constitutional Treaty, this was done by many experts already. Below we will simply cite the major achievements of the Constitutional Treaty, summarised under seven points, and look at the novelties the text brought about. We examine what we lose, what remains unchanged and what we can win with the halt of the constitutional process and the potential non-ratification of the Constitutional Treaty. Then we establish the balance sheet of the present situation and draw the main conclusions from the point of view of the EU and its citizens.

2. LEGITIMACY, THE LEGAL FUNDAMENTS AND LEGAL PERSONALITY OF THE UNION

The legitimacy of the European Union now derives exclusively from the Member States – in this respect (similarly to international organisations) the Union has inter-governmental legal fundamentals laid down in the founding Treaties. The Constitutional Treaty went further by stating that *“Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common.”* (Article I-1) By instituting the double legitimacy of the Union – deriving from the citizens and the states – the Constitutional Treaty attempted to highlight the reality. The reality is that the functioning of the EU has direct impact on the citizens who in turn enjoy the rights of EU citizenship and who have their representation at the EU institutions, primarily in the directly elected European Parliament. As it is usually cited, the Union is more than an international organisation but less than a state. This “half-way house” situation is very well reflected in the quoted first sentence of the Constitutional Treaty as well as in the

¹ Action Plan to Improve Communicating Europe by the European Commission. IP/05/995, Brussels, 20 July 2005. The main slogan of the Action Plan is: “Listen, Communicate, Go Local”.

Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – The Commission’s contribution to the period of reflection and beyond: Plan-D for Democracy, Dialogue and Debate. Brussels, 13.10.2005. COM (2005) 494 final.

² Opinion of the Committee of the Regions of 13 October 2005 on the period of reflection: structure, subjects and context for an assessment of the debate on the European Union. CONST-032.

official name of the document: *Treaty establishing a Constitution for Europe*. This title refers at the same time to the notions of a constitution (legal foundation of one state) and a treaty (concluded between sovereign states). Thus – while the reality remains the same – the sources of legitimacy laid down in the Treaties remain the same too, keeping the EU farther and not closer to the citizens.

Not only the indicated sources of EU legitimacy are outdated in the present Treaties – they themselves remain a highly complex system of legal fundaments of the European Community and the European Union. One of the main aims of the Constitutional Treaty was to abolish the present utterly complicated system of the Treaties and pillars, and to overwrite it with one single Treaty – of course by preserving legal continuity. For the first time since the Maastricht Treaty came into force, the Treaty structure (with its Preamble and four Parts) became clear and understandable thanks to the Constitutional Treaty. Thus the rightly perceived confusion as regards the differences between Community and Union, as well as their complicated legal fundaments (the Treaties³) became simplified and transparent. Of course, the 448 articles, making up nearly 200 pages (excluding the protocols and declarations constituting another 280 pages) seems to be “frightening”, but let us not forget that Part I containing the constitutional achievements and explaining in a very clear way the values, the objectives the competences, the institutions and the functioning of the Union make up less than 30 pages! The Charter of Fundamental Rights can be found in Part II – slightly more than 10 pages. Part III (around 130 pages) contains detailed provisions on the policies and functioning of the Union (streamlined provisions on each policy, on the institutions, finances, etc.) which could have been communicated as the “Annex” to the constitutional Part I⁴. The 7-pages long Part IV contains – similarly to all international treaties – the general and final provisions with necessary legal and technical details.

Furthermore, the European Union – the single entity to substitute both the Community and the Union – was to enjoy legal personality (Article I-7), which is now given only to the European Community. It is very much in line with citizens’ expectations that the EU, as one of the economic giants, should play a similarly decisive role in World politics, acting with one voice⁵. Of course, legal personality as such does not pre-determine EU-leaders to always pursue a single foreign and security policy (this policy area basically still remaining in an intergovernmental framework also in the Constitutional Treaty), but once positions are homogenous this legal personality can be used to act more efficiently (e.g. to conclude international agreements or to adhere to international organisations/agreements).

To sum up, with the failure of the Constitutional Treaty EU citizens lose the direct reference to double legitimacy of the European Union (recognising their real place in European integration); the existence of a clearly structured and comprehensive legal

³ The Treaties presently in force are: Consolidated version of the Treaty establishing the European Community (Official Journal of the European Communities, 24.12.2002, C 325); Consolidated version of the Treaty on European Union (Official Journal of the European Communities, 24.12.2002, C 325); and there is also the Treaty establishing the European Atomic Energy Community.

⁴ A similar solution was already proposed by Richard von Weizsäcker, Jean-Luc Dehaene and David Simon in 1999, in their paper “The institutional implications of enlargement”. There the “three wise men” advised to split the Treaties into two parts, the first, basic part containing the aims, the principles, the general policy orientations, the citizens’ rights and the institutional framework (in our case Part I and II of the Constitutional Treaty), while leaving the detailed provisions on the functioning of the Union in separate texts. According to the proposal only the first part would have been subject to unanimity among the Member States and national ratification, while the “rest” could have been modified and adopted by a kind of super qualified majority (or unanimity in certain cases) by the Member States coupled with EP assent.

See: http://europa.eu.int/igc2000/repoct99_en.pdf, p. 12

⁵ According to Eurobarometer polls (Eurobarometer 62, pp. 116-118) the general support for the common foreign and security policy is steadily between 60-70% while the share of those supporting common security and defence policy is above 70%. See: http://europa.eu.int/comm/public_opinion/archives/eb/eb62/eb62_en.htm

fundament; and the legal personality of the Union as a whole, not entailing but enabling more efficient action on the international stage.

3. THE BASIC VALUES AND OBJECTIVES OF THE UNION

According to the EU Treaty, presently there are basic principles (and not “values”) of the European Union, such as freedom, democracy, human rights, and fundamental freedoms, as well as rule of law. Reinforcing these principles the Constitutional Treaty mentions *values* shared by the Member States and underlying the functioning of the Union. These are stipulated in Article I-2: *“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities⁶. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality of women and men prevail.”*

As regards the objectives of the Union, they are set out in Article I-3 of the Constitutional Treaty. By uniting/rephrasing the basic objectives of both the Community and the Union (be it in the beginning of the present Treaties or under the policy headings) the list of objectives contains some new elements as well – indicated in bold.

*“1. The Union's aim is to promote peace, **its values and the well-being of its peoples**. 2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted. 3. The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, **a highly competitive social market economy, aiming at full employment** and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote **social justice** and protection, equality between women and men, **solidarity between generations and protection of the rights of the child**. It shall promote economic, social and **territorial cohesion**, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded **and enhanced**. 4. **In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter**. 5. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Constitution.”*

Here especially the reference to “full employment” merits attention, since this wording was adopted upon French proposal both in the Convention and on the

⁶ Minority rights are referred to in the proposed primary law for the first time in EU history – and namely upon Hungarian initiative. The idea was put forward already in the Convention but did not get sufficient support. During the Intergovernmental Conference Hungary succeeded in inserting the minority issue into the basic values of the Union, although not exactly in the original form tabled by the Hungarian delegation (“including the rights of national and ethnic minorities”).

Intergovernmental Conference, while during the pre-referendum public debate in France over the European social values this point seemed to be forgotten. In any case, even if these new objectives can be integrated into Union actions without entry into force of the Constitutional Treaty, the indicated parts will remain missing from the primary law in force. The same is true for the values, the majority of which are already part of primary law – either under the principles, or under the objectives (e.g. equality between men and women) and policies (e.g. non-discrimination on the Internal Market) – except for minority rights. Thus the main losers of non-enforcement of the Constitutional Treaty, including its Article I-2, are the minorities within the Union.

4. EU CITIZENSHIP, FUNDAMENTAL RIGHTS AND DEMOCRACY IN THE UNION

One of the main missions of the constitutional process was to bring the EU and the citizens closer to each other – in other words, to render the EU more democratic and transparent. European citizenship has been installed by the Maastricht Treaty granting the citizens of the Member States additional rights supplementing national citizenship. These rights⁷ have all been reinforced by the Constitutional Treaty (Article I-10). Furthermore, the protection of EU citizens' fundamental rights was to be guaranteed via the incorporation of the presently legally non-binding Charter of Fundamental Rights into the Constitutional Treaty (Article I-9/1 and Part II) – even if this protection can be exercised only in relation to formulation and application of Union law.

Moreover, for the first time in EU history, a separate Title (Title VI of Part I) was devoted to the “democratic life of the Union” – in which, after stipulating the equality of Member States before the Constitutional Treaty, the principles of representative and participatory democracy were laid down. According to the former, the citizens are directly represented in the EP and they can have access to the documents of the main EU institutions, which in their turn must act as openly as possible. According to the latter, direct participation of the citizens in Union affairs can be exercised in different forms. First of all, the Constitutional Treaty introduces the direct initiative of the citizens: at least one million citizens from a considerable number of Member States can ask the European Commission to formulate a proposal towards the decision-makers on a given issue (Article I-47/4). Furthermore, in the Constitutional Treaty the Union pledges to engage in a dialogue with civil organisations, as well as with confessional and non-confessional organisations.

What happens with the discussed democratic rights and values in case of non-ratification of the Constitutional Treaty? The rights linked to EU citizenship will remain intact, as they stem from Maastricht. The Charter of Fundamental Rights remains non-binding, although surely orienting the European Court of Justice, who has actually been keen on implying fundamental rights aspects into European case-law of the past decades⁸. The principles of representative and participatory democracy can be implemented too, without entry into force of the Constitutional Treaty. The citizens'

⁷ The right to move and reside freely on the whole territory of the Union; to enjoy active and passive voting rights at the European Parliament and local elections in the place of residence; to be protected by diplomatic missions of any other Member State (in case the citizen's home country does not have one abroad); to petition the European Parliament, and to turn to the European Ombudsman; as well as to turn to any other European institution with a written question.

⁸ The European Court of Justice in its practice of case law has frequently been implying the respect for fundamental rights of EU citizens by the Community institutions and indirectly by the Member States, but the Court's explicit right to do so was first stipulated by the Treaty of Amsterdam. (Weidenfeld (1998), p. 174)

right of access to Commission, EP and Council documents is already enshrined by Article 255/1 of the EC Treaty and Article 1 of the EU Treaty states that in the Union “decisions are taken as openly as possible and as closely as possible to the citizen”. The EU institutions can well engage in wider dialogue with different organisations representing citizens’ views/interest (as it was already highlighted by the European Commission’s White Paper on Governance in 2001). And finally, who can imagine the European Commission ignoring any civil initiative backed by at least one million citizens from a “persuading” number of Member States? Thus the Union’s democratic values can/should live on, even without the Constitutional Treaty.

5. THE STATUS OF UNION LAW

The status of Community law is not defined in the present Treaties. The definition of the relationship between national law and Community law has been shaped by the European Court of Justice through some of its preliminary rulings. The first milestone has been the 1964 case of *Costa v. ENEL* establishing the principle of primacy of Community law over national law, which was further reinforced by the 1978 *Simmenthal* case. After some reluctance of the Member States⁹ this principle became one of the basic principles of the functioning of the EU. Finally, the Constitutional Treaty introduced this principle into the primary law via its Article I-6: *“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.”* The clear definition of the status of Union law is important, notwithstanding the fact that the principle of primacy will continue to prevail in the EU even without the entry into force of the Constitutional Treaty¹⁰. Moreover, such basic principles as pre-emption or direct effect of Community law do not appear in the Constitutional Treaty, even if they also refer to the status of Community law vis-à-vis national law, and will further on remain in practice.

6. THE INSTITUTIONAL FRAMEWORK OF THE UNION, DECISION-MAKING MECHANISMS AND LEGAL TOOLS

The Constitutional Treaty does not transform the present institutional set up into a federal one. It preserves the unique, “permanently intermediate” system containing supranational as well as intergovernmental elements. At the same time, the Treaty brings about important changes vis-à-vis the main institutions, therefore it is important to cite them shortly. According to Article I-19 of the Constitutional Treaty the institutional framework comprises the European Parliament, the European Council, the Council of Ministers, the European Commission and the Court of Justice of the European Union¹¹. Let us make a comparative inventory of the provisions regarding the European Parliament, the European Council, the Council of Ministers and the European Commission.

⁹ The Member States reacted to the primacy principle very differently and it took years and decades that their courts and legal orders internalised this principle (Kecskés (1999), pp. 163-167).

¹⁰ Although, there are experts who have doubts about that. See for example the commentaries of Jo Shaw entitled “After the referendums: Change or continuity in the legal and constitutional orders of the European Union?” EU Constitution Newsletter of the Federal Trust, Special Issue, July 2005, pp. 6-8.

<http://www.fedtrust.co.uk/admin/uploads/PolicyBrief14.pdf>

¹¹ The European Central Bank, the Court of Auditors, the Committee of the Regions and the Economic and Social Committee count as “other Union institutions and advisory bodies”. Because of space limits and also because the Constitutional Treaty does not really reform them, these institutions are not discussed here.

According to Article I-20 (maximising the EP's size at 750) the European Parliament's five main functions are: to exercise jointly with the Council legislative and budgetary functions, to exercise the functions of political control and consultations, and to elect the President of the Commission. This definition of the EP's role in the EU system is per se an important improvement in the wording, since the EC Treaty in force states simply that the Parliament "shall exercise the powers conferred upon it by this Treaty" (Article 189 EC). As it is underlined, the EP and the Council become real co-legislators in the overwhelming majority of decision-making. With a view to emphasise this, the Constitutional Treaty re-names the present co-decision procedure to "ordinary legislative procedure" and extends its application to 84 areas (of which 20 are new provisions)¹². The Constitutional Treaty leaves only 20 legal bases under consultation (of which 4 are new provisions), and all together 13 items under consent (presently assent, of which 2 are new provisions)¹³. The consultation, as well as the consent procedure, are called by the Constitutional Treaty "special legislative procedures" – most often involving unanimity in the Council. This indicates that those modes of EU legislation where the EP is not a fully equal partner of the Council and the Council does not use (qualified) majority voting, can be considered as a deviation from the norm. This shift in the general approach to legislation is underpinned by the number of issues to be moved to co-decision: 84 legal bases meaning almost a *doubling* from the present 45 legal bases according to the latest Treaty modification, the Nice Treaty¹⁴. This can be considered as a clear commitment for increased democracy at EU level.

Furthermore, the political controlling rights of the European Parliament are enhanced by its right to "elect" the President of the Commission (even if this is not an election in the classical sense: the would-be President remains to be chosen by the Member States). Of course, the full "parliamentarisation" of the EU system would not occur with the Constitutional Treaty. Nevertheless, three steps towards it merit mention here. First, according to Article I-27 the President of the European Commission has to be proposed by the Member States "*taking into account the elections to the European Parliament.*" This is a step towards politicisation of the EP even if there is no direct link between the electoral results and the person of the would-be President. The direct link would presuppose truly trans-European political parties, the leading figure of the winner party becoming the "prime minister" of the EU "government". This is not the case, but the way leading to such a system was cautiously paved by this provision, as well as by the provision of the Constitutional Treaty to enable the EP to initiate (and the Council to adopt by unanimity) the system of uniform electoral rules in the Member States (Article III-330). Thirdly, the move towards a "parliamentarised" EU is reinforced by the EP's mentioned position of co-legislator.

To date, without the Constitutional Treaty, the co-legislative powers of the European Parliament cannot be extended further, this being one of the greatest losses of non-ratification. The President of the European Commission has already been chosen by the Member States in respect of the 2004 EP elections results, and the uniform electoral procedures can also be brought to the agenda based on the present primary law (Article 190/4 EC). Similarly, the EP enjoys the political control rights as well as the budgetary rights, but – as we stated – remains in a weaker position as regards European legislation.

¹² Horváth – Ódor (2005), pp. 363-382.

¹³ Horváth – Ódor (2005), pp. 383-391.

¹⁴ Wessels (2001), p. 17.

The European Council – comprising the Heads of State or Government of the Member States and the President of the European Commission – was to become an institution of its own right in the Constitutional Treaty. It would not be allowed to exercise legislative function, thus any overlaps with the Council's competences would fortunately have been eliminated. Beyond the obligation to *“provide the Union with the necessary impetus for its development”* and to *“define the general political directions and priorities thereof”* (Article I-21/1) the European Council was to decide on some constitutional-type issues too (e.g. the rotation principle of the Commission, or the “passerelle” clause¹⁵) in order to avoid the complex procedures of Treaty modification and thus enhancing efficiency.

The European Council is currently functioning on a six-month rotation basis allowing every Member State to lead EU affairs (including setting its own priorities) throughout a half year. This system would be abolished according to the Constitutional Treaty, by introducing the position of the “full time” European Council President (Article I-22) to be elected by the European Council (by qualified majority) for 2.5 years (with maximum one re-election). The EU President would enjoy mainly organisational tasks, such as preparing, convening and chairing the European Council meetings, helping to hammer out consensus, as well as representing the EU towards third countries. The Constitutional Treaty actually provided for a rather weak President with organisational and representative functions. At the same time the very creation of this position as well as its potential future merger with the Commission President (which is not excluded by the Constitutional Treaty) would have pointed towards a state-type development of the EU system.

At the level of the Council of Ministers the rotation system would be preserved (i.e. in the General Affairs Council and in the sectoral Councils, the formations of which were to be determined later by the European Council) – except for the Foreign Affairs Council (Article I-24/7). According to the agreement by the European Council¹⁶ the rotation would be realised by a group of three countries providing for the presidency throughout 18 months. Via this modification the increased influence a Member State can enjoy during its presidency would be preserved, while this “reinforced Trojka” should be seen as an added value to the system.

Regarding the voting modalities in the Council, it is worth highlighting that the Constitutional Treaty rendered qualified majority the rule and unanimity the exception (Article I-23/3). Furthermore, the Constitutional Treaty introduced the double majority system reflecting the double legitimacy of the European Union stemming from the citizens and the states. According to the new rule (Article I-25) qualified majority would be reached with 55% of the Member States (or at least 15 countries) who should represent at least 65% of the total EU population. This means, the equality of states was coupled with the principle of representative democracy, resulting in a “better” representation of the population proportions, clearly to the detriment of the small and medium sized countries. At the same time this system can be deemed more transparent and would easily solve the problem of further accessions. Nevertheless, this was (as usual) one of the most sensitive issues at the Intergovernmental Conference, therefore, abandoning this precarious consensus –

¹⁵ Based on Article IV-444 the European Council may decide (by unanimity) to move a legal basis from unanimity to qualified majority in the Council, and to apply the ordinary legislative procedure instead of the special one.

¹⁶ CIG 81/04, Annex 8

because of non-ratification of the Constitutional Treaty – would be a great loss in the foreseeable future¹⁷.

The Constitutional Treaty installed the position of the Union Minister for Foreign Affairs. According to Article I-28 the Foreign Minister was to wear a “double hat”, by serving at both the Council and the Commission. The would-be Foreign Minister was to represent in one person all kinds of the Union’s external action – be it economic, political, humanitarian, etc. When dealing with external competences under the Commission’s responsibilities, the Foreign Minister would have been an “agent” of the Commission (as its vice-president); and, when dealing with foreign and security policy he/she would have enjoyed the full rights of the Foreign Affairs Council’s president (including the right of initiative). This would have been a step further towards transparency of EU action – especially vis-à-vis the outside world. At the same the notions of the Foreign Minister and President of the EU seem to point towards a state-like development of the EU, even if these changes are more important from the point of view of the form and not so much the substance (as we saw, none of these posts entail greater powers to be concentrated in Brussels).

As regards the European Commission, the major issue since Amsterdam has been the size of the college. Although every Member State prefers to have an “own” Commissioner in the European executive – especially the smaller countries and the new members sticking to this principle – the agreement was finally met about the upper limit¹⁸. According to Article I-26/6, the number of Commissioners (starting with the second Commission appointed under the provisions of the Constitution) should correspond to two thirds of the number of Member States (“unless the European Council, acting by unanimity decides to alter this number”). The rotation principle to be applied should be adopted by the European Council later on (while some of the underlying aspects appear already in the text). Such a reform would not only lead to the rationalisation of the Commission’s size, but more importantly, would underline its independence from the Member States – one of the basic ideas of the founding fathers of European integration. Besides the double majority principle this has been the other break-through compromise which might be difficult to re-open.

The Commission President’s rights are reinforced by the Constitutional Treaty, especially as regards controlling and “censuring” the Commissioners. According to Article I-27/3, last indent: “*A member of the Commission shall resign if the President so requests.*” In fact, this possibility enhances the principle of collegiate responsibility, since, in the worst case, the Parliament can “fire” the whole Commission, even if only one Commissioner acted unlawfully. By calling on such a Commissioner to resign, the President actually safeguards the college’s reputation and saves it from resigning all together. The President has a similar right already under the Nice Treaty (tabling such a proposal to the college, and after hearing the person in question, putting the issue to unanimous vote), but the provisions of the Constitutional Treaty go even further.

Moreover, the plethora of instruments has been simplified by the Constitutional Treaty by introducing a hierarchy of acts (distinguishing between legislative and non-legislative acts) and shrinking the number of acts basically to six.

¹⁷ The Treaty of Nice provided for the institutional framework of the EU27 only. Thus, after the accession of Romania and Bulgaria, the highly sensitive issue of the weighted votes will have to be re-opened, sparking a new debate on an already settled issue.

¹⁸ The principle that the number of Commissioners should be less than the number of Member States once the EU exceeds 27 was already agreed in Nice, and laid down in a protocol attached to the Treaty. That protocol foresaw such a change already in the case of the Commission starting office in 2009, while the Constitutional Treaty postponed this (by upholding the principle of one Commissioner per Member State) until 2014.

To sum up, the institutions of the Union have been reinforced by the Constitutional Treaty. The institutional balance and democratic input was further improved (Commission proposal followed by the ordinary legislative procedure as the rule), the major institutional challenges of further enlargements (the size of the EP and the Commission as well as the voting weights in the Council) have been solved, and the innovations of the Foreign Minister and President of the European Council have been invented to provide for a better representation of the EU towards third partners as well as to provide for a smoother functioning of the Union's leading institution, the European Council. Moreover, the simplification of instruments issued as a result of interaction among the institutions has been an important step towards increasing transparency of the functioning of the EU. Without the entry into force of the Constitutional Treaty the institutions will of course continue to function and fulfil their daily work, at the same time, the range of important achievements (aimed at increasing efficiency and transparency) will be lost, giving ground for potential new heated debates over all these reforms, necessarily emerging in the foreseeable future.

7. THE COMPETENCES OF THE UNION – THE POLICIES OF THE UNION

For the first time in the development of primary law the clarification of competence sharing between the EU and the Member States was laid down in the Constitutional Treaty. Regarding the three underlying principles of exercising competences, the Constitutional Treaty reinforces and completes Article 5 of the EC Treaty. According to Article I-11/2 *“Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States.”* Thus it is highlighted that the EU has no competences on its own, because all competences it enjoys stem from the Member States through conferral. Furthermore, the Union cannot increase its competences by its own, since the competences not conferred on it remain with the Member States. The way the Union should exercise competences (not falling within its exclusive competence) must be based on the principles of subsidiarity and proportionality. The subsidiarity principle is part of primary law since Maastricht, and has further developed in Amsterdam (introducing the protocol on the application of subsidiarity). The Constitutional Treaty (Article I-11/3) has further refined the subsidiarity principle by highlighting that *“...the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, **either at central level or at regional and local level**, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”* This seems to highlight a federalist approach, the basis of which is to delimit the competences across the different vertical levels of power-sharing. Proportionality (Article I-11/4) refers to the content and form of Union action which *“shall not exceed what is necessary to achieve the objectives of the Constitution.”* What is more important – in response to one of the main requests of both the Nice and Laeken Declarations to increase democracy in the Union – the Constitutional Treaty has a protocol on the control of the principles of subsidiarity and proportionality by the national parliaments. Even if there is justified criticism concerning the viability of the control provisions across all the parliaments of Member States with very different degrees of their traditional (constitutional) involvement in

European affairs, as well as with the vague binding effect of the ‘yellow cards’ shown by at least one third of national parliaments¹⁹ – nevertheless, the possibility of such a direct control of EU legislation by national parliaments can indeed enhance democracy in the EU and may bring the EU closer to the citizens²⁰.

As regards the competences, the Constitutional Treaty attempted to enlist and classify them, namely under the categories of exclusive competences, shared competences and supporting, coordinating or complementary competences. Two areas have not been integrated into any of the above categories – the coordination of economic and employment policies, and foreign and security policy – pointing to the special nature of these policies. This “elegant” solution of ranging the policies under three competences goes hand in hand with the fact that the Constitutional Treaty abolished the complicated pillar structure of EU, gathering all policies (exercised to different extents and degrees) under the European Union, as one single legal entity. Even if the special status of common foreign and security policy, as well as economic and employment policy coordination might be perceived as separate “pillars” under the Constitutional Treaty, this formal unity is to be appreciated from the point of view of simplification and transparency. All in all, such a clear description of the Union–Member State relationship appeared for the first time in the primary law, reminding the constitutions of federal states, such as Germany, Austria or Belgium, and even of regionalised states, such as Spain or Italy. The principles of competence sharing as well as the classification of competences can be regarded as especially important steps towards rendering the EU more comprehensible for the citizens. Thus the whole Title III of Part I of the Constitutional Treaty should be seen as a Title worthy of a constitutional document. Without the entry into force of the Constitutional Treaty this light shed on the highly complex state of affairs of exercising competences at Union level will disappear, and the less ‘citizen-friendly’ texts of the EC and EU Treaties will remain in place. Moreover, the subsidiarity control/feedback by national parliaments will remain missing. Thus the national parliaments and the citizens will be the main losers of the non-enforcement of the Constitutional Treaty, including this part of the document. The former will continue to lack real control rights while the latter will continue to have difficulties in understanding the functioning of the EC/EU with its three different pillars and opaque system of competences.

As regards the policies themselves, the Constitutional Treaty did not introduce any radical change compared to the present situation – as this has *not* been the aim of the reforms. Nevertheless, there are some important innovations reflecting three tendencies: the commitment of Member States to strengthen some of the policies, to update and reinforce most of the policies, and finally, to include those policies which already belong to common action but do not appear explicitly in the present Treaties. Below we will cite the most important examples underpinning this statement.

In the Constitutional Treaty the Member States pledged to pursue a reinforced common foreign, security and defence policy coupled with institutional innovations (such as the Union Minister for Foreign Affairs, the separate Foreign Affairs Council, the new European External Action Service and the European Defence Agency), and strengthened commitments (such as structured cooperation for those willing to deepen defence cooperation, mutual defence clause in case of external armed aggression, or the solidarity clause in case a Member State is victim of terrorist attack or natural disaster). At the same time, this sensitive policy area basically

¹⁹ See for example: Neuhold – Versluis (2004)

²⁰ As stated among others by Raunio (2004)

remains under intergovernmental-type cooperation with unanimous decisions in the Council and strategic guidance of the European Council. As regards the area of freedom, security and justice the Constitutional Treaty went even further in strengthening this policy field. First of all, it appears entirely under the shared competences, practically abolishing the present difference between first and third pillar justice and home affairs issues. Furthermore, the Constitutional Treaty introduced the ordinary legislative procedure to cover all topics (except for operational cooperation between police forces, justice cooperation in criminal matters and family rights) and extended the Court's jurisdiction to the entire policy field.

Beyond these two political "pillars" the Constitutional Treaty carefully updated and reinforced a range of policy areas. For example, it strengthened the role of the European Commission (and weakened the rights of the Member State breaching the rules) as regards both the excessive deficit procedure under economic and monetary union, and the coordination of economic policies. Furthermore, the Constitutional Treaty complemented the common commercial policy with the movement of foreign direct investments, provided (upon Commission initiative) for increased cooperation among Member States in the field of e.g. employment, labour law and working conditions, vocational training or social security, it enhanced the role of the European Parliament under the common agricultural policy, and enlarged the Union's competences in the field of intellectual property rights – just to cite some of the changes.

Finally, the Constitutional Treaty provided for the legal basis of three "new" (in fact existing) policy areas: energy policy, space research and sport – the former two belonging to shared competences and the latter to complementary action.

To sum up, the Constitutional Treaty provided for reinforcing, streamlining and updating the Union's policies (while the abolishment of the difference between the notions of common policies, Community policies and Union policies is in itself an important achievement). The EU would not have acquired increased competences via the Constitutional Treaty: the reinforcement of EU policies aimed to reach higher efficiency, without deepening the European integration process as such. Thus, the fears of potential further shrinking of national sovereignty have not been justified, while the citizens might miss higher efficiency of the Union's performance as regards internal security or the EU's action in the World. At the same time, it must also be emphasised that more comprehensive EU action in these important political fields should first of all be based on political will. Once there is political consensus, Member States can manage these policies more efficiently even under the present Treaties, notwithstanding the fact that the institutional and legal framework conditions of the Constitutional Treaty are obviously better.

8. REVISION OF THE CONSTITUTIONAL TREATY

Again for the first time in EU history, the revision procedure of the Constitutional Treaty would have been substantially more democratic than ever before. According to Article IV-443 the "ordinary revision procedure" could be initiated by any Member State, *the European Parliament* or the Commission, while these proposals should have been forwarded to the European Council by the Council, and the *national parliaments* were also to be notified. In case the European Council would (by simple majority and after consulting the European Parliament and the Commission) endorse the proposed amendments, the President of the European Council would convene a *Convention "composed of representatives of the national Parliaments, of the Heads*

of State or Government of the Member States, of the European Parliament and of the Commission.” The mandate of the future Conventions would remain to adopt by consensus a recommendation to the intergovernmental conference. In the end, the amendments would enter into force after ratification by all Member States. Thus the European Parliament and the national parliaments would have been tightly involved into the revision procedure – enhancing democracy and control by the citizens. Even if the Constitutional Treaty allows both the simplified revision (Article IV-444) and the omission of the Convention in case the extent of the amendments would not require such a wide basis for preparation (Article IV-443/2) the general approach to Treaty revision can be perceived as a break-through – thanks to the success of the European Convention presided over by Valéry Giscard d’Estaing.

Also for the first time, the Constitutional Treaty does not automatically recognise the amendments void if one or more Member State “*encountered difficulties in proceeding with the ratification*”, since in this case the matter would be referred to the European Council. In fact, a similar case happened in 2005: two Member States had difficulties in ratifying the Constitutional Treaty. Even without reaching the share of four fifth of the Member States (twenty countries) the case was immediately forwarded to the European Council which decided to launch the reflection period and left it up to the Member States to proceed with the ratifications. According to the state of play²¹ 12 countries²² completed the ratification process – of which only two organised a referendum: Spain and Luxembourg, while the latter was the only EU Member State (by to date) to endorse the Treaty *after* the negative referenda in France and the Netherlands on 29th May and 1st June 2005 respectively. Two more countries have passed it through both chambers of parliaments, but in Belgium ratification has to be completed by the regional parliaments and in Germany the President’s signature is still pending. The rest of the Member States²³ actually postponed the ratification of the Constitutional Treaty – mostly indefinitely.

9. CONCLUSIONS

By concluding this short overview let us make the balance sheet if the Constitutional Treaty is to remain non-ratified. What do we, EU citizens lose, what remains unchanged and what can we win?

As we saw, with the failure of the Constitutional Treaty EU citizens lose the direct reference to double legitimacy of the European Union stemming from both the citizens and the governments. We also lose a clearly structured and comprehensive legal fundament of European integration, as well as the legal personality of the Union as a whole enabling more efficient action on the international stage.

Regarding the basic values and objectives of the Union EU citizens lose more extensive references to common values/objectives missing from the present Treaties. However, the greatest loss occurs vis-à-vis minorities whose rights are not part of the primary law in force, this being introduced for the first time by the Constitutional Treaty.

Regarding democratic rights and values as we saw, the rights linked to EU citizenship will remain intact, as they stem from Maastricht. The Charter of Fundamental Rights remains non-binding, although surely orienting further on the

²¹ <http://www.cosac.org/en/info/ratification/ratification/> (latest up date: 27 October 2005); and: <http://news.bbc.co.uk/2/hi/europe/3954327.stm> (latest up date: 24 November 2005)

²² Austria, Cyprus, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Slovakia, Slovenia, Spain.

²³ Czech Republic, Denmark, Estonia, Finland, Ireland, Poland, Portugal, Sweden and the United Kingdom.

European Court of Justice. The principles of representative and participatory democracy can be implemented too, without entry into force of the Constitutional Treaty, because on the one hand most of these provisions already enjoy legal basis in the Treaties, on the other hand the EU institutions can well engage e.g. in wider dialogue with different organisations representing citizens' views/interest and the Commission can always be attentive to popular initiatives of at least one million citizens from a number of Member States. Against the background of the two negative referenda and with the potential non-ratification of the Constitutional Treaty the democratic values and characteristics of the EU will surely be reinforced and not weakened in the months and years to come.

Regarding the status of Union law EU citizens lose its clear definition (referring to the primacy of Union law over national law) notwithstanding the fact that the principle of primacy will in all probability continue to prevail in the EU.

Regarding the institutions of the Union EU citizens will primarily lose a better institutional balance in general, and the extended rights and role of the European Parliament in particular. Citizens also lose the reinforced control of subsidiarity and proportionality by their own national parliaments (which however might be introduced even without reforms). The citizens also lose the substantial simplification of instruments which has been an important step towards increasing transparency of the functioning of the EU. On the other hand, a majority of the citizens might feel to be the winner with the rotation principle preserved at the European Council level – this providing each and every Member State an important role in the formulation of EU affairs for six months.

Regarding the policies, the Constitutional Treaty provided for reinforcing, streamlining and updating them without really altering the state of play in the power sharing between the EU and the Member States. Thus, the fears of potential further shrinking of national sovereignty have not been justified, while the citizens might miss higher efficiency of the Union's performance as regards the area of freedom, security and justice, or the Union's action on the international stage. In general, all the policies will continue to live on, as based on the present Treaties.

Finally, as regards the revision procedure in the future, the EU citizens will lose the increased democratic input in this matter. Nevertheless, the outstanding performance of the European Convention bringing together EU institutions, government and parliamentary representatives of 28 European countries and managing to table a comprehensive draft to the European Council will surely continue to serve as an option when preparing EU reforms.

As we saw, there are important novelties and good reforms that will be lost with the non-ratification of the Constitutional Treaty, while in general the institutions and the policies will continue to function, and the major underlying principles and objectives remain in place. What we can win with the present situation is that the EU will surely be willing to increase democracy and transparency even without the new provisions on such issues would enter into force; and in general, the fact that a public debate and dialogue can start on the future of Europe is highly welcome too.

Finally, to make a general assessment, we state that the performance of the EU – through its policies, rules and actions – can be regarded as the substance, while the Treaties, the institutional set up and decision-making can be perceived as the form. The Constitutional Treaty mainly revised and streamlined the form of European integration but not really its substance. The highly complex, sometimes even chaotic legal fundamentals and structures of the EC/EU are by far more embarrassing for those working *in* the system (the Member States, the institutions) than for those

“outside”. The truth is that ordinary citizens are not as preoccupied with the revision of the Treaties and reform of the institutions as EU leaders might think they are. What they are interested in is the performance of the EU to their personal benefit.

Through the Constitutional Treaty the Member States actually subscribed to the streamlining of the form and enriching it with important constitutional values – without really altering the substance. If, however, this streamlined version of the primary law, the structures and the functioning was to enhance the EU's performance in favour of the citizens, then we can all regret its failure.

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