
**EU CONSTITUTIONALISATION:
FROM THE CONVENTION TO THE
CONSTITUTIONAL TREATY 2002–2005
ANATOMY, ANALYSIS, ASSESSMENT**

Lenka Rovná and Wolfgang Wessels (eds.)

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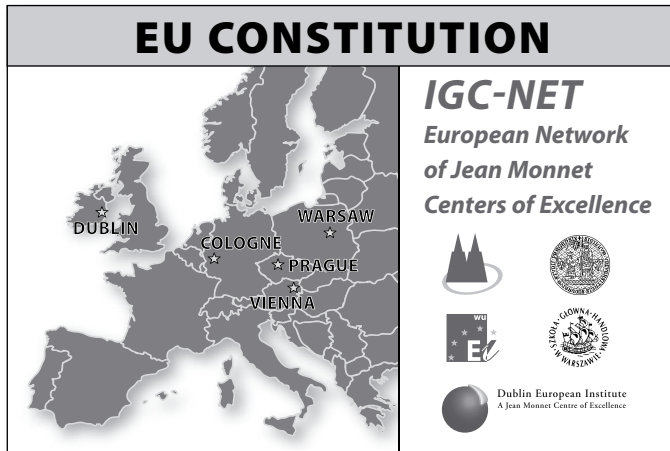
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This volume is the final publication of the transnational research project “IGC Net: Anatomy, Analysis and Assessment of the EU Constitutionalisation: studying constitutional reforms from the European Convention to the Constitutional Treaty”. The research was carried out in 2004 and 2005. The project was funded by the European Commission.



EU Constitutionalisation:
 From the Convention to the Constitutional Treaty 2002–2005
 Anatomy, Analysis, Assessment



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Foreword

Wolfgang Wessels

EU Constitutionalisation – From the Convention to the Constitutional Treaty 2002–2005 presents the main results from the project “IGC Net” geared to study a crucial period of EU constitutionalisation: constitutional reforms from the European Convention (2002-2003) to the constitutional treaty (2004). The research on the “Anatomy, Analysis and Assessment of the EU Constitutionalisation” was carried out by a transnational group of political scientists and lawyers in 2004 and 2005 in the framework of the Jean Monnet Programme funded by the European Commission.

The core group was constituted by five Jean Monnet Centres of Excellence across Europe (Cologne, Dublin, Prague, Vienna, and Warsaw). Thus, IGC Net integrated perspectives from ‘small’ and ‘large’ as well as from ‘old’ and ‘new’ member states. Of specific importance are, first, the contributions on the Convention by our Czech partner Lenka Rovná, an alternate member to the Convention, who provides us with an insight analysis of the Convention cosmos from the perspective of a new member state. Second, our Irish partners Brigid Laffan and Etain Tannam present a detailed study on the Irish Presidency in the first half 2004 which led to the adoption of the constitutional treaty on 19 June 2004 by the EU heads of states and governments.

The three sections of the volume reflect the project’s three core research interests: first, the innovative form of treaty revision by the European Convention (*The Convention: New Method, Old Challenges*), second, the impact of the traditional form of Intergovernmental Conference (IGC) which followed the Convention (*The Intergovernmental Conference: Old Method, New Challenges*) and, third, the analysis of the new provisions for the field of Common Foreign and Security Policy (*Constructing a New Face for EU Foreign Policy*).

The “External Action” of the European Union, as it is called in the treaty, was a main focus for the research group. The respective treaty provisions contain major innovations for the institutional architecture of the EU such as the establishment of a Union Minister of Foreign Affairs. The third and largest section of the volume offers analyses on the reform of competences with a particular focus on the external dimension (Angelika Hable), on the provisions for the Common Foreign and Security Policy (Nadia Klein and Wolfgang Wessels) and on the Union’s development policy (Dominika Jakubowska).

One major feature of the project was to be a platform especially for young researchers and PhD students giving them the opportunity to present their work related to the issue of EU constitutionalisation. All partners felt that this set of activities was very rewarding. From each partner institute, several young researchers were regularly engaged in the IGC Net conferences and seminars by presenting their research.

Moreover, IGC Net launched two open calls for papers on the constitutional treaty and on EU foreign policy for graduate students. We received over fifty fine proposals. The best papers were presented during project conferences in Paris (Sciences Po) and in Brussels (TEPSA) in July and November 2005. From these papers, three have been selected for each part of the volume:

- ▶ In the first section on the Convention, Francesco Marchi analyses the role of executive power with regard to the changes from the Convention to the IGC text of the Constitutional Treaty.
- ▶ In the second section on the Intergovernmental Conference (IGC), Manja Klemenčič scrutinises EU governments’ collective strategies in the 2003-2004 institutional reform.
- ▶ In the third section on EU foreign policy, Kathrin Blanck-Putz analyses from a lawyer’s perspective the options of flexible integration in the Common Foreign and Security Policy.

The exchange between junior and senior political scientists and lawyers in the framework of IGC Net proved to be very fruitful, especially with regard to the confrontation and the comparison of the different methodological approaches from the two disciplines. The group profited from

regular inputs and involvement of five Jean Monnet professors from the fields of political science [Prof. Brigid Laffan (University College Dublin), Prof. Krystyna Michałowska-Gorywoda (Warsaw School of Economics), Prof. Lenka Rovná (Charles University, Prague), Prof. Wolfgang Wessels (University of Cologne) and law (Prof. Stefan Grillner (Vienna University of Economics and Business Administration))].

However, the exchange was not limited to the world of academia. Practitioners and external experts were regularly invited to the IGC Net conferences and seminars, providing the group with helpful insights and critical comments on their research.

We hope that this volume offers useful reflections on the ongoing EU constitutionalisation process. Whatever the outcome of the “pause of reflection” declared by the European Council after the negative referenda in France and in the Netherlands on the Constitutional Treaty in 2005 might be – we are convinced that the analysis of (alternative) procedures of treaty revision such as the European Convention as well as the analysis of structural problems of policy fields such as the EU foreign policy remains highly relevant for both the political and the academic world. The volume shall also encourage young researchers to present and discuss their work in the framework of future projects of this kind.

The editors would like to thank especially Hugo Brady, Lenka Škrábalová and Jan Váška who took care of the final editing of the contributions and Nadia Klein for an excellent job as IGC Net project manager.

Cologne, December 2005

Introduction

Lenka A. Rovná, Lenka Škrábalová, Jan Váška

I was a regular visitor to the spacious European Parliament building in Brussels, taking in part in academic conferences, meeting colleagues and discussing European integration. I knew well the faces one encounters there. But when I entered the spacious hall of the European Parliament in the Autumn of 2002 the room was packed. I glanced around and I tried to identify the people present. Important people were identified by placards or the number of hands reaching forward for a shake or the centrifugal activity of journalists buzzing around them. The seat just in front of me was occupied by Jacques Santer, the former President of the European Commission who had to resign, along with the whole Commission in 1999, due to financial scandals involving Edith Cresson. I saw the good-natured round head of a German MEP, Elmar Brok, the elegant shape of Italian Deputy Prime Minister Gianfranco Fini and the bearded, ebullient face of the Slovene foreign minister, Dmitrij Rupel. A timid-looking, but resolute Polish Europe Minister Europe Danuta Huebner and her UK colleague Peter Hain were slowly seating themselves. The buzz of reporters found its focal point in the bolt upright, aristocratic frame of bolt-upright former French President, Valéry Giscard d'Estaing, the President of the Convention. Giscard took a seat in front of the plenary behind the table decorated with a title "LA CONVENTION EUROPÉENNE". On his sides were seated his vice-presidents, former prime ministers of Italy and Belgium, Giuliano Amato and Jean-Luc Debaene. The "Grey Eminence", Lord John Kerr, head of the all-important secretariat of the Convention was also there. The hall felt silent and everybody listened to the words of the energetic President introducing the current topic for the discussion in the Plenary Session. The hush was broken by the noise of microphones and TV cameras following two men, Joschka Fischer with his green tie and Dominique de Villepin with his poetic mop of hair, to their seats. More than 200 Convention members and alternates from 28 member and candidate countries were present. How would so many personalities with their individual ideas, interests, wishes and hopes ever be able to come to any common conclusion? Yet nearly a year later, on 13 June 2003, we were all standing with a glass of champagne as the tones of Ludwig van Beethoven's Ninth Symphony

*vibrated through the hall. Tears were rolling on my cheeks, and I felt a good job had been done. The words of Joschka Fischer were ringing in my ears: "No one will be happy with it, but everyone has to be able to live with it." But I was also sure that for a complicated document with the ambitious title of a 'constitution', the road ahead would be painful. All the 'conventionnels', as Giscard referred to us, spent 18 months preparing documents, reading proposals, discussing, networking, publishing, consulting and negotiating. The spirit of the Convention put together people from different political and professional backgrounds with different levels of experience, both from the member states and candidate countries. The Convention represented for them an exciting learning experience. During the last common lunch the representative from Luxembourg told me with a pleasant smile on his face: "You know what was for me the greatest discovery? That it is possible to work together with you, people from the East." He looked so happy that I could not feel offended. The Convention prepared the document with many weaknesses, but under the given circumstances we could not do better. Hopefully the sad fate of the result of our work will not consign convention method to history, which compared to the method of IGC is more open, involving the opposition as well as representatives from the governing parties; the appointed as well as the elected. Through open discussion and the availability of all documents on the internet, the convention method is a step forward towards democratization of the constitutionalisation process of the European Union.*¹

The Laeken mandate

The new, overt stage of EU constitutionalisation, which preceded a new and historically the most extensive wave of enlargement, started even before the Convention was called. The European Union, previously designed for six, nine, and later fifteen members, was then preparing to welcome ten newcomers with others waiting still outside. The representatives of the fifteen on decided to launch the Convention at the Laeken summit in 2001, the eve of enlargement. The task for the Convention was to draw up a document, which would formulate recommendations for changes in the founding treaties or, if consensus on particular points cannot be found, indicate different options including the degree of support they had received. The Intergovernmental Conference would then take the ultimate decision.² The tasks were:

1) Lenka A. Rovná served as the Alternate for the Czech Government Representative Mr. Jan Kohout in the Convention from September 2002.
2) European Council (2001).

- ▶ The introduction and enforcement of the division of competencies between the EU and member states and the preservation of the principle of subsidiarity,
- ▶ Clarification of the status of the Nice Charter of Fundamental Rights, in accordance with the instructions of the European Council in Cologne,
- ▶ Simplification of treaties with the aim of making them more clear and understandable without changing their meaning,
- ▶ Improvement of the role of the national parliaments in the European political architecture.

The declaration emphasized the necessity of ensuring and improving democratic legitimacy and transparency of the EU and its institutions, which would bring them closer to the people in the member states.³ The debate on the future of Europe, which had already been launched in 2000, needed a forum. National debates were to be included. European citizens would be brought closer to the European 'project' and its institutions; reforms would better organize an enlarging European political area. The EU would finally take a fuller role on the world stage.⁴ The mandate of the Laeken summit mentioned the constitution as an envisaged and possible final result of the work of the Convention and subsequent Intergovernmental Conference [IGC].

This volume, **EU Constitutionalisation – From the Convention to the Constitutional Treaty 2002-2005: Anatomy, Analysis, Assessment** presents the main results of a two-year multinational research project "IGC Net", geared to analyse some of the key phases of the EU constitutionalisation process launched at Laeken: the Convention of 2002–2003, the Intergovernmental Conference of 2003–2004, and the final text of the EU constitutional treaty.

New method of EU constitutionalisation

'Constitutionalisation', according to Rittberger and Schimmelfennig, represents a process in which the institutional architecture and legal order of the European Union increasingly reflect the fundamental norms and principles of liberal democracies. They perceive the constitutionalisation as 'strategic action in a community environment.'⁵ As [Helen] Wallace pointed out,

3) Ibid.
4) NORMAN (2003), p.21.
5) RITTBERGER and SCHIMMELFENNIG (2005), p.1.

“the European Council has become the key forum for determining treaty reforms.”⁶ Galloway wrote after the adoption of the Nice Treaty: “The Union appears to be involved in an almost perpetual process of reform. Four major revisions of its founding treaties have been undertaken in the past fifteen years through the process of negotiation which goes under the somewhat cumbersome label of “Intergovernmental conference”. These IGCs led to the Single European Act (1986), the Treaty on European Union (The Maastricht Treaty – 1992), the Treaty of Amsterdam (1997) and the Nice Treaty (2001).⁷ In particular, the Nice Treaty was agreed with last minute horse-trading between Heads of State and Government, even if the majority of work was done by ministers and government representatives before hand. It was then decided to use the method of the Convention as a preparatory phase for the method of the IGC. The method of the Convention was not a new procedure; it had already been used for the preparation of the Charter of Fundamental Rights adopted at Nice with political, not legal force. The Convention paved the road for the IGC. It attempted to satisfy a demand to make the EU more transparent and representative being composed of government representatives, national and European parliamentarians, and officials from the Commission. The openness was guaranteed: all materials were published online, plenary sessions were open to the public and civil society was encouraged to participate in the discussion.

After 18 months of the Convention’s proceedings, in July 2003 Giscard d’Estaing handed a final document entitled ‘Draft Treaty Establishing the Constitution for Europe’ to the Italian Prime Minister Silvio Berlusconi, then the chair of the European Council, as a basis for the IGC. On one hand the organization of the IGC by the Italian Presidency itself, and decisively the reservations of number of member states especially to the provisions on institutional reform and the formula of qualified majority voting, resulted in the unsuccessful December 2003 summit in Brussels. Skilful personal diplomacy and commitment of the subsequent Irish Presidency to the cause of constitutionalisation throughout spring 2004 led to the adoption of the treaty establishing the Constitution for Europe on Brussels summit on 18 June. The treaty was signed in Rome on 29 October 2004 by the Heads of State and Government of 25 member states and three candidate countries.

6) PETERSON and SHACKLETON (2002), p.40

7) GALLOWAY (2001), p.14

The ratification process started shortly afterwards according to the constitutional procedures of each signatory country. The ‘parliamentary’ method or the method of ‘referendum’ or both were envisaged as the mechanisms for ratification. The treaty was meant to come to force in November 2006 if ratification was completed in all member-states.

Ratification – the ultimate obstacle

In some countries, a referendum was required by constitutional necessity; in others polls would be merely consultative. In France, over 69 per cent of voters took part in a referendum and almost 55 per cent of them voted No on 29 May 2005. Just a few days after, on 1 June the citizens of the Netherlands with the turnout at 63 per cent decided No with the majority of almost 62 per cent. Rejection of the text by two of the Union’s founding states led the European Council on its 16 and 17 June 2005 meeting in Brussels to declare that “we do not feel that the date initially planned for a report on ratification of the Treaty, 1st November 2006, is still tenable, since those countries which have not yet ratified the Treaty will be unable to furnish a clear reply before mid-2007.”⁸ In the event, the European Council decided to call a twelve-month “period of reflection”. By the end of the British Presidency (December 2005), the constitutional treaty had been ratified in Austria, Cyprus, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg (on 10 July 2005, with a Yes vote of 56.5 per cent), Malta, Slovenia and Spain (on 20 February 2005, with a Yes vote of 77 per cent). In Germany, the document had been ratified by both the Bundestag and the Bundesrat, but the President’s signature was still missing, as was the case of Slovakia. In other countries ratification was postponed in countries planning referenda such as the United Kingdom, Ireland, Denmark, Poland and the Czech Republic.⁹

As every member state is required to ratify the Treaty establishing a Constitution for Europe for the document to come into force, it is not going to constitute the legislative basis of the EU in the form in which it was signed by the representatives of 25 member’s states in October 2004. Clearly, the politicians failed in their goal to involve the citizens of Europe in the constitutional process. In any case the document which was a result of the

8) http://europe.eu.int/constitution/referendum_en.html

9) *Ibid.*

work of the Convention and the IGC created substantial contribution to the discussion about the future of Europe and the reform of institutions and politics of the EU. The document will serve in the future discussions as a reference point which has to be studied carefully. In all its complexity, the process of EU constitutionalisation also requires a very thoughtful theoretical background.

Structure of the publication

The reader is receiving a publication composed of eight contributions by both senior and young researchers from seven European countries. These concentrate on three selected areas, connected to the story of the constitutional treaty, and are accordingly divided into three sections. The first section looks at the Convention, the following one at the Intergovernmental Conference and the last one examines issues connected with the reform of the “second pillar” – the Union’s foreign, security and defence policy.

The first section of the book dealing with the Convention (*The Convention: New Method, Old Challenges*) contains two chapters. **Lenka Rovná**’s chapter examines the process of the Convention from the perspective of a network analysis. She applied this theory as a method for an analysis of the communication course of action of the involved actors in the Convention (small and big states, the like-minded group, French-German partnership, Spanish-Polish cooperation, different political groupings, the Presidium etc.). The chapter provides an overview of theory of network analysis which is applicable on the analysis of the communication processes between participating actors within the Convention; concentrating on consensus building process and interaction. Using the networks analysis gives testimony to the complexity of the conflict management in the EU. Furthermore, the author also concentrates on the decision-making process within the Convention from the view of different integration theories, each of which she tests.

Another perspective of the Convention is offered by **Francesco Marchi**, who develops a framework for explaining differences between the Convention’s 2003 proposal and the final IGC outcome, as concerns individual institutional and policy issues. Building on negotiation theory and the classical distinction between high and low policy areas, he argues that the real effect of the innovative, deliberative and consensus-building Convention method was largely limited to issues to which low political saliency was

attributed, while with issues perceived as ‘high politics’ and those with redistributive effect, deliberation gave the floor to bargaining and power relations, which then took full prominence during the IGC. Marchi also shows how the significance attributed by the actors to individual issue and policy areas was already discernible from the composition of the Convention’s working groups.

The second part of the publication (*The Intergovernmental Conference: Old Method, New Challenges*) is devoted to the IGC itself. **Etain Tannam** and **Brigid Laffan**’s chapter studies the IGC 2004 during Irish presidency from the concepts of bargaining and learning theories and analyses the relevance of learning theory for this period. The chapter offers an overview of bargaining theory from a rational institutionalist perspective and neo-realism perspectives. The goal is a discovery of the actual bargaining process in evidence in the 2004 IGC or to find out whether one actor or group of actors can force other actors to reach an agreement. This chapter can be perceived as an illustration of the multi-faceted nature of the bargaining process.

The following chapter by **Manja Klemenčič** looks at the 2003-2004 IGC negotiations dealing with the reform of the institutions from the perspective of the social interaction between government coalitions. She defines coalitions as groups of states which coordinate their positions and work cooperatively on all or some negotiation issues. She analysed four main coalitions: the Franco-German, the Spanish-Polish, the Benelux, and the Friends of the Community Method (the so-called ‘like-minded countries’). Also, the coalitional behaviour of the UK and Italy is examined. This chapter made a contribution to the literature since this type of coalitional behaviour inside the EU is a relatively unanalysed area.

The third section of the publication (*Constructing a New Face for EU Foreign Policy*) focuses on issues connected with the CFSP/ESDP and EU external action. The contribution by **Angelika Hable** seeks to clarify the reform of competences in this field as proposed by the constitutional treaty. She concentrates on the range of the Union’s external powers after the incorporation of the principle of implied powers, in addition she analyses the individual competence in Title V of the text which concerns the ever-closer link between foreign policy and economic aspects of external relations which is especially apparent in the area of restrictive measures or the Union’s cooperation agreements.

The new arrangements for the foreign, security and defence policy have, despite extensive reformulation, definitely come short of constituting a real breakthrough from the limits of intergovernmental governance in this domain. The constitutional treaty was only able to mend some of the earlier weaknesses at the expense of creating new ones, argue **Nadia Klein** and **Wolfgang Wessels**. The Union's capabilities will not live up to meet ambitious expectations concerning its civil-military international role and will be let down by inter- and intra-institutional power struggles. This ever-widening capability-expectation gap leaves, as a consequence, an in-built need for further reform, which will be accentuated by the next crisis. Then, in line with the fusion theory, steps towards a new plateau are expected. **Kathrin Blanck-Putz** provides a legal analyses of the scope, instruments for flexibility and enhanced co-operation in the CFSP and its limited defence dimension, comparing arrangements of both the Nice treaty and the constitutional treaty. Despite notable backtracking during the IGC negotiations from the measures originally proposed in Convention drafts, she argues, the constitutional treaty holds promise for overcoming some of the inherent weaknesses of the current rulebook and could lead to significant improving of the efficiency of the EU foreign policy-making system. In the realm of defence policy, the new vehicles of diversification and flexibility, above all the permanent structured co-operation, could spark-off a real integrationist project within, not outside, the Union.

Changes foreseen in the constitutional treaty for the area of the Union's development policy bring on balance a moderate improvement, which is in line with the overall strengthening of the profile of the EU as international actor, argues **Dominika Jakubowska**. Notwithstanding, a more pronounced reference to international solidarity as a guiding principle of EU external action would be welcomed. Commitment to poverty reduction gets more prominence in the constitutional treaty and the requirement of coherence between individual areas of external action is emphasised. Still, there lies some caveats ahead, and the future status of development policy will be largely decided by its actual handling by individual institutional actors, notably "the double-hatted" European Foreign Minister and the Commission.

Promise (un)fulfilled

The main tasks of the debate about the future of Europe were fulfilled. The proposed constitutional treaty would have contributed to the constitutionalisation process of the EU, the previous treaties would have been simplified, decisive steps towards the simplification of laws and procedures would have been taken. According to the constitutional treaty, the EU would have become more transparent and democratic; stronger role would have been given to directly elected bodies, the European Parliament and national parliaments, and directly to citizens via their right of petition. The method of the Convention itself was a proof of increasing transparency in a complex process of European integration; more openness was required from all EU institutions as well. The inclusion of the Charter of Human Rights was making the EU more democratic. Proposed reform of EU institutions could have helped the Union to become more flexible and dynamic in solving problems and challenges of the new century.

Still, the attempt to adopt the Treaty establishing the first European Constitution failed. The reasons were many: lack of communication with citizens and increasing gap between political elites and voters, domestic problems projected into the voting behaviour, different perceptions of what the Constitution really was about, and the global challenges of the new millennium such as immigration, social insecurity, terrorism and globalization. The process of constitutionalisation of Europe continues and the EU is not in cul-de-sac; it is learning from its past failures and preparing itself for a new stage. All aspects of the constitutionalisation process have to be carefully studied and the lessons have to be learnt. This book aspires to contribute to the discussion in the period of reflection.

Prague, December 2005

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CHAPTER 1

Constitutionalisation: the Case of the Convention as a Network Analysis

Lenka Anna Rovná

Lenka Rovná, Prof. PhDr., CSc., is Jean Monnet Chair and the bearer of the Jean Monnet Centre of Excellence in European Studies at Charles University in Prague (the first one in Central/Eastern Europe). She is Chair and Professor at the Department of Western European Studies, Faculty of Social Sciences, Charles University. She acts as President of ECSA – Czech. In 1991–1995 she was visiting Professor at Guelph, Bishop’s and Calgary Universities, Canada. From summer 2002, Lenka Rovná was governmental alternate for the Czech Republic at the Convention on the Future of Europe. In 2004 she was awarded a Chevalier de l’Ordre National du Merite by the French President. She teaches courses in the field of European Politics, British and Canadian Politics. She is the author of the following monographs: “Prime Minister of Her Majesty: A Decade of Thatcherism in Great Britain” (Prague, 1990), “History of Canada” (Prague: Nakladatelství Lidové noviny, 2000), and “Who Governs Britain?” (Prague: Slon, 2004). Her other publications include: “Socio-political dimension of the EU accession negotiations, The case of the Czech Republic”, in: Swierkocki J. (ed.), *Accession Negotiations* (Lodz: European Institute, 2001); “Democratization through enlargement and participation in the Convention – A perspective from the Czech Republic”, in: Neuwahl, N. (ed.), *European Union Enlargement* (Université de Montréal, 2003); and “Czech Republic” and “Slovakia”, in: Lodge, J. (ed.), *The 2004 Elections to the European Parliament* (Palgrave Macmillan, 2005).

SUMMARY

The European Union, more than a classical international organization and less than a full-fledged federal state, derives its legitimacy from both its member states and their citizens. These are represented accordingly in the institutional architecture of the EU, its decision-making process and also its constitutionalisation process. While previous Intergovernmental conferences only involved governments of member states, the Convention on the future of the European Union strived to include representatives of citizens and apply as much transparency as possible. The convocation of the Convention and following IGC was supposed to finalize the debate about the future of Europe, launched in 2000 in Nice. This chapter suggests that the Convention process, with its representation of different interests, networks in operation, as well as its modes of communication, negotiation and compromise-seeking can itself be perceived as a concentrated and condensed integration process, and it can be seen as a kind of integration laboratory or microcosm. Thus theories of European integration can be applied for its analysis, albeit in a qualified way. The main task of this paper is to analyse communication processes at the Convention, methods for consensus-building employed in that forum, and the interaction among different actors, their respective roles and influence. The applicability of different integration theories to the specific case of the Convention and its decision-making mechanisms will also be examined.

The “External Action” of the European Union, as it is called in the treaty, was a main focus for the research group. The respective treaty provisions contain major innovations for the institutional architecture of the EU such as the establishment of a Union Minister of Foreign Affairs. The third and largest section of the volume offers analyses on the reform of competences with a particular focus on the external dimension (Angelika Hable), on the provisions for the Common Foreign and Security Policy (Nadia Klein and Wolfgang Wessels) and on the Union’s development policy (Dominika Jakubowska).

INTRODUCTION

“The European Union is a unique international entity that directly affects the daily lives of this 378 million citizens”, wrote Desmond Dinan in his book *Ever Closer Union* in 1999.¹ After the last round of enlargement, this now applies to 450 million Europeans. This unique institution, a hybrid international organization incorporating some elements of a federal state, is considered to be a *sui generis* entity with its own rules and methods of governance.² The European Union represents multi-level and multi-actor polity.³ Its sources of legitimacy derive from the Community and the member states with the citizens represented in both.⁴

Understanding European integration, its complex decision-making processes and the accommodation of many interests involved therein, poses great challenges for social scientists. Many theoretical approaches are used and more or less successfully explain the mosaic of actors and their roles and modes of operation in the system. All theories aim to explain and comprehend extremely complicated social processes on many different levels with so many independent variables that every generalization leads to certain simplification. On one hand, this simplification can represent a problem on the other, it is necessary for better comprehension of the problem. In fact there is no “general truth”, simply better or worse approaches.

Integration has gone through many different stages over the last fifty years and is anchored in a continuous reaffirmation – through several treaties – stressing its purpose is to achieve an “ever closer Union”. This process can be called ‘constitutionalisation’. The Convention was the latest attempt to simplify the EU’s selection of treaties, under the headings of making the Union more efficient, transparent, democratic and user-friendly. The body consisted of representatives of the member states, national parliaments, EU institutions: the Commission and European Parliament, and a guiding Presidium. It was given a limited time span (one year, from 28 February 2002 until 19 July 2003) to prepare a document (or documents) to serve as a basis for the IGC.

1) DINAN (1999), p. 1

2) ROSAMOND (2000), p. 110

3) WESSELS, MAURER and MITTAG (2003), p. 3

4) NORMAN (2003), p. 9–10

The process of the Convention, the representation of different interests, as well as the modes of communication and ways of negotiation and compromise seeking can itself be perceived as a concentrated and condensed integration process and thus theories of European integration can be applied, perhaps somewhat loosely. Hence the Convention can be seen as a laboratory or microcosm of the integration process.

This paper analyses the communication processes at the Convention, approaches to consensus-building among different segments and groupings, the interaction among different actors, their roles and influence. The Convention process is open to many different analytical approaches and this paper will thus examine the balance and applicability of different integration theories accordingly. The paradigms which view the nation state as the leading EU actor have great potency and must be one of theoretical approaches examined.⁵ Although this approach EU acknowledges that integration involves ‘deepening’ (more and more power is transferred to EU institutions) it is the nation state which is a “key agent in determining the pace of European integration and the extent to which sovereignty is being pooled within that polity.”⁶ The opposite paradigm is to perceive the EU as a sort of *quasi federation* with its own institutional or European interests. This acknowledges a growing numbers of actors and players creating different networks which operate on the basis of ever-growing functional interdependence on the European stage.⁷ The paper attempts to explain that, while major theories are useful tools to uncover the scale of enquiry needed, they in the event fail to provide a complete picture of the multifaceted and complex nature of European integration. Analysis of the Convention needs a broader theoretical framework, which requires a division of whole the process into several separate layers. It is then appropriate to apply different theoretical approaches to each of these layers.

Finding the theoretical tool

In their analysis of the bargaining processes in the 2004 IGC (find this chapter later in this volume) Etain Tannam and Brigid Laffan examine two

5) According to Dehousse “the conventional [unitary] vision of the state ignores the centrifugal effects of integration, which have led to a fragmentation of state structures and the emergence of functional networks among the institutions of governance in the various member states.” See RHODES, HEYWOOD and WRIGHT (1997), p. 39

6) *Ibid.*, p. 9

7) *Ibid.*, p. 41

grand theories: neo-functionalism and liberal intergovernmentalism as the most suitable theories. They consider that “the crux of neo-functionalism’s validity rests on whether the Convention’s provisions and its influence on the IGC reflect national self-interest and conflicts between states or common ‘upgraded’ interests shared by EU states.” For intergovernmental institutionalists, the Franco-German partnership with periodic British backing plays the crucial role in their intergovernmental bargains. Tannam and Laffan argue that the application of these two grand theories leads to a significant simplification of the multifaceted entity and diversified policies on many levels of the decision-making and law-making processes. To avoid this simplification the authors propose using the theories of ‘mezzo-level school’. These include fusion theories, historical institutionalism, sociological institutionalism and social constructivism, which seems more appropriate and helpful.⁸

In “European Integration and the nation state”, Renaud Dehousse states that state-centric approaches to understand European integration tend to see the relations between nation states and the EU as a zero-sum game: powers conferred on the former are necessarily taken away from the latter. The intergovernmentalists need independent bodies – nation states – to ensure the effective implementation of interstate bargains or, as argued by Andrew Moravcsik, to identify areas in which national preferences seem to have converged at a given time.⁹ On the other hand, neo-functionalism supposes that actors tend to expand the scope of mutual commitment and lead to a widening of the functional scope of EU law, creating an increasing number of treaty provisions for a growing number of policy fields. Thus the EU plays the role of “a ‘political promoter’ which formulates far reaching policy agendas, articulates ideals and brokers strategies for the deepening of the integration process. The influence of national actors would wither away.”¹⁰ Both approaches simultaneously simplify the process which also relates to the issues solved, actors involved, and the timing. To some extent, organized interest is accounted for in the neo-functional approach. Network analysis has mostly concentrated on a more narrow scope – mostly linked with the governance approach. It thus does not seek to explain ‘why integration occurs’ (the intergovernmental and neo-functionalist question) but rather addresses the more narrow issue of ‘how do interests organize to influence supra-national decision-making’

8) *Ibid.*, p. 8

9) *Ibid.*, p.47

10) WESSELS, MAURER and MITTAG (2003), p. 10

(how they enter supranational governance). It is in a sense related to the neo-functional explanation of ‘why integration happens’ - fitting into its narrative of what EU integration is – but focusing on a more narrow research problem. Dehousse proposes to use a ‘fragmented’ approach to the role of state bodies in the integration process. He argues that the parallel development of functional networks crosses national borders and that the ‘fragmentation’ approach contrasts fundamentally with a basic argument of intergovernmentalist theory, “namely the capacity of states to formulate a centralized and coherent European policy”¹¹.

This paper would like to avoid “falling into a teleological trap, the neo-functional – intergovernmentalist dispute, [which] tends to pose two diametrically opposed scenarios for the European future: the EU as an intergovernmental organization *versus* the EU as a putative supranational state”.¹² It argues that for an analysis of the Convention the fragmentation approach is useful, as well as the definition of the EU by Giandomenico Majone. For him, the EU represents “a web of networks of national and supranational regulatory institutions held together by shared values and objectives, and by a common style of policy making”.¹³ Thus when avoiding two traps: state-centrism or seeing the EU solely from the point of view of European institutions (or seeking a European superstate) it seems more useful to use the theory or an approach (as stated by many) of “multi-level governance”, which is more complex and thus better captures the multifaceted and complex substance of the integration process. According to Marks and Nielsen, “member state executives, while powerful, are only one set among a variety of actors in the European polity. States are not an exclusive link between domestic politics and intergovernmental bargaining in the EU. (...) multi-level governance theorists posit a set of overarching, multi-level policy networks. The structure of political control is variable, not constant, across policy areas”.¹⁴ For an explanation of the functioning of the EU as well as to analyze the case of the Convention, which can be conceived as a microcosm of the EU decision-making processes, a multi-level governance approach is more plausible. The decision-making process in the EU is “a horizontally as well as vertically asymmetrical negotiating system” (Christiansen)¹⁵, or

11) RHODES, HEYWOOD and WRIGHT (1997), p. 52-53

12) ROSAMOND (2000), p. 105

13) MAJONE (1996), p. 276, according to ROSAMOND (2000), p. 108

14) MARKS, NIELSEN, RAY and SALK (1996), p. 41, according to ROSAMOND (2000), p.110

15) CHRISTIANSEN (1997), p. 65, according to ROSAMOND (2000), p. 110

“a system of complex, multitiered, geographically overlapping structures of governmental and non-governmental elites” (Wessels)¹⁶. Rosamond stresses that the multi-level governance approach is an attempt to depict complexity as the principal feature of the EU policy system and its emphasis on variability, unpredictability and multi-actorness.¹⁷ There are political scientists who propose to use a different theoretical tools or models for different levels of governance. Thus the case of the Convention can serve as a condensed example or laboratory of the complexity of European decision-making: formulation, articulation and promotion of specific interests of different actors gathered in different “networks” according to their specific interests.

How applicable then is the multi-level governance approach to the Convention specifically? “Multi-level governance is about fluidity, the permanence of uncertainty and multiple modalities of authority – suggesting an association with postmodernity”.¹⁸ In the Convention, populated by representatives of the member states, parliaments, and EU institutions, the members’ connection to any specific groups was accompanied by, or in conflict with, other sympathies. For instance government representatives were not only loyal to their governments, but also to the political party family they she came from. Members of the European Parliament were there to represent the institution but also displayed loyalty to his or her party grouping and, not least, their native country’s national interests. All of them were also loyal to themselves, and their own beliefs and convictions.

According to Peterson and O’Toole, “modern governance is shaped fundamentally by shifts in both loyalties and power. Changes in the way modern citizens identify themselves combined with the transfer of powers previously monopolized by nation states create sort of ‘new medievalism’: a proliferation of systems of overlapping authority and multiple loyalty”.¹⁹ To express the multiplicity of loyalties and their expressions on the negotiation and policy-making process the most suitable model thus seems to me “policy network analysis” and “actor-based models”. Rosamond stresses that “policy network analysis is also consistent with the multi-level governance view that power has become dispersed within the EU polity”.²⁰ He quotes

16) WESSELS (1997), p. 291, according to ROSAMOND (2000), p. 110

17) PETERSON (1995), according to ROSAMOND (2000), p. 111

18) ROSAMOND (2000), p. 111

19) PETERSON and O’TOOLE (2001), p. 303

20) ROSAMOND (2000), p. 123

Peterson: “The term *network* implies that clusters of actors representing multiple organizations interact with one another and share information and resources. *Mediation* signifies that the networks are usually settings for the playing of positive sum games; they facilitate reconciliation, settlement or compromise between different interests which have a stake in outcomes in a particular policy sector”.²¹ To understand the case of the Convention – with so many interests expressed and many networks created on very different basis – “the network type model” and “the actor based analysis” will be applied in some selected cases. This model does not and could not have an ambition to cover all aspects of the complexity of the process; multi-level governance can create only sort of a framework for the use of policy network analysis. According to the “policy network analysis” model different theories can be applied for different segments of the Convention at given stages. This would then require a much broader view such as the one outlined below where Rosamond adapts Peterson’s approach:

Level	Decisive variable	Best model
Super-systemic	Change in the wider political/ economic environment	‘Macro theories’ (intergovernmentalism, neofunctionalism)
Systemic	Institutional change	New institutionalism
Mezzo level	Resource dependence	Policy network analysis

22

At the Convention, all these levels were recognizable in the course of its duration.

Networks and their application in the study of the Convention

For Peterson and O’Toole, *Network* is “probably the single most widely used metaphor in the analysis of modern governance (...) most policy outcomes are products of negotiation and mutual adjustment between different – and nominally independent but clearly interdependent – levels of government. Network analysis offers leverage for understanding multi-level governance because actors that represent different levels, between which powers are divided in ways that are disputable, must cooperate

21) PETERSON (1995), p. 391, according to ROSAMOND (2000), p. 123

22) ROSAMOND (2000), p. 112

and share resources to achieve common goals.”²³ This would seem from the quotation that the network analysis could be applied for the division of powers and setting the policies of the state agents, but the authors are explaining further that the networks “are almost limitless: information networks, policy networks, value networks, trans-governmental networks, networks of civic engagements, issue networks, the ‘network society’ and so forth”.²⁴ Policy networks are “usually portrayed as being characterized by interdependence between actors, patterned resource exchange, and informal rules or norms in specific policy sectors...”²⁵

The term *Policy network* was first used in British political science for an explanation of the shift from government to governance. Rhodes tried to identify different approaches to networks:

Levels of analysis	Micro	Mezzo	Macro
Discipline			
Sociology	Group dynamics Social network analysis	Interorganizational analysis	Political Economy
Political Science	Issue networks	Sub-governmental/ Intergovernmental Relations	Neo/pluralism

26

Quoting Richardson and Jordan, Rhodes stresses the aim of networks as “to create a nexus of interests so that cooperation flows from a sense of mutual advantage”, when “the style is deal seeking and consensual”.²⁷ Policy network thus represents a mezzo-level concept which needs to be, and can be, located within very different macro-theoretical approaches.²⁸ “Rhodes’s original typology categorizes policy networks along a continuum from policy communities at one end, through professional networks, inter-governmental networks and producer networks to issue networks, at the other end. An updated Rhodes-Marsh typology offers formal definitions for demarcating the world into different types of network”.²⁹

23) PETERSON and O’TOOLE (2001), p. 300-301

24) Ibid., p.300

25) Ibid., p.304

26) RHODES (1990), p. 294

27) Ibid., p. 302

28) Ibid., p.309

29) DOWDING (1995), p. 141

Types of Policy Networks: Characteristics of Policy Communities and Issue Networks³⁰

Dimension	Policy Community	Issue Network
	Membership	
Number of Participants	Very limited number, some groups consciously excluded	Large
Type of Interest	Economic and/or professional interests dominant	Encompasses range of affected interests
	Integration	
Frequency of Interaction	Frequent, high-quality, interaction of all groups on all matters related to policy issues	Contacts fluctuate in frequency and intensity
Continuity	Membership, values, and outcomes persistent over time	Access fluctuates significantly
Consensus	All participants share basic values and accept the legitimacy of the outcome	Some agreement exists, but conflict is ever present
	Resources	
Distribution of resources [in network]	All participants have resources basic relationship is an exchange relationship	Some participants may have resources, but they are limited basic relationship consultative
Internal distribution	Hierarchical, leaders can deliver members	Varied, variable distribution and capacity to regulate members
Power	There is a balance of power among members. Although one group may dominate, it must be a positive-sum game if community is to persist	Unequal powers, reflecting unequal resources and unequal access – zero-sum game

Political scientists usually use network theory in a descriptive sense and networks for them in fact represent more of a metaphor. In sociology, networks are studied in conjunction with a bargaining model of power and distinguished one from another by the relations between actors, the role of different actors in the network, the density of network, inclusiveness

30) MARSH and RHODES (1992), p.251, according to DOWDING (1995), p.142

and number of connections between actors. In addition, the behaviour of a group is analyzed as a function of the network characteristics. Different networks denote different structures. The usage of sociological theories and analysis in political science is helpful, but cannot explain the function of a network in broader environment and political framework.³¹ Sociological theories help to understand the internal dynamics of the network, its embeddedness and rules of interaction. For an analysis of policy outcomes and the decision and policymaking we have to go further.

When applying the theory of network analysis in the Convention I suggest applying two types of networks: *policy communities* and *issue networks*.³² The term *policy communities* is used for the more organized and stable entities that evolved in the Convention with their regular interaction and ways of communication. Their membership is derived from the belonging to certain segments of the Convention such as the Presidium, governments representatives, national parliaments representative, members and alternates, members of the European Parliament, members of the Commission, representatives of the candidate countries, women representatives etc.³³ Some of these networks were organized and operated using certain rules and modes of communication. 'Membership' in these networks was formally provided for; active participation was voluntary. Some were important actors themselves and their role and influence differ during the time span. Some networks were only latent, they were not organized with a very limited scope of communication and their existence is questionable. These were for instance the representatives of candidate countries, women etc.

Issue networks were characterized by the fluidity of their members, who created different networks connected with different issues and interests during the Convention. The membership in these groupings was usually changeable, and followed the complex process of constitutionalizing the EU. An example of a stable network can be the Franco-German relationship whereas more fluidity can be found in the 'like minded countries group', Spanish and British cooperation or Spanish and Polish defence of the status quo on voting.

31) DOWDING (1995), p. 150-158

32) ROSAMOND (2000), p. 124

33) „Policy community is understood in all the literature in some sense as a common culture and understandings about the nature of the problems and decision-making processes within a given policy domain.“ DOWDING (1995), p. 138

“Policy communities” posed structural elements; “issue networks” created the sources of dynamics.

Policy communities	Issue networks
Presidium Representatives of the governments Representatives of the national parliaments Members of the European Parliament Members of the Commission Representatives of PPE Representatives of PES etc.	Like minded countries group French-German ‘axis’ British-Spanish cooperation (Iraq war) Spanish-Polish cooperation (QMV) etc.

Different theories used for an explanation of the constitutionalisation process in the EU as well as European integration as such can coexist. Evidence can be found to either validate or invalidate each one.³⁴ They represent the tools for understanding different slices of the EU studies cake.³⁵

Bargaining or deliberation?

The integration process and the interaction among many actors attempt to reach a consensus. Two ways are mentioned: bargaining and deliberation. The network analysis is mentioned as a useful tool for understanding bargain theories. In the case of the Convention, the question arises if we can use the bargain theory or the deliberation theory for the work and position claiming and the results. Lucie Königová and Petr Kratochvíl, of the Institute of International Relations in Prague, explain the method of the Convention, and compare it with the method of IGC and through the perspective of the theory of negotiation, they perceive the process from two different points of view – using in fact two grand theories:³⁶

Conflict of national interests	Common search for European interest
IGC negotiations are the conflicts of the governments with clearly formulated positions. Proximity of agents (some actors have stronger position and are directing the agenda and directing the discussion).	Negotiations are an argumentation and persuasion process, the preferences of actors can change during the negotiation. Proximity of actors (identical possibility to initiate the negotiation, ask question and open the debate).

34) LANDFRIED (2004)

35) ROSAMOND (2000), p. 112-113

36) KÖNIGOVÁ and KRATOCHVÍL (2004)

This approach, encompassing the federal and intergovernmental perspectives, leads to simplification of a very complex process of European governance and consensus seeking.

Applying multi-level governance theory is then omitting the zero-sum negotiations associated with the intergovernmental approach and seeing the EU negotiations according to Andrew Moravcsik’s formula: “national interests → state preferences → international negotiations → outcome”.³⁷ The paper does not support Moravcsik’s statement that: “European integration can best be explained as a series of rational choices made by national leaders”.³⁸ The method of bargaining could be applied only at certain specific cases in the Convention, e.g. when Britain was stating its “red lines”. For majority cases I consider more suitable the method of deliberation.³⁹ Francesco Marchi (in this volume) argues that high saliency issues such as the power structure and institutional architecture of the EU, the definition of the budget, economic coordination, the reinforced cooperation, the revision procedure of the treaty and the common foreign policy were negotiated by hard-style ‘horse trading’ bargaining and amidst asymmetrical power relations. On the other hand low saliency and high technicality issues such as regulatory or juridical issues attracted more actors with high technical knowledge and juridical knowledge and were characterized by the deliberative style of discussion with symmetrical relation of power.⁴⁰ Manja Klemenčič (also in this volume) proposes to use coalition-building behaviour for an explanation for the case of the Convention⁴¹.

The Convention in its 18 months of duration represented a very lively organism, where numerous different interests were formulated and expressed. As stated above, the case of the Convention can be conceived

37) MORAVCSIK (1998), p. 23, see also DEHOUSSE (1997), p. 37

38) MORAVCSIK (1998), p.18

39) “The analytical [and normative] distinction between the deliberative and bargaining modes of conflict – resolution has become very fashionable in political science in the last ten years. Very schematically, this distinction can be summarized in these terms”

i) *bargaining* is usually defined, in the widely accepted terms of social choice theory, as a process between a) actors with stable preferences, b) who try to maximize their benefits, c) through exchanges of concessions.

ii) by contrast, the advocates of deliberation argue that this process takes place among a) actors who are ready to change their preferences, b) when they are convinced by rational arguments, c) in order to reach ‘common goods’. MAGNETTE (2003), p. 28

40) MARCHI (2005), p. 8

41) KLEMENČIČ (2005)

as a laboratory of old and new groupings and multitude of interests, mixture of bargaining and deliberation, an attempt to promote the interests of states, as well as European interests in general, variously to strengthen the role of the states and to strengthen the role of the EU. Hence this paper proposes to analyse the case of the Convention from the point of view of *fragmentation theory*, and *network analysis* and *actor-based analysis*. Two concepts introduced above are used, *policy communities* and *issue networks*. To conceptualise the process of the Convention, an analysis of different actors' relationships, and how loyalties in these relationships translated into networks, is central.

“Le Grand Debat”: What was the Convention about?

The EU is facing new challenges connected with the demands of the new millennium, but it is also seeking new paradigms for itself. It is asking questions about its future and it is in search for new visions, among others on the fundamental question for neo-functionalists or intergovernmentalists is whether the future architecture of Europe is going to strengthen the role of the nation state governments or the search for the common European interest.. The EU is grounded in the legitimacy emanating from the nation states, as well as from the citizens of Europe, but it is operating in a certain geographical, political, social, economic and spiritual environment. Clarification of all these elements, finding of common ground for what is ‘European’, much more clear definition of aims and values were and still are considered as essential. The answer to these questions represented the basis of the Convention’s agenda.

In addition, calls for bringing the EU closer to the citizens, to make it more transparent and more “user-friendly”, and to give it new tasks, including that of becoming the world’s most competitive and dynamic economy with a single voice on the international stage, have led to a public debate about the EU’s objectives after enlargement. In December 2000, the Nice European Council in its *Declaration on the Future of the EU* stated that the reforms needed in view of enlargement had been prepared and that the road was clear for the acceptance of new member states.

At the same time, the Nice declaration effectively started a broad discussion about the future development of the EU. The need for the discussion was expressed in several speeches and articles written by leading

European statesmen like the German foreign minister Joschka Fischer.⁴² The Swedish and Belgian presidencies suggested that the discussion should be pursued in cooperation with the European Commission and with the participation of the European Parliament and that it should include representatives of national parliaments and all opinion makers from political, economic and academic circles, representatives of civil society in member states, as well as in candidate countries.⁴³

The discussion was launched by the Swedish presidency with a report from the June 2001 European Council at Göteborg. It was followed by the Laeken summit that December which agreed the key declaration outlining the main themes of a European discussion. The results were supposed to be discussed by an intergovernmental conference in 2004, which would be convened also to carry out necessary institutional reform.

The main topics for the discussion according to the Declaration were as follows:

- ▶ The introduction and enforcement of a division of competencies between the EU and member states;
- ▶ Clarification of the status of the Charter of Fundamental Rights, in accordance with the instructions of the European Council in Cologne;
- ▶ Simplification of treaties with the aim of making them more clear and understandable without changing their meaning;
- ▶ Improvement of the role of the national parliaments in EU decision-making.

In addition, the declaration emphasized the necessity of improving the democratic legitimacy and transparency of EU institutions, in order to bring Europe closer to the citizen.⁴⁴

42) FUTURUM: Speech by Joschka Fischer; FUTURUM: Message from Guy Verhofstadt; National conference of the Social Democratic Party of Germany (2001); *Euractiv.com*, Schroeder's Europe, A Eurovision song contest; *The Economist*, May 5th, 2001, ss.12, 25-26; *Euractiv.com*, Chirac and Jospin launch French debate on future of EU; *Financial Times*, Hubert Vedrine, A greater Europe by Reform; FUTURUM: Tony Blair, Prime Minister's Speech to the Polish Stock Exchange; Foreign Government Office UK, Edited Speech by FCO Minister for Europe, Peter Hain; FUTURUM, Lecture by the Foreign Secretary Jack Straw

43) FUTURUM: Declaration on the Future of Union

44) Ibid.

THE EUROPEAN CONVENTION

The aims of the Laeken Declaration on the Future of Europe were undeniably ambitious. The declaration contained about sixty questions which became the remit of the Convention on the Future of European Union which was to meet for the first time in February 2002. The Convention was to follow the traditions of the French and American revolutions as well as the modern examples of two previous Conventions in the history of European integration, those convened for the preparation of the Maastricht Treaty and for the preparation of the Charter of Fundamental Rights⁴⁵.

The method of Convention is usually contrasted to that of intergovernmental conference as more efficient, as well as lending more transparency and legitimacy to the complicated constitutionalisation process. The involvement of not only government representatives, but also of national parliamentarians, representatives of the European Commission and the European Parliament certainly made the Convention a more representative body. The national parliaments' representatives often came from opposition political parties and thus covered the whole political spectrum of the country. Where national elections took place during the Convention, continuity was preserved. "The Convention process (...) offers the opportunity for a deeper and more effective legitimization of the European Union as well as the narrower possibility of changing the long term trajectory of treaty amendment processes."⁴⁶

The Convention was asked to prepare one or more alternative documents to be submitted to the IGC. The fact that the Convention's task was to suggest simplification of the treaties, and also to seek to edit a new text, constituted a big qualitative step. Many commentators and politicians questioned the elucidation of the Convention's ultimate ambition, to draft the EU's first constitution. Some authors argued that there was no constitutional moment for the EU, while others considered the Union's enlargement to become EU-25 as one. To quote one of the critics, Schmitter wrote: "The answer to each of the questions – Why? When? and How? – is unequivocal. The process whereby the EU has decided to give itself a constitution or constitutional treaty has, so far, strayed far from the ideal path: the motives are not convincing, the

45) KOENIGOVÁ (2003), p. 27

46) SHAW (2003), p. 53

impetus is weak, the moment has been missed, the timing is off, the participants may be wrong, and the ratification procedure is likely to be deficient."⁴⁷

The Actors and the Process

The Convention was headed by the former French President Valéry Giscard d'Estaing together with two Vice Presidents, the former Prime Ministers Giuliano Amato and Jean-Luc Dehaene. Every member state and all candidate states including Bulgaria, Romania and Turkey each sent one governmental representative and two representatives from the national parliaments. Also sitting on the Convention were 16 members of the European Parliament, and Michel Barnier and Antonio Vitorino who represented the Commission. Permanent alternates were appointed for every member of the Convention. There were thirteen observers too, namely, three representatives of Economic and Social Committee, three representatives of the European social partners and six representatives of the Committee of Regions, and the European Ombudsman.⁴⁸

The Convention started its work on 28 February 2002 with a so-called 'listening phase', which continued until summer. This was followed by the elaboration of the text of a 'Basic Treaty' in form of an unofficial document, which at that stage was called a "*non-paper*". The main points of discussion at the time were: legal personality, the aims and basic principles of the EU, citizenship, the division of competencies between the institutions and member states, the institutional framework of the EU, the decision-making process in the EU and sources of law, the jurisdiction of the European Court of Justice, finance and the budget, treaties with third countries, enhanced cooperation and general and basic provisions.⁴⁹

The second phase, called 'the working phase' started when the first six working groups were established in May 2002. In each of these groups, 25-30 Convention members discussed in detail and subsequently reported on the following issues:

- Principle of subsidiarity (chaired by Iñigo Mendez de Vigo, representative of the EP), final report CONV 286/02 submitted on 23 September 2002

47) SCHMITTER (2003) p. 34

48) KRÁL (2002)

49) Parlament České republiky, Senát (2002)

- ▶ The Charter of Fundamental Rights and its placement in the Treaties (Antonio Vitorino, EC), CONV 354/02, 22 October 2002
- ▶ Legal personality of the EU (Giuliano d'Amato, Vice-President of the Convention), CONV 305/02, 1 October 2002
- ▶ The role of national parliaments (Gisela Stuart, national parliament – UK), CONV 353/02, 22 October 2002
- ▶ The supplementary competencies of the EU (Henning Christophersen, government representative, Denmark), CONV 375/1/02, 4 November 2002
- ▶ Economic and Financial Cooperation (Klaus Hänsch, EP), CONV 357/02, 21 October 2002

The working groups presented the results of their work during the autumn 2002. Later on, several new groups were created to discuss in particular:

- ▶ Justice and home affairs and the former “Third pillar” (John Bruton, national parliament – Ireland), CONV 426/02, 2 December 2002
- ▶ External Affairs of the EU (Jean-Luc Dehaene, Vice-President of the Convention), CONV 459/02, 16 December 2002
- ▶ Defence Policy (Michel Barnier, EC), CONV 461/02, 16 December 2002
- ▶ Simplification of laws and procedures, Giuliano d'Amato, CONV 424/02, 29 November 2002.⁵⁰

After a heated discussion one more group, dealing with the so-called Social Europe was set up. It was chaired by George Katiforis, representative of the Greek government, and its final report was presented on 4 February 2003 (CONV 516/1/03).⁵¹ A “skeleton” draft of the Constitution was introduced by Giscard on 28 October 2002⁵². “Flesh” was added, step by step, article by article, during the first half of 2003. The third phase of the Convention started, the constitutionalisation of Europe was on the agenda.

Parallel to the Convention, another forum was created to serve as platform for discussion and participation of citizens, NGOs, civil society, think-tanks, academics, trade unions etc. The Convention of Youth and national conventions in every member state and candidate state were also discussing questions concerning the future of Europe. All contributions were made

50) Ibid.

51) NORMAN (2003), p. 61-62

52) European Convention, Preliminary Draft Constitutional Treaty

available to the public via the Convention web page.⁵³ Thus we can argue that the method of the Convention, characterized by its relative openness and transparency, tried to bring the EU closer to the citizens.

After 16 months of heated and frequently emotional debates between the members of the Convention and also bearing in mind contributions from non-governmental organizations and general public, the Convention came to a result: one text, a draft of a European Constitution.⁵⁴ Its first part, introduced by a Preamble stressing the “unity in diversity”, was devoted to the definition of the Union and its objectives, to the relations between the Union and the member states, to fundamental rights and citizenship. The EU as a whole was given legal personality. Articles dealing with the division of competencies established three categories of powers: exclusive EU competencies, shared competencies and areas where EU institutions could only support the work of the member states with complementary action.

The reform of EU institutions proved out to be the most contentious part of the final deal, especially among the government representatives. Some of the most controversial points were the creation of a permanent Chair of the European Council and the appointment and number of the college of Commissioners. Another highly sensitive issue was the question of qualified majority voting (QMV). Instead of the current system, where votes are allocated according to a complicated weighting procedure, a more simple “double majority rule” was proposed. This would entail 50 per cent of member states, representing 60 per cent of the EU population.⁵⁵ A new position, the Union Minister for Foreign Affairs was created (for his remit, see other contributions in this volume). The legislative procedure was also simplified. Articles dealing with Union membership clarified the terms of accession, suspension procedures and for the first time allowed for member state to withdraw from the Union.⁵⁶

Part II of the text incorporated the Charter of Fundamental Rights, which had already been accepted as a political document at the Nice summit in 2000. Part III was discussed during the last two sessions of the Convention

53) <http://european-convention.eu.int/>

54) European Convention, Draft Treaty Establishing a Constitution for Europe

55) This is when especially Ms. Anna Palacio, minister of foreign affairs of Spain and Ms. Danuta Huebner, minister for Europe of Poland, both government representatives, protested.

56) European Convention, Draft Treaty Establishing a Constitution for Europe

in July 2003. This “technical” part sought to simplify the existing treaties, detailing all Union policies and procedures starting with the internal market, through economic and monetary policy to justice and home affairs and foreign policy. The closing part (Part IV) was dealing with national opt-outs, and the procedures for ratification and implementation of the constitutional treaty.⁵⁷

The fact that the Convention came out with one single document can be considered as a tremendous success, and as such it was, after certain doubts, accepted by the majority of the members of the Convention. The most cautious group were the representatives of national governments. The fact is that intergovernmental discussions began even while the Convention was still completing its work. The participation of acceding countries’ representatives in the Convention played an important role which allowed both the existing and future EU members to experience the new dynamics of an EU-25+ for the first time.

Examples of Network analysis: Nation States as Actors?

The emergence of different networks, which occurred during the Convention, was based on varying grounds, such as the affiliation to political party families, the federalists *versus* intergovernmentalists and small *versus* big states division, or *ad hoc* groupings according to different interest articulation etc. The difference between the conception of cleavage and the network is quite clear. The suggestion is not to consider the terms cleavage⁵⁸ and the term network as identical. The argument is that one division that was missing at the Convention was the cleavage between old and new member states. For the rest, the representatives from the candidate countries took part at the meetings of their political groupings, they gathered according to their components [governments and parliaments] or their approach to the reform of institutions. There existed though a network of candidate countries government representatives who informally consulted their further steps. As stated above, when applying network analysis for the Convention, it is suggested that that two types of networks are taken into consideration: *policy communities* and *issue networks*.⁵⁹

57) European Convention, Draft Constitution, Draft revised text of Part Two, Three and Four

58) A cleavage in political science term is a deep, persistent division in society that has significant implications for the political system.” DYKE (2000), p. 8

59) ROSAMOND (2000), p.124

Policy communities are more organized and stable entities evolved in the Convention, with regular interaction and patterns of communication, whose membership is derived from belonging to certain segments of the Convention: the Presidium, government representatives, national parliaments representatives and alternates, MEPs, members of the Commission, representatives of the candidate countries, female representatives, and so on.⁶⁰

Issue networks, on the other hand, were characterized by fluidity of members who created different networks connected with different issues and interests during the Convention. The membership in these groupings was usually in flux. As an example of a stable ‘issue network’ can serve the Franco-German relationship, more fluidity can be found for instance in the ‘like-minded countries group’ or in the cooperation between Poland and Spain on the QMV.

The dynamics of the Convention were closely connected with level of activities of the traditional engine of the integration process, the Franco-German cooperation. Other groupings were formed mainly after the strengthening of the French–German tandem, when their government delegations were empowered by the presence of the ministers of foreign affairs, Villepin and Fischer, in September 2002. Coordination among these two countries resulted into several proposals, the most important of which dealt with the institutional reform and was launched in January 2003 at the 40th anniversary of the signing of the Elysée Treaty. This proposal called for the creation of a permanent Chair of the European Council, a “double-hatted” Union Minister of Foreign Affairs, a smaller, and thus more efficient, Commission, with the EP involved in its appointment. A Congress of national parliamentarians would serve as a new second chamber of the European Parliament.⁶¹

Fischer’s shifting positions during the beginning of 2003, after the agreement had been reached between the Germans and the French was reached, are instructive. His willingness to listen, argue, persuade and explain facili-

60) „Policy community is understood in all the literature in some sense as a common culture and understandings about the nature of the problems and decision-making processes within a given policy domain.” DOWDING (1995), p. 138

61) European Convention, Contribution Franco-Allemande a la Convention Europeenne sur l’Architecture institutionnelle de l’Union,

tated the subsequent wider agreement.⁶² The Franco-German tandem was bolstered by close cooperation with other countries, mainly the Benelux countries, Italy, or – on some issues – Britain.

British–Spanish cooperation was rooted in common support for the Iraq war and stressed the necessity to preserve as many intergovernmental features as possible, especially in the field of security and foreign policy. Also the common position of Spain and Poland was quite utilitarian and concentrated mainly on the preservation of the Nice QMV system, where both had won generous voting allocations. (Germany with 82 millions citizens has 29 votes while Poland and Spain with around 40 millions of inhabitants operate with 27, the Czech Republic with 10.5 millions has 12 votes.) The Polish and Spanish partnership developed more during the IGC due to other shared interests as medium-sized countries. Poland vacillated between seeing itself as the “smallest of the big” states or the “biggest of the small” ones.⁶³

During February and March 2003, the group of so-called “like minded countries”, or the “friends of the community method”, was established. This group involved most of the small and medium-sized countries, and the most active role was played by Portugal, Ireland, Austria and Finland.⁶⁴ This group was at times joined by Sweden and Denmark, who nevertheless had reservations against some of its positions and e.g. accepted the role of the permanent Chair of the European Council. The Benelux played a certain double role, with first joining the group of like-minded states and later associating themselves more with the French-German tandem. This applied mainly to the Netherlands and Luxembourg. The liked minded countries group was joined by nearly all the new member states: the Czech Republic, Slovakia, Slovenia, Hungary, Estonia, Lithuania and Latvia. Malta and Cyprus also played active role.⁶⁵

62) The author had a chance to participate at several closed meetings in Brussels or Berlin where Fischer met representatives of new member states in different formations. At those occasions, he was explaining the foundations of French-German proposals, the attitudes of France and the attitudes of Germany and the final wording. He was very carefully listening to the arguments of his counterparts and he tried to incorporate their worries and wishes to the proposals. As an example can serve the requirement of the strictly equal rotation in the formations of the Councils of Ministers, which was not in the draft of the Presidium of the Convention and was threatening the result of the Convention in June 2003.

63) The Economist, European Union Enlargement, Big brother is still watching

64) The author was present at the meeting in the Portuguese permanent representation to the EU when the group was established.

65) The meeting of the group of like minded countries was held during the last days of the Convention in July 2003. All above mentioned countries took part and expressed their willingness to coordinate their attitudes during the upcoming IGC. They also accepted to invitation for the meeting of the group organized in Prague at the Ministry of Foreign Affairs on September 1, 2003.

The group’s main aim was to preserve of the principle of equality of member states and to safeguard the community method (preserve a strong Commission). One of the main tasks was the conservation of the principle of equal rotation in the chair of the Council and the principle “one country, one Commissioner” in the European Commission. In the course of the Convention, the membership of the grouping kept changing, and at the end even Britain supported the idea “one country, one Commissioner”. Poland, which did not join the group, did nevertheless express many similar views. Poland even took part at the meeting of the initial pre-IGC meeting of the group in Prague in September 2003. It was not difficult for the Czech delegation to join the group, because the Czech governmental contribution (the “Non paper”), officially submitted in January 2003, was nearly identical to the proposals of the group.⁶⁶

After the end of the Convention, the group of like-minded countries met again officially on 1 September 2003 in Prague. High representatives (state secretaries) of fifteen countries introduced their expectations from the IGC. The Benelux countries decided not to participate at the last moment. Poland had intended to send its Minister for Europe, but in the event it was represented by the Ambassador to the Czech Republic instead. The main concern of the states’ representatives present was not to form an institutional framework for consolidating cleavages among member states. Especially the representatives of Sweden, Denmark, Greece and Ireland expressed their worries openly. The countries present were mainly focussed on their own national priorities, giving them a “communitarian” outlook. It was possible to state that the countries present accepted the idea of a permanent Chair of European Council if the equal rotation on the level of Ministerial Councils was preserved. More often, the effort to preserve the requirement “one country, one Commissioner” was stressed. The principles of efficiency and democracy do not necessarily go hand in hand.⁶⁷

To consider this group to be truly “like minded” would be an overestimation. These small states were worried about the extension of the relative influence of the big states, and about the speed of this extension. They considered the proposals of the big states to stress too much the role of nation states, which would consequently give more power to bigger coun-

66) European Convention, Non paper on the reform of EU institutions

67) Minutes from the meeting of “like minded countries” were taken by the author, 1 September 2003

tries. New member states were worried that rules of the game were about to change against their interests and just before accession. This is a crucial point as at the same time the citizens of central and eastern European candidate countries were voting in accession referendums. The main *raison d'être* of the group was the preservation of the principle of equality in the EU. The question of equal rotation can serve as an example. The impetus to create the group was nevertheless not an initiative of the acceding countries.⁶⁸

Another 'issue network', and quite a marginal group in the Convention, gathered around the Danish MEP Jens-Peter Bonde, who labelled himself a federalist, but is one of the leading figures of Euroscepticism. After the adoption of the Draft of the Constitution for Europe he congratulated the Convention for creating a *superstate*. In a hall with 210 representatives and alternates, only very few clapped. He also belonged to a group of five Convention members who did not sign the draft.

We can also see an example of 'policy community' in the case of the representatives of European Parliament. They could meet on weekly basis because of their parliamentary commitments in Brussels or Strasbourg; their participation at the Convention is widely credited as being among the most effective contributions to the Convention. At the end of the Convention, on 12 July 2003, which was a critical moment for adopting the document, the support coming from MEPs and representatives from the national parliaments was crucial for Giscard. The representatives of the national governments who were much more reserved in accepting the document were then persuaded by Amato.⁶⁹

Many pages were filled by comments about the role of the Presidium, and especially of its head, the former French President Valéry Giscard d'Estaing. At 76, he presided long sessions of the plenary meetings with attention and strong determination to enter history as the "father of the European Constitution". His dogged conviction and enthusiasm was shared by many members of the Convention and helped to push proceedings to

68) In fact this is an attempt to answer some accusations published later that the activities of "the group of like minded countries" was an expression of not mature enough candidate countries.

69) Valéry Giscard d'Estaing refused to communicate with the "disobedient" representatives from the national governments and he sent Guilio Amato to persuade them. Amato, according to Gisela Stuart (British member of the House of Commons and the only woman in the Presidium of the Convention) was like a magician: 'you knew he was doing tricks, but you did not know how.'

a conclusion. He managed to create many networks himself at different levels: his role as the President of the Convention's guiding triumvirate, together with Amato and Dehaene; as head of the 12-member Presidium, his link with the secretariat, and last but not least his bilateral communication with the state representatives during the sessions of the Convention or during his many visits to the member or candidate countries. On one hand Giscard was accused for being rather too authoritarian and listening more attentively to the representatives of the big countries, but without his determination, sometimes endless discussions would not result in the desired consensus.

National delegations as networks? The Case of the Czech representation in the Convention

Jo Shaw wrote: "One clearly important innovation (...) which creates a very different feel to the Convention as compared to the IGC is the presence of national opposition parties through the medium of national parliamentary representatives and European parliamentary representatives, sitting in the same debating chamber and round the same negotiating tables as national government representatives. This brakes down the sense of the unitary 'national' interests."⁷⁰ The division in the Czech political scene as well as in the Czech society found its expression also in the participation at the Convention. The representation at the Convention was organized according to political affiliation. The representative of the Czech Government, Jan Kavan, was a former minister of foreign affairs and member of the Social Democratic party (ČSSD). In summer 2002, after national elections, he was replaced by his alternate Jan Kohout, state secretary and first deputy minister of foreign affairs responsible for European matters (also ČSSD). The House of Deputies of the Parliament (the lower chamber) appointed as its representative in the Convention Jan Zahradil, member of the main opposition party ODS (Civic Democratic Party) and shadow minister of foreign affairs. The Senate was represented by Josef Zieleniec, former minister of foreign affairs, then affiliated to the right-of-centre Four-party Coalition.⁷¹

70) SHAW (2003), p. 54

71) The alternate for Jan Kohout was Lenka A.Rovná, Professor at Charles University, no party. The alternate for Jan Zahradil was Petr Nečas, MP from ODS. The Alternate for Josef Zieleniec, Senator Kroupa, is from KDU-ČSL (Christian democrats).

Jan Kohout as the government representative adhered to his socialist loyalties, but he was also involved in the group of like-minded states. The main tenets of their common statement had already been expressed in Czech government's *non-paper*⁷². The government supported a "*mixed model*" based on preserving balance between intergovernmental and supranational/ federal models. This method can lead to the "derived federation" model, which exists e.g. in Canada. Thus an "ever closer Union" would respect nation states and their positions in key areas of national sovereignty, at the time it would strengthen cooperation in all fields.⁷³

Josef Zieleniec was mainly involved in the activities of the Christian democratic EPP group. He supported a transfer of competencies to the federal level. His model of federal state corresponded to the idea of a decentralized asymmetrical unitary state. Zieleniec supported further politicisation of the decision-making processes in the EU; the President of the Commission would be elected by the European parliament according to the result of EP elections. Zieleniec's motto was: "if we give Europeans European politics, they will give Europe their hearts and trust".⁷⁴

Jan Zahradil associated himself with a group of European Democrats led by a Danish Eurosceptic Jens-Peter Bonde. His model is close to pure confederation, in which every step requires confirmation by national institutions. Zahradil supported the economic integration of the EU, but he rejects its political dimension. On 12 June, the day before the final text of Part I of the constitution treaty was accepted, Zahradil left the Convention. The following day he called a press conference in Prague, in which he reproached Valéry Giscard d'Estaing for manipulating the process. This was the day when the Czech accession referendum was held, and a rare moment when Czech public was thinking "European". Zahradil's proclamation did not fail to catch attention⁷⁵, however it did not overshadow the referendum itself; 55, 21 per cent of voters took part, and 77, 33 per cent of them voted in favour of membership.⁷⁶

72) European Convention, Non paper on the reform of EU institutions

73) The author as an Alternate member of the Convention was using internal materials of the government.

74) Speech to the Convention by Senator Josef Zieleniec, 21 March 2002

75) 78 Lidové noviny, 12 June 2003, Zahradil opustil Konvent

76) Lidové noviny, 16 June 2003, p. 15

CONCLUSION

This chapter tried to explain the Convention as an innovation in EU constitutionalisation process, and highlighted the need to determine applicable theories. It is argued that theories of European integration can be applied to the European Convention, which can be perceived as a kind of microcosm of the integration process. The two grand theories of European integration, neofunctionalism and intergovernmentalism, are legitimate but can only offer limited options, such as in understanding the 'red lines' in the British approach. The chapter suggests that for a multifaceted, complex and many actors involving process of the Convention, the theory of network analysis seems more appropriate. To distinguish between different types of networks, the notions 'policy community' and 'issue networks' are used. Applying this perspective on the Convention showed the complexity of conflict-resolution in the EU. The example of the conflict between big and small member state pointed out that the intergovernmental approach, as well as the neofunctionalist approach, can be used to certain extent. Small states used the 'friends of community method' not only to protect European interests, but also to protect their national interests in the EU since this method means a strengthening of their influence in the EU. The networks they created helped them express common values and gave them stronger position in the negotiating process.

The applicability of a purely intergovernmental and bargaining approach in negotiations among representatives of nation states, and towards identifying national interests, is however highly questionable in this case. As the case of the Czech delegation shows, as it was with the representations of other countries, both old and new member states, there were very diverse affiliations among members of individual national delegations. The whole process of the Convention in the event represented more of deliberation than a bargaining mode of conflict-resolution.⁷⁷ The validity of neofunctionalist theory can be examined in respect to the reform of institutions, as a balance between the role of the nation states and the citizens of Europe in supranational institutions. In the examination of the Convention, we nonetheless need to be yet more cautious, as the Convention itself turned out to be a proof of the existence of European interest and affiliation to European values.

77) MAGNETTE (2003), p. 28

In studying the case of the Convention, both the grand theories as well as the fragmented approach and the network analysis can be applied. But in all cases we must conceive the limits and scopes of applicability of individual perspectives. In the event, network analysis seems to be a more suitable tool for explanation of a multifaceted, multilayered process with many actors, which the Convention represented.

The fact that the EU launched two important processes together, deepening and widening, brought the new member states to the discussion about the substance and the future of Europe. Without having personal experiences with the functioning of the EU, they took part at the preparation of its new architecture. The learning process involved both sides: the member states as well as candidate countries. For the first time they were working together in such numbers, they participated in coalitions and they learned how to work with each other. Thus not only the result of the Convention, but also an experience of the EU with so many member states represented an added value.

One of the most important fundamentals of the European Union is the equality of its members and the “unity in diversity”. Different approaches in the Convention as well as in the IGC show the diversity of attitudes, the will to preserve unity leads usually to consensus. Using the words of German minister of foreign affairs Joschka Fischer, “no one will be happy with the result, but everyone has to be able to live with it”.

The greatest disadvantage of the exciting venture the Convention represented for those present was that it did not create expected enthusiasm among European citizens and the gap between political elites and the ordinary voters seems to be even deeper than expected. Heated discussions in the buildings of European Parliament, European Council, Permanent Representations in Brussels, and in the cabinets of member states’ governments left most Europeans cold. The main task ahead is to persuade Europeans that they are Europeans. This cannot be done through any social engineering; this must be the result of their life experience. From this point of view Jean Monnet’s method is still applicable.

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CHAPTER 2

The Convention and IGC Texts of the Constitution: Explaining Changes and Differences in the Shade of the Executive Power

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SUMMARY

The aim of this article is to evaluate the process of the European convention by carrying a retrospective analysis of the changes made by the Inter-Governmental Conference to the text of the constitutional treaty drafted by the European Convention. If the new institutional context and the deliberative setting of the Convention had a certain *lock-in* effect on the most powerful actors (the representatives of the governments) they however regained their influence by pushing national interests to the fore because of the need of the IGC approval in the final text. The article will focus on the differences across the issues areas showing that we can find a rather stable consensus in regulative issues areas of low political salience and high technicality (i.e. simplification of the treaties) whereas the major changes operated by the IGC concerned the high saliency and redistributive issues areas (i.e. institutional architecture).

THE CONVENTION: A “DELIBERATIVE INTERSTICE” BETWEEN LAEKEN AND THE IGC

From the Nice deadlock to the Laeken mandate

The European Union has undergone a continuing process of treaty reform aimed at deepening and widening the scope of integration during the last twenty years. From the Single European Act onwards, this evolution through intergovernmental negotiations has followed an incremental logic and at the same time the progressive enlargements of the EU have pushed for a rationalisation of its institutional framework¹. The issues at stake were the redefinition of voting weights in the Council, the size of the Commission, a clearer division of competence between the Member states and the EU, and the simplification of the treaties.

Such a task of rationalisation should have been carried out by the IGC of Nice that instead failed in proposing efficient solutions and proved the weakness of the IGC method. As a result the Nice European Council in December 2000 approved the Declaration on the Future of the European Union² in

1) DE WITTE (2001).

2) Declaration n. 23 on the Future of the Union (annexed to the Treaty of Nice) (2000).

which the Member States reaffirmed their commitment to deepen and widen the debate about the future of the European Union. They agreed to convoke another IGC by 2004 to resolve all these important issues at stake before the official joining of the ten new member states; at the same time the governments, facing such an outstanding deadlock, decided that an alternative method of reform was to be found. The experiment of the Convention who drafted the Charter of fundamental rights had proved to be much more efficient than a normal IGC and it started to be perceived as possible “*alternative avenue*” for the adoption of the future constitutional reforms.

The atmosphere of change was also fostered by the re-emergence of a constitutional debate that can be traced back to the two speeches of the German Foreign Minister Joschka Fischer³ followed by the speeches of the French President Jacques Chirac⁴, the Italian President Ciampi⁵, and the Belgian Prime Minister Verhofstadt⁶. The European Parliament played also a prominent role as it immediately caught the opportunity to rescue the use of the constitutional language by adopting the Duhamel Report⁷ and the subsequent resolution for the “*constitutionalization of the treaties*”. Moreover the idea of formulating a coherent and unique text supported by the Dahene report⁸ was becoming a real option thanks to a feasibility study⁹ of the European University Institute realized for the Commission. During 2001 according to the Nice Declaration wishes, a broad debate was sparkling under the auspices of the Swedish and Belgian presidency.

Opening a constitutional debate on the overall structure of the EU in such large terms was an opportunity for the federalists who were trying for deeper integration and a more direct democratisation of the EU decision-making structure. On the other side, this was also an opportunity for the intergovernmentalists to effect a redefinition of the competences of the EU that could have led to a conservative turn in the integration, giving the pace to a re-nationalisation of some competences.¹⁰

3) FISCHER (2000).

4) CHIRAC (2000).

5) CIAMPI (2000).

6) VERHOFSTADT (2000).

7) DUHAMEL (2000).

8) WEIZSÄCKER, DEHAENE and SIMON (1999).

9) «Réformer les procédures de révision des traités – Deuxième rapport sur la réorganisation des Traités de l’Union Européenne», 31 juillet 2000, (EUI :Florence).

10) DE WITTE (2001).

The Convention mandate: opportunity and constraints

The Belgian presidency was largely in favour of the Convention method; first in term of efficiency, as the Convention that drafted the Charter of Fundamental rights, succeed in a relative short time span to produce a coherent legal text with a greater legitimacy; secondly because the assembly included actors that were permanently left aside the treaty reform process (European Parliament, European Commission, national parliaments).

At the Laeken European Council, despite the reticence of the some governments¹¹, the European Convention was entrusted with the task of proposing a comprehensive reform of the EU. For the first time, “the governments, acknowledging the quasi failure of Nice, agreed to share their power to define the fundamental rules with other actors” (MP, MEP, the Commission, national government representatives, observer).¹² Thus it was the first time that a treaty reform was entrusted to such a plural assembly in which the governments’ representatives were a minority and the decisions would have been taken by “consensus” and not by unanimity.¹³

By implying a new set of actors usually left aside the process of reform, many believed that the Convention would have completely changed the dynamics of interaction of the actors, fostering a deliberative style of negotiation. On the contrary, we still find several elements of continuity with the past IGC and the Convention can be considered in line with a progressive and incremental evolution of the European Union rather than being classified as a moment of “*rupture constituionelle*”.¹⁴

During the Convention the logic of bargaining has progressively replaced the deliberative style of decision-making¹⁵ and to have a better understanding of such a change we need to consider three set of relevant variables: the institutional setting and context of the Convention, the actors involved in the process and the issues on the agenda.

11) MAGNETTE (2004).

12) DEHOUSSE and DELOCHE-GAUDEZ (2005).

13) DELOCHE-GAUDEZ (2001).

14) MAGNETTE and NICOLAIDIS (2004).

15) Ibid.

The Laeken mandate¹⁶, the Convention birth’s certificate¹⁷, was the result of a bargaining compromise that shaped the workings of the Convention since the beginning as the governments included a series of safety guarantees¹⁸ aimed at not losing control over the process and thus limiting the autonomy of the assembly. The European Council appointed the president and the two vice-presidents, hence differentiating the procedure from the one adopted in the first Convention in which the president was directly elected from the plenary.

The appointment of Valéry Giscard d’Estaing was a clear sign of the willingness of keeping an eye on the Convention works. D’Estaing was required to inform constantly the European Council on the evolution of the works, giving birth to what has been called the “*navette* or shuttle diplomacy” of Valéry Giscard d’Estaing.

Another constraint imposed on the assembly was the limited time span of one year to accomplish the work. On that point the difference with the former Convention is even more evident because the first did not have a defined time limit but was up to the President to communicate to the European council when consensus had been reached. This was clearly a safety measure to keep the time pressure high on the European Convention with the view of circumscribing the debate to the initial agenda set up by the Laeken mandate.

These elements shaped substantially the working of the Convention but the most relevant feature of the Laeken mandate was the constraint that whatever document drafted by the Convention was to be approved unanimously by the IGC.

As a result the assembly was deliberating in the shadow of the IGC approval and the government representatives had a sort of pre-veto on the options outlined and debated in the Convention. Since the beginning they secured them the right to pre-scrutinize the final product of the Convention and this privileged status changed their weight in relations to the other actors.

16) Laeken Declaration on the Future of the European Union.

17) DEHOUSSE / DELOCHE-GAUDEZ (2005).

18) HOFFMANN (2002).

The IGC was a low cost exit option that permitted the governments to have a second chance to re-open and discuss again some issues they accepted unwillingly. If we understand the formal and substantial equality of the actors involved as a fundamental pre-condition for an effective deliberative setting, this favourite position of governments has entailed a shift in the relation amongst the actors, relatively compromising the deliberative aspirations of this body.

The Convention lost much of its deliberative attributes because it was conceived as a deliberative interstice between two intergovernmental meetings: Laeken and the IGC of 2003/4. The room of manoeuvre of the assembly was compressed between two moments; one in which the States set up the mandate with clear constraints and another, the IGC, in which the States would have regained autonomy by scrutinising the final product of the Convention. The governments also profited of political resources outside the Convention as they were constantly negotiating and building coalition through their Ministry of Foreign affairs, their ambassadors, the COREPER, the European Council. This is quite evident if we look to the several important joint proposals that some governments tabled at the Convention and that had a substantial impact on the final outcome.¹⁹

The importance of the policy variables

The negotiating context of a specific EU constitutional negotiation matters because it determines the extent of the collective action²⁰ problem and whether an actor possess a privileged institutional position and the opportunities to translate the resources into influence.

Therefore, the institutional set up of the negotiation can matter in that actors can start with or gain a privileged position during the negotiation that can be exploited to influence the outcome.²¹

19) Contribution conjointe franco-allemande sur la Gouvernance économique (CONV 470/02), Propositions conjointes franco-allemandes dans le domaine de la justice et des affaires intérieures (CONV 435/02), Propositions conjointes franco-allemandes pour la Convention européenne dans le domaine de la politique européenne de sécurité et de défense (CONV 422/02), Contribution franco-allemande sur l'architecture institutionnelle de l'Union (CONV 489/03), Contribution anglo-espagnole sur l'architecture institutionnelle de l'Union (CONV 591/03), Contribution "Reforming the institutions: principles and premises" (CONV 646/03)

20) ZARTMAN and RUBIN (2000).

21) BEACH (2003).

The institutional design of the Convention was expected to produce a more discursive environment able to overcome the disease of the lowest common denominator. The idea lying behind was that a more inclusive assembly with a wide range of actor should have fostered deliberation. Most of constructivist approaches²² are often biased in favour of an overestimation of the discourse supporting characters of the institutional variables in fact there could be some doubts that the institutional design variable cannot carry the entire explanatory workload. We must acknowledge in fact that during the Convention the institutional context has remained unchanged (the Convention and its organizational structure) but on the contrary the dynamic of negotiation has changed and so did the influence of the actors. To explain this exponential variation we need to consider also the policy variable as an intervening variable that completes the analysis.²³

Therefore it is plausible to formulate the hypothesis according to which the strategy, the way of action and the influence of the actors are not only significantly influenced by the institutional context of the negotiations (in our case the Convention) but are also influenced by the resources that the actors were able to mobilise according to the issue and its *political saliency* Vs *technicality-complexity*²⁴.

Tab. N° 1		
Independent variables	Intervening variable	Dependent variable
Property of the issue at stake: Political saliency Vs technicality/complexity	Institutional and organisational context Domestic political context	Negotiation strategy and influence

The hypothesis is that the properties and the characteristic of the issues areas that was debated not only has entailed a different dynamics of interaction amongst the members but that in the case of low political saliency issues the Convention has managed to produce a stable consensus, whereas in high political saliency issues areas in which a bargaining style has emerged, the Convention did not manage to produce a stable consensus but a compromise that was reopened during the IGC²⁵. Classifying the issues

22) See CHECKEL (2001), MAURER (2003), RISSE (2003).

23) MAGNETTE (2004).

24) BEACH (2003).

25) POLLAK (2004).

according to these two main typologies (high and low political saliency) has the problem of being an ex-post classification but it can help to better understand the dynamics of the negotiations, highlighting which type of actors' resources proved to be relevant for which issues areas. In high saliency issues areas negotiations were characterised by hard style bargaining and material resources of power were a determinant factor of influence. Such issues reflected the patterns of material power with a tendency to put in evidence the fixed and strong preferences of the most powerful actors (in our case the governments of the biggest countries), favouring the emergence of competing coalition of governmental actors. This kind of issues were characterised by a clear redistributive effects that could lead to a zero-sum-game. Examples are the redefinition of the power structure and institutional architecture of the EU, the definition of the budget and the economic coordination, the reinforced cooperation, the revision procedure of the treaty and the common foreign and security policy. Because of the political relevance and high saliency they involved the political leaders of the highest level. The negotiations of these issues were keen to reveal asymmetrical relation of power and the fixed interests prevailed on the discursive force of the rational arguments, thus giving the pace to the horse-trading and the classic scheme of concessions.

The second typology concern low saliency and high technicality issues: this was the case of regulatory issues or juridical issues that were supposed to produce an advantage for a large spectrum of actors with a win-win situation. Due to their low political connotation, actors that have a privileged influence were those with a high technical knowledge and juridical knowledge. The governments did not specially have the sufficient expertise to influence the decision and prefer to delegate to actors having this kind of expertise. Normally such a type of issues has been defined as being "*Convention friendly*" issues; the low political saliency has favoured the deliberative style of discussion and the use rational arguments thus creating symmetrical relation of power. We can classify among this typology issues such as: the juridical personality of the EU, the complementary competences, the simplification of the legal instruments, and the role of national parliaments.

The governments were so powerful in negotiating high-politics issue and imposing their views, while other institution like the European parliament and the national parliaments were more successful in negotiating issues where their expertise was necessary using a discursive rationality. This is

to show to a certain extent the limit of the influence of the deliberation settings and the relevance of the actors' resources. In fact the presupposed formal equality, that should have fostered a open debate amongst equals, have worked for issues with regulative characteristics in which the governments lacked sometimes of the necessary expertise and they were relying on the expertise of the supranational institution like the Commission and the European Parliament as in the case of the simplification of the juridical instruments of the Union.

If we assume for example that in a EU constitutional negotiation the actors do not have perfect knowledge of the often very complex institutional and legal implications of the many issues under discussion due to high information costs, then we would expect a more influent role provide by actors with a higher comparative informational advantages.

The presence of a large spectrum of actors cannot be translated automatically into influence. We can take as an example the presence of the majority of parliamentarians in the Convention. They did not exert the same degree of influence as they lacked of the informational comparative advantages in relation to the governments, they lacked of coordination amongst their component and moreover they were not used to negotiate in an international context.

The phases of the Convention

The Convention started its work on the 26 of February 2002 and finished one year and half later in July 2003. The work was structured in three consecutive stages: the listening phase, the study stage, and the proposal stage²⁶. During all the three period there has been an evolution in the work of the convention and there has also been a change in the influence of the actor involved. We will map this evolution focusing on the changes in actors' influence through the phases and issues dealt with at different time.

Two relevant factors were the external determination of the time frame of the Convention by the Laeken mandate and the role played by the Presidium in sequencing the organisation of the work and the timing of the debate.

²⁶ Introductory speech of the president Valéry Giscard d'Estaing to the European Convention, 26 February 2002 (SN 1565/02).

The first phase of the Convention endured the longest and witnessed a clear deliberative style of interaction, actors were on equal footing. The dialogue was underpinned on the active listening of the others' point of view and there was during this moment a reach exchange of arguments on the future reforms of the European Union. Everyone had the possibility to express the expectations and wishes. Such a long phase that lasted till the end of July 2002 was functional to create a common sense of belonging to the Convention and let the representatives of the several components to get to know each other. We can describe this phase a "socialisation stage" of the actors in which they profited to get used to work in a new context. This was especially valid for the national parliamentarians who were a large majority of the assembly but were the less accustomed to work in an international assembly.

The second phase was that of studying the issues that emerged during the listening phase. Some 11 working groups were set up with a specific mandate to outline the possible solutions and to make proposition to the plenary assembly. The third phase was the drafting phase in which the Presidium presented the articles of the treaty in relation to the proposal made by the working groups. After the discussion in the plenary the Presidium progressively modified the text according to the debate held in the plenary and according to the amendments tabled by the convention members. Then there was the final phase aimed at reaching the consensus that was characterized by fervid negotiation between the institutional components of the assembly. Setting up the working groups was an important change in how the debate was conducted. The interaction in these small groups had the advantages of fostering the exchange of substantive arguments rather than bargaining. Many of the members of the Convention have referred as being the base of the formation of the consensus in the Convention²⁷. However it is important to stress the role of the presidium in drafting the mandate of the working group. The first set of working group was constituted by five groups on: subsidiarity, economic governance, Charter of the Fundamental rights, juridical personality, the role of national parliaments, complementary competence. Shortly after a second set of WG was mandated on the external action of the EU, the Defence, the simplification of the legal instruments, Freedom security and justice; the last one was set up in December to discuss the issues related to the social aspects of the Union.

27) Intervention of Andrew Duff at the Conference "Towards a European Constitution", Goodenough College, London, 1-2 July 2004.

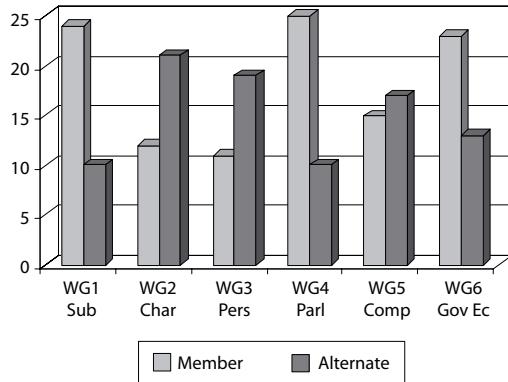
These groups were invited to propose concrete solutions to the assembly and everyone was free to choose in which group to participate according to his or her competence. This phase of the working group lasted from July to the end of January when the last group (the one discussing 'social Europe') reported to the assembly.

The work of the Convention started to take a more concrete shape with presentation of the skeleton structure of the draft treaty from VGE²⁸, defining in broad terms the possible structure of the future treaty. This was a key moment of the Convention in which the possibility to produce a single legal text was doing its way onwards. Despite this open atmosphere of discussion during this phase, VGE opposed directly the idea of creating a working group on the institutional architecture believing that such an issue would have been too much controversial and conflictual. His strategy was to leave this issue for the end of the Convention, once a general agreement was already found. He thought to postpone such a difficult discussion that would have led to a conflict and possibly would have proved to be very counterproductive for the dynamics of the Convention.

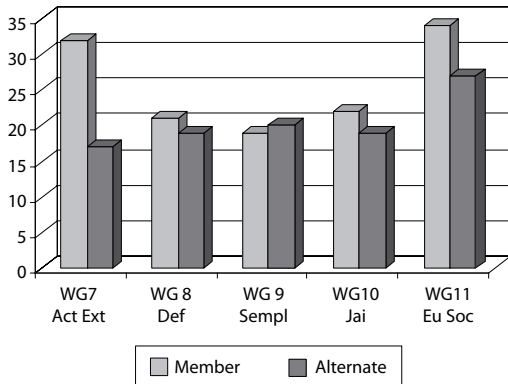
Already at this phase we can see a relevant change in the dynamics of the Convention as the governments started to understand that the Convention was becoming a serious business: The sign of such a change was the appointment of the foreign affair minister as representative of some governments as Spain, France and Germany that, in a certain sense, up-graded their representatives in order to gain a major influence on the process. In this phase it is worth to have a look on the composition of the working groups to put in evidence that already at that time the policy variable was having a clear influence as their composition was changing in relation to the issues they were dealing with. It is interesting to look at the composition according to the criteria of institutional affiliation and titular/alternate to verify how different actors with different resources have tried to participate in the working group in which they could have maximised their influence by translating their political resources or technical knowledge into influence.

28) Preliminary draft of the Constitutional Treaty (CONV 369/02), 28 October 2002.

Tab. № 2: WG 1–6 Member/Alternate

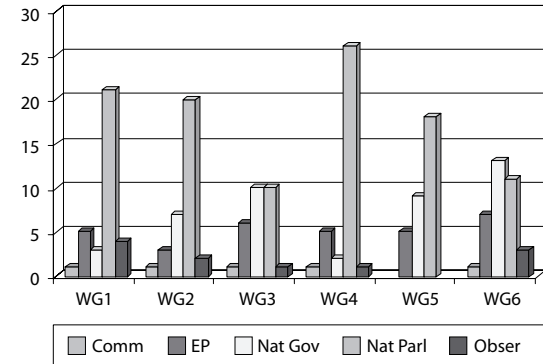


Tab. № 3: WG 7–11 Member/Alternate



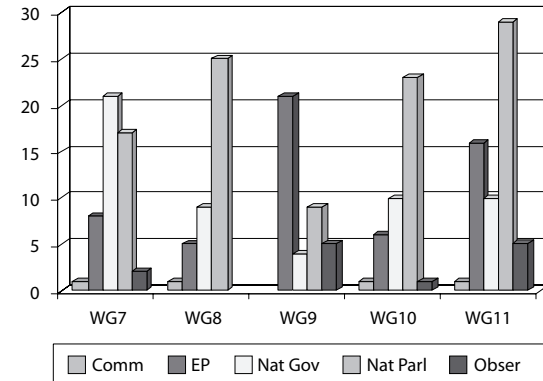
The figures show that the working groups on juridical and technical issues were composed mainly by alternates, the governments were nearly absent while there was a massive presence of the member of the national parliaments. One clear example is the WG on the simplification which was almost composed by MEPs due to their expertise in the subject. From the point of view of institutional affiliation it is worth noting the massive participation of the government in the WG on external action and the one on economic governance.

Tab. № 4: WG 1–6 by Institution/Affiliation



WG 1 Subsidiarity
 WG 2 Charter Fundamental Rights
 WG 3 Juridical Personality
 WG 4 Role of National Parliaments
 WG 5 Complementary Competences
 WG 6 Economic Governance

Tab. № 5: WG 7–11 by Institution/Affiliation



WG 7 External Action
 WG 8 Defence
 WG 9 Simplification
 WG 10 Justice and Internal Affairs
 WG 11 Social Europe

The changing dynamics of the Convention was also caused by the growing influence of several proposals tabled by coalition of governments. The first example are the four Franco-German proposals: one on justice and internal affairs, one economic governance, one on defence and the most influent on January 2003 on the institutional architecture of the EU²⁹. This was an impulse to the Convention and the strategy of the actors. In fact this was the beginning of a long series of contribution that saw competing coalition of states affronting them on a different conception of the Union. There was the question at stake of redefining the size of the Commission, the presidency of the European Council, the election of the president of the Commission. This was the moment in which a clear cleavage between small and big states emerged as well as the divide between federalists and intergovernmentalists³⁰. The franco-german proposal triggered the emergence of an opponent coalition formed by the “friend of the community method” which first met in April 2002 and that was composed by small and medium size countries for a total of 16, with sometime the participation of the Benelux countries³¹. The problem of such an evolution was the growing frustration of the parliamentary components of the Convention as they were having the impression of being left aside the negotiation of the big compromises. In fact, if there was a change in the preference pattern compared to a classic IGC, this did not translate into bargaining power that rested in the hands of the governments as the issues at stake was always more of a high political saliency nature.

The presentation of the first part of the text from the Presidium at the beginning of October concluded the phase of studying the options. The Convention was entering into the drafting phase and the proposal of amendment phase. This phase was of an ever-increasing dynamism so that the process gathered speed such as not to leave enough time to the conventionals to digest the thousand of amendments proposed by the plenary assembly. The Presidium together with the Secretariat of the Convention were in charge of drafting the text and adjusting them according to the

29) Contribution conjointe franco-allemande sur la Gouvernance économique (CONV 470/02), Propositions conjointes franco-allemandes dans le doaimne de la justice et des affaires intérieures (CONV 435/02), Propositions conjointes franco-allemandes pour la Convention européenne dans le domaine de la politique européenne de sécurité et de défense (CONV 422/02), Contribution franco-allemande sur l'architecture institutionnelle de l'Union (CONV 489/03).

30) MAGNETTE and NICOLAIDIS (2004).

31) Contribution “Reforming the institutions: principles and premises” (CONV 646/03).

amendments proposed by the plenary and to re-discuss the amended text, in order to verify if consensus was attained. This state of fact gave to such an institution a relative power as it was up to the presidium to declare when the consensus was achieved. The fact that the consensus was not clearly defined gave a wide room of manoeuvre to the Presidium that in the very last phase, acting as a mediator, searched to reach a consensus on the final draft of the text. Under high time pressure, and in relation to intergovernmentalisation of the atmosphere, the Presidium started to have separate meetings with the components of the Convention reproducing the “confessionnel strategy”³² we have seen in the IGC, with the exchange of concessions, the discussion on the “red lines” posed by the governments and the usual trade horsing. Before the Thessaloniki European Council, the Convention managed to reach a large consensus on the part I and II even though an extension of its mandate was asked to discuss further adjustments to the part III. The Convention finished its work officially the 18 of July.

A retrospective analysis on differences and changes

Certainly the results obtained by the Convention can be classified as being superior to that of the previous IGC. At least the scope of fluidification of the debate was achieved, allowing different actors to interact in an open forum. On the other hand it is fair to believe that certain logic of bargaining was still present. The explanation can be given through the privileged role of governments but also to the quality and characteristics of the specific issues debated by the Convention and the resources that the actors have been able to mobilize.

Carrying a retrospective analysis of the changes operated from the IGC to the text of the Convention will give us a picture of the stability of the consensus that the assembly managed to produce, highlighting that:

- 1) Highly technical issues, with a clear juridical nature, regulative issues with a low political saliency (simplification, juridical personality, role of national parliaments, Charter of Fundamental Rights) favoured the deliberative way of action, giving a privileged role to those actors possessing the technical and juridical expertise. These areas were characterised by

32) Bilateral talks between each Member State and the Presidency at the IGC. In a deadlock situation such a strategy is used to know the point of possible compromise.

a stable consensus that was able to survive the IGC because a previous consensus already existed.

- 2) Sensible issues, with high political saliency and redistributive effects (Budget, Institutional architecture, QMV, revision, reinforced cooperation, foreign policy) proved to be more controversial, giving the pace to asymmetrical relation of power and bargaining. In these areas the consensus that was achieved was apparent and the IGC re-opened the discussion.

This analysis it will put in evidence that the Convention method, proved to be effective in areas with low political saliency whereas in issues of high political salience, even producing a good base for a further agreement, it did not succeed to reach a stable consensus.

The instability of high political saliency issues

The case of the institutional architecture

An example that comes to the evidence is the question of the institutional architecture which proved to be one of most controversial issues and less stable of the Convention text. The first victim of the IGC (that lasted nearly one year) was the proposed creation of a legislative Council³³. The proposal of the Convention was aimed at rationalising the activities of Council in order to separate the legislative function from the executive one, avoiding thus the fragmentation of the several formations of the Council. A step in this direction was already made from the Seville European Council³⁴ that had decided to limit the formation of the Council to just nine. The idea was to have a kind of second chamber that would legislate together with the European Parliament, but there was much opposition from an ideological and also from a technical point of view. The new figure of the legislative minister representing the government would then have taken the place of the sectoral ministers, achieving a too much influential role.³⁵ Such a change would have also had important repercussion on the domestic structure of the governments. The IGC in the end accepted only to divide the task of the Council between a legislative phase in which it will deliberate in public and the executive one, maintaining the actual formation of the Council.

33) Art. I-23 CT(CONV), Art. I-24 CT (CONV)

34) Presidency Conclusions, Seville European Council, 21 and 22 June 2002.

35) REICH (2004).

The new system of QMV was also a conflicting issue that the Convention text addressed without being able to reach stable consensus. The proposed system of the 50 per cent of the States and the 60% of the population was the results of the forcing of Giscard d'Estaing, supported by the coalition of the bigger states that ignored the opposition of the small and middle size states. This distribution had the merit of being more transparent but was disproportionately advantaging the bigger states at the detriment of medium size. The IGC moved a step forward by finding a new compromise increasing the threshold to respectively 55 per cent and 65 per cent and when the Council is not acting on a proposal of the Commission, to a majority of 72 per cent of states and 65 per cent of the population³⁶. But more importantly it included a series of safety guarantees in order to limit the effect of these new rules: the fact that a minimum winning coalition should be formed by 15 members and that a minority should be constituted by at least 4 member states. The most evident setback from the IGC was also the rescuing of a kind of Ioannina compromise that would have been applied till 2014; such a clause will oblige the Council to continue searching for an agreement if there is a three-quarters of the members states forming a minority against the issues in question. The IGC rolled back on the scope of the QMV in area like taxation and for certain budgetary decisions and also in domain of social security and justice and criminal cooperation. This setback was complemented by the quasi nullification of the "*passerelle clauses*"³⁷, specifically designed to allow the European Council to decide unanimously to swift one domain from the unanimity to the qualified majority procedure or to pass from the special legislative procedure to the co-decision procedure, only in some areas of part III of the Constitution. The Art. IV-444 clearly stated that every initiative under this article must be communicated to all the parliaments of the member states (giving them a period of six months to react) and that in case of opposition of just one the decision would not then be adopted.

In terms of institutional arrangements the draft of the Convention was almost criticized in relation to the composition of the Commission. The solution of a two tire commission with a representative for each member states but just 13 commissioners plus the Minister of Foreign Affairs with a right to vote and being part of the college, was soon abandoned because

36) Art. I-25 CT.

37) Art. IV-444 CT, Simplified revision clause.

such a big commission would have compromised the collegiality of this organ and would have fragmented even more the division of the portfolios. The IGC therefore introduced a commission composed by a number of two-third of the number of member states following a principle of equal rotation. This system was to enter into force in 2014 thus keeping the Nice system still alive for a decade, with the risk of paralysing the functioning of the body. Another setback is the limitation of the President of the Commission in appointing the commissioners as the IGC scrapped the provision in which, according to the Convention draft, was foreseen that the each member states had to present a list of three candidates from which the president would have been chosen.

The seats of the EP were also raised to the number of 750 increasing the minimum threshold to six representatives and limiting the maximum number to 96 in order to equilibrate the modification of the double-majority system. The Convention formula of team Council presidencies, with the possibility of different countries presiding different council formation at the same time, was only nominally maintained. The IGC, following the Seville European Council conclusion, restored indirectly the system of six months presidency although the country holding the presidency will be assisted by the other two in the team on the basis of a common programme.

The case of policies

The variation of the texts it includes also some relevant changes in the area of policies having a certain high political salience and relevance as in the case of the enhanced and structured cooperation. The IGC tried to limit the effect of the Convention text in CFSP and CSDP area by changing the procedure to authorise an enhanced cooperation in these domains and thus passing to unanimity. A further limit is represented from the fact that the council cannot resort the *passerelle clause* of the Art. IV-444 as it is excluded from the issues areas having military and defence implications.

Major changes were conducted in the economic governance area, lessening the coordination of economic policies but increasing on the other side the decisional autonomy of the Euro zone members. In fact the IGC went further that the Convention in recognising the formal existence of the Euro group, for example suspending the vote of the “outs” in the recommendation made to the Euro zone members within the framework of the

Broad Economic Policy Guidelines. This will entails that only member of the Euro zone will be entitled to vote on the decision to address early warning for the member states economic policy or excessive deficit. This can be considered as a progress to reinforce the decision making capacity of the Euro group. The IGC maintained the power of the Commission to submit proposals – which can be amended only by unanimity of the Council – as far as the decision on whether the deficit exists, is concerned. However the IGC has returned to the *status quo ante* with regard to the corrective measures to be taken from the member state in question; the decision in fact will be taken on the basis of a recommendation of the Commission that can be changed from the Council without unanimity.

The budget has proven to be a sensitive issue during the IGC, showing some setbacks in relation to the own resources and the multi-annual-financial framework. Despite the recommendation of the discussion group specifically set by the Convention on the budget procedure and the own resources system, the IGC has modified some important rules virtually closing the door to a lighter and easier modification of the own resources system. In fact the European law establishing the provisions related to the system of the own resources will be still adopted by unanimity without the abolition of the national ratification. Qualified majority will apply only for the law laying down the implementing measures. The Convention draft modified also the adoption of the multi-annual-financial framework by QMV system and thus avoiding the national ratification. The IGC on the contrary restored the unanimity even though there is a possibility to change the procedure adopting the “*passerelle clause*” (that is quite frozen by the need of approval by all the parliaments). Last but not least, the Convention deleted the distinction between compulsory and non-compulsory expenditure in order to fully involve the European Parliament in the definition of the European Union budget. On the other side the IGC altered the compromise of the Convention in favour of the Council as in the conciliatory committee stage, the Council will have the right to refuse the amendments put forward by the Parliament and can directly ask the Commission to formulate another proposal.

In other two policy areas (police and judicial cooperation in criminal matters and social policy) it is possible to outline quite important changes in relation to the Convention given to the pressure of some member states’ governments. This is the case in which the IGC inserted a special mecha-

nism called brake-accelerator procedure. The brake consist in the possibility given to any member state to block the adoption of a certain measure on the basis that it would affect fundamental aspects of its criminal justice system with the effect of suspending the law and the possibility after that European council has deliberated to asking the submission of a new draft. The accelerator clause allows for the possibility that members states which wish to adopt such a measure to go ahead through enhanced cooperation. If within twelve months of the submission of the new draft the draft framework law has not yet been adopted, the member state can formulate the request of establishing an enhanced cooperation with at least one third of the Member States. This could slow the legislative process because proposals will be watered down in order to gain acceptance from all the member states in order also to avoid the proliferation of the enhanced cooperation. More or less the same system was introduced by the IGC in the field of the social security for migrants workers.

CONCLUSION

The paper has tried to outline the limit of the conventional method, showing to a certain extent that in some issue areas the consensus of the Convention was apparent and could be considered just as a good basis for further negotiation. The “revolutionary character” of this new method has proved to be limited to certain issues areas of low political saliency (simplification, legal personality, role of national parliaments, Charter of Fundamental Rights) in which it favoured the deliberative way of action, giving a privileged role to those actors possessing the technical and juridical expertise. These areas were also characterised by a stable consensus that was able to survive the IGC also because previous consensus already existed. On the contrary sensitive issues, with high political saliency and redistributive effects (the budget, institutional reform, QMV, treaty revision, enhanced cooperation, common foreign and defence policy) the governments remained the privileged actors giving the pace to asymmetrical relation of power and bargaining style of interaction. In these areas the in fact the consensus that was achieved was apparent and the IGC re-opened the discussion.

The great result of the Convention was the fact that it succeed to produce a single text able to influence the work of the IGC and to form a good base for further negotiation; however the result of the IGC bring the Convention closer to a wide preparatory body than a real constitutional assembly.

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CHAPTER 3

The 2004 IGC: Bargaining and Learning?

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SUMMARY

The aim of this paper is to identify key hypotheses about the 2004 Dublin IGC from the perspective of bargaining and learning theories. The paper is divided into four parts: an overview of bargaining theory is provided and hypotheses drawn from this overview. Second, the relevance of learning in analysing the 2004 Irish presidency of the EU is examined. Finally the relevance of the hypotheses drawn is summarised. The following hypotheses are drawn:

- 1) The 2004 IGC reflected a bargaining process which allowed small states to achieve their strongest preference.
- 2) The 2004 IGC provides evidence of joint-problem solving and conceptualisation: non-zero sum process.
- 3) The 2004 IGC bargaining process reflected the interests and control of the more powerful states, not the influence of the EU presidency or other EU institution.

1. BARGAINING THEORY

Bargaining in the general literature refers to a process whereby agreement is reached by a group of actors, each of which have their own sets of preferences. Bargaining itself is thus a relatively neutral term; it neither indicates the existence of a zero-sum game, whereby for one actor to gain another must concede a preference, or a non-zero sum game whereby by all actors can achieve their preferences by agreeing to one outcome. In game theoretical literature much effort has been made to examine whether the 'game' is zero-sum or non-zero sum. Moreover, a primary aim is to identify whether a bargaining process exists at all or whether one actor or group of actors coerce others to reach agreement. In this sense while bargaining is neutral about whether preferences are shared or not, it precludes the existence of coercion. In the next section an overview of bargaining from a rational institutionalist perspective is provided before examining alternative views which imply bargaining refers only to a specific style of negotiation.

Bargaining in Rational Institutionalism

Institutionalism emphasises the role of institutions in advancing co-operative bargaining between states. Co-operation is defined as 'actions of separate individuals or organizations – which are not in pre-existent harmony...brought into conformity with one another through a process of negotiation'.¹ Order is defined by the absence of force, the lack of hierarchy among issues and the presence of multiple channels of contact between societies'

The rational institutionalist task in international relations is to explain how co-operative bargaining relations emerge between states. According to institutionalists complex relations are pursued within sets of stable organisations because of institutionalisation.² International regimes facilitate co-operative bargaining between states, where a regime is defined as a set of norms, rules and standard operating procedures which underpin behaviour.³ There are two main ways in which the regime facilitates co-operation: (i) It influences the bargaining relationship between states and (ii) It provides information and causes a process of learning which facilitates co-operation. In a regime, if one actor fails to co-operate, then other actors may fail to co-operate on other issues in the future.

In the complex interdependent world, issue linkage occurs between rational actors. Each actor has different goals depending on the issue area. However, if one actor fails to compromise and reach agreement on one policy issue (that is, fails to co-operate with another actor), then other actors may fail to co-operate with it and reach agreement on other issues in the future. In other words, the 'shadow of the future' provides incentives for actors to co-operate with each other and compromise so that they will each be more assured of achieving their policy priorities at a future date.⁴ Furthermore, where different issues are linked closely (a 'dense policy space'⁵, regimes 'will reduce the cost of continually taking into account the effect of one set of agreements on others'.⁶ Thus the denser the policy space,

1) KEOHANE and NYE (1977), p. 182

2) RUGGIE (1998), p. 54

3) KEOHANE and NYE, op. cit.

4) AXELROD (1990), p. 174

5) KEOHANE (1984), p. 79

6) Ibid.

the greater the need for an international regime to facilitate agreement. The regime also allows members to calculate more accurately the cost of a given action and allows them to increase their knowledge of the preferences of other states. It allows issue linkage to occur more efficiently – members of the regime have fuller information about how each state perceives issues on the bargaining table. Thus, compromise will be reached more easily. Overall, regimes lower the transaction costs of bargaining and increase trust between states to allow them reach ‘pareto optimal’ outcomes. Regimes also punish members who break a promise, or do not co-operate, by ostracising them.

In a regime where conditions of complex interdependence exist, the less powerful actor in a bargaining relationship can be surprisingly successful in achieving its aims. In the case of the USA-Canadian relationship, it was found that less powerful states achieve their aims because of sensitivity interdependence.⁷ Sensitivity interdependence implies that more powerful states may be very sensitive to key decisions made by less powerful states, giving less powerful states bargaining leverage. Less powerful states may adopt a more coherent and intensive lobbying strategy as regards a powerful state. Also, if an international regime provides rewards based on non-zero-sum outcomes for all members, more powerful states will not want to depart from its co-operative norms and will not coerce less powerful states.⁸ Overall, according to proponents of institutionalism, policy outcomes are explained by a bargaining process that affords relatively equal status to all its members.

Moreover, rational institutionalists argue that *perceptions* of self-interest and of how objectives should be pursued depend not merely on national interests and the distribution of world power, but on the quantity, quality and distribution of information.⁹ The ability to assimilate new information and to reach new understandings of causal relationships, that is the ability to learn, is a key factor in influencing the bargaining relationship between states and increasing their chances of co-operation.

According to this view, membership of the EU itself will promote a co-operative bargaining relationship empowering less influential states. The presidency of the European Council will provide an important information resource to facilitate smoother and more co-operative bargaining. Policies

7) KEOHANE and NYE, (1977), op. cit

8) Ibid.

9) KEOHANE (1984), p. 245.

will reflect consensus between more powerful and less powerful actors. Overall, for institutionalists, the incentives provided by a regime to engage in bargaining and compromise and the ability of a regime to enable a learning process are fundamental to achieving co-operation in international relations. The following hypotheses can be derived from the above discussion of rational institutionalism:

Hypothesis 1: *The 2004 IGC reflected a bargaining process which allowed small states to achieve their strongest preference.*

Hypothesis 2: *The Dublin IGC provides evidence of joint-problem solving and conceptualisation: non-zero sum process.*

Bargaining in Neo-Realism

In contrast to the institutionalist belief in rational actors’ ability to co-operate if they have fuller information about each other’s preferences, the emphasis of neo-realists is on the insecurity of states and the need of states to provide their own security ‘because no-one else will’.¹⁰ Anarchy in the international system implies that inequality of power is the only way of providing security and this ‘focus on power politics provides the apparent continuity in the realist tradition’.¹¹

For neo-realists, ‘international society may be an arena of rules and institutions, but...is it really power and interests doing the work?’¹² In refuting the institutionalist account of international relations, the main criticism is that ‘institutions are basically a reflection of the distribution of power in the world. They are based on the self-interested calculations of the great powers, and they have no independent effect on state behaviour’.¹³

Overall, according to neo-realist critiques, international institutions are not the underlying cause of co-operation. The regime itself reflects the will of more powerful states and its success reflects their dominance. Power is central to the operation of regimes and thus, regimes are not necessarily fair.¹⁴ Relative gains matter most to members – if another country is benefiting

10) WALT (2002), p. 200

11) BUZAN (1996), p. 22

12) DUNNE (2001), p. 224

13) MEARSHEIMER quoted in KREBS (1999), p. 346

14) WALT, op. cit, p. 214

more than one's own state, co-operation will be more likely to collapse, regardless of whether all members of the regime benefit. Ideas and learning are controlled by the dominant players in a highly competitive game. Institutionalists, it is argued, have neglected this centrality of power.

Moravcsik encapsulates these neo-realist assumptions in his approach to explaining various IGCs. The bargaining process is a lowest common denominator process:

“The bargains struck in the EC reflect the relative power positions of the member states. Small states can be bought off with side-payments, but larger states exercise a de facto veto over fundamental changes in scope or rules of core element of EC ... thus bargaining tends to converge toward the minimum common denominator of large states' interests.”¹⁵

The following hypotheses can be derived from this neo-realist view:

Hypothesis 3: *The Dublin IGC bargaining process reflected the interests and control of the more powerful states, not the influence of the presidency or other EU institutions.*

In contrast, to both institutionalism and neo-realism, constructivism emphasises norms and constructed reality in determining international relations. Ideas and learning are thus central to the constructivist critique.

The Role of Learning for Constructivists, Institutionalists and Neo-Realists

A core part of rational institutionalism concentrates on the role of ideas, knowledge and the dissemination of knowledge. Learning is thus a central theme to many accounts of bargaining. The regime may promote learning about cause-effect relationships and may alter bureaucratic behaviour, ideas and values. A key task is to determine how learning occurs. Different causes of learning have been identified. Learning may be caused by a dominant actor compelling other states to accept preferred policies. In this case, power politics is more central to policy than the existence of the regime

15) MORAVCSIK (1991), in KEOHANE and HOFFMANN, p. 47.

per se. In contrast, according to Haas, for fundamental learning to occur, groups which previously were antagonistic to each other ideologically turn themselves into an inner circle of reformers.¹⁶ Each group still has to keep its followers in line, but they are mediators, rather than antagonists.

“Decision-making models that are supposed to draw on the lessons of history, that are predicated on the assumption that actors deliberately learn from prior mistakes, are badly flawed, because the lessons of history are rarely unambiguous ... learning, under such circumstances, consists of recognising the desirability of a different process of decision-making, a process that copes a little “better” with the ambiguity.”¹⁷

A core concern for Haas is the distinction between adaptation and learning. Two key attributes separate adaptation from learning, namely whether re-evaluation of fundamental assumptions occurs, and which type of bargaining occurs. For Haas, although both adaptation and learning constitute responses to the existence of bounded rationality, learning implies that basic beliefs are re-evaluated. Re-evaluation implies that new factors are considered in examining policy and new causes are believed to be valid in affecting behaviour.¹⁸ It is made possible by the existence of knowledge, previously unavailable.

A key difference between adaptation and learning is bargaining style. Policy will reflect analytical decision-making and in bargaining an understanding of the causal relations between different groups' aims will be evident. Moreover, institutionalisation will occur, whereby decision-making routines are established to search for consensual knowledge, for example, think tanks, altered recruitment practices. Crisis management normally implies institutionalisation and, thus for Haas, the occurrence of a crisis will act as a catalyst for learning because policy-makers will recognise that the recurrence or outbreak is brought on by 'the insufficiency of institutional routines to avert it'.¹⁹

The neo-realist criticism of the above account of learning and bargaining is that new ideas are argued to be a reflection of hegemonic preferences. The absence of full information among policy-makers implies that conditions of bounded rationality exist in international relations, analogous to market imperfections

16) HAAS (1990), p. 129

17) *Ibid.*

18) *Ibid.*

19) HAAS, E (1990), p. 86

in micro-economics. One of the key benefits of the regime is that it provides more accurate information to its members about each others' intentions, preferences and the benefits of co-operation. The regime allows its members to share information and communicate more openly. Bargaining will lead to outcomes which achieve policy-makers aims more fully. As the next paragraphs show, constructivists like institutionalists emphasise the importance of ideas in creating new institutional processes. For constructivists 'it is through discursive practices that agents make sense of the world and attribute meaning to their activities.'²⁰ Constructivists emphasise arguing and discussion as a

*"Mode of interaction which enables actors to challenge the validity claims inherent in any causal or normative statement and to seek communicative consensus about their understanding of a situation."*²¹

Moreover, 'the goal is not to attain one's fixed preferences, but to seek a reasoned consensus'.²² Thus, the adoption of new ideas (that is, learning), is caused by communication and discourse. For constructivists, the set of values and ideas chosen by political leaders and the communicative processes that underlie their interaction is central to understanding international relations.

Similarly, institutionalists by emphasising the role of information and learning highlight the role of ideas in international relations. For institutionalists, the absence of full information among policy-makers implies that conditions of bounded rationality exist in international relations, analogous to market imperfections in microeconomics. One of the key benefits of the institution is that it provides more accurate information to its members about each other's intentions, preferences and the benefits of co-operation. Institutions allow members to share information and communicate more openly. Such bargaining will achieve policy-makers' aims more fully.

The overlaps between institutionalism and constructivism are illustrated by the relevance of Haas' analysis of learning to both constructivism and institutionalism. For Haas, learning implies a fundamental shift in policy purposes and underlying conceptualisation.²³ Issue-linkage is substan-

20) RISSE (2004), p. 164.

21) Ibid.

22) Ibid.

23) See above

tive, whereby issues in bargaining are linked only if one is perceived to be connected to the other in its content – substantive issue-linkage occurs. Moreover, learning implies the existence of ideological compromise.

While emphasising the importance of institutional engineering in facilitating learning, Haas has also been defined as a constructivist because of his emphasis on a 'powerful sociological (sic) of international co-operation, based on learning.'²⁴ Thus, for both institutionalists and constructivists ideas matter and communication processes matter in bargaining relationships. Overall, there are clear overlaps between institutionalism and constructivism in their emphasis on information and learning. In contrast, for neo-realists, ideas and norms are used and abused as the more powerful think fit:

*"Rules and norms can be longstanding and widely recognized, but also frequently violated ... the international system has always been characterised by organized hypocrisy."*²⁵

Thus, if norms appear to explain the bargaining process or outcome, it is only because hegemons allow these norms to be implemented – because of their self-interest. The most influential self-interest is the will to survive and threats of annihilation or of war provide the most effective constraints on state behaviour

Assuming, co-operative bilateral relations exist and the smaller state wields disproportionate influence on bargaining outcomes (see above), the process of bargaining may exhibit evidence of a learning process. In this case, institutional processes play a key role in allowing states to evaluate ideas, revise older approaches and innovate. This evidence would provide a defence of institutionalism, emphasising the role of institutions in allowing free flows of information between individuals and groups to facilitate consensual bargaining. The institution serves states' aims and lowers their transaction cost of bargaining. The relevance of learning to bargaining in the 2004 IGC is that learning implies that agreement are consensual and that bargaining is non-zero sum. Indeed, for some academics, learning would imply no bargaining, but 'arguing' or 'problem-solving'.

24) ADLER (2003),

p. 99

25) KRASNER (2000), p. 134.

2. BARGAINING AS A ZERO-SUM PROCESS: ARGUING, PROBLEM-SOLVING AND BARGAINING

The North European literature has adopted different definitions of bargaining as the next paragraphs show. According to Elgstrom and Jonsson:

“The essential, defining difference between a bargaining and problem-solving approach (or between distributive and integrative negotiations, as these phenomena are also commonly called) seems to lie in their respective focus on self-interests versus common interests.”²⁶

Problem-solving implies that no one is worse off because of the decision made; it is non-zero sum or a pareto optimal solution.²⁷ Like learning, problem-solving is driven by the creative search for solutions.²⁸ Moreover, bargaining can imply the use of threats and manipulation, defined as coercion not bargaining above, but problem-solving is consensual.²⁹

Thus, the EU may be perceived as a bargaining arena implying that outcomes reflect lowest common denominator forces and that there is a joint decision trap.³⁰ Actors accept an outcome if that outcome is no worse than the status quo and also does not impinge upon their interests. This status quo bias implies that policies do not adapt to change.³¹ In contrast from a problem solving perspective, bargaining outcomes are determined by institutional processes and norms and the shadow of the future implies that actors will seek to compromise in anticipation that in the future other actors will also concede to their interests. Problem-solving is thus another term for co-operative bargaining according to rational institutionalists. Definitions of problem-solving and arguing are also similar in German international relations literature. Arguing and persuasion can be defined as non-manipulative reason-giving in order to alter actors' choices and preferences irrespective of their consideration of other actors' strategies'.³² In contrast bargaining refers to a more zero-sum neo-realist concept of negotiation:

26) ELGSTROM and JONSSON (2000), p. 684.

27) Ibid.

28) Ibid.

29) Ibid.

30) Scharpf cited in ELGSTROM and JONSON (2000), p. 686.

31) Ibid.

32) KLEINE and RISSE (2004), p. 8.

Table 1: Arguing and Bargaining as Models of Communication

Mode of Communication/ Characteristics	Arguing	Bargaining
Modal	Empirical and normative assertions and validity claims (assessment criteria, empirical proof and consistency and impartiality); based on argumentative power in the sense of good reasoning	Pragmatic demands with credibility claims (assessment criteria: credibility of speakers); based on bargaining power in the sense of material and ideational resources and exit options
Procedural	Relexive	Sequential
Possible Observable Outcome	Reasoned consensus, actors submitting to the better argument and changing interests/preferences accordingly	Compromise without change in preferences
Structural	Triadic (speaker and listener have to refer to some external authority to make validity claims)	Dyadic (only mutual assessment counts)
<i>Source: Ulbert et al, 2004, p. 4.</i>		

Arguing will lead to a consensus identified by the outcome being surprising, beyond the lowest common denominator and explained by actors in the same way.³³ Arguing has been found to be all-pervasive' during all phases of international negotiation, but it co-exists with bargaining, whereby:

“All actors must show their openness to ‘truth-seeking,’ and normative arguments. Hence, even more powerful actors may feel obliged to change their position in response to smaller actors’ arguing.”³⁴

According to this view, the IGC is less likely to involve arguing than the Convention because IGC members are given binding instructions and therefore have fixed preferences, the Convention's method was by consensus not by unanimity and the Convention method was more open – the IGC was 'behind closed doors'.³⁵ Thus, according to this view, the 2004 Dublin IGC will exhibit lowest common denominator decision-making not consensual learning or non-zero sum processes. In the remainder of this paper an overview of the Irish presidency's management of the 2004 is provided and applied to the above hypotheses.

33) RISSE, cited in Klein and Risse, (2004), p. 8.

34) ULBERT et al. (2004), p. 2.

35) KLEINE and RISSE, (2004), p. 10.

3. THE 2004 IRISH PRESIDENCY: BARGAINING PROCESS³⁶

The Nice Treaty and European Convention

The background to the Convention and hence to the constitutional treaty reflected cleavages after the Nice Treaty. The Franco-German relationship has been highlighted as a key determinant of the Convention bargaining process.³⁷ For example, French and German governments tabled a separate paper on judicial co-operation and on a new political committee to resolve conflicts about EU competencies.³⁸ The UK government was also argued to be ‘leading the dance’ in the Convention.³⁹

The Convention’s cleavages continued to exist in the negotiation of the constitutional treaty. Early in the Irish presidency, an agreement was reached not to unravel the Convention’s provisions. Consequently, only 10-15 per cent of the Convention’s text was amended by the draft constitutional treaty. In this way, the Convention had a significant input to the final treaty. The agreement to accept the Convention’s influence in itself may appear to reflect a shared interest, or cross-cutting cleavage among states. However, the bargaining process of the Convention did not reflect the existence of cross-cutting cleavages (see above). Therefore, underlying the Convention’s provisions and hence those which were retained in the constitutional treaty are inter-state cleavages.

Agreement to accept 85 per cent of the Convention’s proposals merely reflected an inter-state bargaining process which had already occurred. As this process was driven by more powerful EU states, the institutionalist, consensual, non-zero sum approach to bargaining does not appear to fit. Moreover, clearly, the issues on the bargaining table for the 2004 IGC reflected issues where state preferences diverged and a clear absence of cross-cutting cleavages, or non-zero sum issues existed. Table 2 summarises the key institutional issues and cleavages in the formulation process.

36) Material for this section was derived from interviews with key civil servants involved in the negotiation process.

37) PERDERSON (2003), p. 18

38) PERDERSON (2003), p. 19

39) Lamy cited in PERDERSON (2003), p. 19

Table 2: Institutional Issues and Cleavages in Treaty Formulation Process.		
Issue	Nature of Cleavage	Key Members of Cleavage
Composition of the Commission	Inter-state	Sweden, Denmark, Benelux, Ireland, Austria, Finland, most new states, especially Estonia, Czech Republic, Slovakia vs. large states
QMV/institutional rules:		
Maintaining double majority	Inter-state	Spain, Poland vs Germany, France (medium states vs. large states)
Maintaining Convention threshold	Inter-state	Finland, Austria, new member states vs France, Germany (to maintain Convention threshold; small/medium states vs. large states)
QMV for Taxation	Inter-state	France, Germany vs. UK, Ireland, all new states (Czech Republic and Hungary less opposed to QMV than other new states)
QMV for Own Resources	Inter-state	France, Germany, Benelux vs. UK
QMV for Justice and Home Affairs (JHA)	Inter-state	France, Germany, Belgium, Greece, Spain vs. UK, Ireland, Luxembourg, Portugal (to an extent)
QMV for Financial Questions	Inter-state	France, Germany vs. Netherlands
<i>Source: Interview with authors, Department of Foreign Affairs, July 2005.</i>		

Overall, three sets of issues dominated the bargaining process:

- ▶ Voting system: Double majority?
- ▶ Voting system:
 - QMV for tax, own resources, justice and home affairs (JHA)?
- ▶ Size of Commission
- ▶ Size of EP: not a conflictual issue in the end

Double majority: There was a cleavage between the large states and medium sized states about weighted voting. The Convention text proposed the introduction of a voting system based on a double majority, a majority of member states and states representing over 60 per cent of Europe’s peoples. This shift from the traditional QMV system was bitterly opposed by Poland and Spain who issued a joint statement on 29 September 2003 rejecting the new system.

On 26 November, the Italian presidency published a set of compromise proposals for a conclave of foreign ministers (28/29 November) that had the responsibility to prepare for the 12/13 December 2003 European Council.

As regards the double majority requirement, during the Irish presidency the Spanish government had a single-minded bargaining approach focusing on the thresholds for a double majority. The Polish government had a more complicated approach to this issue. The German government was willing to compromise and it gradually emerged that President Chirac would also compromise on aspects of the voting system, as long as the double majority was maintained. However, the French position initially was ambiguous and French preferences were not clear. The removal of the Spanish Prime Minister Azanar from power facilitated an easier bargaining process between France and Spain following Chirac's anger at Azanar's endorsement of the Iraq war. The UK government was 'agnostic' on this issue.⁴⁰

For negotiators of the treaty, a much bigger divide between states was about the gap between the two thresholds in the Convention and in the forthcoming treaty. The Finnish and Austrian governments were anxious to amend the gap agreed in the Convention, as they felt it favoured large states. They gathered substantial support mainly from new member states. The French sought to retain the threshold as they regarded it as recompense for supporting the double majority decision (an agreement they felt increased German power). The final outcome maintained the Convention threshold.

Size of Commission: During the Convention, the small states established a group called 'Friends of the Community Method'. This was followed by meetings in September 2003 among a large group of small states favoured the retention of the principle of one Commissioner per member state. In the early stages of the Irish presidency, the bargaining process centred almost exclusively on Poland, Spain, France and Germany with respect to the above double majority issue. However, counter-tensions then developed about the size of the Commission. Generally, the cleavage was between small states and large states on this issue, whereby small states wanted to retain their permanent seat on the Commission. In addition, the QMV issue precipitated various state responses, depending on the specific policy area.

40) Interview with authors, 23.03.05.

QMV: First, as in previous treaty negotiations, there was a cleavage between those states that favoured more intergovernmental control and those that favoured supranational outcomes. Germany, France and the Benelux generally favoured shifting more policy areas to QMV than those with a more intergovernmental approach. The United Kingdom was to the fore on this issue with a series of red lines on which it would not move.

For taxation, the lead states in the bargaining process were France, Germany and the UK. The leaders of these three states met separately to reach a compromise on introducing QMV for taxation. However, the Irish presidency intervened in May to accelerate this process. In fact, there was an awareness that the taxation issue was 'non-negotiable' for the British government and the French and German negotiators did not lobby beyond a certain point. However, in return they did seek QMV's introduction for JHA. The UK government offered QMV for this area, but subject to an emergency break and enhanced co-operation. The offer was rejected by Chirac who did not want any dilution of French proposals in this area.

However, despite French rejection, overall, by 14 June there was a broadly consensus about these key bargaining issues, mainly because for French and German governments, the priority was to reach a final deal by the end of the Irish presidency. Hence, overall they were willing to compromise with the British government. Small states and medium-sized states did not attempt to influence all contentious bargaining issues. Often, they enjoyed the support of a large state and relied on that state to achieve their preferences (for example, Ireland and the UK shared preferences on taxation). However, all small states had strong preferences on approximately two issues and concentrated lobbying on these issues. Thus, apart from the above large issues, there were additional issues of importance to specific states:

- ▶ Common Commercial Policy: Intense preferences for Sweden, Finland: sought unanimity and achieved it.
- ▶ Cohesion Policy: Greece wanted specific reference to 'islands' and achieved it.
- ▶ Social security: Denmark wanted re-writing of Maastricht protocol and provisions for social security for migrant workers achieved it?
- ▶ Public health: Sweden and Finland sought specific provisions
- ▶ Trade and services: Sweden and Finland sought specific provisions.

- ▶ References to implications of divisions of Germany: Czech Republic and Poland wanted these references to be deleted, as they argued no references were made to consequences of division of Europe in Cold War.
- ▶ Stability and Growth Pact: Netherlands wanted fresh commitment to this pact.

Overall, the key issues related to the nature of decision-making in the Union, the voice and representation of the member states, and member state control over sensitive issues. The Irish presidency presided over crucial stages of the bargaining process. In the next section an overview is provided of how the Irish presidency managed the above issues, before analysing the theoretical explanations for the bargaining process.

The Irish Presidency: Chronology of Events

Following the failure of the December Summit, the Irish presidency took over responsibility for the IGC. The Italian presidency made a break-through on security and defence that was not substantially re-opened during the Irish presidency. In the conclusions of the December summit, the presidency was mandated to 'listen, assess and report' back to the European Council in March. The mandate meant that the presidency's management of the IGC was in two phases. Phase one which ran from January to the end of March consisted of a series of very intensive bilateral meetings at political and official level with all member states. The presidency wanted to ensure that all member states felt that their concerns were listened to and that the Dublin team were in a position to make a judgement on where solutions might lie on the central issues. Working at both official and political level in a process of 'engaged listening' atmosphere improved considerably early March 2004. Although none of the member states had actually given up their negotiating positions, all member states were positive about reaching a final agreement during the Irish presidency. The Madrid bombings and the change of government in Spain altered the political context within which an IGC was conducted. The European Council in March gave the go-ahead for the completion of the negotiations in June.

The second phase of the presidency consisted of a pre-IGC bi-lateral phase in April and the IGC itself was re-convened in May. This consisted of a meeting at official level on 4 May (Focal Points), three ministerial meetings (17-18 May, 24 May and 14 June) and the European Council (17-18 June). The formal meetings

were augmented by continuous bi-laterals at official and political level with all member states. The presidency had to manage the dossier so that there were a sufficient number of meetings to get the work done but not so many that too many issues would be re-visited. The paper prepared for the focal point meeting at official level on 4 May had 50 annexes, which indicated how many outstanding issues remained on the table. The paper did not include any proposals relating to QMV, the issue that remained the most politically charged in the negotiations. The presidency objective was to get agreement on the 50 or so issues so that only the most contentious issues would remain on the table for the European Council. The Taoiseach, Bertie Ahern, insisted that as much as possible should be agreed going into the June Council so that political energy could be used to get agreement on the most contentious issues.

Following the focal point meeting, the presidency adopted its end-game strategy for the remainder of the IGC by preparing two documents for the Foreign Ministers meeting on 17-18 May. Although the presidency maintained the official position that 'nothing is agreed until everything is agreed', it presented two papers to the ministerial meeting:

Closed Document: consisting of 43 annexes consisting of those issues on which the presidency maintained there was 'broad consensus' and on which there was no need for further ministerial discussion.

Open Document: this document consisted of 15 annexes covering those issues on which further debate was necessary.

Again the presidency did not offer new proposals on weighted voting but included ideas concerning the composition of the Commission. Following the May ministerial meeting, the presidency produced a further paper (CIG 79/04) providing a revised set of draft texts so that those issues that were broadly agreed so that they would not be re-opened at the European Council. By this stage of the negotiations, the closed document, consisting of 49 annexes, is getting progressively thicker. The ministerial meeting on 14 June was designed to get agreement on most outstanding issues prior to the European Council. The ministerial meeting document dealt with 13 different issues aimed at delivering a 'fair overall balance between different delegations' views'.⁴¹ Based on the accumulated agreement from the earlier

41) CIG 80/04

meetings, the presidency prepared its final papers for the European Council, the final arena in which agreement would or would not be achieved.

The member states were given two papers, the open and closed documents, immediately prior to the European Council meeting. The closed document (CIG 81/04) had 57 annexes representing broad agreement on the text contained in that presidency paper. The open document was a discussion document designed to structure the debate on the outstanding institutional and non-institutional issues. Concerning the institutional issues, the presidency outlined its thinking on QMV, seats in the EP and made specific proposals on the composition of the Commission. The paper also dealt with a number of non-institutional issues relating to economic governance, the multi-annual financial framework and the legal status of the Charter as part of the constitutional treaty.

Following discussion on 17 June, the presidency made further proposals on 18 June in a document containing 14 annexes, which represented the outstanding issues in the negotiations. Following intense bilateral discussions, the European Council agreed the final text on the evening of the last day of the summit. The key breakthrough was agreement on the institutional package, the Commission, definition of qualified majority voting, seats in the EP and the implementation rules of the new system of QMV. The strategy of the presidency was to accumulate agreement by establishing a closed document, to reduce the number outstanding issues to a minimum for the European Council and to search for an 'overall and balanced agreement'.⁴² The documents prepared by the presidency are replete with references to 'balance among all Member States' and an 'overall balanced outcome on the institutions'.⁴³

The Irish Presidency: Analysis of Bargaining Strategy

There are some striking features of the above overview of the bargaining process. Firstly, the key approach adopted by the Irish presidency was to reach agreement on as many issues as possible before the culmination of the IGC. Where possible, individual states were left to attempt to reach their own compromise. However, if it became apparent that they were not succeeding, the Irish presidency stepped in (for example, the taxation issue debated by French, British and German leaders). The intervention by Bertie

42) CIG, 84/94, 1

43) CIG 82/04, 2

Ahern and his civil servants and the strong personal rapport developed by Ahern through his tour of European capitals appeared to contribute to successful Irish management of the IGC. By 14 June there was nearly a complete consensus on all the bargaining issues.

Secondly, a striking feature of the Irish presidency is the decision to seek the satisfaction of Franco-German preferences, where these two states agreed. This Irish decision meant that Irish preferences with respect to specific issues, for example, membership of the Commission and other 'small-state' issues were not advanced by an Irish presidency. An agreement was reached administratively that the EU division of Irish Department of Foreign Affairs would have autonomy from other civil service departments in negotiations – other key civil departments, for example, the Department of Finance would not intervene. Therefore, internal turf wars and attempts to achieve departmental interests did not undermine coherence. While this approach implied an admirable setting aside of individual Irish interests, it also reflected the influence of more powerful actors in the bargaining process. The rational institutionalist hypothesis that institutions enable small states to influence outcomes is thus undermined.

However, qualifying the above conclusion, where a small or medium-sized state concentrated resources on an issue of key national importance, the Irish presidency did engage strongly with that particular issue and generally, the specific state achieved its aims, if the issues were not central to large states' bargaining agenda. Indeed, such a scenario was outlined in the early institutionalist examinations of state bargaining.

Also qualifying the above hypothesis, the bargaining style adopted resembled one of 'problem-solving' rather than simple bargaining, implying the existence of consensual knowledge. Awareness of a need to work together in the future and needing future agreements ensured that all members sought to adopt a consensual approach to current bargaining problems – the 'shadow of the future'. This regime facilitated co-operation. Moreover, from the case of the Irish presidency there appears to be evidence that working together over time created psychological co-operative norms of behaviour.⁴⁴ For example, the Austrian government was willing to aid Irish endeavours to reach agreement because it remembered that the Irish government had not supported

44) ELGSTROM and JONSSON (2000), p. 688

EU sanctions against Austria when it voted into power an extreme right-wing party (interview, *op. cit.*). Accounts of the Irish presidency also depict a close alliance with British governments and a mutual knowledge between British and Irish governments about the other's behaviour and preferences based on its close relationship in devising policy towards Northern Ireland.

In the Irish presidency, the aim generally was to find a rational coherent way of dealing with divisive bargaining issues. Moreover, the presidency by engaging in bilateral talks with leaders had a bird's eye view of all state preferences and at times had more knowledge overall than individual member states. Thus it was able to instil a problem-solving approach to the IGC. While all states had their preferences, they sought a consensus, or package deal and acknowledged the importance of reciprocity in bargaining. In short, in contrast to strict bargaining, even if state governments sought to achieve their aims, they tended to care about the consequences of their bargain for others.

Apart from the shadow of the future and the need to ensure future IGC agreements, there was an awareness that the Italian presidency had not delivered a treaty and time was running out. The desire to reach an agreement by the end of the Irish presidency facilitated a problem-solving approach to negotiations for all states. Moreover, Azanar's government's election loss precipitated a warmer bargaining relationship between France and Spain, again lessening emphasis on zero-sum bargaining. Finally, in the process, it is noteworthy that the Commission played only a minor role. The Irish presidency relied more on the Council secretariat, both for its political 'know-how', but also for its drafting of the final texts. The Commission was always informed of developments, but did not play a key role.

The Dublin IGC exhibited a clear style of management with obvious success. However, from the above analysis, the international context was a vital background to its success: the Convention process itself, cleavages about the Iraq war, and the perceived need to reach a speedy agreement after the Italian presidency were significant factors. Clearly, a mixture of cross-cutting and inter-state cleavages characterised the formulation process of both the draft constitutional treaty and the Convention. The bargaining process was neither purely one of classical bargaining nor of arguing, but exhibited characteristics of both forms of negotiation. Different constellations of states were on different sides of each institutional debate, depending on the issue at stake. Cleavages were national, not cross-cutting: shared common

interests among all states on all issues did not typify negotiations. However, despite this, a problem-solving consensual approach existed.

Overall, the case of the 2004 IGC highlights the increasing complexity of the EU environment. Cross-cutting cleavages do not yet dominate the actual IGC bargaining process. However, contrary to classical intergovernmentalism, there are shifting constellations of divided cleavages with shifting membership. Moreover, background factors: the Convention, the perception of a limited timeframe to reach an agreement do constitute common interests, but not in the manner neo-functionalists and Europhiles would predict. The Convention, as argued above, also reflected a package deal based on inter-state cleavages. Overall, the three hypotheses drawn from an overview of bargaining theory cannot be either fully falsified or validated:

Hypothesis 1: *The 2004 IGC reflected a bargaining process which allowed small states to achieve their strongest preference:* partially valid: small states could achieve interests where large states did not prioritise the specific interest.

Hypothesis 2: *The Dublin IGC provides evidence of joint-problem solving and conceptualisation: non-zero sum process:* this hypothesis is valid, but the qualification must be made that on some issues such co-operative bargaining was not possible.

Hypothesis 3: *The Dublin IGC bargaining process reflected the interests and control of the more powerful states, not influence of the presidency or EU institution:* just as the above two hypotheses have only partial validity, so too does this intergovernmental hypothesis. The presidency did play a powerful mediating role. The institutional regime did appear to facilitate easier bargaining and small states did achieve some aims. However, where large states shared a consensus, their preferences prevailed (as Moravcsik would predict).

The above analysis has illustrated the multi-faceted nature of the bargaining process and the added dimension of the convention's draft that had a clear input into the constitutional treaty. The case of the Irish presidency is neither one of arguing nor bargaining, but a cocktail of both strategies.

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CHAPTER 4

Government Coalitions in the Institutional Reform Negotiations at the 2003/04 IGC

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Manja Klemenčič, M.Phil. is doctoral candidate at the Centre of International Studies, University of Cambridge. In her research, Manja analyses patterns of government coalitions in the last three EU institutional reform negotiations with specific focus on the Convention on the Future of Europe and the 2003/04 IGC.

SUMMARY¹

This article argues that IGC negotiations can be viewed as social interaction between predominantly *coalitions of governments* that put forward proposals on the scope and terms of cooperation within the framework of the EU. Coalitions are defined here as groups of states which coordinate their positions and act cooperatively on all or some negotiation issues. The article focuses specifically on EU governments' coalitional behaviour in the part of the 2003/04 IGC negotiations that dealt with the reform of institutions, which was, arguably, the most contested in the examined case. Four prominent coalitions are identified and their characteristics and 'binding factors' explained: the Franco-German, the Spanish-Polish, the Benelux, and the 'Friends of the Community Method'. In addition, the coalitional behaviour of the UK and Italy is also analysed.

INTRODUCTION

The 2003/04 Intergovernmental Conference [IGC] was unique in the history of EU treaty negotiations for three main reasons. First, it was the first negotiation exercise among the EU-25 with its substantively larger number of member states than the previous EU-15. Even though the ten candidate states had not yet formally joined the EU by the time the IGC started, the European Council decided that they would fully participate in the IGC.² Second, the pre-negotiation phase of the IGC was conducted in the novel forum of the Convention on the Future of Europe. The Convention prepared a Draft Treaty which framed the agenda for the IGC negotiations. Finally, the IGC concluded with the member states' agreement on the first-ever single-text constitutional treaty formulation of the constitutional order of the European Union [EU]. Although in view of the negative referenda results in the Netherlands and France the future of the constitutional treaty is uncertain, it has nevertheless made an important mark on the constitutional develop-

- 1) The author would like to that the participants of the Graduate Workshop on "The Constitutional Treaty: Anatomy, Analysis and Assessment", and especially Prof. Renaud Dehousse and Prof. Wolfgang Wessels for their constructive feedback to the earlier version of this article. Thanks go also to Dr. Julie Smith for her careful reading of and comments on the final version of this article. The author would also like to thank UACES and the European Commission for supporting the empirical research conducted in Brussels in 2004.
- 2) The accession of Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia took place on 1 May 2004 following the signature of the Accession Treaties on 16 April 2003 in Athens.

ment of the EU. Unsurprisingly then, a lot of scholarly attention has been concentrating on studying legal and political aspects of this treaty reform.

This article adds to this literature by directing the analysis of the constitutional politics of the 2003/04 IGC to the as yet relatively unexplored area of the coalitional behaviour of EU governments. In EU negotiations in general, coalitional behaviour is seen as a typical, even inevitable part of EU decision-making, in the areas covered by the majority-voting rules as well as in areas of unanimous decisions.³ It becomes even more important with EU enlargement, which increases the number of players in EU decision-making.⁴ This article argues that IGC negotiations can be viewed as social interaction between predominantly *coalitions of governments* that put forward proposals on the scope and terms of cooperation within the framework of the EU. Coalitions are defined here as groups of states who coordinate their positions and act cooperatively on all or some negotiation issues.⁵ As pointed out by negotiation scholars, the choice of coalitional behaviour is one of the key strategy choices for governments involved in multilateral negotiations.⁶

It is surprising then that not more scholarly attention has been dedicated to the analysis of EU coalitions.⁷ This is particularly the case concerning coalitional behaviour in a unanimity-rule setting, such as treaty negotiations. Although nearly every account of treaty reform negotiations makes some reference to coalition-formation and dynamics,⁸ almost none of these works makes conceptual distinctions between different coalitions that emerge, or investigates systematically why and how these coalitions came about. There are two prominent exceptions, however.

One work that focuses explicitly on coalitions associated with treaty negotiations is '*On Cores and Coalitions in the European Union*' edited by Pijpers.⁹ Pijpers' edited work includes a series of article addressing the 'cores' and coalition patterns in the EU at the time of the 2000 IGC, paying special

3) Elgström et al (2001): 114; Wallace (1990): 222-223.

4) Elgström et al (2001); Hosli (1999).

5) Najam (2001): 31.

6) Midgaard and Underdal (1977).

7) Many scholars perceive that there is a dearth of scholarly work on governments' coalition behaviour and coalition patterns within the EU. Elgström et al. (2001): 112; Kaeding and Selck (2005): 272.

8) Beach (2005); Closa and Fossum (eds.) (2004); Edwards and Pijpers (1997); Laursen (1992); Laursen (ed.) (2002); Laursen and Vanhoonaeker (eds.) (forthcoming January 2006); Moravcsik (1999); Stubb (2002).

9) Pijpers (ed.) (2000).

attention to the position of selected medium-sized and smaller member states. The work gives important empirical insights on the characteristics of ‘cores and periphery’ in the areas of EU foreign and defence policy and the monetary union, and describes the bilateral and multilateral relationships of Spain, the Nordic countries, and the Benelux. Although the work offers important empirical evidence on the nature of the coalitions within the EU, there is no coverage of the theoretical implications that these findings might have on the European integration literature.

A work that does show some theoretical interest in coalition-formation is an article by DuPont on coalitions in the Single European Act negotiations, entitled ‘*Coalition Building: using power to build cooperation*’.¹⁰ DuPont discusses and applies different methods of classification to emerging coalitions in the Single European Act negotiations (and comparatively in the Uruguay round) to be able to explain their formation, strategies and effectiveness. By doing so he draws attention to qualitative differences among the coalitions and the importance these have on the general dynamics of the negotiation process and outcomes.¹¹ The rather complex typology of the emerging coalitions arguably does not help clarify the complex social reality of coalition-formation in the EU. However, his work is important not so much for the typology of coalitions he proposes, but by offering an account of different methodologies for conceptually distinguishing between, and consequently codifying empirically observed differences in, coalitions.

The present article focuses specifically on EU governments’ coalitional behaviour in that part of the 2003/04 IGC negotiations which dealt with the reform of institutions. These were, arguably, the most contested and the most prominent issues in the examined case. Changing institutional provisions is particularly difficult since these issues lie at the centre of the debate about the balance of power among EU member states and between member states and EU institutions. The outcomes of institutional reform hence impacted upon an individual member state’s capacity to defend its interests within the EU and influence the course of development of European integration. The outcome is expected to be *long-lasting*, since there is an expectation of stability attached to institutional outcomes, and also *uncertain* given the uncertainty regarding future circumstances that may have impact on EU decision-making.

10) DuPont (1994).

11) Ibid.

There were two kinds of contested institutional issues that induced governments’ coalition strategies in the negotiations examined here: (1) those that deal with distribution of power between member states, and (2) those that deal with distribution of power between member states and EU institutions.

(1) The institutional provisions concerning the nature of the voting system in the Council of Ministers, the composition of the European Commission and the mode of the Council presidency raised profound disagreements between the smaller member states and the larger member states which both – for different reasons – feared losing their influence within the EU and accordingly sought to invoke changes to these provisions. Not all issues were equally pressing to all member states. The bargaining regarding the definition of the system of qualified majority voting [QMV] in the Council of Ministers was conducted for the most part between Spain and Poland, which favoured the status quo, on the one side, and France and Germany, who favoured change, on the other side. We see the UK playing a pivotal role here, ‘selling’ support to either side in exchange for concessions on the not directly related issue of the scope of use of the QMV. Once it became clear that change was to come about, the old smaller states (Austria, Finland, Ireland, Portugal, Greece, Sweden, Denmark, Czech Republic, Cyprus, Hungary, Estonia, Malta, Latvia, Lithuania, Slovakia and Slovenia) gathered in the ‘Friends of the Community Method’ as well as the Benelux got involved to ensure that the terms of the changed system would retain as much as possible the balance between the small and the large.

Concerns about the composition of the European Commission and the Council presidency were much more clearly divided along the small-large states line of division, and tended to be perceived by most of the states as vital for their national interest. The small states within ‘Friends’ (with exception of the Benelux) pressed for the retention of the rule of one Commissioner per member state which they saw as vital for adhering to the principle of equality among member states.¹² The majority of small member states (with the prominent exceptions of Sweden and Denmark) also argued in favour of retaining the rotating presidency system for the European Council, while the large states suggested establishing a new

12) See the proposal submitted by the group of ‘Friends’ to the Convention ‘Reforming the Institutions: Principles and Premises’ (CONV 646/03). See also the Benelux proposal on the functioning of the institutions (CONV 457/02).

position of an elected President.¹³ The final outcome on both issues clearly shows that although smaller states ‘lost’ on both points, the effect of their coalitional effort was, nevertheless, visible. The reduction of the Commission to two thirds of member states represented would take place only as of 2014, and this provision could be changed by the Council acting by unanimity.¹⁴ In addition, a declaration was attached guaranteeing equal rotation among the member states ensuring geographical and democratic balance. Large states did, however, get an increased number of Vice-Presidents (whom it was assumed would predominantly come from the large states). The new post of an elected President was agreed upon, but only for the European Council, and not for the Council of Ministers formations, where the rotating presidency would still apply. Furthermore, the president’s competencies were narrowly limited so as not to overpower the role of the Commission President, whose status was accordingly upgraded.

(2) Among the institutional provisions concerning the balance of power between member states and EU institutions, the question of the extension of the scope of the use of QMV (and correspondingly the co-decision procedure) was the most contested. While, as in past treaty reforms, there were a number of ‘maximalist’ states which argued for a substantive extension of the procedure in order to retain the efficiency of decision-making in the enlarged Europe, almost every member state had some ‘red lines’ in the form of areas in which unanimity should be retained. The coalitional patterns in this area were much more diffused than in the question of distribution of power. The UK had prominently announced its ‘red lines’ in the areas of defence policy, tax harmonisation, social security rights and ‘own resources’, in addition to treaty reforms.¹⁵ However, unlike in the past, it was not alone on these points. For example, Estonia and Cyprus were also firm proponents of unanimity in the area of tax harmonisation, and so, among older members, were Ireland, Sweden and Luxembourg. Denmark also as usual sought to retain unanimity in the area of social policy and ‘own resources’. Differences on these points occurred even

13) Birklbauer (2004). See also the Franco-German proposal on the reform of institutions tabled to the Convention (CONV 489/03).

14) See ‘Treaty Establishing a Constitution for Europe, as approved by the Intergovernmental Conference on 18 June 2004’.

15) See ‘A Constitutional Treaty for the EU. The British Approach to the European Union Intergovernmental Conference’ (2003).

within stable coalitions, such as France-Germany (on foreign and defence policy) and the Benelux countries (where Belgium was more in favour of extension of QMV to Justice and Home Affairs, tax harmonisation and social and economic policy and health policy, than either Luxembourg or the Netherlands). Thus the Italian Presidency (in 2003) and Irish Presidency (in 2004) that coordinated the IGC adopted a strategy of breaking-up coalitions on these issues in order to be able to trade concessions across individual issues. What we could see in this area was a plethora of issue-by-issue coalitions defending a ‘minimalist’ position on one or a few issues. The outcome of the IGC was an extension of the use of QMV in 44 policy areas, as compared to the provisions currently in place.¹⁶ However, the traditionally sensitive areas of foreign and defence policy, social and tax policy and multi-annual financial framework would remain subject to unanimity voting.

In summary, the outcome of the 2003/04 IGC negotiations on the institutional provisions clearly carries imprints of the action of various member state coalitions. Most of the coalitions had already emerged in the pre-negotiation phase of the Convention on the Future of Europe, and indeed many had existed also during the past institutional reforms leading to the *Treaty of Amsterdam* and the *Treaty of Nice*. Although, this article refers to all examples of concerted action among groups of member states as ‘coalitions’, there are clearly also substantial differences among them. This article seeks to explain what the key characteristics of these coalitions were, whether we can typologise them, and how we can explain the governments’ key motives behind the particular pattern of coalitions that occurred. The article proceeds in two steps. The following section presents the analytical framework used for answering these questions. First, the section draws observations from negotiation theory on the characteristics of coalitions and coalitional choices. Second, four explanations of coalition-patterns in EU negotiations are derived from rationalist and constructivist scholarship, inspired by studies of coalitional patterns in EU legislative processes by Elgström et al; Mattila; and Selck and Keating.¹⁷ The final section analyses each of the coalitions in turn, highlighting their characteristics and assessing the explanatory potential of the four different explanations of the coalition patterns for the present case study.

16) Wessels (2004).

17) Elgström et al (2001); Kaeding and Selck (2005); Mattila (2004).

ANALYTICAL FRAMEWORK FOR STUDYING GOVERNMENT COALITIONAL BEHAVIOUR IN THE 2003/04 IGC NEGOTIATIONS

The function of coalitions in multiparty negotiations is usually presented as two-fold: managing complexity and power-enhancement.¹⁸ In the words of Hayes-Renshaw and H. Wallace, '[c]oalitions simplify complex negotiations by reducing the range of alternative options and by identifying the strength or weakness of particular groups of supporters or opponents of a proposed settlement'.¹⁹

Government tends to opt for coalition membership when it expects to achieve something that it would not be able to achieve on its own, or even possibly if it believes that in the coalition it would be able to achieve as much as it would on its own. In the latter case the governments is motivated by interests in developing strategic relationships to which it could return in future negotiations.²⁰ The government must, in principle, agree with the purpose of the coalition, believe in its success – whatever that is in a specific situation – and be aware of the costs either in material form or as opportunity-cost preventing it from collaborating with other actors.²¹ Through membership of a coalition, the actors' collective and individual relative power is hence expected to increase through access to new resources: either through accumulating necessary votes in majority-voting environments, or by pooling resources (human, financial, information) that give them a comparative advantage over other actors, or simply by creating an image of wide support behind a particular proposal.²² Although coalitions naturally occur in a QMV setting, Elgström et al point out that coalitions have a purpose in a consensus-seeking environment as well, when in principle all actors have equal power through the veto right: 'process coalitions might be formed during negotiations with the purpose of demonstrating combined strength, to put emphasis behind the persuasion effort, or to boost morale among a group of advocates'.²³

18) DuPont (1996): 61.

19) Hayes-Renshaw and Wallace (1997): 251.

20) Midgaard and Underdal (1977): 340.

21) *Ibid.*: 341-342.

22) Lewicki, Saunders and Minton (Eds.) (1999): 322.

23) Elgström et al (2001): 114.

However, despite the indisputable benefits that participation in a coalition may have for a country's potential success in negotiation, coalition-formation does not happen automatically, and it is not always seen as the best strategic choice. Joining a coalition can be costly because governments might need to compromise on their own preferences in negotiations in order to come to an agreement on a unified position. Midgaard and Underdal point out that when more parties are involved in a coalition, it is 'more difficult to decide on own moves and to find satisfactory solutions to problems involved'.²⁴ Intra-coalitional negotiations leading to such a common position can be difficult especially if they involve many parties. This additional negotiation level can in turn potentially endanger the efficiency of the negotiation process as a whole.²⁵ As Midgaard and Underdal suggest, coalitions as pluralist actors tend to be 'rather slow and inflexible actors' as their decision-making capacity is lower than that of a unitary actor.²⁶ The decision-making capacity of the coalition depends on the number of participating actors, their homogeneity in terms of subscribing to the same norms of behaviour, ideology and past experiences of collaboration, as well as the convergence of interests on negotiation issues. Participation in a coalition may also incur material costs in terms of investment of administrative, financial and time resources, but also opportunity costs in terms of giving up other coalitional options. The decision on whether a coalitional strategy is a viable negotiation strategy will, hence, also include such calculations as the time and resources necessary to establish and maintain relationships.²⁷

As with any other behavioural choice, contextual variables play an important role in governments' decisions whether to opt for coalitional strategy. The likelihood of coalitional behaviour in EU treaty negotiation depends on institutional factors (the number and composition of parties, rules and procedures), but also on non-institutional factors, such as uncertainty and political risks, and countervailing interests and power.²⁸ The generally accepted proposition with regard to the impact of contextual variables on coalition-formation is that the more parties; the more uncertainty; and the more conflictual interests there are, the higher is the proximity for coalitions.

24) Midgaard and Underdal (1977): 332.

25) Hampson and Hart (1995): 49; Midgaard and Underdal (1977): 343.

26) Midgaard and Underdal (1977): 343.

27) Ostrom (1999): 44-45.

28) Pierson (2000); Thelen (1999).

tional-behaviour.²⁹ In view of these propositions, I assume that the IGC context, as well as the preceding Convention, is conducive to coalitional behaviour. The number of members has increased significantly with the enlargement; and in the Convention a host of other actors (national and European parliamentarians) were also involved. The situational complexities increased accordingly, and this added to the uncertainties inherent in decisions on institutional provisions. As indicated above, the institutional provisions also tend to be highly contested among the member states. The questions then poses themselves: what were the key motivations for governments in choosing to cooperate with other governments in the form of a coalition? and what types of coalitions occurred as a result?

Patterns of coalition-formation

Inspired by scholars who have studied patterns of coalition-formation within the EU legislative processes, I derive hypotheses from the two leading – and often presented as conflicting – approaches to social explanation: rationalism and constructivism.³⁰ Although a considerable amount of prominent scholarly work on governments' strategic behaviour in treaty negotiations has followed the rationalist paradigms,³¹ there has been a new wave of social constructivist oriented works pointing out to the weaknesses in rationalist explanations and offering alternative views on governments' motivations and the role of institutions in treaty reforms.³²

According to rationalist scholarship, governments' behaviour follows the generic postulate of rational action: 'actors are rational insofar as they choose their actions from the range of available *options* that best serve their *ends*, given their *beliefs* about available strategy options and their probable consequences'.³³ The institutions – rules, norms, procedures and organisational bodies – constrain the behaviour of governments and provide opportunity structures.³⁴ They themselves, however, do not have an autonomous impact

29) Elgström et al (2001); Midgaard and Underdal (1977).

30) Elgström et al (2001); Kaeding and Selck (2005); Mattila (2004).

31) Hug and König (2002); König and Brauningner (2004); Magnette and Nicolaidis (2004); Moravcsik and Nicolaidis (1999).

32) Christiansen (2002); Falkner (2002a); Falkner (2002b).

33) Little (1986): 45. Note that 'beliefs' are mentioned in rational-choice theories in terms of strategy options and strategy preferences. This is different from the usage of word 'belief' in constructivist approaches, where it refers to ideological inclinations and values.

34) Wallace and Wallace (eds.) (1996): 159.

on negotiation outcomes. The rational-choice explanation of governments' strategic action can then be put into a simple equation: the pre-determined preferences and information and beliefs about available strategy options in a negotiation situation determine governments' choices of strategising, and hence also choices of coalitions. These choices follow instrumental motivations, i.e. calculating means and costs to obtain predetermined goals.

This article takes into consideration those accounts that suggest that the rationalist assumptions of a governments' capacity to choose between various alternatives on the basis of clear – exogenously defined – preferences in an information-rich environment, may be overstated.³⁵ It is unrealistic to believe that all governments will have fully formed preferences when they start the negotiations, especially when dealing with the complex institutional options. If they do not have fully formed preferences which they seek to attain, then their behaviour might be driven also by some other motivations, such as learning and gathering information in order to formulate preferences or building strategic relationships. A more complete picture of governments' behaviour emerges if we consider – as maintained by social constructivist scholarship – that governments' behaviour might also reflect socially constructed and widely-recognised world views and shared normative notions of 'appropriateness' enshrined in the institutions and emerging from the interactions within the EU polity.³⁶

Social constructivist approaches suggest that all elements of rational-action models – actors, interests and preferences – are 'socially constructed'; they emerge from actors' interaction with institutional structures.³⁷ The EU as a polity consists of a system of principles, rules and procedures that are enshrined in EU institutions and might have socializing effects on governments acting in this polity.³⁸ National governments acting on the EU level *socialise* into these shared understandings which consequently influence their identities and preferences. Hence, EU institutions determine 'not only what actors can do, but influence also their perceptions and preferences – and thus what actors will want to do'.³⁹ Governments' actions might thus be driven also by non-instrumental motivations, especially under conditions of uncertainty and bounded rationality.

35) Stubb (2002); Sverdrup (2002).

36) Fligstein and Sweet (2002); March and Olsen (1989); Powell and DiMaggio (1991).

37) Johnston (2001); March and Olsen (1989); Powell and DiMaggio (1991).

38) Risse and Wiener (1999): 776.

39) Scharpf (2000): 770.

In view of this ‘methodological openness’, this article derives explanations from both rationalist and social constructivist scholarship in order to guide the empirical analysis of governments’ motivations for coalition-formation and to test the explanatory potential of individual explanations on the case of EU institutional reform negotiations in the context of the 2003/04 IGC.

The rationalist literature offers *power-based* and *interest-based* explanations of coalitional patterns. Power-based explanations focus on the actors’ power considerations as the key motivation for collective strategising. The logic is that a group of states is better able to affect the interests of other actors than a state acting alone.⁴⁰ Goal-oriented governments can be expected to be choosing the collective strategy in view of strengthening their relative power or the force behind a proposal they would like to see accepted.

Governments are reluctant to stand alone against a proposal because this has reputational and relationship costs which are a heavy burden to bear in the repetitive and ongoing EU negotiation environment. Hence, influence still lies in the number of governments supporting a certain initiative. The more governments ally behind a proposal, the more difficult it becomes for the opposing governments to use the veto. Using the veto on initiatives that many other governments strongly favour brings with itself reputational costs. The disagreeing parties can expect that they will be reciprocally sanctioned in the future and might have difficulties levying support for their own proposed initiatives. Governments, hence, congregate in order to display a joint force behind a proposal or to pool resources which will enhance the relative power of the group in relation to other groups or individual states.

States with more resources, i.e. larger and wealthier states, are expected to be at the centre of coalition-building since: (i) they have more means to offer side-payments or concessions on other issues; (ii) their support weighs more than that of the smaller states because they have more leverage when it comes to negotiations in other policy areas where alternative coalitions can be formed;⁴¹ and (iii) their veto threats have more lever-

40) Leigh-Phippard (1996).

41) Moravcsik (1993).

age (again because smaller states fear reciprocal blocking actions of their proposals in other policy-areas). The key to understanding the power of large states in institutional reform negotiations is in recognising that EU negotiations are interlinked and continuous. The choices of a government in one negotiation situation matter for other negotiation situations.

The ‘policy-based’ or ‘interest-based’ explanation of coalition-formation posits that coalitions are formed when there is congruence in the actors’ interests.⁴² Policy distance between individual actors is, hence, the key determinant of coalitions. The primary goal is to get the specific shared interest realised, which means there is no immediate expectation of cooperation on other issues. Interest-based coalitions are predicted to be issue-specific and short-term.⁴³ The more congruent the members’ interests, the more formal and active becomes the coalition.⁴⁴ To establish the prevalence of interest-based coalitions in the case study, I will seek to identify those coalitions that cooperate on a single issue or very few issues among the institutional provisions and do not display any formality of the arrangement.

The social constructivist account offers two further explanations of coalition patterns: *ideology-based* and *culture-based* coalitional patterns. Ideology-based explanations posit that coalition-formation among governments is driven by ideology (i.e. policy distance, similarity in world views and values to which the governments subscribe). Different aspects of a government’s ideology will be pertinent to different policy areas. On institutional issues, the pro-integrationists or intergovernmentalist views and the large-small state dichotomy prevail.⁴⁵ On economic and social policies, the left-right divide is relevant as it captures governments’ (and their publics’) positions on two sets of issues: intervention-free market issues, such as welfare policies, unemployment and inflation; and liberty-authority issues, such as environmentalism and minority rights.⁴⁶ In principle then, governments that share party political affiliations (belong to the same European party family) should be more likely to form coalitions given the similarities in their views.

42) Bilal and Hosli (1999); Elgström et al (2001); Kaeding and Selck (2005).

43) Elgström et al (2001): 120; Kaeding and Selck (2005): 274.

44) DuPont (1994).

45) Magnette and Nicolaidis (2003); Tsebelis and Garrett (2000).

46) Hix, Noury and Roland (2005): 218; Hooghe, Marks and Wilson (2002).

The coalitions based on ideological/party-political bases will have a broad issue agenda (agreeing on the issues that are covered by the shared ideology), and may therefore change with changes of governments.⁴⁷ Whereas attitudes to the future of European integration may alter as governments change, the principles linked to the size of populations are clearly not. Hence, in terms of the size of the countries, we should in principle see rather stable coalitions over time. These coalitions also do not necessarily share party political affiliations.

The culturally-based explanation of collective-formation highlights the importance of cultural affinity in terms of similar language, history, and general cultural characteristics that in most cases may be the result of geographical proximity.⁴⁸ European Studies literature refers extensively to patterns of long-term relationships within the EU which are based on long-term strategic interests and/or cultural affinity. In particular, the focus has been on the prominent Franco-German relationship, the Benelux group, and Nordic cooperation, but also other groupings typical for specific policy areas.⁴⁹ The basis of these coalitional arrangements is long-term common interests. This does not mean that the countries within the collective always vote homogeneously, but that they vote similarly on certain issues.⁵⁰ Most of the long-term partnerships tend also to share geographical proximity and hence cultural affinity. The argument is that the necessary trust for a collective endeavour is easier to build up if the countries are culturally (and usually geographically) closer. In such cases, it is plausible to believe that the costs in terms of the time and resources devoted to establishing and maintaining relationships or establishing a reputation of being reliable and trustworthy are lower.⁵¹ This explanation predicts that the coalitions will have a broader agenda, and are likely to be long-term and formalised (given the established trust and long-term relationships).

47) Kaeding and Selck (2005).

48) Elgström et al (2001): 120; Kaeding and Selck (2005): 275.

49) Closa (1995); Morgan and Bray (1986); Pedersen (1998); Pijpers (2000); Wood (ed.) (1995).

50) Elgström et al (2001): 118.

51) Ostrom (1999): 44-45.

Figure 1:
The key rationalist and constructivist explanations of coalition-formation

Rationalism		Constructivism	
<i>Power-based</i>	<i>Interest-based</i>	<i>Ideology-based (party-political affiliation)</i>	<i>Culture-based (geographical proximity)</i>
Coalitions will form with or around the most powerful actors.	Coalitions will be issue-specific and short-term.	Coalitions will have a broad agenda based on ideological and/or party political affinity. Changes to coalitional patterns may take place if governments change.	Coalitions will be stable over time and the same coalition patterns will occur in different issues areas.

Characteristics of coalitions and typology

The different explanations above have already indicated that different types of coalitions may exist. The most frequent parameters and corresponding types of coalitions in EU studies are the following: (i) permanence (*ad hoc* and long-term); (ii) scope of the cooperation (issue-specific and widely-based); and (iii) depth of cooperation (formal and informal).⁵² Whereas the rest of the parameters are rather straightforward, the one regarding the ‘depth of cooperation’ needs a few words of explanations. Najam offers a number of criteria as to how to determine the depth of cooperation, i.e. the ‘formality’ of coalition:⁵³ a) the existence of written statutory documents with defined decision procedures (such as code of conduct or a treaty), i.e. ‘how does the group maintain and display its unity?’; b) the existence of a formal structure defining different functions in the collective and corresponding roles (such as the presidency or the chair); c) the regularity and formality of meetings and information exchange, and d) the expectations of joint public statements and communiqués.

Combining a number of the parameters, we can develop a taxonomy of the *strategic and tactical coalitions* that appears to be particularly relevant to the present study.⁵⁴ Tactical coalitions are present-oriented. The shared

52) DuPont (1994); Hayes-Renshaw and Wallace (1997): 251.

53) Najam (2001): 80-81.

54) This taxonomy is taken from Hayes-Renshaw and H. Wallace, who mention tactical and strategic coalitions, but do not define them. Hayes-Renshaw and Wallace (1997): 251.

motivation among the governments for their formation is jointly to attain a particular shared outcome on one or more issues in a particular negotiation situation. Tactical coalitions do not in principle imply an expectation of future collaboration among the members. The members of tactical coalitions do not invest any further resources into relationship building apart from those that are strictly task-oriented. In summary, tactical coalitions are ad-hoc (although they might be recurrent on the same issues), issue-specific, and informal.

In contrast, strategic coalitions are first and foremost future-oriented. Members are particularly concerned about the anticipated future, which can be influenced through collaboration, rather than the present negotiation. In view of this, members may also be more willing to compromise on the contested issues in the present in order to maintain the collaboration in the future. In a sense, strategic coalitions are a way of strategic positioning for future negotiation situations: identifying issues that might come up or that states wish to bring on the agenda, and thus influence the development of European integration. In summary, strategic coalitions tend to be long-term, with a broad issue-agenda and more formalised cooperation.

Given the permanent, interlinked and iterative character of EU negotiations, we need to take into consideration the occurrences of coalitional behaviour in the past institutional reform negotiations in order to be able to fully establish the character of observed coalitions.⁵⁵ Issues in institutional reforms tend to overlap between different negotiation situations, and hence there can be also continuities of coalitions. Negotiators tend to replicate their past behaviour, if it has been successful, in subsequent negotiation situations. In choosing their actions, governments seek to interpret the lessons from their historical experience – the institutional learning – and make it relevant for the current situation.⁵⁶

Two institutional reform negotiations are directly linked via such continuities to the studied case: the 1996/97 IGC leading to the Treaty of Amsterdam and the 2000 IGC leading to the Treaty of Nice. Furthermore, the pre-negotiation phase of the 2003/04 IGC took place in the framework of the Convention on the Future of Europe. In order to fully understand

55) Elgström and Smith (2000): 676; Pierson (1996); Sverdrup (2000).

56) March and Olsen (2004): 9.

the characteristics of coalitions and the constitutional coalitional dynamics in the 2003/04 IGC, one needs to take into consideration the coalitional behaviour of governments during the Convention, and in the previous IGCs dealing with similar institutional questions.

ANALYSIS OF COALITIONS

This section analyses the coalitions on institutional provisions formed by governments in the 2003/04 IGC negotiations. It discusses in turn the characteristics and development of the four most prominent coalitions: the Franco-German, the Benelux, the Spanish-Polish and the Friends of the Community Method. It also describes the behaviour of the UK and Italy.

France and Germany

France and Germany have a long history of intense bilateral cooperation. The cooperation was formalised in 1963 with the Elysée Treaty which paved the way for regular exchanges between the national cabinets of both countries and regular meetings at all levels of administration. European integration scholars have written extensively about the Franco-German alliance as the driving force of European integration and a motor behind all major treaty reforms.⁵⁷

During the Amsterdam and Nice IGCs, the traditional Franco-German block appeared to be loosening, however, as the states developed divergent interests on the institutional issues. Germany had become more assertive, demanding more constitutional powers that would better reflect its size, which had significantly increased after reunification in 1990. France joined the UK in advocating the need for institutional rebalancing towards upgrading the relative power of large states, which had been reduced by the accession of predominately smaller states.⁵⁸ France's ideas on the future of European integration also appeared to be closer to those of the UK than those of Germany. When the German Foreign Minister Joschka Fischer proposed a European Constitution in a speech at the Humboldt University in Berlin, the reactions in France were mixed. Speaking to the

57) Morgan and Bray (1986); Pedersen (1998); Peterson and Bomberg (1999).

58) Blair (2000); Chirac (2000).

Bundestag in June 2000, President Jacques Chirac did not oppose the idea of a Constitution, but was more negative about the prospect of a European federation.⁵⁹ The French concept of European policy was reasserted by Prime Minister Lionel Jospin in May 2001 when he spoke of ‘doing Europe without undoing France’, alluding to the traditional French affinity for a strong Europe, while seeing Europe predominantly as a means for realising national interests.⁶⁰ Furthermore, Germany’s image as an independent political power – rather than being in tandem with France – appeared to be strengthening due to the enlargement by Eastern and Central European countries with strong economic and political ties to Germany.⁶¹ At the same time, France’s role in the EU was weakened due to the domestic problems related to ‘cohabitation’ and disagreements on the French European policy between the Gaullist President Chirac and the Minister for Europe from Jospin’s centre-left government, Pierre Moscovici. Moscovici was a vocal opponent of transposing the German federal model to the European Union and sceptical of Chirac’s commitment to a tight Franco-German partnership.

The French elections of 2002 put an end to the internal rivalries of the ‘cohabitation’ which had had an effect on French European policy.⁶² The French government became increasingly interested in strengthening the partnership with Germany. France’s reputation within the EU had been in decline not least due to the unsatisfactory Nice Treaty negotiations under its Presidency. France was also increasingly aware that a united Germany was less dependent on France than West Germany had been, and that it increasingly aspired for an independent role within the EU. Since France undoubtedly still wished to exercise leadership within the EU, it realised that it was important to nurture its relationship to Germany carefully and pragmatically.

The critical moment in the Franco-German partnership on institutional issues happened during the Convention with a joint statement entitled ‘Franco-German friendship at the service of a common responsibility for Europe’ released at the occasion of the 40th anniversary of the signing of the Elysée

59) Chirac (2000).

60) Guerot, Hughes, Lefebvre and Egenhoff (2003).

61) Ibid.

62) In November 2002, Dominique de Villepin replaced Pierre Moscovici as the new Minister of Foreign Affairs in Jospin’s government and as the representative in the Convention and on the IGC.

Treaty on Franco-German solidarity on 14 January 2003. In the statement, President Jacques Chirac and Chancellor Gerhard Schröder announced two joint initiatives. Firstly, they confirmed the intention to strengthen their bilateral cooperation through including regular attendance by ministers of each country Cabinet meetings in the other, and examining possibilities for approximating legislation in certain areas. They also agreed on holding a Franco-German Council of Ministers’ meeting which would assemble all ministers from the two countries. Additionally, they agreed to designate a Secretary-General for Franco-German cooperation in each country.

Secondly, they announced that they would offer a joint proposal on the reform of the institutional system to the Convention on the Future of Europe. Given the past differences, it was clear that an intra-coalition compromise was not easy to achieve. The countries still had different ideas regarding the development of European integration. Germany has traditionally been a supporter of the Community method with a preference for strengthening the European Parliament and the European Commission. France has traditionally inclined towards strengthening the intergovernmental arms of the EU – the Council of Ministers and the European Council. The joint proposal to the Convention (CONV 489/03) was, hence, a compromise between the federalist and intergovernmentalist inclinations of either of the countries. The compromise reflected Germany’s preference for stronger EU institutions (the Commission President elected by the Parliament and approved by the European Council) and the French (not to mention British and Spanish) insistence that decisions in key areas must remain with the national governments (strengthening the European Council by having a position of elected President).⁶³ At the press conference following the celebration of the 40th Anniversary of the Elysée Treaty, President Chirac commented as follows on the intra-coalitional trade-off on the institutional proposal:⁶⁴

‘... France agreed to the Commission President being elected by the European Parliament, and Germany agreed to the European Council being headed by a president elected by qualified majority by the Council for a once-renewable two-and-a-half-year term or a single one of five years.’

63) This was the so-called ABC initiative by Prime Ministers Aznar and Blair and President Chirac.

64) Chirac (2003).

The Franco-German proposal received serious criticism from the members of the Convention, in particular those from the smaller states. The proposal was even put to the vote in the governmental component of the Convention on the initiative of the Greek Presidency representative; it was overwhelmingly rejected.⁶⁵ Rather than welcomed as a compromise between federalist and intergovernmentalist visions of Europe, the proposal was widely perceived as a hegemonic attempt by both countries to direct the institutional reform of the EU.⁶⁶ The proposal appeared to further motivate the smaller member states towards strengthening their coalition in order to prevent a Franco-German dominance. Austrian government representative Birklbauer points out that the Franco-German proposal in the Convention presented a real ‘booster’ for the coalition of the ‘Friends’ and their effort to come up with a joint proposal on institutional reform.⁶⁷

Interestingly, in the area of institutional issues, we do not see any further public displays of Franco-German relationship during the Convention. Both countries tabled amendments to proposals, but they tabled them strictly separately.⁶⁸ To be sure, their positions were basically convergent or one or the other governments did not have an opinion. Yet, it seems that the strategy was to downplay – for the duration of the Convention – the partnership in order to prevent a further rising of tensions with other governments.

The coalition came back to the forefront at the IGC, first, when it defended the constitutional draft treaty and appealed for its acceptance unchanged, and, secondly, when it was confronted with firm opposition from Spain and Poland over the change of the qualified majority voting system in the Council of Ministers. The issue of the system of QMV became one, if not *the*, key point of dispute during the IGC and had a high priority for both France and Germany. Both EU Presidencies coordinating the negotiations attached great importance to Franco-German concerns, and kept them actively involved in the negotiations. All Franco-German proposals on major institutional issues – including the revision of the majority voting system – were enshrined in the final Treaty document. Independently,

65) Confidential interview with Slovenian official in Ljubljana 15 November 2004.

66) Confidential interview with Portuguese official in Brussels 11 November 2004.

67) Birklbauer (2004).

68) See ‘Proposed amendments to the text of the articles of the Treaty establishing a Constitution for Europe’ on the website of the European Convention <http://european-convention.eu.int/> [last visited 16 October 2005].

France achieved its key objectives of establishing the positions of an elected President of the European Council and a Union Minister of Foreign Affairs, and Germany succeeded in getting the Commission President elected by the Parliament, although it failed to extend QMV in CFSP.

In conclusion, in the Convention and the IGC negotiations, we observe France and Germany’s mutual accommodation of each others’ vital interests in order to secure the strategic objective of maintaining the partnership.⁶⁹ Germany and France’s shared concern to nurture their bilateral partnership was not matched by attempts to cultivate their relationships with other member states. Neither Germany, which in the past had often joined with Benelux in advocating the interests of smaller states and the Community method, nor France, which was perceived to be condescending toward the newcomers, made an effort to cooperate with other governments. This behaviour of the Franco-German tandem led to a fair amount of mistrust and resentment among the other governments. Hence, their ‘isolated block-like behaviour’ did not contribute to the reuniting of Europe, but instead seems to have caused new divisions between the EU countries, especially concerning the institutional and organisational arrangements of the EU.⁷⁰

The Franco-German relationship during the 2003/04 IGC can be best described as a strategic coalition based on a long-term relationship, a broad issue-agenda and displaying unity externally through joint proposals and public appearances. There were several motives behind the coalition. Most importantly there has been the cultural affinity resulting in mutual understanding and trust which has facilitated the long-term cooperation. Secondly, there were certainly power considerations, both in terms of influencing the institutional outcome of the IGC, and more broadly, to offer leadership to the enlarged Europe. Both countries shared the view that there would be a need for leadership in the enlarged EU to keep the integration process on track. They each saw the Franco-German coalition as particularly suited to offering this leadership given the past role it has played in the integration process. The words of Chancellor Gerhard Schröder, in a more recent speech to the Bundestag on July 2, 2004, illustrate this idea well: ‘Progress in European integration can and will only take place if France and Germany are as united as possible’. Ideologically, they had dif-

69) Confidential interview in November 2004 with a French government official.

70) Dehousse, Maurer, Nestor, Quermonne and Schild (2003).

ferences in terms of federalist versus intergovernmentalist visions of the EU (as well as party political difference between both parties in power – French conservative and German socialist), however their views were much more convergent on the principles related to the size of countries which were equally (if not even more) present in the negotiations.

Spain and Poland

A Spanish-Polish coalition that emerged at the end of the Convention and continued during the IGC was a novel constellation in EU politics. Spain has been a member since 1986 while Poland only joined the EU in the May 2004 enlargement. The comparable size of the countries (both medium-sized) resulted in the emergence of convergent positions on representation in the EU institutions, and especially on the question of the distribution of votes and the voting system within the Council of Ministers. The institutional interests were reinforced by some other issues preferred by both conservative governments, such as a reference to Christianity in the constitutional treaty, close relationships with the US and support for the Anglo-American war on Iraq.

At the same time, both states aspired to a greater role within EU decision-making.⁷¹ Under Aznar, Spain was eager to become more ‘respected’ at the EU level. It was interested in pursuing issues which would strengthen its position vis-à-vis other European states, especially France and Germany.⁷² Poland, as the largest of the new accession countries, had similar aspirations. The Polish were especially sensitive to the balance of power with Germany and this relationship was part of the national debate on the EU constitution. Being close to national elections, it was especially important for the government to show the voters that it was able to defend the national interest.

The similarities between the two countries helped the Spanish in recruiting Polish into a coalition to defend retaining the Nice formula on the definition of QMV. It is not surprising that this was a vital issue for Spain given its bargaining behaviour in particular during the 2000 IGC. In Nice, large states bargained against losing their second Commissioners if a rule of one commissioner per member state was introduced. Spain had a special inter-

71) Confidential interview on 10 September 2004 with a Polish government official.

72) Chari, Egea de Haro, Benoit and Laver (2004). Confidential interview on 1 July 2004 with a Spanish government official.

est in this regard. As it had retained the right for the second commissioner as a compensation for not being in parity with the four large states in the Council following the Amsterdam Protocol, it stoutly demanded compensation in terms of voting weights in the Council. This demand was indeed realised and the same ‘upgrade’ in terms of votes in the Council of Ministers was granted also to Poland in view of its potential accession to the EU.

Thus when the Convention reopened the discussion on the QMV system, Spain naturally opposed the reform and eventually (towards the end of Convention) recruited Poland to its cause. In fact, Poland’s initial reaction to the proposal on the change of the Nice formula in the Convention was favourable. It was due to Spain’s guidance and arguments on why their relative position within the EU decision-making would worsen if the Nice formula was changed, that its positions shifted and it formed a coalition with Spain.⁷³ There was no common proposal or amendment on institutional provisions tabled by the both governments for most of the Convention negotiations.

The signals of disagreement with the new proposed formula on QMV came from the Spanish government representative Dastis (also a member of the Praesidium) towards the end of the Convention in May 2003. Dastis managed to rally support from Denmark, Poland, the UK, Sweden, Austria, Ireland, Lithuania and Cyprus for the retention of the Nice formula not only for the system of voting in the Council of Ministers, but also for the composition of the Commission and the distribution of seats in the Parliament.⁷⁴ However, in the end, this support was diluted and Dastis did not manage to influence the Convention outcome. Both the Spanish and Polish governments expressed their dissatisfaction with the outcome on the issue of the definition of QMV and announced that they would seek to reopen it during the IGC.⁷⁵

While Poland kept a rather low profile during the Convention, it came out much more forcefully on the issue of QMV system before the beginning of the IGC. During the Convention in 2002 Poland was still undergoing the accession negotiations and in 2003 it was preparing for the EU accession

73) Confidential interview with a Polish official in Brussels, 10 September 2004.

74) Norman (2003): 2.

75) Confidential interview with a Polish official in Brussels, 10 September 2004 and Spanish official in London, 1 July 2004.

referendum to take place in June 2003. At the same time, Poland also had problems domestically within the coalition government which in March 2003 led to one of the coalition partners, the Polish Peasant Party, leaving the coalition, as well as a number of deputies from the leading Democratic Left Alliance leaving to form a new party.⁷⁶ Hence, the Polish government's political priorities were not focused on the Convention. The real involvement started only after the positive outcome of the accession referendum. Thus by the start of the IGC Polish government's priorities clearly stated that apart from the reference to Christianity and security issues, it was also concerned about the number of Commissioners and in particular the threshold for qualified majority voting in the Council.⁷⁷

The beginning of the IGC was marked with the public emergence of a coalition between the Spanish and Polish governments with the main priority of defending the system of weighted votes agreed upon in Nice. The two countries held regular consultation meetings.⁷⁸ Foreign Ministers Palacio and Cimoszewicz wrote a joint article, 'How to keep a balance in Europe's new Treaty', published in Financial Times, arguing for retaining the Nice agreement.⁷⁹ Within a month President Kwasniewski and Prime Minister Miller had visited Madrid. On the occasion of Kwasniewski's visit on 30 September 2003, Spain and Poland issued a joint declaration on the forthcoming IGC, in which they reiterated their position on retaining the Nice formula for the QMV voting system.⁸⁰

The Spanish-Polish coalition was concerned firstly that, according to the formula proposed by the Convention, the states with a high percentage of population compared to the total EU population would improve their influence on the Council decisions. At the same time, the formula would reduce the influence of several members (apart from Spain and Poland also Czech republic, Hungary, Belgium and Portugal). Secondly, and most importantly, the new formula considerably reduced the Spanish-Polish capacity to block Council decisions. This was particularly sensitive as in

76) After the 2001 elections, the government consisting of the Democratic Left Alliance (with Prime Minister Miller) in a coalition with Polish Peasant Party and the Labour Union had a strong anti-EU front in the Parliament (the League of Polish Families and the Self-defence).

77) Trzaskowski (2004): 61. Confidential interview with Polish official in Brussels 10 September 2004.

78) Confidential interview with Polish official in Brussels 10 September 2004 and Spanish official in London 1 July 2004.

79) Palacio and Cimoszewicz (2003).

80) Spain and Poland (2003).

Nice Spain and Poland had been upgraded to a position of near parity with the large states in this regard and Prime Minister Aznar had claimed this result as a personal negotiation victory.

As the IGC started under the Italian Presidency it became apparent that the voting system in the Council would become one of the most disputed issues in the negotiations as Spain and Poland on one hand, and France and Germany on the other, appeared determined to fight to realise their position. On the eve of the Brussels European Council Summit in December, it was clear that both sides would be taking a tough line on the issue of QMV system. Poland became as a fierce defender of the Nice formula as Spain during the IGC. Given that both countries also had a good relationship with the UK, there was a joint effort for raising the UK's support (or at least ensuring that the UK would not support France and Germany) on the QMV voting system in exchange for their support on the British 'red lines' concerning the extension of the QMV to areas of taxation and CFSP. Having the request for pro-active support also from France and Germany, Britain found itself in a pivotal role between both coalitions trading support in exchange for the concessions on its preferred issues.

The Brussels Summit ended with the break-down of negotiations. The IGC resumed under the Irish Presidency and the Spanish-Polish coalition remained largely intact until the change of government in Spain following the elections on 14 March 2004. However, with the new socialist Prime Minister José Luis Rodríguez Zapatero, the Spanish strategy in the IGC shifted towards a more conciliatory tone. Whereas the People's Party was emphatic about protecting national interests and sought alliances with countries left out from the Franco-German tandem, the Socialists were keen to be part of Franco-German axis and willing to accept its leadership.⁸¹ Zapatero stated that he would try to overcome the isolation of Spain created by the former Prime Minister Aznar, and he decided to reformulate the negotiation problem from 'whether double majority formula can work' to 'what double majority formula can work for Spain'.⁸² This effectively meant that Zapatero had declared his intention to accept the Convention proposal on the QMV system which consequently led to the Polish government expressing its willingness to adopt a different approach in negotiations to

81) Magone (2004).

82) Ibid.

avoid damaging its reputation for future negotiations, most notably the upcoming budget negotiations. That was, however, not the end of the coalition. Once it was clear that the formula would be changed from the Nice, Spain and Poland continued to collaborate in raising the threshold of population and specifying the blocking minority requirement. Following Spanish-Polish insistence, the final Treaty includes a provision which specifies that a blocking minority must include at least four Council members which ensured that the large three states alone – France, Germany and the UK – should not be able to block a proposal.

In conclusion, the Spanish-Polish coalition emerged only towards the end of the Convention and became more visible only in the IGC. Regular meetings and joint public statement display a high level of coordination of strategic actions in the coalition. It was built on shared – and in both cases intense – preferences over the QMV voting system combined with convergent, if not equally intense, preferences for the reference to Christianity and composition of the Commission (where they sided with the small states). Both countries also had similar aspirations on strengthening their role within EU politics. The shared interests and ideology, combined with mutually reinforcing power considerations (and to lesser extent strategic preferences), best explain both countries' choices for forming a coalition. Although Spain acted as the initiator of the coalition it does not appear that there was asymmetry in decision-making within the coalition. Poland soon rose to an equal level partnership with Spain. During the IGC, the Spanish-Polish coalition sought to build tactical partnerships with the UK (on the definition of the QMV in exchange for support over the scope of QMV), and with the small countries (supporting one Commissioner per member state rule again in support for the Nice definition of QMV).

The UK

Traditionally, the UK has been at the forefront of the intergovernmentalist block in the EU. Joined by Denmark and often Sweden, it has argued for the intergovernmental method of decision-making, distrusted towards supranational integration, and envisaged the EU as an upgraded version of a free trade area. However, the position of the UK within the EU has been changing. With 1997 election of a new Labour government under Prime Minister Tony Blair, the UK began to seek a more active role in the centre of the EU rather than playing the role of the sceptic 'outer-ring'

member.⁸³ What appeared to be a new British European strategy has had potential effects on the position of the Franco-German axis, and opened new opportunities for trilateral cooperation as well as other coalition constellations involving the UK.

The British government – although initially sceptical about a Convention on a Future of Europe – prepared early and systematically to defend its interests. Although the British government cared about all the institutional provisions, its most important concern was the use of QMV in traditionally sensitive areas. In the White Paper published in September 2003 on the 2003-04 IGC the Government stated:⁸⁴

'In many areas, the use of majority voting has benefited the British economy. [...] But we will insist that unanimity remain for Treaty change; and in other areas of vital national interest such as tax, social security, defence, key areas of criminal procedural law and the system of own resources (the EU's revenue raising mechanism). Unanimity must remain the general rule for CFSP, as proposed in the final Convention text.'

These points soon became known in the Convention as British 'red lines'. In order to defend its 'red lines' British built a number of strategic partnerships with various other governments concerned, mostly with the traditional allies Sweden and Denmark, but also with many of the new accession states. The strategic partnerships with the new accession states are particularly interesting. British understood that many of the prospective accession states might be sensitive on issues of sovereignty due to their recently acquired independence and may well join the intergovernmentalist block. Since it had been very supportive towards the enlargement, this provided a helpful foundation for potential future strategic relationships. Examples of this strategic partnership-building are well illustrated by the joint paper by Prime Minister Blair and Polish Prime Minister Miller on 'The Future of Europe: Bringing Europe closer to its Citizens' in 2001,⁸⁵ and the joint article by Prime Ministers Juhan Parts of Estonia and Tony Blair on 'An enlarged Europe needs competition' published in 2003 in Financial Times.⁸⁶

⁸³ Smith and Tsatsas (2002).

⁸⁴ Foreign and Commonwealth Office London (2003).

⁸⁵ Blair and Miller (2001).

⁸⁶ Blair and Parts (2003).

In contrast to Germany and France which largely ignored the newcomers, Britain actively involved them, offering guidance and support, and raising their support for British positions.⁸⁷ The British targeted all countries, but especially Poland given its large size and history of partnership, and Malta as a member of the Commonwealth, but also Estonia, Czech Republic and others.⁸⁸ Obviously Britain sought to create public displays of strategic partnership with as many new-comers as possible. Also, contrary to the past, UK's managed to construct the reputation of being a more cooperative and less problematic member state, especially among the newcomers. However, its reputation was not without blemishes. Many newcomers believed that Britain approached them opportunistically – arguing in favour of issues it cares about and asking for support, while its willingness to reciprocate this support on issues which were of importance by some of the targeted countries remained in some doubt.⁸⁹

To be sure, the UK did not only ask for support, it also gave it to other countries. In the closing stages of the Convention, the UK supported Spain and Poland and a group of smaller states in defending the Nice deal on qualified majority voting and the number of commissioners. On both questions, the UK was rather indifferent, and maintained a low profile until near the end of the Convention. Since it did not expect especially the new member states to withdraw from the Nice compromise of one commissioner per member state at least until the EU reached 27 members, it saw accepting this proposal as a way to trade-off on the permanent chair of the Council. It also calculated that the support for Spain and Poland on the system of QMV might be reciprocated by in their support against the use of QMV in the field of taxation.

In conclusion, during the Convention and the 2003/04 IGC, Britain developed a number of tactical bilateral coalitions on single issues with states that had convergent interests on these matters. Although the cooperation did not raise expectations on the future cooperation, it nevertheless built strategic relationships which may be rebuilt in future negotiations. Apart from tactical coalitions with the member states, the

87) Confidential interview with government officials from new member states in Brussels on 19 September 2004.

88) Only Britain's relationship with Cyprus (among the newcomers) was at the time of negotiations probably at the lowest point in history due to the conflicting positions on the Cyprus problem.

89) Confidential interview with a Czech government official in Brussels on 19 September 2004.

British government also kept strategic links to both Presidencies during the IGC. In the same way it was also strategically offering support to both France-Germany and Spain-Poland in order to obtain their support on its red lines. In all these examples, Britain was motivated by a combination of power considerations and shared interests. Ideology did indeed play a role in particular when it came to the intergovernmentalist character of the member states. Shared culture could be seen as an explanation only in the case of Ireland, but there also cooperation only happened when their interests were convergent.

Italy

Contrary to the British who adopted the 'pro-active loner behaviour' by choice, Italy, arguably ended in such a role due to the absence of a clear governmental position or a clear negotiation strategy on institutional issues. In the past, Italy often used to ally itself with the large states and/or the pro-integrationist block, given its traditional national consensus on promoting the furthering of European integration. With the government of Prime Minister Berlusconi, Italy's position within the EU and its views on the future of European integration became at best unclear. The centre-right coalition which succeeded in the parliamentary elections in 2001 was internally divided on many issues, including EU issues. Italian governments are notorious for being unstable and fragile coalitions of different parties with rather divergent views. Berlusconi's government is no exception. *Forza Italia*, the party with the largest number of seats claims to be pro-European, however, rejects that EU would move closer towards a federation. *Alleanza Nazionale*, the second largest party, is nationalistic and hence EU-sceptic. *Lega Nord* is similarly EU-sceptic, but has (unsurprisingly) a strong interest on the role of the regions within the EU, and the *UCD* (the Christian Democrats) appear the most pro-European of all.

In such situation it is no surprise that Italy arrived to the Convention without set preferences on any (including institutional) issues and with deep divisions between its numerous representatives (including the government representatives).⁹⁰ What could be observed then was a series of individual (rather than coordinated) contributions and amendments by different Italian representatives, which sometimes even appeared to be contradictory.

90) Riccardi (2003).

On the one hand we could observe Italy supporting the ‘ABC initiative’ for strengthening the role of the European Council, and at the same time Italian representatives claimed to unconditionally support the positions in favour of safeguarding the Community method, particularly the role of the Commission.⁹¹ Prime Minister Berlusconi had, however, made clear that Italy was moving away from the traditional pro-integrationist camp towards closer ties with the sceptic British and Spanish governments (with which it also shared views regarding the transatlantic relationships and the war on Iraq). This position was also confirmed by the appointment of the (EU-sceptic) vice-premier Fini as the government representative in the Convention.⁹²

The only visible attempt for coalition-building by Italy during the Convention was taken up by the Vice President of the Convention, Giuliano Amato (former Prime Minister of Italy). He launched the idea of re-establishing the cooperation inside the Convention among the six founding European Communities countries with the purpose of maintaining and re-launching the ambitions and objectives of the founding fathers.⁹³ The Italian government representative Fini and the Minister of Foreign Affairs Frattini were interested in the idea which they felt could provide them a springboard for more pro-active involvement in the Convention.⁹⁴ They were trying to initiate a ‘Declaration of the Founding Countries’ of the European Communities that would be announced on 25 March 2003 at the anniversary of the signature of the Treaty of Rome.⁹⁵ The idea was that the ‘Six’ would with the declaration ‘affirm their fidelity to the values that lie at the root of European construction’ and that ‘the fundamental traits of the institutional architecture should be safeguarded, maintaining the balance between the institutions and strengthening both the European Commission and the Parliament’.⁹⁶

The initiative, however, did not materialise. The coalition would be possible only on a very broad agenda since the Benelux countries had strong reservations regarding the Franco-German institutional proposal on full-time

91) Ibid.

92) Confidential interview with a representative from Italian government in Brussels 27 September 2004.

93) Riccardi (2003).

94) Ibid.

95) Agence Europe, 14 February 2003.

96) Ibid.

President of the European Council. Furthermore, Italy was the only country among the ‘Six’ which has back the war on Iraq.⁹⁷ A plausible explanation for the caution shown by the other governments is that they might have learnt from the experience of France and Germany, whose joint paper was received with great suspicion for trying to dominate the EU agenda, and feared that the same reaction could occur towards ‘the ‘Six’ had they come out more pro-actively.⁹⁸ The ‘Six’ met again at the beginning of the IGC, however, again without any visible agreement on common strategy. This attempt by Italy serves as an example of a failed attempt at forming a coalition in the negotiations.

During the IGC, Italy took over the role of the Presidency which automatically excluded it from coalitions. Its main position during the Presidency was to keep the Convention Draft as unchanged as possible, which was also the position of France and Germany,⁹⁹ and to conclude the negotiations during its Presidency. There were only few countries that had been perceived to have access and hence influence on the Italian government during the Presidency: France and Germany, the UK, Spain and Poland and to some extent the Benelux. Others largely felt marginalised. Given the failure of the Italian Presidency to secure a deal on the constitutional treaty, the role of the Italian government remained low profile also throughout the Irish Presidency.

The Benelux

The Benelux states have traditionally acted as a block and have in the past been a driving force for issues of economic and monetary cooperation. In the last years, apart from the historical ties, there was also a good working relationship between the three Prime Ministers – Kok, Dehaene and Juncker – which further facilitated their cooperation.¹⁰⁰ During the 1996/97 IGC, the three countries expressed a firm commitment to strengthening the contacts and coordinating their positions in view of playing a leading role in the negotiations.¹⁰¹ During the IGCs leading to both the Amsterdam and Nice Treaties, the Benelux was at the forefront of defending the

97) Ibid.

98) Riccardi (2003).

99) Ibid.

100) Bossaert and Vanhooacker (2000).

101) Ibid.

Community method in terms of strengthening the role of Community institutions – including strengthening the role of the Commission President and extending the European Parliament’s co-decision procedure as well as further extension of the QMV. As such, they clearly defended the small states’ interests and proved to be experienced and important interlocutor for newer members, such as Finland, Austria, Sweden and the new accession countries observing the negotiations.¹⁰²

However, it also became clear during these negotiations that the countries were not as homogenous as they would like to appear. In the Amsterdam Summit, the Dutch Presidency proposed a modification of the weighting system favouring the large states that would also mean the end of the parity in terms of votes between Belgium and the Netherlands. Furthermore, in the IGC 2000, the Netherlands appeared to be more flexible than Belgium and Luxembourg on some of the institutional provisions that were of key importance for the small states.¹⁰³ Points of disagreement included the voting system in the Council (Belgium and Luxembourg defending dual majority and the Netherlands supporting reweighing of votes) and the extension of QMV to fiscal matters (Luxemburg against).¹⁰⁴ Still, with the enlargement pending and the new constitutional debate on the future of Europe approaching, the Benelux decided to signal that they shared ideas about the future of Europe. In the Benelux Memorandum on the IGC and on the Future of Europe (CONFER 4787/00) they reaffirmed their shared pro-integrationist sentiment and argued that the reforms of the EU needed to be based on the existing institutions and that ‘the Community method must form the main route to European integration’.

When the Convention on the Future of the EU began in 2002 and the Convention president Giscard d’Estaing had presented his ‘constitutional skeleton’ in October 2002, the Benelux countries found it to be too inter-governmentalist oriented and realised that there was a need to strengthen their cooperation in order to promote a more communitarian development of the Union. Not only had they decided to strengthen their Benelux partnership, but also the alliance with other ‘like-minded’ small states. In

102) See ‘Benelux Memorandum on the Intergovernmental Conference’, 5 May 1996; ‘Benelux Memorandum on the Intergovernmental Conference’, 8 December 1999; and ‘Benelux Memorandum on the IGC and on the Future of Europe’, The Hague, 29 September 2000.

103) Bossaert and Vanhoonaeker (2000).

104) *Ibid.*

October 2002, they jointly formed a group which they called ‘Friends of the Community Method’ and which consisted of the existing small EU member state governments. The aim of the group was to support the EU institutional balance as enshrined in the Community method.

Despite participation in the ‘Friends of the Community Method’ group, the Benelux nevertheless decided to act alone. In December 2002, the Benelux submitted to the Convention a joint proposal on the functioning of the institutions (CONV 457/02 11 December 2002). The proposal included many of the issues shared also by other small states, such as the extension of the cooperation procedure; the Commission President being elected by the Parliament; and firm opposition to a President of the European Council elected from outside the circle of its members and for a long period. However, unlike most of the other small states, the Benelux was willing to retain the Nice decision that the size of the Commission be eventually reduced. The Benelux countries managed to overcome their internal divisions and come up with a common position on most of the key institutional provisions. Probably the biggest dispute between the three country was regarding the use of the QMV and co-decision where Belgium was more in favour of its extension to such areas as migration, tax harmonization, social and economic policy and health policy, than Luxembourg or Netherlands. Nevertheless, during the Convention, the Benelux states appeared as a firm bloc. Unlike any other group, they consistently filed joint proposals and amendments.

There are two explanations for Benelux’s behaviour. One is that they believed that in a very large and diverse coalition, such as the ‘Friends’, it would be very difficult to come to a compromise that would be specific enough or go far enough for the Benelux interests to make an impact in the Convention.¹⁰⁵ Specifically, they thought of the participation of the traditionally intergovernmentalist states such as Sweden and Denmark. Furthermore, at the end of 2002 a decision was taken within the ‘Friends’ to extend the group to include also the new small accession states. This invitation was, however, not completely without hesitation. There was uncertainty about how ‘Community Method-oriented’ the newcomers truly would be and whether they would not be lured away by the intergovernmentalist governments with concerns on protecting their

105) *Ibid.*

recently-gained sovereignty.¹⁰⁶ Benelux states were especially doubtful,¹⁰⁷ whereas Austria, Finland and Portugal, despite doubts, found it strategically important to maintain the coalition of small states. Benelux believed that it would be strategically very damaging for the group's influence in the Convention if a substantive number of members of the group were to shift sides during the Convention.¹⁰⁸ Most of the members of the group of 'Friends', especially the accession states, held it against Benelux to have chosen to stay outside 'Friends', believing that this strategy was damaging to the interests of the small states.¹⁰⁹

Whereas the Benelux coalition was preserved throughout the Convention, it started loosening during the IGC. On most of the institutional issues they still agreed – including to jointly change the position on the rotating Presidency and accepting the elected President of the European Council (CIG 53/03 24 November 2003) – but the IGC opened the issue of the use of QMV on which the three countries had considerably divergent views. While Belgium wished for as much extension as possible, Luxembourg was wary of tax harmonization and social and migration policies. The Netherlands had reservations about extensions to budget negotiations which were also favoured by Belgium. Hence, their partnership loosened, partly due to the divergent interests, and partly due to the Presidency's strategy of negotiating with the states individually and trying to break-up coalitions, .

In conclusion, the Benelux states are a strategic coalition brought together through cultural affinity and shared views regarding the future of the EU. In the examined negotiations, they have stayed together also for power considerations even though their interests were divergent on many issues.

Friends of the Community Method

During the Convention the small countries established the so-called 'Friends of the Community Method' group which focused especially on the debate concerning the institutional provisions. The group could be seen as a formalisation of the small states' cooperation during the Amsterdam

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Confidential interviews with government officials from Austria in Vienna on 15 October 2004, Estonia in Brussels on 17 September 2004, Czech Republic in Brussels on 17 September 2004.

and, especially, the Nice Treaty negotiations. In Nice, the then ten small states – Benelux, Austria, Denmark, Greece, Ireland, Portugal, Sweden and Finland – gathered around the position of retaining the rule of one commissioner per member state.¹¹⁰ This was clearly the key issue which held the group together. While countries like Ireland, Portugal, Greece, Austria and Finland also agreed on many other institutional issues, the more EU sceptic Denmark and Sweden tended to be rather ambivalent about allegiance.¹¹¹ The group, although stressing its informal character, has, however, displayed a high level of coordination in terms of meetings and joint strategy for work in the Convention and press conferences. In the first three months until December 2002, the small states from the existing member states including Benelux met frequently to discuss their positions and possible coordinated action in the Convention.

In the December 2003, the Benelux countries presented their own institutional proposal to the rest of the group of 'Friends'.¹¹² During the meeting it became evident that there was divergence in the views regarding the composition of the European Commission for which Benelux were willing to accept the Nice arrangement and the rest of the group argued for return to the rule one Commissioner per member state.¹¹³ At the same meeting, a decision was taken that the accession states would be invited to join the group.¹¹⁴ By February, all new accession states were included in the group. By that time, the leadership of the group was clearly in the hands of the Austrian, Greek, Finnish, Irish and Portuguese representatives. The Benelux states indicated that they were happy to participate with the group on shared interests, but would not formally be part of the group.¹¹⁵

According to Austrian government representative Birkbauer, 'the real booster for the coalition of like-minded and its ambition to forward a common institutional paper was [...] – besides the Praesidium's refusal to establish

¹¹⁰ Confidential interviews with government officials from Austria in Vienna on 15 October 2004 and a Belgian government official in Brussels on 17 September 2004.

¹¹¹ Ibid.

¹¹² Birkbauer (2004).

¹¹³ Ibid.: 162. There was, however, an indication that within the Benelux, Luxembourg was more inclined towards retaining one Commissioner per member state rule. This was evident much later when on 12 June 2003 at the end of the Convention Luxembourg co-signed the 'Friends' proposal which included insistence on this particular rule.

¹¹⁴ Ibid.

¹¹⁵ Confidential interview with a government representative from Portugal in Brussels in September 2004, and from Belgium in September in Brussels 2004.

a working group on institutions – the submission of the Franco-German contribution of 15 January 2003.¹¹⁶ Equality of states and support for the Community method, along with the preservation of the institutional balance, the guiding principles in the formation of the group, eventually translated into a group proposal ‘Reforming the Institutions: Principles and Premises’ (CONV 646/03), submitted to the plenary by sixteen government representatives in the Convention (all of the small states except the Benelux). The paper highlighted the group’s support of the preservation of the rotating presidency; one Commissioner per member state; extension of QMV; and joining the positions of High Representative and External Relations Commissioner. Denmark and Sweden, traditionally intergovernmentalist countries, were co-signatories of the paper, however on condition that the paper explicitly mentioned that there were two governments who were willing ‘to examine the idea of an elected chair of the European Council’. The Convention outcome was on many points below the expectations of the small states. It was clear, therefore, that certain issues such as the composition of the Commission and the system of Council Presidency would need to be reopened at the IGC.

As the IGC progressed, the deal appeared on trading off the small states’ concession on accepting the elected President of the Council in exchange for the one Commissioner per member state rule. In the meantime, however, the battle regarding the definition of the QMV system was still being fought, and the small states felt that they had little if any access to the Italian Presidency with their issues. They felt as a group and individually as small states largely marginalised.¹¹⁷ After the breakdown of negotiations in December 2003, the Irish Presidency took over which made a point in negotiating with all. After it became clear that the QMV system would change, the group was eager to negotiate terms favourable to smaller states. They advocated the parity of population and member state thresholds and small gap (no less than 10%) between these. Despite the earlier dealings on the question of the composition of the Commission and the system of Presidency, these remained open basically until the end of negotiations in June 2004.¹¹⁸ In the final outcome, the decision was made to reduce the size of the Commission to two thirds of member states, but only as of 2014,

116) Birkbauer (2004): 164.

117) Ibid.

118) Confidential interview with Portuguese and Estonian government official and Italian Presidency official in Brussels in September 2004.

and this provision could be changed by the Council under unanimity. In addition, a declaration was attached guaranteeing that when the size was reduced, there would be an equal rotation among the member states having a Commissioner. The ‘Friends’ conceded accepting the new post of an elected President for the European Council, however, the President’s competencies were narrowly limited so as not to overpower the role of the Commission President, whose status was accordingly upgraded.

The formation of ‘Friends’ displays strong interest-based motivations as well as ideological affinities pertinent to the size of population. Power considerations also drove the coalition-formation as the small states perceived that in large number they were more able to ensure that their interests were not ignored by the larger states. The most evident example of this is the fact that Denmark and Sweden which have more intergovernmentalist preferences, nevertheless decided to be part of the group in defence of the common small states’ interests. The ‘Friends’ could be typologised as a tactical coalition although with more formalised cooperation that indicated that some of the members had aspirations for building a more strategic coalition. There was no real expectation of future cooperation as a group on other than ‘small state’ issues. However, it might have provided a springboard for (re)emergence of other sub-groups of ‘Friends’, such as the Visegrad group or Nordic states or the Central European Regional Partnership.

CONCLUSION

In the 2003/04 IGC negotiations, the coalitions of governments can be divided into two main types: strategic and tactical coalitions. France-Germany and the Benelux displayed all main characteristics of strategic coalitions: their relationship was long-term, the scope of issues they covered was broad and their cooperation was formalised regular meetings, joint proposals and public statements. The binding factors in both cases are clearly cultural affinities in combination with geographical proximity which have led to building long term relationships and with them mutual understanding and trust. Both coalitions also displayed a high level of ambition in influencing the negotiation outcomes, and hence were motivated to cooperate in view of increasing their relative power. What is particularly important is that the coalitions did not form on the basis of clearly convergent interests. In fact, in both cases the joint posi-

tions on institutional issues resulted from intra-coalitional trade-offs and compromises. In both cases, the 'size identity' led to ideological affinities in regard to the question of balance of power between the member states, however, the states had ideological differences when it came to the question of the extension of the QMV. Probably, the most important factor in overcoming the differences, apart from the past relationships was the fact that both coalitions were eager to maintain the partnership also in the future. This goal of 'strategic positioning' or the future was especially pertinent in the view of the EU enlargement.

With Spain-Poland as with the 'Friends' the prospect of future cooperation is much less clearly identifiable. The coalitions formed around shared interests, seeking relative-power enhancement and having mostly 'size-identity' related ideological affinities, as the newcomers' position on the federalist-intergovernmentalist dimension was not yet clearly formulated. Hence, I categorise them as tactical coalitions, however more stable and more formalised than the one's formed between the UK bilaterally with various member states on an issue-by-issue basis. While UK certainly is eager to build strategic partnerships for future tactical coalitional endeavours, it does not formalise these relationship. Its tactical coalitions, hence, tend to be strictly ad hoc, issue-specific and informal. Finally, after a failed attempt to form a coalition of the founding 'Six', Italy did not display much of coalitional behaviour. During the Convention it appeared generally lacking a negotiation strategy, then it held Presidency, and after a failure of the Brussels Summit in December 2003 largely kept low profile for the rest of the IGC.

Finally, through analysing the characteristics of the coalitions present in the 2003/04 IGC negotiations, and the governments' motivations underlying their coalitional choices, I tried to show that coalition-analysis can add important insights to our understanding of the dynamics of EU treaty negotiations. Not only we are more able to understand how the negotiation outcomes came about, but through understanding the relationships between the member states as displayed in tactical and strategic coalitional choices, we may also be able to predict how these states might behave in the future. This, however, is an important point if we consider that due to stalemate in the ratification process of the constitutional treaty we may see another constitutional and institutional reform in not too distant future.

Maybe one prediction that can be made already is that due to the enlargements, coalitions as power enhancing strategy will remain one of the key instruments in EU negotiations. In institutional reform negotiations, the formal coalitions that will occur will necessarily be among small or among large states, but unlikely mixed as such pattern has persisted throughout history of European integration. It is also plausible to expect that the stable partnerships are unlikely to break up as there will not exist yet viable alternatives for more formal coalitional choices. Like strong relationship, formal coalitions are difficult to build. They take time and effort and pose opportunity cost. It will still take few years before there is sufficient mutual understanding and trust built between the 'new' and 'old' states, that there could be new formal partnerships built. Much more likely is that stable coalitions will remain (unless domestic politics initiates a change in coalitional strategy), but these relationships will not be exclusive. More than ever, governments will invest resources and time to cultivating strategic partnerships with other governments. In other words, more than ever a successful governmental strategy in an enlarged and still enlarging Europe means building circles of friends and allies to whom a government can turn for support and to whom government offers support when the other side needs it. Reputation of being a cooperative and reciprocal partner is crucial.

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CHAPTER 5

The European Constitution and the Reform of External Competences

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SUMMARY

Core issues in the constitutional debate within the framework of the European Convention were the reform of competences and the Union's external relations. For both areas, the set-back of the French and Dutch referenda was particularly painful: the reform of competences would have clarified their distribution, without however introducing substantive changes regarding the foundations of the current system. The reform of the Union's external relations would have been supported by strong – also public – support for a more coherent and effective European voice on the international stage. Whatever the outcome of the reflection period postulated by the European Council on 16/17 June 2005 will be, however, any future debate of the Union's external powers will be based on the deliberations in the European Convention and the results achieved in the constitutional treaty. This contribution analyses the Union's external competences in the constitutional treaty. It looks at the potential implications of the institutional amendments as well as the newly defined principles and objectives of the Union's external action. Further emphasis is placed on the scope of the Union's external powers following the incorporation of the principle of implied powers, as well as on an analysis of the individual competence provisions in Title V of the constitutional treaty.

I. INTRODUCTION

Among the core issues in the debate on a future Constitution within the framework of the European Convention were the reform of competences and the Union's external relations. The mandate in the Laeken Declaration¹ for these sections of the constitutional debate was broad: It called for more transparency in the division of competences and requested an evaluation of the need for any reorganisation of competences. Furthermore, while preserving the European dynamic, it called for a guarantee that a redefined division of competence would not lead

1) 'The present contribution constitutes a shortened and up-dated version of the Working Paper 'European constitution: changes in the reform of competences with a particular focus on the external dimension', Europainstitut, Vienna University of Economics and Business Administration, available at <http://fgr.wu-wien.ac.at/institut/ef/wplist.html>; the author wishes to thank Professor Stefan Griller for his valuable suggestions and support. European Council, Declaration on the Future of the European Union, 15 December 2001, SN300/01.

to a creeping expansion of the Union's competences or to encroachment upon the exclusive areas of competence of the member states or regions. Regarding external relations, the Laeken Declaration postulated a more coherent approach and raised the question of whether Europe, being finally unified, had a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples.

The result of the reform procedure, the treaty establishing a Constitution for Europe² (hereafter: 'CT' or 'constitutional treaty') was signed by the Heads of State or Government on 29 October 2004. The enthusiasm, however, was soon halted by the negative outcomes of the ratification referenda in France on 29 May 2005 and in the Netherlands on 1 June 2005, which have frozen the process of ratification. It is now questionable whether the CT might ever constitute the future legislative framework determining the member states' economic and political margin of manoeuvre.

The votes of the Dutch and French population are undoubtedly an important signal to improve awareness and understanding of the European Union and much of the criticism and concern raised with respect to the implication of the CT is apprehensive. It is, however, most regrettable that, among the many reasons that led to the rejection of the CT, a lack of information as well as misplaced perceptions regarding the impact of the CT were important motivations.³

This is regrettable particularly with regard to those fundamental areas where the CT would have brought about clarification and greater transparency of the current Community *acquis*. It is also an unfortunate set-back in those fields where strong public support for reform would have existed, such as particularly for a more coherent and effective European voice on the international stage.⁴

Looking at the reform of competences, it may be stated that the CT does not contain substantive changes regarding the foundations of the current

2) Official Journal 2004/C 310/01 of 16 December 2004.

3) Compare BEST (2005), p.6f, particularly referring to the post referendum survey in the Netherlands in Flash Barometer EB 172, June 2005.

4) Compare the European Commission's Standard Eurobarometer 63, Brussels, July 2005.

system, namely the constitutional structure of the distribution and control of competences. Also with regard to the definition of competence categories and the attribution of competences, the constitutional treaty mainly codifies the present *acquis communautaire* and the distinction developed by academia.⁵ It thereby essentially contributes to enhancing clarity and transparency, but does not entail important changes to the system of competences. Significant amendments, however, have been introduced in the field of external action that yield considerable impact on the balance of powers within the European Union. These amendments can be ascribed to the Convention's ambition to equip the Union with the necessary tools "to shoulder its responsibilities in the governance of globalisation, [and] to play the role of a power wanting to change the course of world affairs [...]".⁶

On the basis of the existing treaties, there may be only limited scope for a comprehensive reform of the European Union's external relation. Also, the opposition against "cherry-picking", which means to take certain parts out of the treaty text that will not need ratification, have been prominently voiced.⁷ The fact is, however, that the constitutional treaty sought to address many deficiencies that are currently perceived in the system of European external competences, such as its lack of coherence, the artificial divide between economic and political aspects of external relations, the limits to the Community's economic external powers and the institutional obscurity in the Union's external representation. Moreover, it is submitted that the CT was not rejected because of its chapter on the Union's external relations. As will be developed in the course of this contribution, with regard to some of its proposals, it is questionable, to what extent the potential that is yielded in the constitutional treaty could be implemented in practice. Yet, whatever the outcome of the reflection period postulated by the European Council on 16/17 June 2005 will be, any future debate of the Union's external powers will depart from the deliberations within the framework of the European Convention and the results achieved in the constitutional treaty.⁸

5) Compare, for example, von BOGDANDY and BAST (2002), p. 236ff; CRAIG (2004), p. 323-344; BURGSTALLER (2004), p. 255-271; DOUGAN (2003); LENAERTS and DESOMER (2002), p. 377ff; PERNICE (2002); DE WITTE (2002), powers, available at and DE WITTE (2004), MAYER (2004), CONV 375/1/02, REV 1, 2002.

6) European Council, Declaration on the Future of the European Union, 15 December 2001, SN300/01.

7) NEWMAN and FOX, *The Times*, 10 June 2005.

8) With regard to a "possible avenue ahead for the period of reflection" compare DUKE (2005), p. 15f.

The objective of this contribution is, thus, to analyse the Union's external competences in the constitutional treaty. It addresses the proposed institutional changes in the field of external relations and the newly defined principles and objectives of the Union's external action. Further emphasis is placed on the scope of the Union's external powers following the incorporation of the principle of implied powers in the constitutional treaty. The final and most comprehensive chapter deals with the individual competence provisions in Title V, Part III of the CT, the section on the Union's external action and the relevant changes proposed in each field. Within the European Convention, three Working Groups dealt specifically with external relations, namely the Groups on Legal Personality, as well as Defence and External Action focusing on the nature of the Union and its role in the outside world. In addition, the Working Groups on Complementary Competences and Simplification also touched upon the Union's external competences and the respective applicable instruments, specifically in the field of CFSP.⁹

As a result of deliberations, the CT entails a new structure and considerable amendments in the field of the Union's external relations. In the light of stronger coherence, the CT regulates the thrust of the Union's competences in the external sphere in one chapter in Part III, Title V on "The Union's external action" (Art. III-292 to III-329 CT). Yet, beyond this chapter, there are several provisions referring to the Union's external relations. They concern, on the one hand, the basic principles, objectives, and institutional aspects contained in Part I of the draft. On the other hand, the constitutional treaty contains a range of competence provisions outside Title V that confer external powers upon the Union. Several important changes that were applied in the CT to the Union's external competences may be attributed to the amendments in Part I CT as well as to the general provisions applicable to the Union's external relations regulated in Part III. Moreover, the inclusion of new competence provisions in Part III and the amendment of existing ones, such as particularly the provision on the conclusion of international agreements would have yielded the potential to alter the Union's position in the outside world.

9) Regarding the final reports and the working documents of the different Convention Working Groups

II. PRINCIPLES AND OBJECTIVES OF THE UNION'S EXTERNAL ACTION

In accordance with the general structure of the CT, Part I contains the constitutional foundations for the Union's external competences. Several amendments included in this Part have a direct impact on the Union's external competences, its underlying procedures and implementation.

A pivotal point regarding the Union's future external relations is certainly the proposal to introduce a single legal personality, which assumes the rights and obligations of the European Community and the Union (Art. I-7 CT). It comes together with the merging of the pillars, the consolidation of the EC- and EU-Treaties and the consequential embedding of the CFSP in one single legal framework. In line with the organisational restructuring, the ambition to provide for better coherence has also extended to the institutional side, specifically regarding the Union's external representation and a largely uniform procedure for the conclusion and negotiation of international agreements. At the same time, the formulation of common principles and objectives for the Union's external action would have added a new tone to the Union's external relations.

As Article IV-438 CT stipulates, the Union will succeed to all rights and obligations of the European Community and the European Union, whether internal or resulting from international agreements. This should clarify the Union's current ambiguous position in its representation to the outside world, where legal personality is only explicitly awarded to the European Community and not to the European Union, despite its competences, *inter alia*, to conclude international agreements under Article 24 TEU. Whilst a single legal personality undoubtedly simplifies the current situation by providing a uniform appearance for the Union, it raises at the same time a number of questions, specifically with regard to the conclusion of international agreements in the field of CFSP under the new regime.

Also, the joint definition of general principles and objectives for all fields of EU external action reflects the Convention's intention to enhance clarity and transparency to the public and the EU's partners. In order to ensure consistency in EU external and internal action, the consideration of these

principles and objectives would generally extend to all external aspects of EU internal policies. It finds its first expression in the CT in an amendment to the Union's objectives, stipulating that the Union "*in its relations with the wider world, [...] 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.*" (Art. I-3 para 4 CT).

The formulation of these objectives that should inspire the Union's action on the international scene clearly follows the mandate of the Laeken Declaration *to set globalisation within a moral framework*. These principles and values are reiterated in more detail in the general provisions of Title V on the Union's External Action. Article III-292 CT formulates a common set of objectives for the entire field of external relations. Instead of different objectives for the various fields of external action, such as the CFSP, the CCP, development cooperation, etc., the principles and objectives formulated in Article III-292 CT would generally apply in the development and implementation of the different areas of the Union's external action, as well as the external aspects of its other policies. As Cremona observes, this would require a delicate balancing of possibly conflicting objectives and interests, if for example the CCP would, next to its objective of abolishing restrictions in international trade, also have an explicit sustainable development and human rights mandate.¹⁰

III. THE INSTITUTIONS IN THE FRAMEWORK OF EXTERNAL RELATIONS

III.1. The Union Minister for Foreign Affairs

The ambition to enhance coherence and efficiency has also extended to the institutional side. The most prominent proposal in the CT is to reconsider the roles of the High Representative for CFSP and the Commissioner

¹⁰ CREMONA (2003), p. 1349.

responsible for external relations and to create the post of a Union Minister for Foreign Affairs (Art. I-28 CT). The Foreign Minister, who is to be appointed by the European Council with the agreement of the Commission President, shall simultaneously be one of the Vice-Presidents of the Commission and chair the Foreign Affairs Council.¹¹ His/her tasks include conducting the Union's common foreign and security policy, as well as the common security and defence policy, which he/she shall carry out as mandated by the Council of Ministers. In his responsibility as Vice President of the Commission, he/she shall ensure the consistency of the Union's external action and shall be responsible for handling external relations and for coordinating other aspects of the Union's external action (Art. I-28 CT). As Griller observes, however, it is doubtful whether the ostensible uniformity of the Foreign Minister's post could compensate for the weaknesses inherent in the draft, as the rules applicable to the CFSP and the other areas of external action forming part of the current first pillar have not been consolidated.¹² Despite the outwardly unified structure, basically the same (considerable) differences regarding the procedures, legal instruments, and organs involved in the decision making process apply as is presently the case. Given the frequent tensions between the two institutions, the Foreign Minister would face considerable difficulties in reconciling diverging political interests. To represent a coherent picture of the Union towards the outside world would, therefore, constitute the major challenge and, at the same time, the essence of the Foreign Minister's task. To this end, the Union delegations, which represent the Union in third countries and international organisations, would also be placed under his authority (Art. III-328 CT).¹³

Given this considerable workload, much of the Foreign Minister's success would depend on the efficient installation of the European External Action Service (hereinafter: EEAS), which was foreseen for his assist-

11) The CT proposes to legally anchor the establishment of a specific Foreign Affairs Council (Art. I-24 para 3), formally distinct from the General Affairs formation, which will be headed by the Foreign Minister.

12) Compare GRILLER (2003) in: DE WITTE, p. 142ff.

13) At present, both the Council and Commission represent the EU in third countries – on the one hand by the diplomatic representation of the country holding the Presidency and, on the other hand, by the EU delegations represented in 128 third countries. By introducing a single legal personality, the delegations, which are currently mandated by the Community, would become veritable Union delegations. As Duke, points out, it is not clear under the draft Constitution, who assumes the former role of the Presidency regarding its diplomatic representative function. He argues, however, that the changes in the institutional structure will have the effect of considerably eroding the significance of the Presidency in external relations (DUKE, 2003, p.19).

ance. It would be composed of officials from relevant departments of the General Secretariat of the Council and of the Commission, as well as staff seconded from national diplomatic services and support the Foreign Minister in “*fulfilling his mandate*” (Art III-296 para 3 CT). The institutional embedding of the EEAS and the scope of its tasks, however, is not specified in the CT and remains subject to European decision. With a view to its composition, it might serve as the ideal forum for the practical realisation of the consistency obligation of Council and Commission in the field of external action (Art. III-292 CT). In this respect, it would certainly be enlightening, under whose authority, or respectively structural affiliation, the EEAS were established, the Council's or the Commission's or, alternatively, whether it rested solely under the authority of the Foreign Minister. Notably, the EEAS currently constitutes the most prominent touchstone, of whether “cherry-picking” of the CT will become political reality or not. There are strong voices within the Community that opt for establishing the EEAS, in order to strengthen the structure and coherence of European foreign policy – independent of the CT's and thus the Foreign Minister's fate. Given their intimate link, however, the absence of the Foreign Minister would also call the logic of having an EEAS into question.¹⁴

In summary, it seems almost needless to say that the Foreign Minister would hold an enormously influential position in the future institutional framework. With a view to the powers unified in this single new post, it must also be observed, however, that the Foreign Minister would hold the potential of policy determination and execution in one hand, which might considerably blur the separation of powers with the Union's institutions.¹⁵

In this regard, the Foreign Minister's relationship to the President of the European Council and the Commission President is an issue of interest for the inter-institutional balance in the CT. Both have considerable competences in the field of external relations and the division of labour is not clearly delimited. The proposed permanent European Council chair shall be elected for a, once renewable, two and a half year term. The European Council President “*shall, at his or her level and in that capacity, ensure the external representation of the Union on issues concerning its common*

14) DUKE (2005), p.17.

15) GRILLER (2003), p.147.

foreign and security policy, without prejudice to the powers of the Union Minister for Foreign Affairs” (Art. I-22 para 2 CT). The European Commission, in turn, shall, *with the exception of the common foreign and security policy, and other cases provided for in the Constitution, ensure the Union’s external representation* (Art. I-26 para 1 CT). The President of the Commission has to ensure that the Commission acts “*consistently, efficiently and as a collegiate body*” which is a considerable challenge, given the vast field of external relations, and even more importantly, given that also the Union Foreign Minister forms part of the Commission.¹⁶

III.2. The European Council’s Role in the Field of External Action

The implications of these institutional amendments will not be dealt with in more detail in the framework of this contribution. There is one proposal, however, that merits further attention, as it would contribute to significantly shifting the balance of powers between the EU institutions. It concerns the increase of the European Council’s powers in the field of external action. Whilst already under the current regime, the European Council is entitled to define common strategies under Article 13 para 2 TEU, these strategies are, however, limited to the field of CFSP. The CT, in turn, empowers the European Council to identify, on the basis of the (newly defined) principles and objectives in the field of external relations (Art. III-292 CT), the strategic interests and objectives of the Union. The European Council would thereby act by way of European decisions, thus legally binding acts which “*shall relate to the CFSP and to other areas of the external action of the Union. Such decisions may concern the relations of the Union with a specific country or region, or may be thematic in approach*” (Art III-293 para 1 CT).

The Union institutions, as well as the member states, would consequently be subordinated to such decisions of the European Council which set the guidelines for the entire area of external action. Such decisions, though not even legislative acts in the definition of Art I-33 CT, would spearhead the hierarchy of norms in the respective fields. Therefore, even in those areas which now form part of the first pillar and are subject to the so-called “Community method”, the foundations for legislative action are set by an “intergovernmental mechanism”, namely the European Council act-

¹⁶ DUKE (2003), p.17.

ing unanimously.¹⁷ Admittedly, under the current regime, the European Council has not made extensive use of its power under the CFSP. It rather laid down the strategic guidelines applicable in the CFSP under Article 13.1 TEU, thus acted by legally non-binding instruments. Yet, the resolutions adopted by the European Council have frequently transcended a mere guideline-function and established detailed rules for legislative action in the policy fields concerned. This applies even more to the Presidency conclusions, which are likewise legally non-binding, but which the European Council has efficiently used to boost the institutional and legal setting of the CFSP and the CSDP.¹⁸ It thus seems conceivable that the European Council would be tempted to refer to this power more frequently, given that it allows defining the path for the entire field of external relations. As a counterweight to these extensive powers, Art. III-365 para 1 CT provides that legal acts adopted by the European Council, which are intended to produce legal effects vis-à-vis third parties are subject to judicial control by the Court of Justice.¹⁹ This acknowledges the dominant function of the European Council, in its capacity of issuing legally binding decisions, and to some extent mitigates the deficit in the rule of law inherent in the CT. Yet, this review of legality by the Court is limited, as it only applies to acts by the European Council producing legal effects vis-à-vis third parties, and may only refer to those parts of an act which do not relate to the CFSP (Art. III-376 CT and Art. III-293 CT).²⁰ This is unfortunate given that a comparable review exists with respect to restrictive measures by the Council against natural or legal persons in the CFSP (Art. III-322 and III-376) and given the impressive powers that the CT bestows upon the European Council. The (albeit limited) control of the ECJ could have been regarded as an indispensable counterbalance. Moreover, it is questionable how the ECJ, in the case of a review of legal acts on the basis of Art. III-293 CT would draw a meaningful delimitation between the parts of a European decision which relate to the CFSP and other fields of external relations.

¹⁷ See GRILLER (2003), p.133-157: ‘If the respective powers of the European Council follow the decision making procedures of the CFSP, such a mechanism would entail, to the extent that the latter would remain intergovernmental in nature, the “intergovernmentalisation” of external policies in general, including what currently comes under the first pillar. In essence, this would not enhance, but rather deteriorate the capacity of the Union to take efficient action in the field of external relations.’

¹⁸ Compare BLANCK (2004), p.131ff referring in particular to the Presidency Conclusions of Helsinki (1999, Headline Goal), Feira (2000, Civil Headline Goal) and Nice (2000, Establishment of permanent bodies, such as the PSC).

¹⁹ CIG 52/1/03 REV1, p.5 and CIG 52/03ADD 1, Annex 7 (Article III-270(1)).

²⁰ CIG 79/04, Annex 24.

IV. IMPLIED COMPETENCES IN THE FIELD OF INTERNATIONAL AGREEMENTS

IV.1. Introduction

Whilst the amendments relating to the European Council might imply the danger of a stronger “intergovernmental” influence in external relations, the CT in turn contains proposals that limit the member states’ external powers to a considerable degree. One of these proposals concerns the common commercial policy which will be dealt with below. Another concerns the conclusion of international agreements, one of the key issues regarding the division of competences in the field of external action. The complexity of the system of external competences is particularly due to the fact that, besides competence provisions explicitly conferring external powers in the treaty, external competences may also arise implicitly through provisions of the treaty or secondary law. Since its decision in the AETR Case²¹, it has been acknowledged that external competences may arise not only through an express conferment by the treaty but “*may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.*” On the basis of this decision, the ECJ has developed a subtle jurisdiction with its most recent refinement in the ‘Open Skies’ judgments.²² The European Convention has apparently resolved to render the implied external competences explicit and attempted to incorporate the jurisprudence of the Court in the CT. It seems, however, that this codification has resulted either in a not entirely successful translation of the principle or a projected, significant development of the Court’s jurisprudence.

Generally, for external competences the same principles and the same definition of competence categories, exclusive and shared competences as well as areas of supporting, coordinating or complementary action, apply. Exclusive external competence, for example the common commercial policy or the monetary policy for the member states whose currency is the euro (Art.

21) C-22/70, Commission of the European Communities vs Council of the European Communities, European Agreement on Road Transport, ECR 1971/263, para 16.

22) Compare as one example for the essentially identical set of judgments C-475/98, *Commission/Austria (Open-Skies-Agreements)*, ECR 2002/I-9797.

I-13 para 1(c) and Art. III-195ff CT)²³ excludes any action by the member states at the external level, thus the conclusion of international agreements in the fields covered by the CT. In the area of shared external competences, such as for example environment (Art. III-233 para 4 CT), member states may exercise their external competence to the extent that the Union has not exercised or decided to cease exercising its competence. Interestingly, the CT does not foresee specific external competences in the area of supporting, coordinating or complementary action. The area of development cooperation (Art. III-316 CT, amended by an additional humanitarian aid competence in the CT) has been assigned as shared competence, with the significant clarification, however, that the exercise of Union competence in that field does not prevent member states from exercising theirs (Art. I-14 para 4 CT). The same applies to the areas of research, technological development and space (Art. I-14 para 3 CT). As the essential dividing line between shared competences and supporting, coordinating or complementary action is the exclusion of pre-emption in the latter category (Art. I-12 para 5), the competence attribution in this regard is not entirely meaningful.

With regard to implied external competences, it has, throughout the Court’s jurisprudence in this context, been difficult to distinguish the existence and the scope of competences.²⁴ In the Open Skies judgments, the Court has resumed this jurisprudence and, unfortunately not in an entirely coherent way, listed the situations under which *exclusive* external competences may arise. Up to the present, it is moreover subject to dispute whether the Court admits the concept of implied concurrent, or under the CT’s terminology, shared competences.²⁵

23) For a thorough discussion on the economic aspects of the EMU and the Union’s external representation in this area, compare BREUSS (2005), in: HOEDL (ed.).

24) Compare cases C-22/70, Commission of the European Communities vs Council of the European Communities, European Agreement on Road Transport, ECR 1971/263; Cases C-3, 4 and 6/76, Cornelis Kramer and others, ECR 1976/1279; Opinion 1/76 of 26 April 1977, ECR 1977/741; Opinion 2/91 of 19 March 1993, ECR 1993/I-1061; Opinion 1/94 of 15 November 1994, ECR 1994/I-5267; Opinion 2/92 of 24 March 1995, ECR 1995/I-521; for an analysis of the ECJ’s jurisprudence on implied competences compare HABLE (2005), Chapter IV.2.

25) For the discussion on implied concurrent competences, compare GRILLER and GAMHARTER (2002), p.79f, compare also DASHWOOD and HELISKOSKI (2000), and DASHWOOD (2000), EECKHOUT (2004), p.98f.

IV.2. Rendering Implied Power Explicit? The CT's Proposals on Implied Competences

IV.2.1. Introduction

Compared to the complexity of the Court's jurisprudence, the objective of the Working Group on 'External Action' with regard to implied external competences was astonishingly simple: The treaty should indicate that the Union is competent to conclude agreements dealing with issues falling under its internal competences and the new provision in the treaty should specify that the Council should deliberate on such agreements according to the same voting procedure which would apply to internal legislative deliberations on the same issues (normally QMV).²⁶ Two provisions in the CT now seek to capture the ECJ's case law on implied external competences.

Firstly, Art. I-13 para 2 CT determines in which cases the Union shall have *exclusive* competence for the conclusion of an international agreement:

“The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.”

Second, another foundation is provided in Article III-323 CT, in the chapter on the conclusion of international agreements of Title V CT:

“The Union may conclude an agreement with one or more third countries or international organisations where the Constitution so provides or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Constitution, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.”

26) CONV 459/02, p.4.

Both provisions to some extent seek to codify the Court's findings in the AETR Case and Opinion 1/76²⁷ in the constitutional treaty. The two provisions, however, only partly overlap and, in essential points, translate the principles on implied competences in different ways. It is thereby not entirely clear whether these deviances constitute an inadvertence in the drafting procedure. Art. III-323 CT had, before its final approval in the IGC, been amended by the Working Party of IGC Legal Experts on 11 June 2004, but the fundamental orientation of this provision remained untouched. Whilst Art. I-13 CT undoubtedly refers to exclusive external competences, Art. III-323 CT remains silent as to the scope of Union competence that it confers. Art. III-323 CT confers wider powers, but its relation to Art. I-13 CT is left open. In any event, it is submitted that the CT's proposals would confer extensive external powers to the Union. Together with the Union's competences in the common commercial policy that will be dealt with below, the member states' competences to act in the field of international trade might be significantly curtailed. Against this background, it seems appropriate to look at the individual elements of Art. I-13 and Art. III-323 CT and the extent to which these provisions would broaden the scope of the Union's external powers.

IV.2.2. Implied Exclusive Powers in the CT...

a. ...when its conclusion is provided for in a legislative act of the Union

The first element of Art. I-13 CT corresponds to the Court's findings in Opinion 1/94 and 2/92²⁸, namely that the Union acquires an exclusive external competence, where internal legislation includes provisions expressly conferring on its institutions powers to negotiate with non-member countries. Such powers are limited to the spheres covered by those acts. What remains unclear, however, is under which conditions the European legislator may decide to confer such powers upon the Union institutions in its legislative acts. Up to now, this question has not been addressed in the Court's jurisprudence. As Stefan Griller has pointed out, however, with a view to the principle of conferral which ranks among the fundamental principles in the constitution (Art. I-II CT), it is hardly imaginable that the legislator may decide *ad libitum* to procure external powers to the Union on the basis of any

27) C-22/70, Commission of the European Communities vs Council of the European Communities, European Agreement on Road Transport, ECR 1971/263 and Opinion 1/76 of 26 April 1977, ECR 1977/741.

28) Opinion 1/94 of 15 November 1994, ECR 1994/I-5267; Opinion 2/92 of 24 March 1995, ECR 1995/I-521.

internal treaty provision.²⁹ To assume that the legislator would be entirely free to donate such powers in laws or framework laws, which may eventually be adopted by qualified majority voting, would provide it to some extent with the competence to confer competences which would contradict the fundamental principles of competence allocation. Stefan Griller therefore suggests that it would seem appropriate to only admit the conferral of such competences through an act of secondary law, if the conclusion of an international agreement at least facilitates the attainment of an internal Union objective.³⁰ This would, in fact, correspond to the conditions established for concurrent implied competences, as elaborated by Griller and Gamharter.³¹ Even pursuant to this understanding, however, it is submitted that this provision, if used in practice by the legislator, may considerably extend the Union's external competences.

Turning to Art. III-323 and the corresponding passage in this provision, it immediately stands out that the conditions differ in one remarkable aspect. External competence is stated to arise where the conclusion of an agreement is provided for “*in a binding Union legal act*”. This leads to the questions of which acts may be addressed that are not already covered by Art I-13 CT and which kind of external competence the CT thereby intends to confer. With a view to Art. I-33 CT on the legal acts of the Union, it seems that the principal application might be the “European decisions” which are non-legislative acts, binding in their entirety. One prominent field of application where legislative acts are excluded and where the principally applicable instrument are European decisions is the CFSP. If the current wording of Art. III-323 CT remains, it would signify that (implied) external competences might arise in the CFSP where a European decision in this field so provides. This seems particularly interesting with a view to the extension of qualified majority voting in this area. What remains unclear, however, is the type of competence that Art. III-323 CT in conjunction with the respective “binding Union legal act” should confer, as exclusive external competences are limited to the conferral of powers through legislative acts (Art. I-13 CT). With a view to the residual character of this category (Art. I-14 para 1 CT), one might consider that it leads to a shared competence and the constitutional treaty thus finally resolves the questions of (implied) shared competences.

29) GRILLER (2004), p. 41.

30) *Ibid.*

31) GRILLER and GAMHARTER (2002), p.79f.

Admittedly, however, it remains doubtful, whether this would indeed have reflected the intention of the drafters.

b. ... or is necessary to enable the Union to exercise its internal competence

The second element of Art. I-13 CT reflects Opinion I/76, where the Court stipulated that “*whenever Community Law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connexion.*”³² The “inextricable link” required between the conclusion of the international agreement and the adoption of internal measures for the attainment of a Community objective is formulated pointedly in Art I-13 CT.³³

In contrast, it is again the analogical provision in Art. III-323 CT that gives rise to bewilderment. It confers competences, “*where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives fixed by the Constitution*”. Again, the reason remains nebulous as to why the terminology differs in such a manner from Art. I-13 CT. There is no explanation in any of the drafting documents relating to these provisions. Therefore, it is also difficult to determine which concept of necessity is implied under this provision. If it were the concept of Opinion I/76, why then was the terminology of Art. I-13 CT not adopted? To argue that Art. III-323 CT only constituted a reflection and repetition of Art. I-13 CT, as it occurs several times in Part I and Part III of the draft, would call its wording entirely into question.

Again, the second alternative might be to imply the concept of necessity in the light of shared (concurrent) implied competences. The “necessity” (which in the German version is translated as “*erforderlich*”) in Art. III-323 CT would then (merely) require that the international agreement, in the framework of internal policies, facilitates the achievement of a Union objective. In the light of the significantly expanded objectives, particularly in the field of external relations, this would again extend the potential scope for external powers to a considerable degree. Yet, with the legal basis for implied competences in the first option of Art. I-13 CT

32) Opinion I/76 of 26 April 1977, ECR 1977/741, para 3.

33) The fact that the Union has to exercise its competences in order to attain the objectives set out in the Constitution is anyway presumed by Art. I-11 para 2 CT.

and the extended powers under the common commercial policy, the additional recognition of concurrent implied competences in Art. III-323 CT would almost seem excessive.³⁴

c. ...or insofar as its conclusion may affect common rules or alter their scope

In its last element, the CT takes up the “original” AETR-doctrine, without, however, taking account of the Court’s rulings in the specific cases, where an area “*is already largely covered by such rules*” (Opinion 2/91, paras 25 and 26) or “*where the Community has achieved complete harmonisation in a given area*”. As Cremona observes, also the phrase: “The Union shall have exclusive competence for the conclusion of an international agreement [...] when its conclusion affects an internal Union act” is misleading. She emphasises that it is not the conclusion of the agreement by the Community which might or might not affect an internal act but that the conclusion of a particular agreement by one or more member states acting alone might affect those rules or alter their scope”.³⁵ However, it is argued that these points may be interpreted in the light of the *Community acquis*, particularly with regard to the Court’s finding that in the case of common rules largely covering an area, “*member states may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules*”.

It is also with regard to this last element that finally the provisions of Art. I-13 and Art. III-323 CT coincide to the largest extent. This, at least, may be interpreted as a strong indication that the two provisions were intended to produce the same legal effects, namely to confer exclusive external competence to the Union.

However, in an overall view an explicit statement seems hardly possible to make and, at least, in this regard the CT has accurately continued the line of the ECJ’s jurisprudence: it has avoided a clear statement on the existence of

34) Compare GRILLER (2004), p. 41 referring to the provisions in the CT conferring (explicit) shared external competences to the Union, as for example, environment (Art. III-233 para 4 CT), research, technological development and space (Art. III-248 CT), readmission agreements with third countries (Art. III-267 para 3 CT), development cooperation (Art. III-316 para 2 CT), economic, financial and technical cooperation with third countries (Art. III-319 para 3 CT) and humanitarian aid (Art. III-321 para 4 CT) as well as the ECJ’s judgment on the EU-US Energy Star Agreement (C-281/01, *Commission vs Council (Energy Star-Agreement)*, ECR 2002/I-12049), according to which the scope of the CCP may also extend to other areas, such as the environment, agricultural policy or the internal market in general that normally require specific legal bases.

35) CREMONA (2003), p. 1362 with reference to Opinion 2/91, para 9.

implied shared (concurrent) competences and left the question as a matter of dispute to academia. But even if it were assumed that this competence category would be abolished in the CT (to the extent that it presently exists), the external powers conferred upon the Union by Art. I-13 CT and III-323 CT are in any event comprehensive. Particularly the conferral of powers through a legislative (or binding) Union act, might create considerable dynamics for the Union to act in the international sphere.

V. THE UNION’S EXTERNAL ACTION: INDIVIDUAL COMPETENCE PROVISIONS

V.1. Introduction

The following chapter contains an overview on the individual competence provisions governing the Union’s external relations in Title V of the constitutional treaty. Title V is divided into eight chapters. Chapter I, which includes the general provisions, has already been dealt with in the previous Section. The implications of these provisions on the individual fields of the Union’s external action will, however, be considered in the relevant context.

V.2. Chapter II: The Common Foreign and Security Policy (Art. III-294 – III-313)

V.2.1. General Observations

Despite the merging of the pillars, the introduction of a single legal personality and the integration of the CFSP and CSDP under the general umbrella of “Union external action”, the CT highlights in several ways that the CFSP maintains its specific status. Ultimately, one may state that, despite the outwardly uniform structure, the pillar structure re-enters through the backdoor. The separate competence category for the CFSP in Part I CT (Art I-12 para 4 and I-16 CT) provides a first indication. It displays the reluctance to apply either of the legal consequences attached to the categories of shared competences or the area of supporting, coordinating or complementary action

to the CFSP. The concept of shared competences contains the principle of pre-emption which the member states refused to apply to the CFSP. Yet, obviously it did not seem to constitute an appropriate solution either to simply exclude pre-emption, similar to the example of development cooperation.³⁶ Categorizing the CFSP as area of supporting, coordinating or complementary action, as another alternative, might have been perceived as a poor signal on the way to developing a strong Union common foreign and security policy.

Art. I-40 para 6 CT expressly excludes legislative acts in the field of the Common Foreign and Security Policy; simply put, this implies that the CFSP remains the business of the executive, with the European Parliament, in principle, being only a supporting actor in this field. It needs to be only consulted and regularly informed, but has no participation in decision-making. Moreover, the CFSP remains the only field where the EP does not have to be consulted by the Council for the conclusion of international agreements (Art. III-325 para 6 CT). Also, the role of the Commission is still not as strong as it is, by comparison, in other fields of Community competences. The dominant actors remain the European Council, whose role has been significantly enhanced, and the Council of Ministers. In addition, the jurisdiction of the ECJ continues to be excluded (Article III-376 CT). A novelty in the CFSP is certainly the introduction of a single set of instruments: The current common strategies, common positions and joint actions give way to the European decision which are the main instrument applicable in the CFSP. As Cremona observes, this bears a certain integrative element, as there is by definition no distinction between European decisions under the CFSP and other Community competences, such as for example under Articles I-59, III-165 para 2 or III-172 para 6 CT.³⁷ However, as indicated above, whilst the European decision even has similar characteristics as the legislative act, this may be misleading, as *the essential factor remains the procedure applied for the adoption of such acts which varies depending on the relevant legal base which is applicable*. Thus, it is in particular the procedural differences, the exclusion of the legislative procedure, the institutions involved and unanimity as the principal voting requirement which determine the continuing special character of the CFSP.³⁸

36) Compare CREMONA (2003), p.1353ff.

37) CREMONA (2003), p.1354.

38) Compare however ClG 38/03, according to which some delegations in the Intergovernmental Conference wanted qualified majority to be the general rule or at least extended in the field of CFSP.

An important expression of this specific character is constituted by Article III-308 CT which provides that “*the implementation of the CFSP shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Constitution for the exercise of the Union competences referred to in Articles I-13 to I-15 and I-17*” and vice-versa. Following the merger of the pillars and the introduction of a single legal personality, the non-interference between the CFSP and external competences currently based in the first pillar gains additional significance. With a view to the persisting differences regarding organs, instruments and applicable procedures in the CFSP, it is at stake under the CT that the current supranational fields of external relations are not dominated by the intergovernmental sphere. Presently, the primacy of Community law is explicitly regulated in several provisions of the TEU, namely Art 1, 2, 3 and particularly 47 TEU.³⁹ The Court has ruled upon the primacy of Community law in its decisions in *Leifer*, *Werner* and *Centro-Com*⁴⁰ with respect to acts adopted under the Common Commercial Policy. In *Leifer* and *Werner*, the Court stated that “*a measure whose effect is to prevent or restrict the export of certain products cannot be treated as falling outside the scope of the CCP on the ground that it has foreign and security objectives*” (*Werner*, para 10). In *Centro-Com*, it added that “*even where measures have been adopted in the exercise of national competence in matters of foreign and security policy, they must respect the Community rules adopted under the CCP*” (para 30). Also under the constitutional treaty, it would be for the European Court of Justice to monitor compliance with Article III-308 (Art. III-376 CT). Yet, it is questionable whether, following the merger of the pillars and with no provision in the Constitution securing the primacy of the present supranational fields, the Court would continue this line of jurisprudence.⁴¹ Taken together with the European Council’s powers under Art. III-293 CT, there is the potential that the influence of intergovernmental mechanisms in the Constitution could increase.

39) Regarding the relationship between current first and second pillar and the precedence of Community powers on for specific forms of foreign policy over the CFSP refer to ECKHOUT (2004), p.151ff.

40) C-70/94, *Werner*, ECR1995/I-3189, C-124/95, *The Queen, ex parte Centro-Com*, ECR 1997/I-81, C-83/94, *Criminal proceedings against Leifer and others* ECR 1995/I-3231.

41) Also compare in this regard the Court’s jurisprudence in the *Airport Transit Visa* case, C-170/96, *Commission versus Council*, ECR I-2763 on the delimitation of competences between the first and the third pillar; for a detailed discussion compare GRILLER (2003), p.136ff.

There are several areas in the constitutional treaty, where the delimitation between the CFSP and the other fields of external relations would be relevant. First, Art. III-325 CT on the conclusion of international agreements stipulates that the right of proposing the opening of negotiations, the voting modalities as well as the inclusion of the European Parliament differ, “*if an agreement exclusively or principally relates to the CFSP*”. Another open question in this regard concerns the effects of international agreements in the CFSP. The special procedures and characteristics of Union agreements under Article 24 TEU have been abolished. This particularly refers to the member states’ possibility under this provision to subject the binding character of the agreement to compliance with the respective national, constitutional requirements. Yet, it is not clear whether agreements in the CFSP should have the same binding force as agreements falling under the current Community sphere or whether they would, similar to the whole field of the CFSP, maintain a specific character.⁴² As the CFSP was taken out of the general competence categories, it is doubtful whether any of the respective categories, exclusive or shared, should apply for the conclusion of international agreements in this area. In addition, given the exclusion of the ECJ’s jurisdiction in the CFSP, it is also questionable who would determine the effect of Union agreements in the CFSP sphere on Member State competence?⁴³ Other areas, where the delimitation between the CFSP and the current supranational fields of external action is of relevance are the European Council decisions on the basis of Art. III-293 CT, as set out above, as well as the Union’s cooperation policy and the implementation of restrictive measures, as will be further outlined in Chapters V.4. and V.5. below.

In summary, it may be stated that despite a partly stronger coherence in the field of external action, the artificial separation of the economic and political aspects of external relations still persists in the draft. Given the inextricable link between economic and political concerns, which is even more strongly knotted in the treaty with the inclusion of foreign policy objectives in the area of the commercial policy, its delimitation becomes more and more impracticable in political reality.⁴⁴

42) Compare, however, the general provision in Art. III-323 para 2 CT that stipulates without reservation that ‘agreements concluded by the Union are binding on the institutions of the Union and on its member states’.

43) Compare CREMONA (2003), p.1352.

44) WEIDEL (2002), in: GRILLER and WEIDEL p. 24f.

V.2.2. The Proposed New Competence Provisions in the CFSP/CSDP

a. Introduction

Looking at the individual competence provisions in Title V, it seems that the Articles on CFSP do not contain any radical changes to the current Title V TEU. The emphasis is still on broadly worded objectives rather than a precise delimitation of subject matter or a definition of the kind of competences conferred upon the Union.⁴⁵ With the abolition of specific CFSP objectives and their integration in commonly defined targets for the entire field of external relations, the definition of CFSP competences would certainly not become easier. In contrast, substantive amendments were made in the CSDP⁴⁶, where the constitutional treaty, above all, sought to increase the member states’ obligations to provide military and civil capacities and to procure mutual assistance in the case of crises. At the same time, the competence provisions in the CSDP involve an increased element of flexibility by focusing on a long-term or case-by-case cooperation of certain groups of member states.⁴⁷

The general legal basis for CFSP and CSDP in Part I of the constitutional treaty is provided in Art. I-12 para 4 CT. “*The Union shall have competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.*” According to Art. I-16 CT, this competence covers all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy, which might lead to a common defence. Member states are obliged to support the Union’s common foreign and security policy and adhere to the acts adopted in this area (Art I-16 para 2). A first notable difference in the constitutional treaty lies in the determination of the political statement contained in Art. I-41 para 2 CT providing that the progressive framing of a defence policy *will*, and not only *might*, lead to a common defence, when the European Council acting unanimously, so decides (compare current Art 17 TEU). The European Council would by decision recommend to the member states the adoption of a decision in accord-

45) EECKHOUT (2004), p.139.

46) The differentiation between CFSP and CSDP in this contribution shall not withstand the fact that the CSDP is an integral part of the CFSP (Art. I-41 para 1).

47) CREMONA (2003), p.1360.

ance with their respective constitutional requirements (Article I-41 para 2). This statement is accompanied by the expansion of the Petersberg tasks referred to in current Art 17 para 2 TEU to which other missions have been added in the CT.⁴⁸ They would also include “joint disarmament operations, military advice and assistance tasks, conflict prevention and post-conflict stabilisation” (Art. III-309 CT).⁴⁹ In the light of the most pertinent global security challenges, the treaty explicitly emphasises that “*all these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories*” (Art. III-309 CT). With a view to these extended objectives, the requirements to provide the Union with the necessary operational capacity for the implementation of the CSDP, increases simultaneously (Art. I-41(3) CT). The member states’ are obliged to procure such capacity, which draws on both civil *and* military assets, in order to contribute to the objectives defined by the Council in relation to the respective tasks (Art. I-41(3) and III-309(2) CT). They would, however, continue to have a right of veto with a view to their commitments in the CSDP, as European decisions on defence policy must still be adopted unanimously (Art. I-41 (4) CT).

The most relevant substantive innovations introduced in the CSDP are threefold: the application of several mechanisms of flexibility, including the possibility for structured cooperation, the introduction of a mutual defence clause and lastly the establishment of a European Defence Agency.

b. Areas of Flexibility in the CSDP

Forms of flexibility in the CSDP have many faces in the draft Constitution. On the one hand, “the Council may entrust the implementation of a task to a group of member states which are willing and have the necessary capability for such a task” (Art. III-310 CT). The participating member states, in association with the Union minister for Foreign Affairs, shall agree among themselves on the management of the task. The Council is kept regularly

48) As Duke provides, “one explanation for the relatively easy expansion of the Petersberg tasks may be that the question of competences, at least on paper, is becoming less relevant with the prospect of an EU Foreign Minister who, acting under the authority of the Council and in close and constant contact with the Political and Security Committee “shall ensure coordination of the civilian and military aspects” of the above tasks (Art. III-309 CT) (DUKE (2003), p.21).

49) As set out in Art. I-41 para 1 CT, the Union may use its operational capacity also for missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nation Charter.

informed of the progress and consequences in the implementation.⁵⁰ On the other hand, the draft Constitution foresees a permanent structured cooperation for “those member states whose military capability fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions” (Article I-41 para 6 and Article III-312 CT). This is a remarkable novelty, given that enhanced cooperation in the field of security and defence is explicitly excluded in the TEU (Art 27b TEU). Member states that wish to participate and fulfil the criteria regarding the military capabilities set out in the respective Protocol in the Constitution shall notify the Council.⁵¹ Within three months following such notification, the Council shall adopt a European decision establishing permanent structured cooperation and determining the list of participating member states (Art. III-312 para 2 CT). It would be open to other member states subject to a vote by the Council of Ministers with the participation of those member states already taking part in the group (Article III-312 para 2 CT). The dividing lines between these two forms of flexibility in the CSDP are thus the qualitative requirements for military capability of the participating member states, as well as the quality or respectively the challenges of the missions and the ad hoc character of Art. III-310 CT. Yet, how these differences would apply in conceptual and practical terms is not entirely clear.⁵²

c. The Mutual Defence Clause

The second major innovation in the CSDP is the mutual defence clause in Art. I-41(7) CT. Whilst it was initially, under the Convention’s draft, also designed as a form of flexible cooperation, the final concept of the Union’s mutual defence clause obliges all member states to aid and assist “*by all the means in their power*” another member state that is “*the victim of armed aggression on its territory*”, in accordance with Article 51 of the United Nations Charter. This comprehensive obligation constitutes a significant challenge particularly for the neutral and non-aligned countries, such as Austria, Finland, Ireland and Sweden, and also Denmark with a view to its specific position in the CSDP. It, however, takes account of potential

50) As Cremona observes, those member states will then be committed to the task as defined in the relevant European decision, thus they will not have complete freedom of action and if it should provide necessary to amend those parameters, a further European decision by the whole Council of Ministers will be necessary. These provisions constitute the legal basis for such operations as in the former Yugoslav Republic of Macedonia and the Democratic republic of Congo (CREMONA (2003), p.1360).

51) Refer to Protocol 23 in CIG 87/04, ADD1.

52) DUKE (2003), p.24.

political or even constitutional conflicts by stating that this clause “*shall not prejudice the specific character of the security and defence policy of certain member states*”. At the same time, it avoids challenging the role of NATO by providing that the “*commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.*” Therefore, a clear line is established to Article 5 of the Brussels treaty, which should take priority over any application of Art. I-41(7) CT. Whether this concerns also the scope of the defence clause, in the sense that Art. I-41(7) CT also excludes pre-emptive action on the basis of proven threats in compliance with the standard interpretation of Art 51 of the UN Charter, is unclear. It might be implied by the requirement in Art. I-41(7) CT that commitments in this area are consistent with the North Atlantic Treaty Organisation. Yet, with a view to the differences regarding the legality of military action in Kosovo and Iraq, it is not clear whether there exists a uniform position on these questions within the EU.

d. The Solidarity Clause

Another form of mutual assistance, which is not regulated within the section on CSDP, but in fact also concerns potential security threats against any of the member states, is the solidarity clause (Article I-43 and Article III-329 CT). With a view to the current challenges of global politics, practical recourse to this provision seems even more imminent than situations under the mutual defence clause. Art. I-43 CT establishes an obligation to assist a member state that becomes a victim of a natural or man-made disaster or a terrorist attack, at the request of its political authorities. In this event, Union and member states are called to act jointly, *in a spirit of solidarity*, subject to coordination in the Council of Ministers. The Union shall mobilise all the instruments at its disposal, which notably includes also the military resources made available by the member states, intelligence, police and judicial cooperation, civil protection, etc.⁵³ Similar to the provision on mutual defence, the scope of obligation under the solidarity clause is not entirely clear: princi-

53) Compare CONV 461/02 (Final Report of Working Group Defence), p.20; generally, the arrangements for the implementation by the Union of the solidarity clause referred to in Article I-43 shall be defined by a European decision adopted by the Council acting on a joint proposal by the Commission and the Union Minister for Foreign Affairs. The Council shall act in accordance with Article III-300(1) where this decision has defence implications. The European Parliament shall be informed.

pally, the objectives of Art. I-43 CT are the prevention of threats or the assistance in the event of a threat or other disaster in the territory of the member states. The second indent of Art. I-43(I)(a), however, also foresees the implementation of the solidarity clause, in order to “*protect democratic institutions and the civilian population from any terrorist attack*” without any specification as to where such measures were to take place. Again, therefore, the scope of such competence may be questioned and, particularly, whether its formulation might permit pre-emptive action on the basis of proven threats, contrary to the obligations under public international law (Art 51 UN-Charter). Read in isolation of the Union’s international obligations, a preventive military action for example in Afghanistan, in the case of terrorist threats against any of the member states by a fundamentalist group, cannot be excluded.

e. The European Defence Agency

The last significant amendment in the CSDP that shall be mentioned is the legal basis for establishing a European Defence Agency in Art. I-41(3) and Art. III-311 CT. It is regulated in the context of the member states’ obligation in Art. I-41(3) CT “*to make civilian and military capabilities available to the Union for the implementation of the CSDP [...]*”. In consequence of this obligation, “*member states shall undertake progressively to improve their military capabilities*”.⁵⁴ To this end, the constitutional treaty authorises the establishment of an agency in the field of defence capabilities development, research, acquisitions and armaments. Its tasks include promoting the harmonisation of operational needs, initiating or coordinating multinational projects or programmes with regard to the objectives in terms of military capabilities and fostering research activities and the industrial and technological base in the defence sector (Art. III-311(I) CT). Remarkably, the Agency also contributes to defining the member states’ military capabilities objectives and evaluate the observance of the capability commitments given by the member states (Art. III-311(I)(a) CT), although it is not even obligatory that all member states take part in the endeavour. That is to say that also the European Defence Agency constitutes a sort of flexible cooperation, as it “*shall be open to all member states who wish to be part of it*”. Moreover, “*specific groups shall be set up within the Agency bringing together member states engaged in joint*

54) Compare in this regard the Final Report of the Convention’s Working Group on Defence which clearly stated in the context of the European Defence Agency that “the development of capabilities is linked to development of armaments” (CONV 461/02, 24).

projects". Similar to other fields of the CFSP/CSDP, the Agency brings about an interesting constellation regarding the institutions involved. The Agency's statute, seat and operational rules is to be defined by the Council, acting by qualified majority (Art. III-311(2) CT).⁵⁵ The Agency itself shall act subject to the authority of the Council (Art. III-311(1)), which presumably refers to the Foreign Affairs Council and hence the Union Foreign Minister, and at the same time shall carry out its task in liaison with the Commission where necessary (Art. III-311(2) CT). Remarkably, even before the formal signing of the treaty, the Council has already adopted a joint action establishing the European Defence Agency on the basis of Art 14 TEU with the mission to *support the Council and the member states in their effort to improve the EU's defence capabilities in the field of crisis management and to sustain the ESDP*.⁵⁶

In summary, the constitutional treaty includes important amendments to the CSDP, particularly by broadening the Union's competences through the extension of the Petersberg tasks and including several new legal bases allowing for a flexible integration and, thus, the possibility for a stronger progression of "coalitions of the willing" in the defence sector.⁵⁷ Taken together with the comprehensive obligations of mutual defence and solidarity assistance, it may be concluded that one "achievement" of the Constitution would be to strengthen the legal foundation for a common defence policy to a considerable degree.

55) Presumably, all member states and not only the participating states shall take part in the decision-making, as the following sentence explicitly requests that "that decision should take account of the level of effective participation in the Agency's activities.

56) Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency, OJ L245/17 of 12 July 2004; for a more detailed outline on the European Defence Agency refer to BLANCK, K. (2005), *Flexible Integration in the CFSP* (EI-Working Paper, Europainstitut, Vienna University of Economics and Business Administration), p.27ff.: Notably, Blanck points out that the cooperation programmes envisaged through the Agency and the option to set up exclusive industrial arrangements find itself in direct opposition to the Nice Treaty provisions excluding enhanced cooperation from issues having military or defence implications.

57) Another indication for a more efficient operation of the CSDP is the provision on financing in the Constitution (Art. III-313 CT). Principally the Constitution maintains the approach of charging expenditure arising from operations having military or defence implications to the member states in accordance with their respective gross national product scale. Yet, for the urgent financing of initiatives in the framework of the CFSP, and particularly preparatory activities for the Petersberg tasks, the Constitution foresees the establishment of specific procedures guaranteeing rapid access to appropriations in the Union budget (Art. III-313(3)). In addition, in order to finance preparatory activities for Petersberg tasks, a start-up fund made up of member states' contributions shall be established.

V.3. Chapter III: The Common Commercial Policy (Art. III-314 and III-315 CT)

Chapter III of Title V on the common commercial policy contains two provisions: Art III-314 CT on the establishment of a customs union between the member states and Art. III-315 CT which constitutes the considerably amended version of current Art 133 TEC. In the external sphere, the customs union as well as the common commercial policy is explicit exclusive competence as specified by Art. I-13(1)(e) CT.

Article III-314 CT essentially reflects Article 131 TEC with the significant complement, however, that it shall also contribute to the progressive abolition of restrictions on *foreign direct investment* and to the lowering of customs *and other* barriers. As Herrmann provides, the inclusion of non-tariff barriers and foreign direct investment (hereinafter: FDI) in the scope of the common commercial policy constitutes another indication for the ambitious and comprehensive global commercial policy aspired by the CT. It corresponds to the extension of the Union's objectives in the field of external action through Art. III-292 CT which, in his view, constitutes an expression of the Union's aspiration at international level to find and defend its own consensus on the equilibrium between economic and non-economic trade aspects towards the outside world.⁵⁸ With a view to these objectives, agreements concluded under the CCP might, in the future, also be reviewed with regard to their capacity of furthering sustainable development. It is also questionable, how trade agreements with countries that do not respect human rights should be legally evaluated in the light of the human rights-objective under Art. III-292 CT.

Also, the amendments to the scope of the CCP in Art. III-315 CT would bring about a significant development in the sphere of the international economic law. Currently, the Union's competences under the common commercial policy in Art 133 TEC include the adoption of tariff rates, quantitative restrictions, anti-dumping measures, anti-subsidy measures against unfair trade practices, export policy and the conclusion of tariff and trade agreements. With regard to the WTO-agreement, the ECJ clarified in Opinion 1/94 that besides the agreement on trade in goods, only selected

58) HERRMANN (2004), pp. 175 ff; CREMONA (2003), p.1349.

fields of trade in services and intellectual property are covered by (now) Art 133 TEC. Of the “four modes of the supply of services” identified by the Court, only the cross-frontier supply of services was held to fall under the scope of the common commercial policy. With regard to the TRIPS Agreement, only IP protection regarding the release into free circulation of counterfeit goods was under the Court’s ruling covered by Art 133. In addition, the conclusion of the Agreement on Technical Barriers and on Agriculture falls under exclusive Community competence under the CCP. As a consequence, the Union’s external powers appeared somewhat fragmented in relation to the substantive agenda of the WTO.

Following the Nice treaty, the trade aspects of services and IP rights were included in the common commercial policy, yet with several restrictions. First, following the predominant interpretation of Art 133 paras 5 and 6, the TEC only established concurrent competences in these areas. Second, Art 133 para 5 TEC only covers the conclusion of international agreements regarding services and IP, and does not include autonomous EC-measures, which emphasises the foreign trade aspect of Art 133 TEC. Third, the emphasis on *trade aspects* of services and intellectual property also clarifies that intra-Community aspects are not covered by Art 133 TEC and fall under the domain of internal competences. Fourth, pursuant to the prevailing understanding, the notion of services under the EC-Treaty does not cover the establishment of a commercial presence in another Member State, thus the setting up of a branch or a subsidiary.⁵⁹ Thus, whilst the active and passive freedom of services is covered by the CCP, the third mode of supply in the terminology of GATS remains outside the scope of the Union’s competence under Art 133 TEC. Against this background, it may be observed that the constitutional treaty in Art. III-315 CT would significantly broaden the scope of the common commercial policy.

Above all, the CT extends exclusive Union competence under the CCP to the conclusion of tariff and trade agreements relating to services and the commercial aspects of intellectual property rights, as well as foreign direct

59) A national of a Member State who pursues a professional activity on a stable and continuous basis in another Member State where he holds himself out from an established professional base to, amongst others, nationals of that State, comes under the provisions of the [...] right of establishment, and not those...relating to services” (Case C-55/94 Gebhard [1995] ECR I-4165). In turn, freedom to provide services includes investment insofar as it concerns the establishment of infrastructure such as an office, chambers or consulting rooms, as long as the “temporary nature of the activities in question” is not lost; compare in this regard GRILLER and GAMHARTER (2002), p.91f.

investment. The member states would thus be entirely excluded from concluding international agreements in these areas. Under the current regime, on the basis of the concept of pre-emption in the sphere of concurrent competences, the member states retain external competence to the extent that the Community has not acted. Pursuant to the CT, the member states would be *ab initio* precluded from setting any external action. It would be exclusively upon the European Union to negotiate and conclude agreements in the respective areas. Indirectly, it would compel the member states to reach agreement within the Council, if they wish to participate in the development of a certain subject matter at international level.

An important extension of the Union’s room for manoeuvre would also be effected by the inclusion of foreign direct investment in Art. III-315 CT. It would (finally) also bring the establishment of a “commercial presence” under the scope of the CCP.⁶⁰ Therefore, FDI would, as well as its focus on questions concerning the capital market, also imply an exclusive Union competence regarding international agreements on the establishment of third country residents and undertakings.

On this basis and with a view to the Union’s exclusive competences pursuant to Art. I-13 CT, namely in particular the field of competition, the Union’s external powers in international trade would be impressive. Herrmann even suggests that the Union would practically “govern” all aspects on the WTO-agenda and would be solely entitled to sign a final agreement at the current Doha development round.⁶¹ With a view to the parallel WTO-membership of the European Community and the member states, he even raises the question on the consequences for a revision of the Agreement pursuant to Art X WTO-Agreement, if the member states were not entitled anymore to translate amendments to the Agreements.⁶² Indeed, the member states’ margin of manoeuvre to conclude international commercial agreements, and more generally to adopt rules on services, IP and foreign direct investment that relate to third country nationals, would be reduced to a considerable degree. Moreover, it may be expected that the conclusion of an international agreement in a certain field also provides an incentive for an internal regulation, for example

60) This may be based on the argument that the maintenance of a permanent commercial presence in a country inevitably includes an investment decision (GRILLER and GAMHARTER (2002), p.93f)

61) HERRMANN (2004), p.26.

62) HERRMANN (2004), p.26f.

on the basis of the Union's concurrent competences. Cremona regards the new wording of the CCP as another attempt to extend the Union's competence in this field beyond its traditional application; an attempt, which has in her view already been shown in the course of the debate within the European Convention on whether the four freedoms should become an exclusive Community competence.⁶³ Notwithstanding this proposal, which has eventually been dropped in the course of negotiations, it remains at issue to what extent the CCP would lead to a 'tacit expansion of exclusive EU competences' in its fields of application.⁶⁴ That is to say that, also in the CT, only conventional measures, meaning the conclusion of tariff and trade agreements, and not autonomous measures are covered with regard to trade in services and IP as well as FDI. Thus, either a third country or an international organisation must participate in a Union measure.⁶⁵

Art. III-315 para 6 CT moreover addresses these concerns, as it stipulates that the exercise of competences under the CCP does not affect the delimitation of competences between the Union and the member states. It thus intends to delimit the external from the internal sphere and seeks to prevent the exclusive character of the powers under the CCP encroaching upon the internal delimitation of competences. In turn, the primacy of Union law and the member states' commitment under Art. I-5 para 2 CT to ensure the fulfilment of the obligations flowing from the Constitution or from the Union institutions' acts, prevents a conflict between the international agreements concluded by the Union and the exercise of internal competences by the member states.

Art. III-315 para 6 CT also sets limits to the Union's external competence, in establishing that the exercise of the competences under the CCP shall not lead to harmonisation where this is excluded in the internal sphere. This concerns the entire area of supporting, coordinating or complementary action (Art. I-17 CT), where the Union may in fact not enter into any international commitment that would imply the establishment of common

63) CREMONA (2003), p.1361f.

64) GRILLER (2003), p.138, on the proposal to bring the entire Common Commercial Policy under exclusive competence: 'The point of such concerns is that as a result of expanding the CCP in this manner, member states would no longer be competent to regulate services and intellectual property rights with regard to nationals of third countries.' CONV 528/03, Comments to Article 11 and CONV 797/1/03, Article I-12 para 1.

65) Compare GRILLER and GAMHARTER (2002), p. 90f; HERRMANN (2004), p.24; differently EECKHOUT (2004)

rules at Union level. Also several other competence provisions in the CT explicitly exclude harmonisation.⁶⁶ Furthermore, pursuant to Art. III-315 para 4 CT, the internal requirements for unanimity translate to the negotiation and conclusion of agreements in the fields of trade in services and IP, as well as FDI. In this regard, the constitutional treaty contains another amendment compared to the Nice version as regards agreements in the field of trade in cultural and audiovisual services. The attribution of such services as mixed competence established under the Nice version in Art 133 para 5 which mainly resulted from the member states', and particularly the French concern to protect domestic cultural services was dropped. Instead, the general CCP competence allocation principally also applies to trade in cultural and audiovisual services. The member states' sovereignty concerns are addressed by the requirement of unanimity where the conclusion of agreements in these fields risks prejudicing the Union's cultural and linguistic diversity. Moreover, the exclusion of harmonisation in the field of culture pursuant to Art. III-280 para 5 CT needs to be attended. As set out above, it prevents the establishment of common rules at the external level. This applies equally to the fields of trade in social, education and health services, where the conclusion of agreements would also be subject to a unanimity requirement, where such agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of member states to deliver them.

Finally, para 5 sets out that the negotiation and conclusion of international agreements in the field of transport are subject to the specific provisions of Section 7 on Transport in Title III. Thus, the field of transport services remains outside the exclusive CCP competence and, following the most recent judgment of the ECJ on the Open Skies Agreements, the largest part of this sector gives rise to (only) shared external competence of the Union and the member states. The area of transport would thus constitute a gap in the Union's near-complete powers in international trade. A last remark relates to the procedural aspects of the CCP which would bring about an increased role of the European Parliament. In accordance with Article III-325 para 6(b) CT, the European Parliament would for the first time be given the right to be consulted, where an agreement under the CCP is concluded.

66) Compare for example Articles III-207, Art. III-210, Art. III-280 or Art. I-14 para 3 and 4 CT.

The provision on the CCP in the CT in fact aspired to resolve the compromise adopted in the Nice-version, between those who felt that the Union's external powers were unnecessarily limited through the Court's ruling in the WTO-Opinion and those who dreaded a further extension of the Union's competences. It seems that the Convention, after the drawback of Opinion 1/94, tended to take up the extensive interpretation of exclusivity first adopted by the ECJ in Opinion 1/78, according to which "*a commercial policy, based on uniform principles must be governed from a wide point of view [...]*."⁶⁷ The CT would undoubtedly broaden the Union's economic external powers, and thus its margin of manoeuvre in the field of international trade, to a considerable degree. Last but not least, the proposal would entail one significant gain, namely to simplify the current "legal monstrosity"⁶⁸ created under the Nice Treaty.

V.4. Chapter IV: Cooperation with Third Countries and Humanitarian and Aid (Art. III-316 to III-321 CT)

V.4.1 Introduction

Chapter IV of Title V on the Union's cooperation policies covers one of the main pillars of EU external action. Measures adopted on the basis of these provisions extend to practically all countries in the world and cover all essential areas of cooperation with third countries, including economic, social and political aspects. The Union's cooperation policy is thus another field which displays the strong link between trade or economic relations and foreign policy aspects.⁶⁹ Articles III-316 to III-321 CT essentially reflect the provisions on development cooperation in the current Art 177 TEC, as well as economic, financial and technical cooperation with third countries in Art 181a TEC. Art. III-321 CT moreover introduces a new competence provision on humanitarian aid, for cases of ad hoc assistance, relief and protection for people in third countries and victims of natural or man-made disasters.

67) Opinion 1/78, 4 October 1979; ECR 1979/2871, para 45. In this paragraph the Court also states that "a restrictive interpretation of the concept of Common Commercial Policy would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries."

68) HERRMANN (2004), p.2 (loose translation).

69) Compare the statement of the Commission and the Council, available at http://www.europa.eu.int/comm/development/index_en.htm, according to which it is the task of the Community to ensure that development policies and trade and investment policies are complementary and mutually beneficial (p.6).

These provisions have been the result of a gradual development of the Community's cooperation policy. In its original version and until Maastricht, the TEC did not contain any specific legal basis for development cooperation or cooperation with third countries. The development of policies in these areas was largely based on (current) Art 310 TEC (Association Agreements)⁷⁰ or Art 133 TEC (Common Commercial Policy).⁷¹ Yet evidently, it conflicts with the very purpose of Art 310 TEC to conclude association agreements with all developing countries. Also the CCP is not the appropriate legal basis to cover all aspects of development policy. Maastricht finally introduced the current Art 177 TEC and established development cooperation formally as an area of Community policy.⁷² Its objectives included amongst others the sustainable economic and social development of the developing countries, the campaign against poverty and the gradual integration of these countries into the world economy. It thus offers a broad margin to define the actual content of cooperation with third countries.⁷³ Moreover, as is emphasised in Art 177(2) TEC, the objectives of development cooperation are taken into account in all Community policies which are likely to affect developing countries. Above all, this refers to the delimitation between development cooperation and the Common Commercial Policy, or the close co-existence between trade, economic or technical cooperation and other forms of cooperation intended to strengthen democratic and human rights values in third countries.

70) Compare for example the earlier Lomé Conventions which have been now replaced by the so-called Cotonou-Agreement with the ACP-countries (Council Decision 2003/159/EC of 19 December 2002 concerning the conclusion of the Partnership Agreement between the African Caribbean and Pacific Group of States, of the one part, and the European Community and its member states, of the other part, signed in Cotonou on 23 June 2000) which is also based on Art 310 TEC; Compare hereto SCHMALENBACH (2002), ad Art 177 (in Callies/Ruffert, Kommentar zu EUV und EGV, 2nd Edition, Luchterhand), para 3.

71) Compare, for example the Council regulation on the cooperation agreement with the Asian and Latin American countries which are based on Art 133 in conjunction with Art 181 (Council Regulation (EEC) No 1440/80 of 30 May 1980 concerning the conclusion of the Cooperation Agreement between the European Economic Community and Indonesia, Malaysia, the Philippines, Singapore and Thailand – member countries of the Association of the South-East Asian Nations, OJ L 144/1; also the regulation on the Generalised System of Preferences (Regulation 2501/01, OJ L 346/1) is based on Art 133 TEC, although it pursues development policy objectives; compare moreover the Court's broad approach on CCP in Opinion 1/78, 4 October 1979; ECR 1979/2871.

72) For an historical background on the development cooperation, refer to MARTENCZUK (2002), Cooperation with Developing and Other Third Countries: Elements of a Community Foreign Policy (in Griller/Weidel, External Economic Relations and Foreign Policy in the European Union, Springer Wien/New York).

73) Compare, by contrast, the narrow interpretation of the Court regarding the scope of Community competence in development cooperation in Case C-268/94, Portugal versus Council, [1996] ECR I-6177, para 39 (in this context: MARTENCZUK (2002), p.393).

The Nice treaty inserted another title in the field of cooperation policy, governing economic, financial and technical cooperation with third countries (Art 181a TEC). It codified a long standing Community practice of concluding cooperation agreements or including cooperation provisions in general agreements with non-developing countries, which until then had to be based on current Art 308 TEC.⁷⁴ In terms identical to Art 177(2) TEC, Art 181a TEC is also designed to contribute to the general objective of developing and consolidating democracy and the rule of law, and to further the respect for human rights and fundamental freedoms. Yet, in contrast to Art 177 TEC, it specifically addresses the cooperation with countries or regions other than developing countries, including industrialised countries. The subject matter of such cooperation in the treaty is defined in broad terms and, as Eeckhout sets out, removes the need for recourse to different Treaty provisions depending on the subject of cooperation.⁷⁵ Nevertheless, to the extent that such measures fall under the scope of other Community policies, in particular to the common commercial policy, the more specific legal basis prevails.⁷⁶ An exclusive Union competence under the CCP would, for example, continue to exist to the extent that Community measures pursuing development objectives have as an essential goal to determine commercial or agricultural policy.⁷⁷

Through the introduction of a common set of objectives, the emphasis to extend the Union's cooperation, and particularly development policy objectives to all fields of external action has become even more explicit (Art. III-292(2) CT). This applies particularly to the respect for human rights, democracy or the rule of law which frequently is a condition for financial or economic assistance in development or trade agreements with third countries. Yet, also the fostering of "*sustainable economic, social and environmental development of developing countries*" (Art. III-292(2) lit d CT) explicitly ranks among the general objectives of the Union's external action. These com-

74) Compare, for example, Council Regulation (EC) No 2698/2000, OJ L 311/1 amending Regulation (EC) No 1488/96 on financial and technical measures to accompany (MEDA) the reform of economic and social structures in the framework of the Euro-Mediterranean partnership, as well as Council Regulation 443/92, OJ L52/1 governing financial and technical assistance and economic cooperation with the developing countries of Latin America and Asia (ALA).

75) An agreement providing for technical cooperation in matters of transport, environmental protection and agriculture, for example, does not need to be based on the express or implied external powers in those areas (EECKHOUT (2004), p.117).

76) MARTENCZUK (2002), p. 407.

77) SCHMALENBACH (2002), ad Art 180 para 1 and Art 179 para 3; C-268/94, Portugal versus Council, ECR 1996/I-6177, ad para 39.

mitments for the future implementation of the Union's external action, as well as the further extension of competences in cooperation policy appear to aim at an enhanced Union engagement in this field.⁷⁸

V.4.2. The New Provisions of the Constitution on the Cooperation with Third Countries and Humanitarian Aid

Both Art 177ff TEC and Art 181 TEC stipulate that the Community policy in the sphere of cooperation policy shall be "*complementary to the policies pursued by the member states*". Yet, despite this clear wording in the treaty, Community measures in the field of development cooperation in practice go beyond a mere coordination of member states' policies. As the Convention's Working Group on "Complementary Competences" observed, the preferred legal instrument for Community action in development cooperation is regulations, which would under the definition chosen imply shared competence. The group, however, also stated that *development cooperation has special features because Union activities in this field would never pre-empt the competence of the member states to maintain their own national development policy*. It is thus presupposed that member states would continue to pursue their own development policies⁷⁹.

The constitutional treaty takes account of this specific nature of the Union's development policy. Art. I-13 CT categorises development cooperation and humanitarian aid as shared competences. At the same time, it provides that the exercise of Union competence in this field *to take action and conduct a common policy* may not result in member states being prevented from exercising theirs (Art. I-13 para 4 CT). The principle of pre-emption, normally inherent in the context of shared competences, does not apply in these areas. Consequently, Art. III-316 in Part III of the Constitution stipulates that the Union's development cooperation policy and that of the member states shall complement and reinforce each other and that the Union's external powers in the field do not prejudice the member states' competences to negotiate in international bodies and to conclude

78) Compare Working Document 29 of Working Group "Complementary Competences"; similar SCHMALENBACH (2002), ad Art 180, para 1; compare also ZIMMERMANN and MARTENCZUK (2000), ad Art 177 (in Schwarze, EU-Kommentar, Baden/Baden, 2000), para 14.

79) CONV 375/1/02, REV 1, p.9, compare also Working Document 29 of Working Group "Complementary Competences", where it is proposed that development policy, as a sub-category of shared competence could be parallel competence; compare also SCHMALENBACH (2002), ad Art 180, para 1; see also ZIMMERMANN and MARTENCZUK, B. (2000), ad Art 177, para 14.

agreements (Art. III-316 and III-317(2) CT). The same applies to economic, financial and technical cooperation with third countries (Art. III-319 CT)⁸⁰ and humanitarian aid (III-321 CT).

V.4.3. Development Cooperation (Art. III-316 to III-318 CT)

A substantial novelty in the provision on development cooperation is the emphasis on the primary objective of reducing and, in the long term, eradicating poverty (Art. III-316 para 1 CT). Despite the general obligation in Art. III-292 CT, Art. III-316 para 1 CT once more underlines the Union's commitment "to take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries". Both Union and member states are moreover held to "comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations" (Art. III-316 para 2 CT). Internally, development cooperation policy shall be implemented through European laws or framework laws, as well as multi-annual cooperation programmes. Art. III-317 CT contains the legal basis for the conclusion of agreements with third countries and competent international organisations to achieve the objectives referred to in Articles III-292 and III-316 CT. Also, the European Investment Bank is held to contribute, under the terms laid down in its statute, to the implementation of development cooperation policy (Art. III-317 para 3 CT). Art. III-318 CT furthermore includes a mutual obligation for coordination and consultation between Union and member states, "in order to promote the complementarity and efficiency of their action".

V.4.4. Economic, Financial and Technical Cooperation with Third Countries (Art III-319 and III-320)

Art. III-319 CT essentially reproduces current Art 181a TEC. It empowers the Union to carry out economic, financial and technical cooperation measures, including assistance and, in particular financial assistance, with

⁸⁰ Interestingly, the field of economic, financial and technical cooperation with third countries (Art. III-221) is not specifically attributed to a competence category in Part I CT, unless one assumes that the reference in Art. I-14(4) CT relates to the entire chapter on cooperation with third countries and humanitarian aid. Yet, also Art. III-319(3) CT foresees that in the sphere of external relations, the member states' competence to negotiate in international bodies and to conclude international agreements shall not be prejudiced by the exercise of Union competences in this field. On the basis of this provision, the systemic integration of Art. III-319 CT in Chapter IV of Title V and the residual character of shared competences, it may be concluded that also Art. III-319 CT confers shared competence by excluding pre-emption.

third countries other than developing countries. A progress in comparison to Art 181a TEC is certainly the introduction of the legislative procedure for decision-making. The requirement for unanimity regarding agreements under Art. III-319 CT with countries that are candidates for accession remains unchanged.

An additional legal base is awarded in Art. III-320 CT for adopting the necessary European decisions, when the situation in a third country requires urgent financial assistance. It allows the Council to adopt such measures by qualified majority, instead of unanimity, as is presently the case under Art 308 TEC.⁸¹

V.4.5. Humanitarian Aid (Art. III-321)

Following current practice of Community action, the provision on humanitarian aid may be regarded as another necessary extension of the Community competences in the field. It entitles the Union to implement operations for ad hoc assistance and relief and protection for people in third countries who are victims of natural or man-made disasters, in order to meet the humanitarian needs resulting from these situations (Art. III-321 para 1 CT). Such operations would have to be concluded in compliance with the principles of international law and with the principles of impartiality, neutrality and non-discrimination (Art. III-321 para 2 CT). As became evident in the *Bangladesh* case⁸² decisions on emergency aid, and particularly the financial assistance linked to such decisions, brought about some difficulties regarding the legal basis in the Treaty for a Community humanitarian aid policy.⁸³ In this judgment, the Court allowed member states to collectively finance emergency aid and to take decisions when meeting in the Council, yet acting outside the framework of the Treaty and of the budget. The current provision in the constitutional treaty brings matters of humanitarian aid within Union competence. This might also entail implications with regard to budgetary matters, given that the main issue of dispute underlying the Bangladesh case was the Parliament's claim

⁸¹ Art. III-320 would provide the appropriate legal basis for the regulation on the rapid reaction mechanisms covering the reaction to crises both in developing and non-developing countries, which was adopted on the basis of Art 308 TEC.

⁸² Joined Cases C-181/91 and C-248/91, *Parliament vs. Council and Commission*, [1993] ECR I-3685.

⁸³ EECKHOUT (2004), p.108; compare also Regulation 1257/96, OJ L 163/1, 2 July 1996 which constitutes the basis for the Commission's humanitarian activities world-wide and has been adopted as an thematic instrument on the basis of Art 179(1) TEC.

that the member states' decisions on emergency aid infringed its budgetary prerogatives. With a view to the "complementary" character of this policy and notwithstanding the coordination with Union actions, member states may still continue to pursue independent operations.

V.5. Chapter V: Restrictive Measures (Art. III-322 CT)

The provisions on economic and financial sanctions against third countries have all along rendered the inextricable link between CFSP and external relations under the current first pillar apparent, both in procedural as well as in substantive terms. Generally, embargo sanctions are *imposed by an authority against another subject of international law in pursuance of a foreign policy objective, namely to alter the conduct of the target State*.⁸⁴ Art III-322 incorporates current Articles 301 TEC on economic and 60 TEC on financial sanctions and, in terms of procedure, maintains the two-stage approach provided for in Art 310 TEC for the adoption of sanctions.⁸⁵ This is particularly noteworthy with a view to the merger of the pillars. In fact, it provides another confirmation that, also in a "unified" Constitution, the member states' concerns to hand over sensitive foreign policy instruments are successfully addressed through the persisting procedural safeguards in the CFSP. For the interruption or reduction of economic or financial relations pursuant to Art. III-322 CT the Council thus needs to adopt a (principally) unanimous European decision in the framework of the CFSP. On the basis of such a decision, the Council, acting by qualified majority, would adopt the necessary European regulations or decisions.

Evidently, a unanimous Council decision as necessary precondition for the adoption of sanctions, though most probably unavoidable from a political point of view, is a rather challenging requirement in a Union of 25 member states. It substantially weakens an otherwise powerful trade and policy instrument in the hands of the Union. Moreover, the unanimity requirement comprises another important facet with a view to the competence allocation for the adoption of sanctions. Notably, Art. III-322 CT is not assigned

⁸⁴ Compare LUKASCHEK (2002), p. 324 referring to SCHNEIDER (1997) 27f.

⁸⁵ The structure of this provision introduced through the Treaty on European Union has been preceded by a long standing practice of a combined approach, namely the adoption of sanctions on the basis of a consensus decision with in the EPC followed by a Community measure based on former Art 113 TEC; for a detailed account on the European Union's legal framework on economic sanctions, compare LUKASCHEK (2002), p.322-354.

to a specific competence category. On the basis of the general rule in Art. I-14(1) CT, one might therefore argue that it figures as a shared competence. This conclusion somewhat contradicts the current perception of Art 301 TEC which is that of an exclusive competence⁸⁶ or, alternatively, suggests that the scope of the Union's competence depends on the repartition of powers in the field of the respective embargo measures.⁸⁷ Following the latter approach, for example, the "classical" trade sanctions covered by the Common Commercial Policy-competence are exclusive. In contrast, on the assumption that the competence to adopt economic or financial sanctions was shared in the Constitution, the member states would be principally free to adopt autonomous sanctions, as long as the Union had not acted in a given case. This would become problematic in each case where the adoption of a measure in the Council was blocked for the lack of unanimity.

With a view to the quest for a more coherent and consistent approach in the field of external relations, this solution seems entirely inappropriate: Particularly with a view to the Union's comprehensive exclusive powers in the field of the common commercial policy, it should be out of question that the member states adopted autonomous trade sanctions. The more plausible approach would therefore be to not interpret Art. III-322 CT as a genuine empowering provision. Rather, the division of competences would depend on the individual case. As long as the Union did not adopt sanctions against a third country, an individual or non-State entity, the member states would be free to take such embargo measures that are not in conflict with any of the Union's exclusive competences. This might include flight embargos in the field of transport, visa restrictions, or eventually the freezing of accounts in the field of capital and payment. In contrast, it would prevent the member states from adopting any trade sanctions with a view to the Union's exclusive competence under Art. III-315 CT. Art. III-322 CT would thus be understood as a horizontal competence provision, conferring power on the Union only in those fields, where the Union's legislator is internally entitled to act. This approach would also seem in line with the member states' interest to retain control on the implementation

⁸⁶ Compare for example CREMER (2002), in CALLIES (2002), ad Art 301 para 14 and fn.63.

⁸⁷ Compare for example LUKASCHEK (2002), p.345f; this would, for example imply that a measure on the basis of Art 301 TEC, which also encompassed services, would on the basis of Opinion 1/94 only confer concurrent competence. This view would, however, contradict a systematic interpretation of the Treaty, as Art 60 TEC extends the competence for adopting measures under Art 301 TEC to the field of capital and payment and explicitly foresees in its para 2 in exceptional cases, a (concurring) competence of the member states for serious political reasons and on grounds of urgency.

of this important foreign policy instrument. By contrast, for reasons of efficiency and coherence at the international stage, it would have seemed preferable to institute a general exclusive embargo competence for the Union and to ease the requirements for decision-making. In any event, it should be added that the issue is put into perspective in practice, as a great proportion of the Union's embargo measures are adopted to implement the decisions of the UN-Security Council that are mandatory for all member states. Nonetheless, it speaks for itself that the Constitution, similar as for the CFSP, avoids clarifying the competence for this hybrid legal basis.

In substantive terms, Art. III-322 CT reacts to the current practice and global security challenges by extending the scope of "addressees" in the provision. Economic and financial sanctions may forthwith be applied not only against States, but also against natural or legal persons and non-State groups or bodies (Art. III-322 para 2 CT). Currently, this would, in principle, only be possible on the basis of Art 308 TEC and, thus, subject to unanimity.

Finally, it should be added that the provisions on restrictive measures, though clearly involving foreign security aspects, are not part of the chapter on CFSP and, therefore, fall within the jurisdiction of the European Court of Justice. This also includes a review under the current Art 230 TEC regarding the legality of restrictive measures adopted by the Council. The Court's jurisdiction in this field might gain importance with a view to the future relationship between the CFSP and current supranational fields of external action, and the associated institutional and procedural prerogatives in the Constitution. It may become pertinent with a view to the delimitation to Art. III-325 (9) CT, which constitutes the second provision in the Constitution for "sanctioning" third countries by suspending the application of an existing agreement. Whilst the adoption of a sanction pursuant to Art. III-322 CT requires "a CFSP measure", thus unanimity within the Council, followed by a Council regulation, the suspension of an economic agreement comes under the CCP and can in principle be done upon proposal by the Commission and qualified majority within the Council. Thus, if unanimity in the Council cannot be achieved and the Commission, nevertheless, considers the adoption of sanctions necessary, it might tempt to achieve qualified majority within the Council by proposing to suspend an agreement with the country in question. If this were among the tasks of the Union Foreign Minister in his function as External Relations-Commissioner, yet simultaneously head of the Foreign Affairs Council,

he/she might indeed face a difficult decision concerning whether or not to push for the adoption of such proposal within the Commission. A lack of unanimity in the Council expresses that the adoption of sanctions is not considered an appropriate foreign policy instrument in a given case. Yet, without considerably affecting the scope of application of Art. III-325(9) CT, this should not prevent a "sanction", namely the decision to suspend an agreement, if the necessary qualified majority is reached, although it contradicts the foreign policy interests of certain member states.

It all comes down to the extent of the institutions' commitments pursuant to Art. III-292 para 3 CT to "*ensure consistency between the different areas of its external action*". Only practice could establish in which fora (the EEAS?) and under whose aegis (the Foreign Minister?) these commitments would be implemented and to what extent the obligation for consistency would be enforced or even challenged in a Court's action.

V.6. Chapter VI: International Agreements (Art. III-323 to III-325)

V.6.1. The Legal Basis for the Conclusion of International Agreements (Art. III-323 CT)

The questions relating to the Union's powers for concluding international agreements in the Constitution have been discussed above in relation to the Union's implied powers under Art. III-323 para 2 CT⁸⁸. In the context of this provision, it should suffice to summarise that Art. III-323 CT empowers the Union to conclude an international agreement with one or more third countries or international organisations where the Constitution (explicitly) so provides or, respectively, on the basis of its implied powers. It is therefore not a genuine competence provision, but entitles the Union to conclude international agreements where there is an appropriate legal basis in the Constitution⁸⁹ or where an external competence arises implic-

⁸⁸) Refer to Chapter IV.4.

⁸⁹) This, for example, includes the Union's competences to include international agreements in the field of the environment (Art. III-233(4)), research, technological development and space (Art. III-248), readmission agreements with third countries (Art. III-267 (3)), development cooperation (Art. III-316(2)), economic, financial and technical cooperation with third countries (Art. III-319(3)) and humanitarian aid (Art. III-321(4)).

itly through provisions of the Treaty or secondary law. With regard to the effect of these agreements Art. III-323 para 2 CT provides that they “*are binding on the institutions of the Union and on its member states*”.

V.6.2. Association Agreements (Art. III-324 CT)

Art. III-324 CT literally reproduces current Art 310 TEC entitling the Union to “*conclude an association agreement with one or more third countries or international organisations in order to establish an association involving reciprocal rights and obligations, common actions and special procedures*”. The concept of “association” remains undefined in the Constitution, yet probably gathers a more narrow scope of application with the newly introduced provision on neighbourliness agreements (Art. I-57 CT) and the Union’s extended competences in the field of cooperation policy (Art. III-316 to III-321 CT). Following the pertinent judgment of the ECJ in *Demirel*⁹⁰, the key elements of an “association” should be the creation of special, privileged links with the country in question and its participation, at least to some extent, in the Community system. For this reason, namely to extend the system of the treaty for the relevant policy areas to the associated country, the Court established an extremely broad external Union competence.⁹¹ As Eeckhout points out, however, even where the judgment was *among the most expansive in Community competence, it did not much change the practice of concluding association agreements in mixed form*, particularly because of the necessary underlying political dialogue.⁹² According to Art. III-325 para 8 CT, moreover, unanimity as well as the consent of the European Parliament is required for the adoption of association agreements. Agreements aiming to establish closer (economic, social or political) links with third countries without the inherent “promise” of accession might equally be based on Art. I-57 CT or, for example Art. III-319 CT. For these agreements, the Council may normally act by qualified majority⁹³; the European Parliament would have to give its consent in the case of agreements subject to Art. III-319 CT (Art. III-325(6)(a)(v)CT) or after having been consulted in the case of neighbourliness agreements.⁹⁴

90) Case 12/68, *Demirel versus Stadt Schwäbisch Gmünd* [1987] ECR 3719.

91) In the case of *Demirel*, this included for example also aspects of immigration and employment of third country nationals.

92) EECKHOUT (2004), p.106.

93) Exempted are agreements subject to Art. III-319 with accession candidates.

94) The Parliament’s consent for the conclusion of neighbourliness agreements might only be required, if such agreements established specific institutional framework (Art. III-325(6)(a)(iii) CT).

V.6.3. The Union and Its Neighbours (Art. I-57 CT)

A specific legal basis for the future of the Union’s relationship with its neighbouring countries is enshrined in Part I of the Constitution, directly ahead of the Title governing Union Membership (Title IX). In conjunction with Art. III-225 CT, it empowers the Union to conclude agreements with neighbouring countries, in order to “*develop a special relationship [...] aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.*” Similarly as for association agreements, the neighbourliness agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly (Art I-57 para 2 CT). In substance, however, the objective target of Art. I-57 CT is different. It pictures a product of the European Neighbourhood Policy (ENP), initiated by the Commission and essentially designed to “*prevent the emergence of new dividing lines between the enlarged EU and its neighbours and to offer them the chance to participate in various EU activities, through greater political, security, economic and cultural co-operation*”.⁹⁵ In its outline on the neighbourhood policy, the Commission emphasises that the ENP is distinct from the issue of potential membership, yet offers a privileged relationship with the Union’s neighbours. Together with partner countries, it aims to define a set of priorities, whose fulfilment shall bring them closer to the European Union. The countries currently covered by the European Neighbourhood Policy are Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Syria, Tunisia, Ukraine, as well as the Palestinian authority. The European Neighbourhood Policy has been successively established on the basis of a Commission’s Communication of 2003 on a New Framework for Relations with the European Union’s Eastern and Southern Neighbours.⁹⁶ Without a specific legal basis in force to conclude neighbourliness agreements, however, the neighbourhood policy will continue to be implemented on the basis of cooperation or association agreements.

95) Further information on the objectives and methods of the ENP are available at http://www.europa.eu.int/comm/world/enp/policy_en.htm.

96) COM (2003) 104, Communication from the Commission to the Council and the EP, ‘Wider Europe—Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours’, 11 March 2003.

V.6.4. *The Procedure for the Conclusion and Negotiation of Internation of International Agreements (Art. III-325 CT)*

Article III-325 CT regulates the procedural aspects of international agreements. Its major achievement is to apply a single provision to the negotiation and conclusion of practically all EU agreements, including also the CFSP and PJCCM (police and judicial cooperation in criminal matters) agreements that are currently regulated in Art 24 TEU⁹⁷. Specific provisions are only foreseen for the common commercial policy (Art. III-315 CT) and for international agreements in the field of monetary matters (Art. III-326 CT).

As Art. III-325 CT covers agreements both in the fields of the CFSP and current Community matters, several features preserving the intergovernmental approach in the CFSP are apparent in the procedure. Either the Commission or, where the agreement relates exclusively or principally to the CFSP, the Union Minister for Foreign Affairs may recommend the opening of negotiations (para 3). The Council nominates the Union negotiator, presumably following the current practice, either the Commission or the Union Minister for Foreign Affairs, or both where an agreement covers both CFSP and Community matters. As has been set out above, the European Parliament unfortunately remains entirely excluded with regard to CFSP agreements. In contrast, its role has been enhanced in other areas. The Parliament's consent is required for agreements in all fields, where the legislative procedure applies (para 6).⁹⁸ Most notably, this is the case for all PJCCM matters, where the Parliament's role has thus proceeded from no involvement to consent. The consultation of the European Parliament would be required for agreements under the CCP, where it currently has no formal role. Also in the framework of the Constitution, the role of the Parliament remains, however, limited to the conclusion of agreements. The negotiating phase, which is essential for the shape and substance of the agreement, would continue to be determined by the Council and Commission and the Union Foreign Minister. Regarding the voting modalities, qualified majority continues to be the principle, except for association agreements, agreements referred to in Art. III-319 (economic, financial

97) For PJCCM matters, Art 24 TEU applied by reference in Art 38 TEU, entitling the EU to conclude international agreements in third pillar matters.

98) Under Art 300 (3) TEC, the Parliament's power of assent was in this regard limited to agreements requiring an adopted act to be amended under the co-decision procedure.

and technical cooperation) with the States which are candidates for accession, as well as those fields for which unanimity is required internally for the adoption of a Union act (para 8). Important also is the power of the European Court of Justice to render opinions as to whether an agreement envisaged is compatible with the Constitution (para 11). In the context of a cross-pillar mixity, thus agreements covering both CFSP matters as well as Community aspects of external relations, the Court's jurisdiction might constitute another potential playing field for defining the future relationship between the former pillars.⁹⁹

Finally, the provision on suspension of agreements (Art. III-325 para 9 CT), which has been mentioned in the context of Art. III-322 CT on restrictive measures is noteworthy. In contrast to the two stage procedure that applies to economic and financial sanctions, the suspension of an agreement is conducted by a European decision of the Council, acting on a proposal from the Commission or the Union Minister for Foreign Affairs. Nevertheless, as has been discussed above, the suspension of agreements mostly constitutes a highly sensitive, political act. It is thus striking that the Constitution remains silent on the European Parliament's participation in these decisions. This might either imply that the Parliament has no say in such decisions or, analogous to Art. III-325(6)(b) CT, would at least need to be consulted.

V.7. Chapter VII: The Union's Relations with International Organisations and Third Countries and Union Delegations (Art. III-327 to III-328 CT)

In a sort of catch-all provision at the end of Title V, the Constitution entitles the Union to “*establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development*”, and “*as are appropriate with other international organisations*” (Art. III-327 CT). The provision furthermore contains a rather curious directive on its implementation as “*the Union Minister for Foreign Affairs and the Commission*”, presumably by the Council, “*shall be instructed to implement this Article*” (Art. III-327(2) CT).

99) Regarding the conclusion of such agreements in the case of a cross-pillar mixity, compare the contrasting positions of GRILLER (2003), p.151 and EECKHOUT (2004), p.184; for a discussion on the hierarchy of international agreements compare LECHNER (2004), p.23.

As mentioned above in Chapter III.3.1, Art. III-328 CT finally empowers the Union delegations to represent the Union in third countries and at international organisations. They are placed under the authority of the Union Minister for Foreign Affairs and would act in close cooperation with member states' diplomatic and consular missions.

VI. SUMMARY

The attempt to analyse the future of the Union's external relations is necessarily limited by two factors: On the one hand, as has been stated in the introduction, this relates to the uncertainty as to whether the constitutional treaty will ever enter into force or whether parts of its provisions will be implemented. The second factor, even presuming a continuation and successful conclusion of the ratification procedure, concerns the extent to which the potential that is undoubtedly yielded in the constitutional treaty could be implemented in practice. This potential may, notably, shift the Union into several directions, including a stronger intergovernmental orientation in the Union's external relations, or indeed, a more coherent role of the Union in the world, based on its extended economic competences and a successful implementation of the institutional amendments. Eventually, the CT might also hold up the artificial divide between economic and political aspects of external relations which currently persists.

The (merely preliminary) findings on the Union's future role in the field of external relations on the basis of the CT may, therefore, be summarized as follows.

- (i) Regarding the definition of competence-categories and the attribution of competences, the CT would provide for stronger clarity and transparency by essentially codifying the present competence regime. With a view to the Union's external competences, however, there are controversial developments: On the one hand, the CT significantly expands the Union's exclusive competences, particularly in the field of the Common Commercial Policy, which implies a move towards integration and centralisation. On the other hand, the draft implies the inherent danger of a stronger intergovernmental orientation of

the entire field of external relations through the predominant role given to the European Council.

- (ii) In spite of the factual perpetuation of the pillar structure with regard to the proposed design of the CFSP, the competences of the Union in the field of external relations have been strengthened as a whole. This applies particularly to the field of economic external powers. The extension of the scope of the CCP together with the CT's proposal on implied competences in Art. I-13 and III-323 CT might in the future even empower the Union to conclude international agreements, such as the Open Skies-Agreement, as well as to sign a final agreement at the current Doha development round alone, on the basis of its exclusive as well as concurrent competences.
- (iii) The introduction of generalized objectives governing the entire field of external action (Art. III-292 CT) implies the obligation for a broader orientation of the Union, also in the area of economic external relations. This might particularly bring about a stronger consideration of non-economic trade aspects in the implementation of the Common Commercial Policy.
- (iv) By looking at the individual competence provisions in Title V, the ever-closer link between foreign policy and economic aspects of external relations becomes visible, particularly in the area of restrictive measures or the Union's cooperation policies. Through the persisting differences in the institutional and procedural provisions between CFSP and the current supranational fields of external action, moreover, the delimitation between the two "pillars" remains at issue. The commitment to ensure consistency between the different areas of external action would thus become a core challenge for the Union's institutions, and particularly the Union Foreign Minister.
- (v) Last but not least, the CT includes important amendments to the CSDP, particularly by broadening the Union's competences through the extension of the Petersberg tasks and by including several new provisions allowing for flexible integration and, thus, the possibility for a stronger progression of "coalitions of the willing" in the defence sector. Taken together with the comprehensive obligations of mutual defence and solidarity assistance, the CT would strengthen the legal foundation for a Common Defence Policy to a considerable degree.

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CHAPTER 6

A 'saut constitutionnel' out of an intergovernmental trap?

The provisions of the Constitutional Treaty for the Common Foreign, Security and Defence Policy

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SUMMARY: 11 THESES

1) Given the “DDS syndrome” (discreet and discretionary action, highly loaded with sovereignty symbols) the constitutionalisation of foreign, security and defence policy raised and raises specific demands and challenges both for the constitutional architects as for the academic observers.

Anatomy and analysis: trends and innovations

- 2) Despite extensive reformulation, major provisions document contain a high degree of continuity:
 - a) an unclear and diffuse division of Union and member state competences: keeping it as a sui generis category
 - b) in spite of the birth of legal personality: an ongoing life of the former pillar structure in terms of the designed procedures;
 - c) limited extension of the Union's resources and instruments: no supranational upgrading
 - d) soft obligations for cooperation rules among member states: constitutional prose without sanctions;
 - e) a reconfirmation of decision-making rules: indefinite veto rights.
 - f) extension and strengthening of the European Council: constitutionalising the de facto role.
- 3) The text sets ambitious expectations upgrading a mixture of civilian power with (limited) military interventionism towards some kind of state like qualities of a global actor.
- 4) The institutional provisions will lead to a high degree of personalisation and politicisation as well as to intensive inter- and intra-institutional power struggles:
 - a) The UMFA will improve the external visibility but the role assignments are not matched by respective internal powers.
 - b) The ambiguous profile for fulltime European Council Chair will lead to major conflicts with the Union Minister for Foreign Affairs (UMFA) and the President of the Commission.
- 5) The procedural provisions for new forms of flexibility do not offer sufficient incentives for mobilising military resources.

Assessment

- 6) The masters of the constitutional treaty have not achieved a constitutional breakthrough, but moved even more into the intergovernmental trap.
- 7) The capability-expectations gap has been widened.

Next constitutional steps

- 8) In cases of high politics, the new provisions will not improve the performance of the EU as a global actor.
- 9) By staying within the intergovernmental trap the new provisions have confirmed the in-built need for further reforms.
- 10) In line with a negative scenario of non-ratification of the constitutional treaty (TCE), major institutional weaknesses of the CFSP would persist; however, especially with regard to ESDP, some elements of the TCE have already been or could be implemented on the basis of secondary law.
- 11) After the next crisis, we expect further steps in a process of ratchet fusion towards a new plateau.

1. THE CHALLENGE: ANALYSIS AND ASSESSMENT OF A CONSTITUTIONAL CORNERSTONE¹

Since the early days of the European integration process,² it has been one of the fundamental motivations for any construction plan to strengthen the role of Europe as a global actor. Public opinion all over the Union has continuously asked for an active role of the EU in the international system³. The constitutional and especially institutional architecture of the “Common Foreign and Security Policy (CFSP)” is thus a cornerstone in the “Treaty establishing a Constitution for Europe” (hereafter TCE or ‘constitutional treaty’) which the “Convention for the Future of Europe” presented to the

1) An earlier version of this chapter was presented at the Conference “Altneuland: The Constitution of Europe in an American Perspective” (New York, April 2004).

2) See e.g. Spinelli, Il manifesto di Ventotene; Robert Schuman declaration, in: LIPGENS (1985), pp. 71, 193-194.

3) See e.g. Eurobarometer 2004; NIEDERMAYER (2003), pp. 52-53.

European Council on 18 July 2003⁴ and which the heads of government have passed, adding partly considerable changes at their summit in Brussels on 25 June 2004.⁵

After the negative referenda on the TCE in France on 29 May 2005 and in the Netherlands on 1 June 2005, the European Council proclaimed in June 2005 a “period of reflection”⁶ until the first half of 2006. Following this declaration, several EU member states⁷ postponed the ratification of the TCE.

However, even if the fate of the treaty is uncertain for the time being, the analysis of its provisions in the CFSP chapter within the “Union’s External Action” (Part III Title V TCE) is highly relevant for two reasons: First, like for other policy fields, the provisions and reform options of the TCE will remain the point of reference for any future treaty reforms – under the label of a “constitution” or not. Second, and this is especially the case for the European Security and Defence Policy (ESDP)⁸, some institutional provisions introduced by the TCE as primary law can be or have already been implemented by secondary law (e. g. the European Defence Agency created in 2004, cf. 4.2.2.).

Consequently, the following analysis refers to the provisions in the CFSP chapter within the “Union’s External Action” (Part III Title V Chapter II TCE), taking into account also the current debate on different options regarding the implementation of (some parts of) the constitutional treaty.

Anatomy, analysis and assessment of the provisions in the CFSP chapter of the TCE face considerable challenges, which are related to our understanding of a ‘constitution’. For a transparent allocation of competences

4) “Draft Treaty establishing a Constitution for Europe”, version handed to the Council Presidency on July 18th 2003 (CONV 820/1/03 REV 1, CONV 843/03, CONV 848/03).

5) The Treaty articles quoted in this text are based on the *Treaty establishing a Constitution for Europe* as signed in Rome on 29 October 2004 and published in the Official Journal of the European Union on 16 December 2004 (C series, No. 310).

6) Declaration by the Heads of State or Government of the member states of the European Union on the Ratification of the Treaty establishing a Constitution for Europe, European Council, 16 and 17 June 2005, Brussels, 18 June 2005, SN 117/05.

7) These member states are the Czech Republic, Denmark, Ireland, Portugal, Sweden and the United Kingdom, cf. http://europa.eu.int/constitution/ratification_en.htm [23.11.05].

8) In the TCE, the term “Common Security and Defence Policy (CSDP)” is used. This analyses, however, uses “European Security and Defence Policy (ESDP)” which is the prevalent term in the current debate.

and precise rules for taking binding decisions as well as a sufficient degree of legitimacy based on compliance and an adequate control by a third, external institution make up the core elements of such a high level document. Beyond such a formal set of provisions many expect that these ‘holy’ texts shape some kind of European identity by stimulating “constitutional patriotism”⁹ with some kind of vision and mission for a regional and global role of the Union.

In view of such a list we are faced with considerable difficulties both in empirical analysis and in normative argumentation: rules for Foreign, Security and Defence Policy are generally not the optimal subject for such a study as “legalization and World Politics”¹⁰ or “Diplomacy by Decrees”¹¹ are raising specific demands due to key features of this policy field. If we assume that actorness in the international system¹² demands *discreet* as well as *discretionary* action and is highly loaded with *sovereignty* symbols (the ‘*DDS*’ *syndrome*) our analytical tools lack some conventional properties. For the diplomatic club¹³ informality and flexibility behind closed doors are of high value and many activities are short-term concrete actions. Thus the academic ivory tower has more problems to explore, explain and evaluate the workings of this part of the Union’s construction, than it has with legislative or budgetary procedures which follow the more transparent and formalized Community method.

The strong link of the CFSP to the notion of national sovereignty makes this policy field a “contested institution”¹⁴. Thus the constitutional treaty has to face a trade-off between shared norms and benefits of common actions compared to costs in terms of losing national sovereignty.

This inbuilt tension is documented by the historical context of the TCE. As other “critical junctures”¹⁵ and “milestone decisions”¹⁶ in the history of the

9) HABERMAS (1996), pp. 129-191.

10) GOLDSTEIN, KAHLER, KEOHANE and SLAUGHTER (2000), p. 387.

11) SMITH (2001), p. 104.

12) See BRETHERTON and VOGLER (1999), GINSBERG (2001).

13) See NUTTALL (1992) and ALLEN and WALLACE (1982), European Political Cooperation: the historical and contemporary background, in: ALLEN, RUMMEL and WESSELS (eds.) (1982), European Political Cooperation: Towards a Foreign Policy for Western Europe (London: Butterworth).

14) KOENIG-ARCHIBUGI (2004), pp. 138 -139.

15) See PIERSON (1996).

16) See LOTH (1996), p. 98ff.

EU constitutional treaty making process, the work of the Convention and the subsequent IGC were also markedly influenced by international events and developments in the time between 9/11 and the Iraq war.¹⁷ The disunity of EU member states over their participation in the Iraq war gave rise to fundamental doubts about the existence of a common will to shape the EU as a global actor based on a convergence or even identity of interest.

In view of these challenges and of the self-set goals of both the Convention and the IGC we will have to discuss if and in how far this text will signal a leap into a new constitutional dimension (a 'saut constitutionnel') or if it documents another version of an ever refined intergovernmentalism, which would limit the capability of the EU to play an efficient and effective role in the international system. Have the masters of the TCE finally agreed to overcome their past and present structural weaknesses or do they again reformulate provisions of soft cooperation without being able to leave the institutional trap they have constructed themselves since the early days of their political cooperation?

2. METHODOLOGICAL ASPECTS

The following analysis is guided by the 11 hypotheses outlined above. They refer to different theoretical assumptions about policy-making in the EU (mainly: neo-institutionalism; fusion thesis; rational choice; principal-agent theory). To test these hypotheses, the analysis relies both on qualitative and quantitative methods. With regard to the subject – the CFSP provisions of the treaty – the qualitative method of text analysis is the main research tool used in this paper. Current treaty rules and the new provisions in the TCE are compared and interpreted by this means.

The analysis is supported firstly by the method of 'participative observation'. The researcher regularly interviews actors involved in CFSP matters at different institutional levels, in the Brussels' arena as well as in the EU member states capitals' arenas. These interviews (open, in depth or semi-standardized interviews) have the advantage to provide the researcher with exclusive insights and detailed information. They help to explain the

17) See e.g. RISSE in WIENER and DIEZ (2003), p. 564.

course of events, actors' interests and their underlying ideas and world views. However, the method of 'participative observation' – which can be regarded as belonging to the tool box of ethnographical methods¹⁸ – can bear the considerable risk to lose the necessary distance to the object under scrutiny. Proximity can quickly result in identification with the interests and viewpoints of the actor. "Epistemic Communities"¹⁹ with the actors can hence lead to a limited perspective and objectivity.

Second, the analysis is moreover supported by quantitative methods, especially by statistical evaluations. The evaluation of the actual use of the treaty provisions by the actors helps to identify patterns of behaviour and to assess the living constitution.²⁰ Within the CFSP context, statistical evaluations focus on the decision-making process and the use of different instruments provided by the treaty such as joint actions and common strategies.²¹ The particular strength of statistical evaluations is the possibility to compare the political output of the EU system over a certain period of time. Although the researcher has to take into account the uncertainties related to all statistical data (conclusiveness of the respective indicators; reliability of data gathering), statistical evaluations bear, on the whole, considerable potential especially to identify trends in the evolution of the EU and the CFSP in particular.

3. EXPECTATIONS AND CAPABILITIES

3.1. Ambitious objectives: towards a dual identity

The Convention and the IGC have formulated ambitious goals²² stressing dimensions of both a "civilian" and a "super power" concept.²³ The text puts forward an almost visionary mission claiming to "advance in the wider world, the principles which have inspired its own creation, development and

18) See BRYMAN (2001), p. 289ff.

19) See HAAS (1992).

20) See MAURER and WESSELS (2003).

21) See REGELSBERGER (2004).

22) See also CREMONA (2003), p. 1348.

23) See DUCHENE (1972), HARNISCH and MAULL (2001), MORAVCSIK (2002).

enlargement” (Art. III-292 (1)) in order to offer “the best chance of pursuing... in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope” (Preamble TCE). The formulations of the objectives, as indicators for identity, underline the notion that member states want and use the EU as a global norm-giver to promote universal values as a “cosmopolitan community”²⁴.

This role definition of a global norm-giver is also stressed by the definition of the policy scope of the EU’s international ambition. In this regard, the IGC underlines that “the Union’s competence... shall cover all areas of foreign policy and all questions relating to the Union’s security” (Art. I-16 (1)).

With regard to mutual assistance clauses – such as Art. 5 of the NATO-Treaty – the IGC has adopted the following formulations: They foresee a “progressive framing of a common defence policy that might lead to a common defence” (Art. I-16 (1)); in Art. I-41 (2) this formula seems to increase the political commitment by stating “this will lead to a common defence”. Article I-41 (7) states a principle of mutual “obligation of aid and assistance by all the means in their power” in case of an “armed aggression” on the territory of a Member State. A reservation or limitation is added: “This shall not prejudice the specific character of the security and defence policy of certain member states.” The IGC has deleted the Convention’s Article III-214 on “closer cooperation” which had opened unclear procedures for consultation in case of an attack. A special solidarity clause (Art. I-43 and Art. III-329) is introduced for cases of a “terrorist attack” or a “natural or man-made disaster” (Art. I-43 and Art. III-329).

These formulations of the document reflect a broad consensus on a dual identity mixing ‘civilian’ power concepts with openings towards military interventionism; if we also take other chapters of the TCE – such as the symbols of the Union (Art. I-8) – the provisions for using military instruments point at an ideational evolution which designs an identity of the EU as an international actor with state-like qualities. This is in line with the main objectives of the “European Security Strategy” (European Council 2003) adopted by the heads of states and governments in December 2003. Overall the masters of the TCE have set the expectations for the Union’s role even higher and more comprehensive than before.

24) SMITH (2004), p. 197.

3.2. Modest allocation of instruments: limited transfers of capabilities

In relation to the aspired objectives, the masters of the constitutional treaty have only marginally changed the provisions for the allocation of competences and for legal instruments. The TCE has created a single “legal personality” (Art. I-7) which raises a set of difficult legal issues about the supremacy of legal orders²⁵. Since the Court of the European Union shall have no jurisdiction with respect to the articles governing the CFSP (Art. III-376) ambiguities created by this provision cannot be resolved by legal rulings; thus this intended ‘simplification’ of the pre-existing pillar structure will inevitably lead to enduring controversial interpretations.

In the allocation of the “Union’s competence” the CFSP (Art. I-16) was placed in between the “areas of shared competence” (Art. I-14) and “areas of supporting, coordinating and complementary action”. (Art. I-17) Such a choice was not inevitable: The IGC might have put the CFSP into the category of shared competence. This arrangement could have been done without pre-empting national sovereignty, as such a type of ‘parallel’ competence is used for development cooperation and humanitarian aid (Art. I-14 (4)); or the text might have allocated the CFSP to the “supporting, coordinating or supplementary action”, as this part of the external action should not harmonize the policy of member states by “legally binding acts” (Art. I-12 (5)). However, the TCE has created – or rather – kept the CFSP as a sui generis category²⁶. This interpretation is reinforced by the provisions earmarking “specific provisions relating to the CFSP” (Art. I-40) and to ESDP (Art. I-41). In contrast to these categories the IGC has allocated e.g. the common commercial policy into the “area of exclusive competence” (Art. I-13 (1e)). Thus behind some unifying façade and slogans the traditional pillar structure continues to exist both in terms of the legal foundations and the procedures applied.

Also in view of legal instruments the constitutional treaty even reinforces this dividing line; it deliberately excludes the application of European laws and framework laws (Art. I-40 (6)), which are foreseen for legislative acts in other fields. Instead, the Union shall conduct the CFSP by defining the ‘general guidelines’, adopting ‘European decisions’ defining ‘actions’ and

25) CREMONA (2003), p. 1351.

26) *Ibid.*, p. 1354.

'positions' to be taken by the Union as well as "strengthening systematic cooperation between member states in the conduct of policy" (see Art. III-294 (3c)). Except for the term 'European decision' the text confirms the now conventional tool box of the CFSP.

For the tasks of the European Security and Defence Policy the Union can resort to "civilian and military means" (Art. III-309 (1)). The instruments for operations remain, however, under national control: "member states shall make civilian and military capabilities available to the Union" (Art. I-41 (3)). "Expenditure arising from operations having military or defence implications" (Art. III-313 (2)) shall not be charged to the Union budget. What is new, however, is the establishment of "specific procedures for guaranteeing rapid access to appropriations in the Union budget for urgent financing of initiatives in the framework of the common foreign and security policy, and in particular for preparatory activities" for security and defence tasks (Art. III-313 (3)). For preparatory activities which are not financed by the budget, a "start-up fund" shall be established with contributions by member states decided upon by a qualified majority vote in the Council (Art. III-313 (3)).

Overall, the changes in comparison to the status quo are limited: provisions for a real transfer of resources to the EU level, if only for a limited scope, as the Monnet-Method proposes, are not foreseen.

3.3. Systematic cooperation through self-imposed obligations: more than constitutional prose?

In specifying the general obligations of "sincere cooperation" and "mutual respect" between the Union and the member states (Art. I-5 (2)), the text emphasises the obligation of member states to "actively and unreservedly support the Union's common foreign and security policy in a spirit of loyalty and mutual solidarity" in compliance "with the Unions action ... They shall refrain from action contrary to the Union's interests or likely to impair its effectiveness" (Art. I-16 (2); see also Art. III-294 (2)).

To guarantee the application of these norms for loyal behaviour "the Council of Ministers and the Foreign Minister shall ensure that these principles are complied with" (Art. III-294 (2)). Moreover, "The Union Minister for Foreign Affairs ... shall ensure implementation of the European decisions adopted by the European Council and the Council [of Ministers]" (Art. III-296 (1)).

These provisions could be interpreted as a 'watchdog function' for the Foreign Minister²⁷ as 'guardian' of the rules of the (CFSP) game based on soft cooperation among peers. As opposed to the European Commission in other fields of the Union's competence, he/she may, however, not invoke the Court against a Member State. Past diplomatic practice in the 'living constitution' of the present CFSP gives little reason to expect the Union Minister to resort to such a 'moral instance'. The Minister would be more likely to uphold group discipline by 'naming, shaming and blaming' members for non-compliance; also different cases of self-coordination among member states²⁸ would not support such a moral persuasion. Thus the new institution is not likely to establish itself as a "third party" which monitors compliance²⁹.

The question, thus, remains if and how these principles for appropriate behaviour³⁰ can turn into guiding norms in real life practice: will the member states by (daily) "autonomous voluntary acts" accept "the European constitutional discipline"³¹ especially in those areas they perceive to be of vital national interest? Will the legal text lead to a strong peer group pressure to establish a high intra-group discipline?

In case of conflicts, we would expect that the cost/benefit calculation by rational member governments will continue to lead towards non-compliance; they can interpret these formulations differently, and in any case evade those written obligations without sanctions. They are offered 'free rider' opportunities wishing to benefit from the solidarity of others, without having to abide by the common rules; for reasons of short-term self-interest³² they might downgrade a possible decline of their reputation as 'reliable partners'³³ or 'good Europeans'. It is thus to be expected that the existing and amended provisions will not create a regime sufficiently strong to induce governments and diplomats to translate the constitutional norms into everyday practice. As in the past, the behaviour of member states will be focused on their perceptions of national interests especially in 'high-politics' crises. Thus the risk is high that these formulations will prove to be no more than constitutional prose, without real relevance for the living constitution.

27) See JOPP and REGELSBERGER (2003), p. 559, RISSE (2003), p. 570.

28) See e. g. MEYER (2004).

29) See GOLDSTEIN, KAHLER, KEOHANE and SLAUGHTER (2000).

30) See MARCH and OLSEN (1989).

31) WEILER (2002), p. 568.

32) HASENCLEVER, MAYER and RITTBERGER (1997), KEOHANE (1984), KRASNER (1983), WESSELS (2000), pp. 72-74.

33) KEOHANE (1984), p. 244.

4. PROCEDURES AND INSTITUTIONS

The following analysis of the procedures and institutions with regard to the Common Foreign and Security Policy in the TCE is divided into two parts: In the first part, the respective general CFSP provisions will be analysed. The second part deals separately with the special provisions for security and defence. This separation takes into account the dynamic development of the European Security and Defence Policy since its creation in 1999, representing a salient part of the Common Foreign and Security Policy.

4.1. Procedures and institutions: CFSP

4.1.1. Decision-making rules: the perennial controversy on QMV

Despite intensive controversy in and around the Convention and to a lesser degree in the IGC, the TCE has only marginally amended the rules for decision-making (Art. III-300) and has thus failed to achieve a major breakthrough to increase internal efficiency. A Franco-German project had proposed to “make decisions in the field of CFSP generally by qualified majority”³⁴. However, this initiative to water down the principle of unanimity met with resistance by a number of representatives especially from governments, above all from the United Kingdom, behind which others did not need to voice their opposition³⁵. The deep rift over the participation in the Iraq war generally reduced the propensity to accept majority voting. In view of unclear majorities more and more governments became risk averse; the worry of being outvoted due to low “policy conformity”³⁶ spread in many capitals. Consequently, the text continues to state that “European decisions ... shall be adopted by the Council of Ministers acting unanimously” (Art. III-300 (1)).

In addition to a small number of complex existing derogations (see Art. III-300 (1) and (2)) the new UMFA is offered a complicated opportunity to put forward a proposal for voting by qualified majority but only on a “specific request” from the European Council (Art. III-300 (2b)). Also with these limited openings the hurdle is kept high: even after a unanimous decision

34) Contribution by Joschka Fischer and Dominique de Villepin to the Convention, [own translation], CONV 489/03, <http://register.consilium.eu.int/pdf/de/03/cv00/cv00489de03.pdf>; (German version) or CONV422/02, <http://register.consilium.eu.int/pdf/fr/02/cv00/00422f2.pdf> (French version) [23.11.2005].

35) See e.g. JOPP and REGELSBERGER (2003) p. 556, THYM (2004), p. 11.

36) See for the term KOENIG-ARCHIBUGI (2004), p. 143.

by the European Council, every member state can reject a majority vote “for vital and stated reasons of national policy” (Art. III-300 (2)). In order to support the fundamental concern of nation states, the document reiterates that even these limited possibilities for QMV do not apply to “decisions having military or defence implications” (Art. III-300 (4)).

The Convention’s proposal for these decision-making rules document the victory of diplomats in general and of intergovernmentalist views more specifically: not only have former intergovernmental conferences missed the opportunity for increasing the efficiency of the procedures, but so has already the Convention, even in a different composition from that of diplomatic conferences. In the case of diverging opinions over external actions of limited scope and minor impact, the constitutional treaty might have provided a constitutional option to overrule minority positions of member state governments.

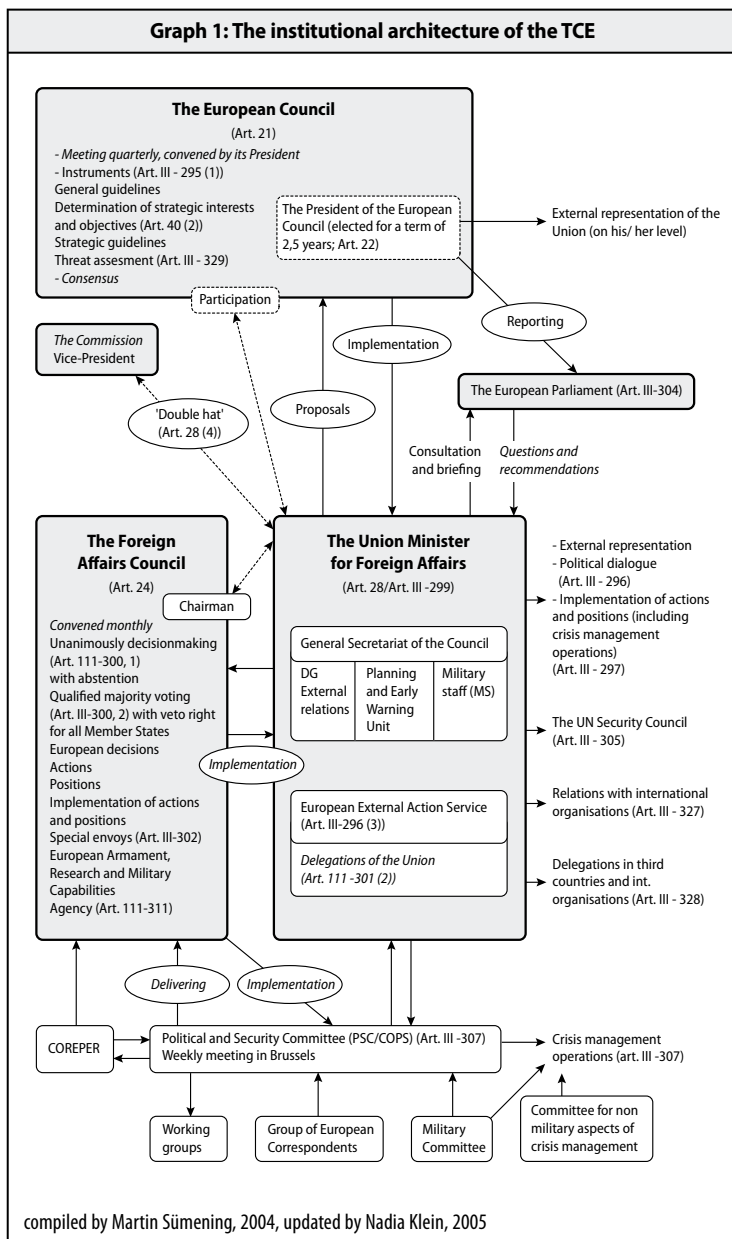
To a certain extent, the document takes note of such suggestions: through an empowering clause, the European Council “may unanimously adopt a European decision stipulating that the Council of Ministers shall act by a qualified majority” (Art. III-300 (3)) provided though that not a single national parliament does make its opposition known (Art. IV-444 (3)); generally excluded are again “decisions having military or defence implications” (Art. III-300 (4)). Through such a ‘passerelle’ the heads of government would circumvent the need to have these revisions formally ratified in each member state.

In contrast to the basic red line, voting with qualified majorities was extended to the nomination procedures for the fulltime President of the European Council and of the Foreign Minister, which might help to achieve a faster consensus.

4.1.2. The institutional architecture: towards personalisation and politicisation

4.1.2.1. Familiar trends

The Convention had considerably redesigned the institutional architecture of the CFSP (see graph 1); in major features this work has been reconfirmed by the IGC.



Overall, the masters of the treaty have continued some familiar trends, but also introduced major innovations. By tackling old headaches, new ones are created. A 'simplification' of the institutional architecture is difficult to discern.

The TCE reinforces the pivotal role of the **European Council** for the EU in general (Art. I-21 (1)), for the External Action (Art. III-293 (1)) and for the CFSP (Art. III-295 (1)): Thus the European Council is put at the top of the institutional hierarchy for all areas of relevance for the EU's global role. "The European Council shall identify the strategic interests and objectives of the Union" which "shall relate to the [CFSP] and to other areas of the external action of the Union" (Art. III-293 (1)). Based on such a European decision of the European Council "the Council [of Ministers] shall act by qualified majority" (Art. III-300 (2)).

In light of the living practice of the last decades the heads of governments will certainly not restrict themselves to a general role of setting guidelines but they will actively react to external challenges and crises. This kind of behavioural pattern is also supported by the European Council's responsibility to "regularly assess the threats facing the Union in order to enable the Union and its member states to take effective action" (Art. III-329 (3)): implementation of the solidarity clause). The role as the 'highest and final instance' is again documented by being the final arbitrator in cases of a veto in the Council where voting by qualified majority is possible (Art. III-300 (2)).

As to the **Council**, the TCE envisages the creation of a separate independent Foreign Affairs Council not dealing any more with "General Affairs". With the UMFA as permanent chairperson, this formation will have a presidency different from the other Council formations (Art. I-24 (7)). A further issue of importance for the Council work is the selection of chairpersons below the Council: will the Political and Security Committee (PSC) and the 30-odd working groups in the CFSP area also be chaired by civil servants of the UMFA or by some kind of rotating presidency?³⁷ The present considerations would give this task to civil servants from the Union Minister.

The **Commission** as a collegiate body has been removed from the institutional architecture of CFSP. The relevant articles only mention the Foreign Minister,

37) JOPP and REGELSBERGER (2003), p. 560.

who, as Vice President of the Commission, is responsible for respective links. A potential pattern for a division of labour is indicated in the provisions dealing with the general right of initiative for external actions: The document envisages "joint proposals" by the Foreign Minister and the Commission; the Minister "for the field of common foreign and security policy" and the Commission "for other fields of external action" (Art. III-293 (2)). In assisting "the Council and the Commission [to] ensure consistency" "between the different areas of its external actions and between these and its other policies" (Art. 292 (3)) the UMFA might pursue a 'catch-all' strategy (see below); in such a constellation he/she will rule deeply into major areas of the Commission's external dossiers – including trade and development aid, but also in the external dimension of internal issue – such as environmental affairs.

Also in terms of administering the EU as global actor, the Commission will lose importance. The "European External Action Service", which "shall comprise officials from relevant departments of the General Secretariat of the Council of Ministers and of the Commission as well as staff seconded from national diplomatic services", shall assist the UFMA (Art. III-296 (3)). The autonomy of the Commission in handling its external relations will be reduced considerably. For the Commission and its President the 'double-hat' of the UMFA might imply serious organisational rivalry, which has already been documented by the behind-the-scene struggle over the one or two substitute(s) and potential replacements in case of the Foreign Minister's absence³⁸.

The **European Parliament** remains sidelined. The text has not increased the participatory powers of the EP in the field of CFSP. In replacing the rotating Presidency and the Commission, the Foreign Minister will become the contact person for the EP. Another dialogue partner will be the permanent chair of the European Council, who after each session will present a report to the EP, which is most likely to include CFSP matters (Art. I-22 (2d)).

Any powers to ratify international treaties have also been excluded: the EP is not even consulted before the adoption of international agreements which "relate exclusively to the common foreign and security policy" (Art. III-325 (6)), whereas those consultative powers have been extended to the EP on issues of Common Commercial Policy (Art. III-325 (6)).

38) *Ibid.*, p. 560.

A further, if very limited, offer for some kind of dialogue is put down in the "Protocol on the role of national parliaments in the European Union", which envisages that "A conference of Parliamentary Committees for Union Affairs may ... organise inter-parliamentary conferences on ... matters of common foreign and security policy, including common security and defence policy." (Title II, Art. 10 of the Protocol). Members of the EP participate in that body. So far COSAC has been a body of marginal importance³⁹.

The limits set for the EP as a public forum of secondary importance can be explained by two lines of arguments. The marginal rights of the EP might be taken as an indicator for the singularity of this policy field, which usually demands fast, discrete and discretionary decision-making (the DDS Syndrome). Perhaps more important is a second reason: the constitutional treaty does not apparently view the EP as legitimating factor for this central area of the Union. National governments and diplomats are perceived to be the only legitimated actors, as they derive their general mandate from domestic sources.

As previously, CFSP matters are excluded from the jurisdiction of the **Court of Justice** (Art. III-376); again the Convention and the IGC remained in the intergovernmental mood of the previous IGCs. The text might have extended the jurisdiction of the Court to procedural issues – not at least to protect smaller member states from attempts of the 'big three' to establish some kind of *directoire*⁴⁰.

4.1.2.2. The Union minister of foreign affairs: high on expectations – low on power

The creation of a 'Union Minister for Foreign Affairs' (UMFA) (Art. I-28) stands out as the most central innovation of the proposed institutional architecture. Generally, this 'double-hatted' figure is assessed as a "major achievement"⁴¹.

After establishing a small secretariat in the middle of the 1980s and creating the function of a "High representative" in the Amsterdam Treaty, the masters of the constitutional treaty have taken a further step towards founding

39) See MAURER and WESSELS (2001)

40) THYM (2004), p. 16.

41) European Commission (2003) 548 final, p. 11.

some kind of strong executive agency. The new feature is that the person is endowed with a 'double-hat'⁴² being embedded in the Commission as well as in the Council.

The double embedment is clearly apparent in the respective procedures for the election as well as for the removal from office: "The European Council, acting by qualified majority, with the agreement of the President of the Commission, shall appoint the Union Minister for Foreign Affairs" (Art. I-28 (1)). The same procedure applies for the termination of his mandate. In view of the proposed requirements for a qualified majority vote in the Council (Art. I-25 (1)) the Minister, after the nomination, will have to secure the support of larger member states, of which three and another fourth state would possess a blocking minority (Art. I-25 (1)) – if the Federal Republic of Germany were included. But also the pre-elected President of the Commission will be a key player in this process. The provisions for electing the Commission are equally relevant for assessing the accountability of this person. The President, as well as the College including "the Union Minister for Foreign Affairs [...] shall be subject as a body to a vote of approval by the European Parliament" (Art. I-27 (2)). The Union Minister thus also needs to get backing from the European Parliament. If the two relatively largest groups continue to form some kind of 'grand coalition' within the EP both will try to distribute the posts of the President and this Vice President of the Commission among themselves along party lines. This role of the EP extends also to a motion of censure, after which "the members of the Commission shall resign as a body and the Union Minister for Foreign affairs shall resign from duties that he or she carries out in the Commission" (Art. III-340).

The UMFA also needs to be aware of the newly extended rights of the Commission President: "A Member of the Commission shall resign if the President so requests" (Art. I-27 (3)), though the resignation of the UMFA takes place "in accordance with the procedure set out in Article I-28 (1)", which means that the President of the Commission would need to get support from the European Council. The text does not explain the details of

42) For the term „double hat“ see the contribution by the alternate delegate of the German government to the Convention, Gunter Pleuger, "Double Hat", Working Group VII on External Action, Working document 17, 5.11.2002, <http://european-convention.eu.int/docs/wd7/4484.pdf>, and the Final report of Working Group VII, CONV 459/02, 16.12.2002, <http://register.consilium.eu.int/pdf/en/02/cv00/00459en2.pdf> [23.11.2005].

this procedure. Overall, the Foreign Minister is accountable to two bodies for his election and during the execution of his office. Via its powers of control and dismissal vis-à-vis the Commission the EP can also extend its power towards the Union Minister.

The tasks of the Foreign Minister constitute a considerable workload and a broad responsibility. Several functions can be identified: the Union Minister should serve as the external representative of the Union, as initiator and executor of European decisions, as chair of the Council of Foreign Affairs and as 'guardian' of the regime of self-coordination (see above) as well as Vice President of the Commission (see for details graph 1).

Also in matters of the CSDP, the Foreign Minister, "acting under the authority of the Council and in close and constant contact with the Political and Security Committee (PSC), shall ensure coordination of the civilian and military aspects of such tasks" (Art. III-309 (2)). The PSC retains, however, "under the responsibility of the Council and of the Union Minister for Foreign Affairs", the main tasks of "political control and strategic direction of ... crisis management operations". The Committee can also be authorised by the Council of Ministers "to take the relevant measures" (Art. III-307 (2)). Finally, the Foreign Minister is involved in the decision-making procedures for the "permanent structured cooperation" (Art. III-312 (2) and (3)).

In addition to this profile as 'enhanced successor' to the present 'High Representative' (Art. 26 TEU), the constitutional treaty gives the Foreign Minister an extended role within the Commission: "The Union Minister for Foreign Affairs shall be one of the Vice-Presidents of the Commission. He or she shall ensure the consistency of the Union's external action" and "he or she shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action" (Art. I-28 (4)).

These formulations of the legal constitution leave a large grey area for the living constitution of the future: will the UMFA in line with the overarching guidelines of the European Council and in view of his/her role for implementing a "European Security Strategy" (European Council 2003) ask for a dominating single purpose role within the Commission, i.e. pursue a 'catch-all' strategy, or will this person stay within a broader, more differ-

entiated and thus less consistent approach of the Commission as a collegiate body? In one variation of the future division of labour, the Commission (including its President) would be just responsible for 'internal affairs', whereas the UMFA (perhaps together with the Chair of the European Council) would take up all functions for 'external action'. Such a pattern might resemble the political system of France.

Quite often it is neglected that his/her job description includes a third major role: the UMFA will be Chair of the Foreign Affairs Council (Art. I-28 (3)); this office has so far been run by a national foreign minister during its rotating presidency.

A first assessment of the new institution stresses different aspects of a cost-benefit analysis. In relation to the job profile and associated expectations, the actual procedural means and policy instruments at the UMFA's disposal are limited.

One plus is that the tasks assigned to this position give reason to expect a higher degree of efficiency and effectiveness of the external action of the Union. As compared to the practice of biannual rotation, the continuity of the Union's external representation will be improved significantly and facilitate the building of relationships of trust with partners in the international system. For the Union's role in the international system the upgraded 'face' and 'voice' will be a major asset. To also reinforce the 'hand' of the EU the UMFA "shall be assisted by a European External Action service" (Art. I-296 (3)), which will comprise officials from the Council's secretariat, the Commission and from national diplomatic services.

More open to debate is the internal weight of this person. Some masters of the TCE have invested great hopes in this office⁴³ and anticipate that the UMFA will advance the objectives of the Union through far reaching proposals and activities. However, as President of the Foreign Affairs Council, the main objective of the Union Minister will remain – not least because of the dominant use of unanimity – the forging of consensus among the member states. In fulfilling these duties, the Foreign Minister will have to

43) See e.g. FISCHER, J. and VILLEPIN, D. de (2003), Franco-German contribution to the European Convention concerning the Union's institutional architecture, CONV 489/03, 16.01.2003, Italian IGC Presidency (2003), Presidency Note on the IGC 2003 – Union Minister for Foreign Affairs, CIG 45/03, 10.11.2003, [23.11.2005].

reconcile different political interests not only of member states, but also of Commission departments and relevant interest networks. Also for creating procedural dynamics his/her right to propose a QMV is very indirect: the Council of Ministers decides with a qualified majority, "on proposal which the Minister has put to it following a specific request to him or her from the European Council made on its own initiative or that of the Minister" (Art. III-300 (2b)). With this complicated formula, the Foreign Minister remains again dependent on a preceding unanimous agreement in the European Council. Thus, the Foreign Minister does not receive any special prerogatives, as the Commission possesses in other parts of the present TEU and of the future constitutional treaty; the Convention and the IGC have thereby denied him an important and powerful instrument, i.e. to exert pressure on colleagues in the Council with such a procedural instrument. The Italian presidency in the IGC had proposed to change this formulation to strengthen the UMFA⁴⁴, but others did not follow.

In both 'home' institutions, the UMFA will have to resort to his/her powers of persuasion. Quite probably, ministerial colleagues will, however, grant only limited national contributions to the strengthening of the EU as a global actor. A significant share of operative resources for external action will still fall under the Commission's competences – such as financial assistance and matters of market access – thus the Foreign Minister will be induced to use this derived potential weight also during his work in the Council.

In sum, the formulations for the 'double hat' create a grey area of vague political responsibility, in which the UMFA might suffer from suspicions from both Council and Commission that this person is a 'Trojan Horse' of the rival institution⁴⁵; this office, however, could also profit from these ambiguities, if the Foreign Minister is able to combine different roles: the UMFA has the opportunity to link multi-layered functions and tasks so as to use a comparative advantage of information and influence from one area to advance positions more easily in another. This influence, however, remains dependent on the goodwill of other players, who could rather easily damage the profile and reputation of this person. In the experimental phase of the living constitution, each co-player will 'test', if and how the UMFA will yield to their respective own interests and rights.

44) Italian IGC Presidency (2003)

45) THYM (2004), p. 21.

Thus the TCE has placed the Foreign Minister in a position of strong inter- and intra-institutional role conflicts. This person has to do justice to a number of demands between differently regulated areas with their associated diverging interests. In the living constitution, the Foreign Minister will be closely controlled by governments in the Council and diplomats in the PSC as well as by the President and the colleagues in the Commission. Moreover, the President of the European Council could interpret his/her own functions in the sense of controlling intensively the European foreign policy as executed by the UMFA (see Art. I-22 (2) and Art. III-296 (1); see also below).

In order to establish a wide acceptance and forge consensus under these institutional and procedural pressures, the Union Minister will almost certainly have to pursue a cautious 'low-profile' policy. Such an attitude is particularly required in situations of crisis, where national governments might pursue different sets of diverging preferences and interests. The perennial risk when sitting between two or even three institutional chairs, or to bridge two co-existing pillars, is to fall right through them. Based on this set of expectations, the Foreign Minister will only be of limited service to enhance the internal efficiency and external effectiveness of the EU especially in moments of 'high politics', such as the Iraq war.

Of course, we need to discuss if and how far this office is more likely to reinforce the intergovernmental or – perhaps by the backdoor – supranational features. The hope of some defenders of this concept was that the new office will render this conventional distinction irrelevant as the 'double hat' might overcome what they perceive as an old and distorting dichotomy.

Most commentators, however, stress the intergovernmental character of the new office. This interpretation of the provisions would see the Foreign Minister strictly as "an agent" of the member states as 'principals'⁴⁶; in turn, this office is controlled by several layers of national control to prevent too large an autonomy of the new person in the Common Foreign Security and Defence Policy. These fences around his office include the permanent President of the European Council, who "shall ensure the preparation and continuity of the work of the European Council" (Art. I-22 (2)), the Foreign Ministers themselves in the Council as well as the PSC and respective working groups of diplomats in Brussels. To understand this multiple

46) See for this term e.g. MORAVCSIK (1993).

construction of institutionalized national 'voice' and 'veto' as a "credible commitment"⁴⁷ from the member states does not seem very plausible.

Other comments – though less prominent at first sight – might view the UMFA as the "agent" of the Commission and indirectly of the EP. From this perspective, the office holder might be forced or induced to use and extend Community instruments as the powers vis-à-vis national counterparts are too limited; thus the UMFA can become an actor or agent of a "cultivated spill over"⁴⁸ towards an integrated foreign policy with strong supranational features.

The ambiguous position of this office can thus be characterized as institutional 'schizophrenia' or as a valid indicator for a "fusion process"⁴⁹, as this institution will merge pillars with a pooled accountability.

4.1.2.3. The full-time President of the European Council: agent or actor?

The list of innovations for the institutional architecture also includes the now fulltime chair of the European Council. In response to the persistent advocacy by its President⁵⁰, however not only according to his concept⁵¹, the Convention and then the IGC has complemented the existing institutional framework with the office of "the European Council President" (Art. I-22) to be elected for a period of two-and-a-half years by a qualified majority of the European Council. The constitutional treaty envisages for "the President of the European Council ... [to] chair it and drive forward its work, ensure its proper preparation ... [and] endeavour to facilitate cohesion and consensus within the European Council". Of specific importance for the CFSP is an additional function: "The President of the European Council shall, at his or her level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the Union Minister for Foreign Affairs" (Art. I-22 (2)). This formulation clearly sketches out future conflicts between these two

47) *Ibid.*, p. 512.

48) See TRANHOLM-MIKKELSEN (1991).

49) See WESSELS (2003).

50) GISCARD D'ESTAING, V. et al (2003), Preface to the Draft Treaty establishing a Constitution for Europe.

51) for a proposal by the French President Jacques Chirac made in Strasbourg on 6th March 2002, see: http://europa.eu.int/futurum/documents/speech/sp060302_en.pdf; for a joint statement by the British Prime Minister Tony Blair and the Spanish Prime Minister José María Aznar made in Madrid on 27th February 2003, see: http://media.ukispain.com/documents/pdfs/ukspain_summit/institutions.pdf [23.11.2005].

offices: the choice of the words “without prejudice to” should immediately invite further reflection, since the acknowledged functional overlaps are not resolved within the treaty text, but shifted to the realm of every-day practice in the future living constitution.

In light of the importance which the heads of government give to consultations and declarations about foreign and security policy in the daily practice and considering the central role which the TCE again attributes to the European Council in CFSP matters, the President will spend considerable time on the “preparation and continuity” of the European Council, also and not least in the area of Foreign and Security Policy. If the officeholder links these tasks effectively to the “external representation at his/her level” – i.e. such as in dialogues with the presidents and heads of governments of third states – the chair might turn into an actor on its own for CFSP and not just a spokesperson and an agent of the European Council.

As the constitution-led catalogue of written functions is rather unspecified in comparison to that of the Foreign Minister different relational patterns between these offices might be established. In one variation of a future division of labour the President of the European Council would take the responsibility of the ‘higher end’ of ‘high politics’⁵² i.e. that the chair of the European Council will ‘dine’ with presidents and heads of government, whereas the UMFA would have to deal with the ‘lower’ end of high politics i.e. this person would have to get ‘hands dirty in tents’ in crisis areas such as on the Balkans and elsewhere.

The possibility – repeatedly mentioned – of a ‘big’ double hat further adds to the scope of interpreting this new office: according to this reading of article I-22 (3), the President of the European Commission could be elected into that position. Such a fusion of both positions could significantly shift the newly designed institutional balance – without further treaty amendments. It remains a matter of speculation which mode of construction – supranational or intergovernmental – such a ‘double hat’ of the top of the institutional architecture would favour.

Overall, given the institutional innovations of the European Council President and the UMFA, but also the strengthening of the President of the

52) See for this term the seminal article by HOFFMANN (1966).

Commission (see Art. I-27), we would expect that the living constitution will be characterised by a – so far unknown – personalisation and politicisation, which will – at least in an experimental early phase – lead to a considerable power struggle. The text thus does not necessarily improve the structure and enhance the role of the Union’s institutions. Some old headaches of the CFSP – like a better external visibility – will have been taken care of, however the therapy used will lead to new institutional worries.

4.2. Procedures and institutions: ESDP

4.2.1. *Permanent structured cooperation: more opportunities – unclear incentives?*

With the accession of ten new member states in May 2005 and the continued use of the unanimity rule, there is – and has been throughout the history of integration – a recurrent debate over the possibility for a group of member states moving ahead inside or outside the EU framework. Catchwords such as “core Europe”⁵³, “avant-garde”⁵⁴ or “centre of gravity”⁵⁵ document such reflections on more flexible strategies. On a Franco-German initiative the Amsterdam summit implanted rules for “enhanced cooperation” into the treaties, and the Nice treaty extended them to the CFSP pillar. However, these articles have never been used in the living constitution up to 2005. The TCE proposes to reconfirm “enhanced cooperation” (Art. I-44, Art. III-419 (2), Art. III-420 (2)), extending these rules also to CSDP provisions.⁵⁶

But the text introduces a new variation of flexibility under the label of “permanent structured cooperation” (Art. I-41 (6); Art. III-312). In comparison to the Convention’s draft, the IGC following a proposal by France, the UK and Germany has markedly reformulated these procedures; it also deleted the procedures of what the Convention had called “closer cooperation” (Art. I-41 (7); Art. III-214 of the Convention’s draft)⁵⁷.

53) See SCHÄUBLE and LAMERS (1994).

54) CHIRAC (2000), Notre Europe, Speech at the German Bundestag in Berlin, 27.6.2000.

55) See FISCHER (2001).

56) See DIETRICH and JOPP (2003), p. 23; JOPP and REGELSBERGER (2003), p. 553.

57) See DIETRICH and JOPP (2004), pp. 4-5; JOPP and REGELSBERGER (2003), pp. 552-556.

Willing and able EU member states can use the procedure of “permanent structured cooperation” (Art. I-41 (6); Art. III-312). As a ‘military Euro-zone’, the offer applies to a list of member states “whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions” (Art. I-41 (6)). The Council can then entrust this “group of member states which are willing” with the implementation of a “task” or mission (Art. III-310 (1)).⁵⁸

In contrast to the original text of the Convention the subsequent procedures are more open and transparent also to the non-participating members of the EU. The TCE thus offers more engaged members a certain possibility to lock their actions into the EU framework. With these formulas, similar to those of the enhanced cooperation, the creation of a special Council with closed doors for just a small circle of a “directoire” of the big three⁵⁹ was avoided. However these treaty provisions do not offer any additional incentives for common actions of willing and able member states – especially when compared to other possible forms of cooperation outside the TCE. Therefore, a major issue of debate is if the big three will use this new opportunity structure in the future, or if they prefer to coordinate their action outside the EU and without the new UMFA. One useful offer would be the rapid access to appropriations in the EU budget for “urgent financing of initiatives” in the CSDP or to the “start-up fund” (Art. III-313 (3)) which has yet to be founded.

It is to be debated if some form of “permanent structured cooperation” could and would be established even without the provisions of the TCE entering into force. From the perspective of capabilities, current developments in ESDP might pave the way for the formation of an ESDP *avant-garde*: the implementation of the EU battle group concept which was specified in November 2004 by the member states at the Military Capability Commitment Conference⁶⁰ does not depend on the ratification of the constitutional treaty. The battle groups could serve as a key element for some form of ESDP *avant-garde*, created on the basis of member states’ decisions.

58) *Ibid.*, p. 552.

59) See WINN (2003).

60) It was decided to establish 13 battle groups (9 of them multinational) each with a force of at least 1,500 soldiers. They shall serve as mobile combat units for ESDP operations, which could be ready for action within a few days. For details see the „Declaration on European Military Capabilities”, Military Capability Commitment Conference, Brussels, 22 November 2004, http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/misc/82761.pdf [23.11.05].

4.2.2. The European Defence Agency

In order to address the Union’s constantly criticised capability-expectations gap in the military sector, the Convention proposed to create a defence agency at the European level which should harmonise and support the development of military capabilities in the EU member states. In the constitutional treaty Articles I-41 (3) and III-311 clarify the tasks foreseen for this new intergovernmental agency: it shall take over coordinating and supporting tasks for the member states in the field of defence capabilities development, research, acquisition and armaments.

The above mentioned dynamic in the field of ESDP is illustrated by the fact that the European Defence Agency (EDA) was already established by a Council Joint Action on 12 July 2004⁶¹ – three months before the constitutional treaty was even signed in Rome by the heads of states and governments. The Defence Agency acts under the “authority and the political supervision of the Council [...] from which it shall receive regular guidelines”⁶². It is headed by the High Representative for CFSP, Javier Solana. The comprehensive work programme for 2005 as decided by the Agency’s Steering Board in November 2004⁶³ underlines the “priority of making the EDA a critical enabling tool of an effective ESDP”⁶⁴. The success of the EDA depends, again, on the political will of EU member states to improve and to pool their military capabilities; it is not to be expected that the outcome of the ratification process of the constitutional treaty – whatever it will be – will substantially affect EDA’s daily work.

61) Council (2004), Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency.

62) Council (2004), Art. 4 (1).

63) For details regarding the work programme see European Defence Agency (EDA), EDA Work Programme 2005, <http://www.eda.eu.int/reference/ewp/ewp-2004-11-22.htm> [23.11.05].

64) BRADY and TONRA (2005).

5. CONCLUSIONS AND FURTHER PERSPECTIVES: A MIXED ASSESSMENT

5.1. An exit from the intergovernmental trap?

The reading of the legal text points at considerable changes in the wording but would that lead to a better performance in the living constitution after ratification?

A 'saut constitutionnel' is difficult to discern. The provisions for the CFSP do not match the self-praise of the Convention which claims that "it proposes measures to increase the democracy, transparency and efficiency of the European Union"⁶⁵. The ideational cosmos about the EU'S role has been incrementally extended, the written constitution has, however, neither provided for the legal instruments, nor the material resources or for the institutional architecture and procedural dynamics to meet the ambitious self-set objectives.

Again, the provisions merely refine the intergovernmental procedures, taking some limited steps towards pooling and merging national and supranational resources. The ongoing tensions and conflicts are clearly documented in the new office of the UMFA; this creation is an ideal type representation of an institutional "fusion"⁶⁶ which hides the schizophrenia between two pillars.

Thus based on past experiences we would claim that the CFSP will work more efficiently in the day to day diplomatic business; it will reduce some weaknesses like the external visibility, but might create new problems of internal rivalry. The performance of EU crisis management – in South-Eastern Europe and elsewhere – will be an important test for the new provisions for CFSP/ESDP. The fundamental test however will be the reaction to international crises of high intensity, where vital national interests of the member states and of other international actors are at stake. From the new provisions with their limited impact on national sovereignty we cannot expect that they will make a major difference for the shaping of a global

65) European Convention (2003).

66) WESSELS (2004).

actor. The title of a 'Foreign Minister' will not be sufficient to overcome deep cleavages among member states. In these cases past experiences and former paths let us argue that national interest formulations and the internal logics of domestic policy will dominate the soft norms of group discipline as formulated again in the relevant articles of the constitutional treaty. Even a strong "identification with Europe in general"⁶⁷ will not be sufficient to support a common or even supranational strategy.

In sum, the gap between ambitious goals and allocated capabilities remains wide. Following this reading this analysis expect an output failure already in an early experimental phase of applying the constitutional text, because the soft disciplinary instruments of a weak pressure group will not work against non-compliance: in such a scenario the treaty would not create, over time, its own "loyalties"⁶⁸, but damage the constitutional authority of the EU – not only with regards to the CFSP, but will also impact on the Union's credibility to "build a common future" (Art. I-1 (1)). Obvious failures in foreign and security policy will affect the value of the constitutional text as a common mobilising force. Thus if we assume that the efficiency and effectiveness of the CFSP will only be improved within the day-to-day diplomacy, but not in high politics crises, then the future output legitimacy of the CFSP and thus the EU overall will also not be upgraded. Under these conditions, the failures of the CFSP chapters might have a negative spill back effect on other parts of the text. The very term of 'constitution' would be damaged, and thus the constitutional 'myth' might be put at risk in a fundamental sense.

To turn the argument around: The successful use of these provisions will be a core factor for creating or reinforcing a "constitutional moment"⁶⁹ leading towards a "constitutional patriotism"⁷⁰. Thus the constitutionalisation process in this policy field has not come to an end – even if the constitutional treaty and the revisions of the IGC will have been ratified.

In line with the assumptions of a negative scenario of non-ratification, major institutional weaknesses of CFSP will persist: the rotating Council presidency which reduces the continuity and the visibility of EU Foreign

67) KOENIG-ARCHIBUGI (2004), p. 147.

68) WEILER (2002), p. 596.

69) ACKERMANN (1998) p. 409.

70) See HABERMAS (1996).

Policy will probably not be replaced. Also, the institutional split between the Council and the Commission in CFSP issues, which is planned to be mitigated by a double-hatted Foreign Minister, will probably remain. Representing a central innovation of the constitutional treaty, it might prove to be rather difficult to establish some form of 'Foreign Minister' e.g. on the basis of inter-institutional agreements.⁷¹

With regard to the further development of ESDP, the (continued) pragmatic implementation of some elements of the TCE such as the European Defence Agency and the battle group concept could increase the Union's effectiveness – also in case of the non-ratification of the TCE. However, the strictly intergovernmental character of EU's security and defence policy is not expected to be changed in the near future.

5.2. Towards a next step in the ratchet fusion?

In view of this analysis and assessment, we expect that the living constitution of the constitutional treaty will clearly manifest an 'in-built' need for further reforms. The treaty would then document another step in a ratchet fusion process⁷². The provisions of the TCE would then not design the ultimate plateau; they are part of an evolution along "punctuated equilibria"⁷³. This chain of arguments would put the TCE chapters in a historical and theoretical context: in each IGC the 'masters of the treaty' have regularly revised the legal constitution upwards on a ladder with ever refined modes of intergovernmental governance from soft to harder variations; compared to other policy fields like EMU and policies in the field of justice and home affairs treaty changes with regard to CFSP (including the constitutional treaty) have not yet moved this policy field onto the supranational level. Visions and concepts have evolved though not towards a federal *finalité*. member states do keep a considerable *domain réservée* for their foreign and especially defence thinking. National actors are apparently not willing and/or able to follow the Monnet method of transferring *real* sovereignty, even if it is of a *limited* nature. This school of thought expects a recurrent pattern also for the future: a stable set of cooperation on a plateau proves suboptimal in a crisis of high politics. Faced with a clear output failure the

71) Though, in the current debate, there are also more optimistic views on this option, see for example KURPAS (2005).

72) WESSELS (2001).

73) HAY (2002), p. 161ff.

EU states and especially the heads of government try to remedy this structural weakness by upgrading the provisions for the rules of their regime, which are used more intensively on a higher plateau – but would fail again in the next external shock. None of this upgrading however transgresses a crucial threshold: the defence of national sovereignty prevents a bold constitutional leap towards a more effective and efficient Union. In spite of many efforts member states do not have enough energy to leave the intergovernmental trap.

Imperfect as it is, CFSP and its younger relative, the ESDP, will thus remain of high relevance for both the political world and for the academic research. Even more than 30 years after its inception as European Political Cooperation (EPC) this set up has not reached its final stage, neither as a legal nor as a living constitution. Thus, both constitutional architects, as well as observers from the ivory tower will have considerable tasks still ahead.

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CHAPTER 7

Flexible Integration in the Common Foreign and Security Policy

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SUMMARY

- ▶ From a legal perspective this contribution intends to elaborate on the instrument of enhanced cooperation and the proposed specific mechanisms of flexible integration in the dynamic field of CFSP in the light of both, the currently applicable treaty of Nice and the envisaged regime of the constitutional treaty.
- ▶ While extending tools of differentiation to the sphere of CFSP is crucial given the fact that the principle of unanimity prevails, one has to strike a balance between the objective of increased efficiency and strengthened unity, as well as between legal security and necessary ad-hocism.
- ▶ The (still limited) option of taking recourse to mechanisms of flexibility in the domain of security and defence neither replaces former instruments of flexibility nor does it preclude flexible integration outside the treaty framework. However, the effective interplay of the new variants discussed could spark off an integrationist process which may allow the most progressive member-states to proceed.

I. INTRODUCTION

A. Intergovernmental sphere

When looking at the envisaged procedure of norm-setting in the realm of the Common Foreign and Security Policy (CFSP) as enacted in the constitutional treaty (TCE)¹ one has to observe, supposing that the TCE or parts of it eventually enters into force, that this traditional field of intergovernmental cooperation faces fewer changes in this respect than one might have expected. Decision-making in the Council remains dominated by the principle of unanimity. The weak position of the Commission and the European Parliament is preserved, thus reinforcing instead of mitigating, important ingredients for the continuous lamentation on the EU's democratic deficit. The complete exclusion of judicial review

1) The Treaty establishing a Constitution for Europe (TCE) was adopted by the 25 Heads of State and Government on 18 June 2004 in Brussels. Referenda in both France and the Netherlands rejected the text of the Constitution on 29 May and 1 June 2005 respectively. Currently a phase of reflection is under way.

by the European Court of Justice (ECJ) in the field of CFSP² illustrates the weight of national interests wanting to preserve as much sovereignty and autonomy as possible with regard to decision-making in external and security affairs.³

In sharp contrast to the detected lack of innovative approaches concerning the norm-setting process, one may identify significant modifications when it comes to the legal effects which may originate from the future Constitution in the field of CFSP. Above all, they stem from the proposed merger of the pillars which, as a result waters down the established principle of supremacy of Community law over Union law⁴, as well as due to the principles contained in Article III-308 TCE. These revisions lay the grounds for a considerable extension of legal competences in the realm of the CFSP. However, for reasons of brevity I will refrain from elaborating on this point any further.

Despite of the projected abolition of the pillar structure and the more coherent pooling of existing policy fields above all with regard to external action, the constitutional treaty does not abandon the intergovernmental characteristic of CFSP, since procedural requirements such as the unanimity principle remain applicable. On the contrary, the intergovernmental aspect will even gain momentum due to the new institutional quality of the European Council together with its additional decision-making competences and the introduction of specific rights to take initiatives attributed to the Union Minister for Foreign Affairs. From a legal perspective, the danger of abusive intergovernmentalism is limited by the principle of the single institutional framework and the principle of coherence as enacted in Article 3 TEU. The former aims at establishing a balanced coordination between the supranational sphere and intergovernmental policy fields while the latter implies the obligation for compatibility or

2) See SMITH (2001), pp. 79-104 (92).

3) However, the competences of the ECJ in the sphere of CFSP have been partially extended in the framework of the Constitution. Following Article III-376 TCE "the Court shall have jurisdiction to monitor compliance with Article III-308 and to rule on proceedings, brought in accordance with the conditions laid down in Article III-365(4), reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter II of Title V"

4) The assumption that EC law prevails over EU law has been confirmed by the ECJ's jurisdiction in cases *Leifer*, *Werner* and *Centro-Com*. See Case C-83/94, *Leifer*, [1995] ECR I-3231; Case C-70/94, *Werner I*, [1995] ECR I-3189; Case C-124/95, *Centro-Com*, [1997] ECR I-81. A different view is presented by WESSEL (2000), pp. 1135-1171.

absence of contradiction and synergy. In other words, in the context of EU law “*coherence*” signifies intensified efforts of coordination among the member states and the institutions “*towards creating the objective of an integrated whole, that is, to ensure that the EU acts in unison.*”⁵ According to the treaty of Nice the Commission and the Council are charged to collectively ensure compliance with the principle of coherence.⁶ In the constitutional treaty, it is for the Commission and the Minister for Foreign Affairs to carry out the same task (Article III-292 para 3 TCE). This means that the above-mentioned institutions must always examine the admissibility of measures of flexibility in the light of the respective article on coherence. Any further check against more specific conditions of flexibility may only be envisaged provided that concerns related to the principle of coherence can be excluded.⁷

B. The obstacle of unanimity

The objective of giving the Union a more effective and rapid profile in external action is to a great extent hampered by the general condition of unanimous decision making in this field. Exceptions from this condition are granted on the basis of Article 23 para 2 TEU, in cases where the Council on the basis of a common strategy is going to decide upon a common action, a common position or another decision or if it takes a decision to implement these instruments or to nominate a special representative following Article 18 para 5 TEU. However, decisions having military or defence implications are entirely excluded from qualified majority voting. The principle of unanimity is going to remain after entry into force of the Constitution. The IGC failed again to overcome the impasse of restricted qualified majority voting in the realm of CFSP and ESDP (Article III-201 para 4 TCE). Against this background the additional option for qualified majority voting, namely “*on a proposal which the Union Minister for Foreign Affairs has presented following a specific request to him or her from the European Council, made on its own initiative or that of the Minister*” does not substantially facilitate the situation (Article III-300 para 2b TCE).

5) See BLANCK (2003), p. 13.

6) Generally on the question of coherence in the EU see, among others, TJETJE (1997) pp. 211-234; WESSEL (1999) particularly pp. 295-314; MISSIROLI (2001) pp. 177-196.

7) It has to be noted that the principle of coherence is repeated in the catalogue of specific conditions governing flexibility; see Article 27a para 1 (3) TEU.

C. Alliances and national preferences in terms of security and defence

Security and Defence Policy as a classical element of national security have not only been left outside the Community legal order until the treaty of Maastricht, they are also shaped by various defence traditions as well as by membership to alliances or by ambitions to maintain a status of neutrality or non-alignment, which regularly provoke opposing positions in day-to-day foreign policy.⁸ Eleven out of the former EU-15 are members to NATO whereby two of them are not militarily integrated into the alliance (Spain and France). The other four EU-members (Austria, Sweden, Ireland, Finland) are neutral or non-aligned States. Resulting from the last enlargement eight (out of ten) new member states have joined the Union as NATO members (Poland, Hungary, Czech Republic, Slovenia, Slovakia, the Baltic States). This gives additional weight to the “*Atlanticists*” in the Council nourishing fears of squeezing out the formerly influential group of the so-called “*Continentalists*”. This refers above all to France, which has traditionally pursued a policy aiming at emancipation from the NATO. Furthermore, the continuous political adherence to the (presumed) status of neutrality reveals to be somewhat contradictory given the changing nature of threats to international security and the full commitment to the implementation of CFSP to which all member states are subject.⁹ A comprehensive solidarity clause contained in the Constitution (Article I-15 TCE) similar to that enacted in Article 11 para 2 TEU figures as the only legal remedy on the EU level, seeking to balance the panoply of national foreign policy programs.

The question however arises of how this self-binding provision shall be effectively put into practice in the day-to-day business. This problem is aggravated by the manifest lack of any mechanisms providing for control or sanction in order to meet potential or evident breaches. This is illustrated by the fact that numerous infringements to the principle of solidarity have occurred in the past without ever meeting legal protest. The potential risks for the Union’s external profile emanating from, at worst, multiply cleaved reactions on external incidences may be disastrous.

8) See BRILL (2003) p. 549.

9) The only exception is Denmark; see Protocol nr. 5 on the position of Denmark.

D. Unity or efficiency?

Against the picture drawn above one may deduce that the Union will have to assert its external role by striking a balance between intergovernmental cooperation, the principle of unanimity and national adherence to either alliances or to the status of neutrality. Taking all these factors into consideration would respect the unity of the EU's external action, whereas in the majority of cases it would also mean to reduce the result to the smallest common denominator.

Cooperation outside the treaty framework may constitute an alternative. Another one would be to use mechanisms of flexibility which enable interested member states to advance the CFSP within the institutional setting of the Union without imperatively involving all member states. Thus it should be possible to unite the most progressive members under a legal umbrella in order to boost the external profile of the Union and, at the same time, to prevent the creation of exclusive clubs.

However, the scope of enhanced cooperation in the field of CFSP is considerably restrained by a detailed catalogue of conditions set out in Article 43 TEU and the legal restriction to exclusively implement joint actions or joint positions. The explicit exclusion of respective measures having military or defence implications cut off the possibility to build coalitions within the European legal order in times of crisis. Against this background there are prominent voices pointing at the potential benefits stemming from enhanced cooperation in the realm of ESDP, particularly with regard to the implementation of Petersberg tasks.¹⁰ Adversaries of a flexible Europe refer to the risk of enhancing the Union's operability "*at the costs of splitting it*", arguing that introducing flexibility into the realm of CFSP equates to a self-made "*disempowerment of the Union in external relations*".¹¹ To rebut this argument suffice is to acknowledge that any form of flexibility within the CFSP always has to represent the Union in its entirety. Nonetheless a dilemma emerges, since any measure of flexibility is only applicable if a unified reaction has not been reached in the Council. It is more than questionable whether it will ever be possible to disguise lacking internal concordance by a seemingly unified appearance in external action. However, the risks

10) See CONFER 4760/00, 4.

11) Quoted in BENDER (2001) p. 753 [translation by the author].

of paralysing the external profile of the Union are much more impressive if decision making within CFSP remained exclusively based on unanimity.

The above-mentioned limitations to enhanced cooperation prompted the Working Group "*Defence*" of the European Convention to adopt the issue of flexibility, despite of the fact that it was not granted particular attention, neither in the Laeken mandate nor in the framework of a specific Working Group within the structure of the Convention. In their final report a number of explicit recommendations reflect the particular importance finally attributed to flexibility, namely:

*"ensuring flexibility in decision-making and in action, both through more extensive use of constructive abstention and through the setting-up of a specific form of closer cooperation between those member states wishing to carry out the most demanding Petersberg tasks and having the capabilities needed for that commitment to be credible"*¹²

The essential impetus leading to this document was given by the Franco-German contribution to the ESDP in which it was explicitly demanded: "*Notre objectif est d'atteindre une plus grande flexibilité, notamment dans le domaine des processus décisionnels*".¹³ In addition, the contribution requested to transform the ESDP into a "*European Security and Defence Union*" through, among others, the extension of enhanced cooperation to the second pillar and its establishment by qualified majority voting as well as to reduce the quantitative threshold for participation. By contrast, the final report of the Working Group on defence put the focus on alternative measures of flexibility such as "*closer cooperation*". Yet it was only after Europe's political division about the war on Iraq and the signal set by the four-nations proposal of 29 April 2003 involving Germany, France, Belgium and Luxembourg, that the European discussion on enhanced cooperation was eventually re-animated. The underpinning objective however, was to avoid the formation of any *avant garde* on European security issues operating outside the Treaties. To this end the presidency of the Convention issued a comprehensive document proposing a range of legal revisions and additional normative options with regard to flexible integration in the CFSP/ESDP.¹⁴ Finally a breakthrough was reached

12) See CONV 461/02, 2.

13) See CONV 422/02, nr. 2.

14) See CONV 723/03.

in the Draft Constitution by overcoming the existing constraints of enhanced cooperation. Furthermore specific instruments governing closer, structured and armament cooperation found their way into the Constitution. These newly created mechanisms significantly increase the range of possibilities to act, as well as the degree of complexity.

Against the background of a selective analysis of existing forms of flexibility this contribution intends to elaborate on the instrument of enhanced cooperation and the newly shaped specific mechanisms of flexible integration. On the basis of both, the Treaty of Nice and the Treaty establishing a Constitution for Europe of 18 July 2004 (CIG 87/04), these instruments shall be analysed from a legal perspective. In order, to complete the picture scenarios of factual and potential cooperation outside the Treaty framework shall be equally taken into consideration. It will be shown in the end, that the range of options, starting from (ad-hoc) mechanisms in the framework of enhanced cooperation going to new forms of pre-defined and even permanent flexibility are promising to boost the profile of CFSP and ESDP. However, whether they will effectively contribute to and urge the integration process is up to future practice. In the following two examples of existing forms of Treaty-based flexibility shall be assessed in more detail.

II. EXAMPLES OF FLEXIBLE INTEGRATION IN THE CFSP

A. Constructive abstention (Article 23 para. 1 TEU)

The instrument of constructive abstention allows single member states to abstain from voting in the framework of CFSP without hampering the unanimous decision making process. Thus it is designed to provide a flexible alternative to fully blocking decisions requiring unanimity. With reference to Article 23 para 1 TEU a member state is authorised to make a formal declaration, which means that it will not have to apply the decision, while accepting that the Union as such is bound by it. The respective member state is also obliged, in a spirit of mutual solidarity to „*refrain from any action likely to conflict with or impede Union action based on that decision and the other member states shall respect its position.*“ If member states that count for

more than one third of the weighted votes, take recourse to constructive abstention, a decision does *ipso iure* not materialise.

When it appeared in the treaty of Maastricht for the first time, it was welcomed as an adequate remedy to the rigid principle of unanimity in the CFSP. Nonetheless, its existence encapsulates a general dilemma. Any application of constructive abstention by one or more member states reveals the ostensible lack of approval with regard to specific matters in this field. In turn a majority of at least two thirds of the weighted votes is required for successful decision-making. Constructive abstention is not so much a potential measure of flexibility than a more organisational element of decision making. Moreover, it is not designed as a general escape clause for cases of conflict between Union law and national politics. To illustrate this concern, one may evoke the scenario of a neutral country which tries to generally avoid its participation in the field of ESDP by taking recourse to constructive abstention. Such an approach would not only run counter the comprehensive acceptance of the *acquis* as signed at the moment of accession to the Union, but it would also infringe both the solidarity clause enacted in Article 11 para 2 TEU and the principle of good faith as fundamental principle of international public law. However it must be emphasised, that any member state which cannot or does not want to agree with a decision requiring unanimity is not obliged to make use of constructive abstention. It never foregoes its right to prevent such a decision by using a veto.¹⁵

The constitutional treaty equally adopted the option of constructive abstention. However, the wording slightly changed, clearly illustrating the general endeavour to link voting majorities with quantitative thresholds. Thus in other words, a decision shall not be adopted if “*the members of the Council qualifying their abstention in this way represent at least one third of the member states comprising at least one third of the population of the Union*” (Article III-300 para 1 TCE).

B. Opting out by Denmark

In the course of the negotiation following the signing of the treaty of Maastricht, which was refused by the population of Denmark in a popular referendum, Denmark was granted a specific opting-out clause enacted in the

15) See Council of the European Union, *Decision making and constructive abstention in defence matters*, 30.08.2001, Doc. 11377/01.

Protocol nr. 5 on the position of Denmark. Based on the so-called “Edinburgh-compromise”, Denmark also received exceptional abstention rights in the field of ESDP and JHA. Since the content of the treaty of Maastricht partially touched upon national sensibilities, this derogation arrangement constituted the last chance at that moment and paved the way for the treaty’s entering into force. In the following, the protocol was incorporated into primary law by means of the treaty of Amsterdam. In part two it is stated:

“With regard to measures adopted by the Council in the field of Articles 13(1) and 17 of the Treaty on European Union, Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications, but will not prevent the development of closer cooperation between member states in this area. Therefore Denmark shall not participate in their adoption. Denmark shall not be obliged to contribute to the financing of operational expenditure arising from such measures.”

Thus Denmark, which has met any attempt of creating integrated EU military structures with open scepticism, is not obliged to participate neither politically nor financially to this kind of operations. In return, it retains the liberty to inform the other member states at any time that it does not want to avail itself of all or of parts of the protocol and that it intends to fully apply the relevant measures within the framework of the European Union. This protocol on the specific position of Denmark has been entirely introduced into the constitutional treaty

In the light of the examples explored above one may note that mechanisms of flexible integration have already been an integral part and stabilising element of the emerging Common Foreign and Defence Policy. In the longer run however, it seems risky to build the concept of a more integrated and more operative CFSP and ESDP exclusively on the principle of constructive abstention and specific derogation regimes or on regular recourse to coordination outside the treaty framework. The introduction of enhanced cooperation in the treaty of Amsterdam initiated a process to meet these considerations and has further developed through the treaty of Nice. The proposals contained in the constitutional treaty text finally mark the turning point in primary law, ranging from temporary constructions of flexibility towards the establishment of even permanent institutionalised systems based on extended mandates.

III. ENHANCED COOPERATION IN THE CFSP

A. Enhanced cooperation in general (Article 43-45 TEU)

The treaty of Nice for the first time enshrined general provisions on enhanced cooperation applicable across all pillars. Before Nice, the treaty of Amsterdam already provided legal grounds for enhanced cooperation. These were however restricted to the Community pillar (Article 11 TEC) and to the third pillar (Article 40 TEU). The field of CFSP affairs was respectively reduced to alternative mechanisms such as constructive abstention according to Article 23 para. 1(2) TEU or closer cooperation in the realm of security (but outside the treaties), according to Article 17 para. 4 TEU. Against this background, Article 43 to 45 TEU in the Nice version constitutes the first horizontal clause of primary law which entirely encompasses both the supranational and the intergovernmental legal sphere of the EU. However, the treaty of Nice did not fundamentally reform the context of enhanced cooperation although new provisions were introduced in order to render future use of the mechanism more attractive. Article 43 TEU limits the required threshold of participating countries to start such a cooperation to eight member states, which constitutes less than one third in the enlarged Union. The existing veto rights, which have been created by the treaty of Amsterdam, are lifted in the first and third pillar. By contrast, as will be shown in the following section, the scope of effective implementation within the CFSP (Articles 27 a-e TEU) became subject to significant limitations.

The relationship between the general provisions of Articles 43 to 45 TEU and the specific rules governing enhanced cooperation in the CFSP might be qualified as a “*specific order of cross-references*”¹⁶. This is impressively illustrated by Article 27a para 2 TEU stating: “*Articles 11 to 27 and Articles 27b to 28 shall apply to the enhanced cooperation provided for in this article, save as otherwise provided in Article 27c and Articles 43 to 45*”. This means that in the field of CFSP the general norms, which are applicable to enhanced cooperation in all pillars subsequent to Title VII TEU, are subordinate to the more specific ones. By contrast, following Article 27a para. 1 TEU enhanced cooperation in the CFSP shall safeguard the values and serve the

¹⁶ See KAUFMANN-BÜHLER in GRABITZ and HILF (2003), Das Recht der Europäischen Union, 22. Ergänzungslieferung, August 2003, Vorbemerkungen zu Art. 27a – 27e TEU, para 4.

interest of the EU as a whole by asserting its identity as a coherent force on the international scene. Furthermore it has to respect the principles, objectives, general guidelines and consistency to the CFSP, as well as the decisions taken within this policy, the powers of the European Community and consistency between all the Union's policies and external activities. In turn, the application of the general rules contained in Articles 43-45 TEU are confined by the prevailing *acquis communautaire* and the principles of unity and consistency.

B. Enhanced cooperation in the CFSP (Article 27 a–e TEU)

At the beginning of the IGC 2000 leading to the treaty of Nice, extending enhanced cooperation to the realm of the second pillar was a non-issue.¹⁷ It took the member states until the European Council summit in Feira in June 2000 to officially add it to the common agenda.¹⁸ However, the provisions introducing enhanced cooperation into CFSP constitute not more than a thin compromise. A number of constraints, which have been added at the request of the UK, Ireland and Sweden, added to its complexity and reduced the potential to effectively exploit the opportunities offered by the mechanism of enhanced cooperation.¹⁹

Firstly, the veto “*for important and stated reasons of national policy*” which had been lifted in the first and in the third pillar has been inserted into second pillar matters (Article 27c; Article 23 para 2 (2) TEU); secondly, enhanced cooperation in the CFSP will only relate to the implementation of a joint action or a common position (Article 27b TEU) and thirdly, all matters having military or defence implications are excluded from its application (Article 27b TEU). The later limitation does not, in the light of Article 17 para 1 (3) TEU, extend to (enhanced) cooperation between member states in the field of armaments. Based on a strict terminological interpretation, procurement and coordination in the field of armaments are obviously related to defence. However, armament

17) The so-called Amsterdam *left-overs* are summarised in the “*Protocol on the institutions with the prospect of enlargement of the European Union*” appended to the treaty of Amsterdam. They refer to the size and composition of the Commission, the weighting of votes in the Council, the possible extension of qualified majority voting in the Council as well as other necessary amendments to the treaties arising as regards the European institutions in connection with the above issues and in implementing the treaty of Amsterdam.

18) See FISCHER (2003) pp. 53 seq.

19) See STUBB (2002) pp.130 seq.

bears reference to commercial, social and further EC-related policies, including issues such as competition, merger-control or subsidies in the industrial sector.²⁰ Against this background one may argue, that enhanced cooperation in the field of armaments cooperation does not infringe Article 27b TEU.

C. Enhanced cooperation in the draft constitutional treaty

(Article I-44 TCE; Articles III-416 to III-423 TCE)

Even though to date enhanced cooperation has never been practically applied yet, it has been further developed within the framework of the European Convention leading to an extension of its scope as laid down in the draft constitutional treaty. The legal bases governing enhanced cooperation do not follow any systematic design but are deliberately spread among the first and the third part of the draft constitutional treaty. Moreover they are subdivided in general and specific norms, whereby the principle of *lex specialis derogat legi generali* has to be applied. However in cases of legal conflict or lack of normative clarity one has to take recourse to the general norms of enhanced cooperation or even to those governing CFSP as such.

Similarly to the current treaty version, the instrument of enhanced cooperation, which is unconditionally open to all member states, “*shall aim to further the objectives of the Union, to protect its interests and reinforce its integration process*” (Article I-44 TCE). Its establishment shall only be authorised by the Council “*as a last resort*” after proving that the pursued objectives cannot be realised “*within a reasonable period*” by the Union as a whole. In addition the Union Minister for Foreign Affairs and the Commission are entitled to issue opinions on the proposed enhanced cooperation's consistency with CFSP and other Union policies. The European Parliament is to be informed. In order to initiate the procedure of enhanced cooperation at least one third of the member states must agree to work together.

Compared to the current treaty regime the proposed procedure is less cumbersome and restrictive. Above all, enhanced cooperation might be estab-

20) See TRYBUS (2004) pp.189-217 (193).

lished in all policy areas, except of the field of exclusive competences.²¹ In the realm of CFSP, the limitation to solely implementing joint actions or common positions has been abolished, together with the explicit exclusion of matters having military or defence implications. In other words, the general rules governing enhanced cooperation unconditionally apply to the CFSP as well. Slight procedural differences persist when it comes to initiating the procedure or with regard to the admission of member states wishing to join the mechanism at a later stage.²²

When looking more closely on the correlation between the trans-pillar regime of enhanced cooperation anchored in Article I-44 TCE and the specific mechanisms of flexibility in the field of ESDP one has to differentiate between both concepts. The only legal basis effectively referring to enhanced cooperation is to be found in Article III-213 paragraph 5 of the original draft dealing with “*structured cooperation*”, thus establishing, there again, a hierarchical order based on cross-references. However, this provision has been dropped in the later version.²³ Similarly, the other mechanisms of flexibility, such as that of closer cooperation, the execution of civil or military operations by groups of member states or active participation within the European defence agency do not relate to enhanced cooperation at all. They fall within the legal ambit of the general norms of CFSP and particularly ESDP, laid down in Articles I-40 and I-41 TCE. However the opportunities offered by these mechanisms do not preclude the application of enhanced cooperation as such in the realm of foreign and security policy. Nonetheless it is apparent that, due to the specific mechanisms potential issues for enhanced cooperation in the field of CFSP are limited in number. Respective initiatives may be considered with regard to civil measures or aspects of human rights protection.

21) Exclusive competences are competition policy, monetary policy, common commercial policy, customs union and the conservation of marine biological resources under the common fisheries policy; Article I-12 para 1 TCE.

22) See Article III-325 para 1 and 2 TCE.

23) See CIG 60/03 ADD 1, Annex 22, according to which the structured cooperation shall be established as a permanent mechanism, whereby the reference to enhanced cooperation has been dropped.

IV. NORMATIVE AND INSTITUTIONAL CONDITIONS FOR ENHANCED COOPERATION

A. Conditions for establishing enhanced cooperation in the CFSP

Basic conditions in the CFSP

Contrary to the detailed catalogue of general criteria contained in Articles 43-45 TEU, specific conditions for enhanced cooperation in the field of CFSP are practically almost lacking. In order to close this gap, a complex system of cross-references has been introduced into the Treaty. According to Article 27a TEU the most important article in this respect, a number of fundamental objectives with regard to external relations must be observed, namely the safeguard of the European values and the commitment to assert the Union’s identity as a coherent force on the international scene. By reference in paragraph 2 to the general objectives of CFSP contained in Articles II et seq. TEU, the obligation to support and maintain a unified European profile in international affairs, gains additional substance. In turn, the Council’s competence to assess whether the above mentioned obligations are successfully met, confers significant discretionary powers to this body. With regard to internal policies, enhanced cooperation in the CFSP has to preserve the common *acquis* and to respect the principle of consistency within the second pillar and within the sphere of Union policies as a whole. To this end the CFSP has to be understood in its entirety as shaped by the (European) Council, thus equally encompassing respective guidelines, strategic principles or specific decisions. In other words, action in the framework of enhanced cooperation does not only have to consider respective treaty obligations but also has to respect results originating from political developments as for example laid down in the regular Presidency conclusions. However, one has to observe that the specific conditions governing enhanced cooperation in the CFSP basically aims at limiting its application and is obviously designed to complicate the whole mechanism.

General conditions as laid down in Articles 43-45 TEU

A further reference contained in Article 27a TEU refers to Article 27c and the provisions laid down in Articles 43-45 TEU. In other words, given the clear lack of a specific catalogue of conditions governing the establishment of enhanced cooperation in the CFSP (except of those mentioned above) one has to

resort to the general set of premises which are applicable across all pillars. It is arguable to draw a line between objective and subjective criteria. Among the objective criteria figure the requirement of a minimum quota amounting to eight member states participating in the mechanism, and the principle of openness for all other member states. The condition of being the last resort and the obligation to respect the “*competences, rights and obligations*” of those member states which do not participate in the enhanced cooperation belong to the sphere of subjective criteria. Similarly to the above mentioned conditions Article 43 TEU equally enacts the obligation to further the objectives of the Union as a whole, to protect and serve their interests and to reinforce the process of integration as well as to respect the single institutional framework and the *acquis communautaire*. Moreover, according to the treaty of Nice the instrument of enhanced cooperation has to remain within the limits of the powers attributed to the Union or to the Community. As soon as the general and specific conditions are met interested member states are entitled to submit an application for enhanced cooperation to the Council (Article 27c TEU).

Conditions laid down in the Constitution

The grouping of general and specific conditions for enhanced cooperation in Article I-44 and Articles III-416, 417 and 418 para 1 TCE constitutes a net gain in terms of simplification and coherence. As a result, following the bundling of the formerly spread provisions and the formal overcoming of the pillar-structure, legal requirements for enhanced cooperation are now equally applicable for both, supranational and intergovernmental policy fields. However, this engenders almost no or just slight editorial changes in terms of content and formulation. As an example, one might refer to the former requirement to respect the treaties and the single institutional framework which has been revised accordingly stating that enhanced cooperation shall “*comply with the Union’s Constitution and law*”. Furthermore the original threshold of eight member states was transformed into a minimum share of one-third of all member states, which however, will not imply substantial changes given the future composition of the EU encompassing 27 member states.

B. The process of application and authorisation

General Conditions

When the respective requirements are met, member states participating in enhanced cooperation are authorised to make use of the institutions,

procedures and mechanisms of the European Union in order to pursue the objectives set. The process of application and authorisation however, is subject to specific provisions which vary among the policy areas.

Accordingly, each application for enhanced cooperation in the field of the European Community has to follow the procedure as laid down in Article 11 para 1 TEC, whereas Article 40a para 1 TEU governs the respective endeavours in the realm of judicial cooperation in criminal matters. Respective requests have to be presented to the Commission which may in turn submit a proposal to the Council. In the event that the Commission refuses to issue a positive proposal it has to forward its reasons to the member states concerned. Finally, it is up to the Council to formally grant authorisation of enhanced cooperation after consulting the European Parliament.

The process in the CFSP

In the field of CFSP any request aiming at establishing enhanced cooperation has to be directly submitted to the Council, which has to forward it to the Commission for its opinion and to the European Parliament for information (Article 27c TEU). Finally the Council has to decide by qualified majority acting in accordance with Article 23 para 2 (2 and 3) TEU. However, the apparent exception to the unanimity principle in CFSP matters relates to the simple fact that enhanced cooperation is limited to the implementation of a joint action or a common position which are already subject to qualified majority.

Scope of discretion of the Council

Against this background the question arises whether the Council disposes of any scope of discretion when deciding upon the admissibility of enhanced cooperation or if fulfilling the underlying conditions leads to an automatic legal entitlement for enhanced cooperation. Thus, following the latter approach, the authorisation by the Council would constitute a pure formal act. On the one hand it is arguable to adopt the latter view, given the comprehensive catalogue of difficult premises and complex procedural arrangements, which would be undermined by an additional discretion attributed to the Council. On the other hand the Council retains the competence to determine whether the subjective criteria are effectively met. To put it more concretely, the act of assessing the degree of i.e. deepening and enhancing the integration process escapes from any viable verification and objective control, thus conferring significant discretion to the Council.

Role of the ECJ

Another problem is indicated by the deliberate lack of competence of the ECJ in the sphere of the CFSP. In any event, the existing case law may be applied analogously or at least be consulted in order to provide for a homogenous implementation of enhanced cooperation across all pillars. However, there is neither a binding obligation towards this end nor a mechanism of supervising it. The sole option allowing for ECJ review in the realm of foreign and security policy consists when the Court is confronted to possible overlaps of the first and the second or third pillar.²⁴ In the future it seems most likely that the ECJ will get more involved into respective delimitation problems, directly resulting from an increasing number of such “*hybrid acts*” covering both matters.²⁵

The veto option

According to Article 27c TEU referring to Article 23 para 2 (2 and 3) TEU, any member state is entitled to declare its refusal to adopt a given decision by qualified majority voting for “*important and stated reasons of national policy*”. In order to rescue the contentious matter the Council may decide to refer the issue to the European Council for decision taking by unanimity. It is interesting to observe, that despite of the formal abolition of this veto clause in all other pillars, it had been introduced in the field of enhanced cooperation in the CFSP by the treaty of Nice.²⁶

The binding effect of the Council's authorisation

The authorisation issued by the (European) Council allowing for enhanced cooperation in the field of CFSP assumes a binding character on the participating member states. Moreover all future decisions and acts adopted in the framework of enhanced cooperation are exclusively binding on these states.²⁷ It is important to note that the initial authorisation also constitutes the relevant legal basis with regard to forthcoming accessions

24) This competence was for the first time confirmed by the Airport Transit Visa case on the basis of Article 47 TEU; Case C-170/96, *Commission v. Council*, [1998], ECR I-2763.

25) See WESSEL (2000) pp. 1135-1171 (1151).

26) It is worthwhile to note that a similar mechanism is still effective with regard to the first and the third pillar. However the referral to the European Council is just of suspensive effect leaving substantial decisions making to the Council (by qualified majority voting).

27) Article 44 para 2 TEU states: „Such acts and decisions shall be binding only on those member states which participate in such cooperation and, as appropriate, shall be directly applicable only in those States“.

of other member states. Therefore it is not allowed to (excessively) deviate from the original scope of action. Member states which do not participate in enhanced cooperation are exempted of its binding effects, but they are obliged by the treaty not to impede the implementation thereof (Article 44 para 2 TEU).

Procedure according to the Treaty establishing a Constitution for Europe

The legal procedure governing the act of application and authorisation of enhanced cooperation as currently enshrined in the consolidated treaty of Nice is equally included in the constitutional treaty. The relevant provisions are enacted in Article III-325 TCE. Additional weight is added to the process by the introduction of an extra right to be heard conferred upon the Union Minister for Foreign Affairs, with regard to the question of consistency. The obligation to consult the European Parliament has been retained unaltered. From a legal perspective, one might criticise the insignificant position of the European Parliament, even more since the European Parliament has been granted the right of approval in all other policy fields.²⁸

Decision-making is carried out by European decisions. These are adopted by unanimity as a result of the extension of enhanced cooperation in the CFSP beyond common actions and common positions. However, following the provision (“*passerelle*”) stipulated in Article III-422 TCE the Council is entitled to decide by unanimity to further on decide by qualified majority. In a given case, this option which may be used from the start of enhanced cooperation is then equally applicable to the process of authorisation. Conversely to the original draft treaty establishing a Constitution for Europe according to which the “*passerelle*” encompasses all policy fields, decisions having military or defence implications are excluded from its application in the current, consolidated version (Article III-422 para 3 TCE). Nonetheless, in all other fields of external action it is possible to enable an *avant garde* in the framework of enhanced cooperation to proceed by using qualified majority voting. In other words, the participating countries would not only advance with regard to substantial questions but would also enjoy extended decision making rights. It goes without saying that enhanced cooperation based on qualified majority voting has a rich potential of action at its command.

28) Article III-325 para 1 TCE.

C. The procedure of joining enhanced cooperation at a later stage

The principle of openness

The legally anchored principle of openness, providing for participation to enhanced cooperation either at the initial or at a later stage, unconditionally applies to all policy fields of the European Union.²⁹ In other words, openness has to be guaranteed at any phase of enhanced cooperation. However, the requirement to pass a specific process of application and authorisation, which is necessary due to a deliberate lack of automatic adherence, challenges the principle of openness. Respective modalities on later accession are enacted in Article 27e TEU.

The procedure according to Article 27e TEU

According to this article any interested member state wishing to participate in enhanced cooperation has to notify its intention to the Council. It shall also inform the Commission which is entitled to formulate an opinion to the Council within three months. As to the Council, it has to decide on the request within four months of the date of receipt of that notification. Moreover the Council has the discretion, where necessary, to decide upon “*specific arrangements*” in cases where it may deem necessary. To put it more concretely, despite the principle of openness participation may not be constituted by a unilateral declaration but requires a formal procedure.

The Council, in its totality, decides on the request of adherence by qualified majority but approval is ideally expressed by concealment.³⁰ Any refusal of accession to enhanced cooperation has to be qualified as of temporary nature, since any permanent exclusion from an existing enhanced cooperation would be in direct conflict with the Treaty.

The option of “specific arrangements”

In a further step the Council disposes of the right to decide on “specific arrangements” where necessary, for example, in order to facilitate the participation of interested member states. This construction may be compared

29) The guarantee of participation is stated in Article 43b TEU together with Article 27e (second pillar), Article 40b TEU (third pillar) and Article 11a TEC (first pillar).

30) With regard to enhanced cooperation in the first pillar it is the Commission to decide upon any participation at a later stage (Article 11a TEC) and in the third pillar it is the Council in the composition of the Council members concerned (Article 40b TEU).

to the well-known transitional arrangements frequently used during the process of EU accession. In turn it is not explicitly excluded that specific arrangements of this sort are used in such a way to create more severe criteria, thus rendering participation more difficult. Although the objectives set out in the initial decision authorising enhanced cooperation must not be altered or its implementation complicated, one may always define conditions which risk to undermine the general right of participation.

The Procedure according to the Treaty establishing a Constitution for Europe

Similarly to Nice, the constitutional treaty provides for accession at a later stage, which is explicitly enshrined in Article III-420 para 2 TCE. Compared to the current legal system, slight but important differences appear, although they do not contribute to accelerate the formal procedure. Firstly, the obligation to notify the intention to participate in enhanced cooperation has been extended beyond the traditional organs, namely the Council and the Commission, to the Union Minister for Foreign Affairs. In turn, the Commission’s obligation to issue a stated opinion has been dropped (but the Commission is free to formulate one). With regard to the Council, one may observe an increased number of restrictions compared to its former position. In the composition of the member states concerned it holds no discretionary decision making powers anymore, but has to formally “*confirm*” the participation of the interested member state, after consulting the Union Minister for Foreign Affairs, and after “*noting*” that the pre-set conditions have been successfully met. This means, that also later participation requires full and explicit approval by the Council, leaving aside the possibility to accept new members by pure concealment. Another innovation refers to the option to introduce specific conditions for participation in the relevant European decision founding enhanced cooperation. Against this background Emmanouilidis noticed a process of “*challenging the principle of openness*” within the framework of the Constitution.³¹ The author however disagrees with this observation, pointing at the institutionalised option of “specific arrangements” in the treaty of Nice, which already allows for far-reaching limitations to the principle. In turn, the obligation to define relevant conditions already at the initial stage of enhanced cooperation and to incorporate them into the founding decision, significantly strengthens predictability and renounces to the vague style and formulation of the

31) In the original German version Emmanouilidis speaks of „Konditionalisierung der Offenheit“; EMMANOULIDIS in GIERING (2003) p. 68.

current regime in this respect. If the Council comes to the conclusion that the required conditions are not met, it has to indicate the arrangements to be adopted and has to set a deadline for re-examining the given request. All in all the procedure under the Constitution reveals a much more participatory orientation which is tellingly illustrated by the wording of Article III-422 para 2 TCE: “*The Council, on a proposal from the Union Minister for Foreign Affairs, may also adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation*”. This provision flows from the general obligation entrusted to the Commission and the member states to promote participation by as many member states as possible and it also ascertains the admissibility of temporary measures in order to support acceding member states.

D. Treaty-based limits

Limitation to common positions and common actions

Article 27b TEU stipulates that enhanced cooperation in the field of CFSP is strictly limited to the implementation of common positions and common action and generally excludes relevant cooperation in respect of matters having military or defence implications. Against this background it is hardly comprehensible why common strategies have not been included, above all because that they are designed to cover areas “*where the member states have important interests in common*” (Article 13 para 2 TEU). Equally excluded are “*decisions*”, which constitute the fourth legal instrument in the realm of CSDP and have to be taken unanimously by the Council. Arguably one may speak of a kind of unwritten principle stating that only legal acts, that are based on qualified decision-making allow for further implementation in the shape of enhanced cooperation. In return one may maintain that the given restrictions express no more than the political intention to confine the mechanism of enhanced cooperation in the second pillar. During the process of consultation in the European Convention, the extension of the scope applicable to enhanced cooperation has been one of the most controversial questions in the relevant working group.³² In the end, one concern of the Franco-German proposal was pushed through according to which enhanced cooperation should be introduced in the field of CSDP without reservation.³³

32) See CONV 791/03, Annex, 2.

33) See CONV 422/02, nr. 2.

Legal effects

The treaty of Nice explicitly states that acts and decisions taken under enhanced cooperation do not form part of the Union *acquis* (Article 44 para 1 TEU). As a consequence these acts and decisions exclusively bind those member states which participate in such cooperation and are directly applicable in those States (Article 44 para 2 TEU). This provision is based on the intention to communicate to future member states that their obligation to take over the whole EU *acquis* does not encompass measures taken under enhanced cooperation. As a result, the question of the legal nature of enhanced cooperation arises. On the one hand it is arguable to consider enhanced cooperation to be fully part of the EU *acquis*. To support this argument one may point to the legal basis of enhanced cooperation rooted in primary law and to the general entitlement to make use of the Union’s institutions, procedures and mechanisms while respecting the institutional framework. This view gains even more momentum by taking into consideration that also acts of secondary law issued by one of the numerous Association Councils in the framework of Association programmes with third states form part of the EU *acquis*. The sole exceptions refer to the mode of decision making in the Council and the fact that operative costs are to be carried individually by the participating member states.³⁴ It follows that enhanced cooperation in the realm of CFSP has to be qualified as agreement under public international law, which constitutes a kind of partial *acquis* existing among the general or aggregate *acquis* of the Union. The legal obligation to respect the *acquis communautaire* and to further the objectives of the Union indicates that in the event of conflict, the general Union *acquis* overrides the partial *acquis* created by enhanced cooperation.

Similarly the constitutional treaty enacts that all acts or decisions taken in the framework of enhanced cooperation exclusively bind those on the member states participating in the mechanism. Furthermore, no candidate country aspiring accession to the European Union has to take over the partial *acquis* stemming from enhanced cooperation (Article I-44 para 4 TCE).

34) It is interesting to note, that even in the framework of Union policies in the second and third pillar, operative expenditure is charged to the budget of the European Communities, except of measures having military or defence implications or if the Council acting unanimously decides otherwise; Article 28 para 3 TEU and Article 41 para 3 TEU.

Parallelism between multiple initiatives of enhanced cooperation or enhanced cooperation and specific mechanisms

A further problem arises with regard to the permissibility of parallel mechanisms of enhanced cooperation being identical in terms of objectives and content, or with regard to similar initiatives of flexibility based on both, enhanced cooperation and specific mechanisms such as structured cooperation. Strikingly, neither the Nice nor the constitutional treaty contain relevant provisions tackling this delicate issue. However, it is not simply theoretical fiction when considering the possibility, that several member states which do not (or do not want to) fulfil the criteria allowing for participation to the mechanism of permanent structured cooperation, decide to create a parallel mechanism based on enhanced cooperation, while promoting more or less the same objectives.

This problem may only be solved by taking recourse to the general criteria of enhanced cooperation. A first idea is indicated by the obligation to further the objectives of the Union and the Community, to serve their interests and to reinforce the integration process. The fragmentation of sensitive matters into a set of separate initiatives can be hardly conceived as enhancing the process of integration. A similar result can be reached by drawing on the obligation to respect the Treaties and the single institutional framework (uniformity clause). Particular consideration has to be paid to the principle of consistency with regard to inter-pillar activities within the framework of the CSDP as well as concerning to both trans-pillar and external relations of the Union and its institutions. More concretely, the principle under consideration stipulates the obligation to work towards highly consistent action in terms of internal policy making and in terms of substance. On the assumption that both objectives are only reachable through conceptual and targeted coordination by the respective actors clearly reveals the disruptive and thus non-consistent potential contained in a situation of parallel mechanisms pursuing identical objectives. However, one has to refrain from generalisation. The effective danger of undermining consistency by a multitude of flexibility mechanisms always has to be assessed and to be proven on a case-by-case basis. Moreover, in the end one should not forget the principle of unanimity, which is generally applicable in the second pillar and thus offer a last resort to circumvent undesirable parallelism. By contrast it is important to note, that a general prohibition of parallel flexibility would confer

some kind of exclusive rights to the fastest member states with regard to issues potentially open to enhanced cooperation. Such a situation would be prone to provoke uncontrolled competition which in a worst case scenario may even favour fragmentation within the EU.

V. SPECIFIC MECHANISMS OF FLEXIBLE INTEGRATION IN THE CFSP/ESDP

For the first time in the history of the European Union, the constitutional treaty has introduced a separate section on European Security and Defence Policy (Article I-41 together with Articles III-309 to 312 TCE). To a large extent the provisions contained in this section meet the demands already phrased in the final report of the Convention Working Group on “*Defence*”.³⁵ The substantial extension of the concept of security beyond the classical Petersberg tasks, figures among the most essential innovations in this context.³⁶ All these tasks are now equally designed to contribute to the common objective of fighting against terrorism, which includes the readiness to support third countries in combating terrorism in their countries. The unconditional acceptance of enhanced cooperation in the field of CFSP and the introduction of new forms of flexibility on a legal basis constitute another important leap towards more efficiency and operability for ESDP as foreseen in numerous Presidency conclusions since Cologne (June 1999) and Helsinki (December 1999). However, these measures are of an inherent alternative nature, resulting from the unresolved antagonism between the demand for efficiency and the principle of unanimity within the framework of CFSP/CSDP. As long as the member states prevent substantial transfer of sovereign rights in the field of external and security policy to the European level, any successful implementation of activities in this field will inevitably rely upon progressive groups of a few. Their effective ability to tackle sensitive issues on the European level but in an asymmetric structure solely depends, on the one hand, on the political will and on the other hand, on the financial and operational capacity.

35) See CONV 461/02. Furthermore see the Franco-German contribution to ESDP, CONV 422/02.

36) According to Article III-309 para 1 TCE these tasks encompass (by using civilian and military means) joint disarmament operation, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces undertaken for crisis management, including peace-making and post-conflict stabilisation.

During the Intergovernmental Conference a number of provisions contained in the Draft Constitution underwent fundamental discussions and substantial amendments. In order to follow this process in a chronological order particular attention has to be paid to the so-called “*Naples-Documents*” dating 25 November 2003³⁷ and the subsequent papers of 2 December, 5 December and 9 December 2003.³⁸ Any additional document which refers to the legal framework of the CFSP do not alter the trade-offs consented beforehand.³⁹ These compromises reflected a high degree of mutual agreement among the member states. As expected, they have been incorporated into the constitutional treaty. The following analysis will be effected on the basis of the legal framework offered by the final treaty text. Only in exceptional cases references will be made to the draft treaty or to respective documents issued during the IGC.

A. Implementation of missions by a group of member states

This form of flexibility refers to the situation in which the Council, entrusts the implementation of a civilian or military task as foreseen in the Constitution to a group of member states „*which are willing and have the necessary capability for such a task*“ (Article III-310 para 1 TCE). To this end the Council has to adopt a European decision by unanimity. According to Article III-210 para 2 TCE the European decision has to contain detailed information on the objectives and scope and the general conditions for the implementation of the mission. The member states involved, in association with the Union Minister for Foreign Affairs shall agree collectively on the concrete management of the task. Despite of a considerable extent of autonomy conferred to the participating member states, they are obliged to regularly inform the Council of the progress achieved during the operation either on their own initiative or at the request of another member state. The mandatory liability towards the Council is most visible in the event that the completion of the task produces major consequences or requires amendments of the objective, scope and conditions. The Council is entitled to authorise necessary adaptations to the legal basis of the operation by means of a European decision.

37) See CIG 52/03 ADD 1 (Annex 17: CSDP).

38) See CIG 57/03 (Defence); CIG 57/1/03 (Defence), CIG 60/03, ADD 1 (Annex 22: ESDP).

39) See CIG 73/04 (Annex 24: ESDP); CIG 76/04 (Annex 20: ESDP), CIG 80/04 (Annex 4: CSFP), CIG 81/04 (Annex 28, 29, 30 CFSP/CSDP).

One of the advantages attributable to this mechanism consists of the lack of any obligatory minimum number of participants for the benefit of rapid coalition-building of the “*able and the willing*”. In other words, only two member states would be sufficient to form such a group in order to implement a European mission. In return, all member states which do not contribute to the group are bound to refrain from any opposing action.

All other necessary decisions for the day-to-day business of the operation are exclusively decided by the participating countries. However, the constitutional treaty is not absolutely clear whether specific decisions, such as the Operation Plan (OPLAN) or the Rules of Engagement, generally taken in the framework of the Political and Security Committee (PSC), are foreseen for decision-making among the participating countries only, or if they are open to all EU members. Moreover, the treaty remains silent on the question of participation rights for third countries willing to contribute to a European mission. In addition one may enquire about any alternatives, namely whether for the implementation of (extended) Petersberg tasks one may also resort to enhanced cooperation? The Constitution itself does not indicate anything contrary to this assumption since it does not establish a kind of hierarchical order between measures of enhanced cooperation and the specific modes of flexibility. However, given the comprehensive catalogue of criteria which have to be met in order to launch enhanced cooperation, will reduce attraction of enhanced cooperation in this field will only.

B. Permanent structured cooperation

The possibility to enter into a permanent structured cooperation as defined in Article I-41 para 6 TCE is open to those member states “*whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions*”. Both, the criteria and the necessary operational commitments to make are listed in a separate protocol added to the constitutional treaty. This means a significant improvement compared to the draft treaty issued by the Convention, which has left the definition of the criteria and the specification of the commitments up to the member states. As a result of logistic shortcomings and ambiguous terms, such as “*higher criteria*”, but even more because of the common demand by the member states to establish structured cooperation as an inclusive and predictable institution, has led to revision of the relevant provisions during the IGC.

Among the most essential conditions figure the obligation to intensively develop the national defence capacities “*through the development of its national contributions and participation, where appropriate, in multinational forces, in the main European equipment programmes and in the activity of the Defence Agency*”⁴⁰. Moreover the participating member states should have the capacity to supply by 2007 at the latest, targeted combat units for the missions planned, structured at a tactical level as a battle group, capable of carrying out the extended Petersberg-Missions within a period of 5 to 30 days which can be sustained for an initial period of 30 days and be extended up to at least 120 days. These combat units are particularly – however not exclusively – designed to carry out operations in response to requests from the United Nations Organisation. Article 2 of the Protocol contains a list of detailed requirements which the participating states have to meet, in order to reach the common objectives. Among them figure measures to enhance the availability, interoperability, flexibility and deployability of the forces and to bring the defence apparatus into line with each other as far as possible by harmonising, pooling and even specialising the member state’s defence means and capabilities. To a certain extent, these measures meet the frequent demands, to introduce military convergence criteria in order to close the operative gap.⁴¹ However, the catalogue on structured cooperation does not tackle the core concern, namely the determination of a financial threshold based on national GNP to be dedicated for defence matters.

The mechanism of structured cooperation is open to all member states provided they do meet the relevant criteria set out in the protocol. Suffice to notify the intention to the Council and to the Union Minister for Foreign Affairs. Thereafter the Council has to adopt, within a time span of three months, a European decision establishing permanent structured cooperation and determining the list of participating member states. To this end the Council acts by qualified majority voting after having consulted the Union Minister for Foreign Affairs (Article III-312 para 2 TCE). Any request to accede permanent structured cooperation at a later stage has to follow the same procedure, except of the fact that effective participation to the Council vote is limited to these members representing the participating States (Article III-312 para 3 TCE).

40) 23. Protocol on Permanent Structured Cooperation, Article 1a.

41) MISSIROLI (1999), p. 485.

The rigorous conditionality between participation and the fulfilment of the pre-defined criteria consequently includes the option to suspend member states which no longer fulfil the criteria or are no longer able to meet the commitments. The respective European decision taken by the Council composed of the participating countries (except of the member state concerned) has to be based on consolidated findings by the defence agency. A qualified majority shall be defined by at least 55 per cent of the members of the Council representing the participating member states, comprising at least 65 per cent of the population of these States.

All other decisions taken in the framework of permanent structured cooperation are to be adopted by unanimity by the Council, composed of representatives of the participating countries only (Article III-312 para 6 TCE). In order to prevent the establishment of exclusive clubs, all member states are entitled to participate in the consultation process. The original intention as laid down in the Draft Constitution was to normatively link structured cooperation with the instrument of enhanced cooperation. According to Article III-213 para 5 in the convention’s draft, “[n]otwithstanding the previous paragraphs, the appropriate provisions relating to enhanced cooperation [ex-Articles III-325 (2) and III-326 (2)] shall apply to the structured cooperation governed by this Article”. This provision was misleading since the Articles in question mainly refer to the process of establishing or joining enhanced cooperation, which has already been regulated in detail by the draft Article III-213 TCE. Consequently the reference to enhanced cooperation has been dropped during the IGC.

Moreover, in the framework of the IGC negotiation process the explicit reference was dropped to empower the members of structured cooperation to carrying out crisis management operations. However, one may deduce the general permissibility of such activities from the fact, that permanent structured cooperation shall not affect the provisions of Article III-309 TCE. Furthermore a closer look at the objectives as enacted in the protocol on permanent structured cooperation may shed some additional light on the role of its members in international crisis management operations. Accordingly they shall “*have the capacity to supply by 2007 at the latest, either at national level or as a component of multinational force groups, targeted combat units for the missions planned, structured at a tactical level as a battle group, with support elements including transport and logistics, capable of carrying out the tasks referred to in Article III-309, within a period of 5 to 30 days, in particular in response*

*to requests from the United Nations Organisation, and which can be sustained for an initial period of 30 days and be extended up to at least 120 days.*⁴²

However, Article III-312 does not constitute a particular legal basis for the execution of military operations. By contrast this quality is exclusively limited to Articles III-309 and III-310 TCE. In other words, Article III-312 constitutes the legal foundation for substantial cooperation in order to meet the agreed objectives, while it does not work as basis for launching operations in a concrete crisis situation. Thus, the Constitution actually encompasses two instead of three provisions as foreseen in the Draft Constitution, enabling either all member states (Article III-309 para 2 TCE) or groups of them (Article III-310 para 1 TCE) to carry out civil or military crisis operations. It has to be noted that generally all member states are invited to contribute military troops and civil personnel but it would be over-optimistic to expect collective action based on unanimous decision-making by 25 member states. Most likely is a scenario according to which civil or low-risk operations will be executed by ad-hoc groups according to Article III-310 para 1 TCE, while high-risk operations will be carried out by members of permanent structured cooperation equally based on Article III-310 para 1 TCE.

C. Participation within the European Defence Agency development, research, acquisition and armaments (European Defence Agency)

In addition to the obligation of the member states “to undertake to progressively improve *their military capabilities*“ the constitutional treaty foresees the establishment of a European Agency in the fields of defence capabilities development, research acquisition and armaments

*“to identify operational requirements, to promote measures to satisfy those requirements, to contribute to identifying and, where appropriate, implementing any measure needed to strengthen the industrial and technological base of the defence sector, to participate in defining a European capabilities and armaments policy, and to assist the Council in evaluating the improvement of military capabilities“.*⁴³

42) Protocol nr. 23 on Permanent Structured Cooperation, Article 1b.

43) See Article I-41 para 3 TCE.

A more detailed catalogue of its functions is contained in Article III-311 para 1 TCE. Effective participation in the agency remains facultative and does not affect membership in other forms of flexible integration in the field of armament cooperation. In this respect the final report of the Convention working group on “*Defence*” suggested,⁴⁴ that the agency should “*incorporate, with a European label, closer forms of cooperation which already exist in the armaments field between certain member states (OCCAR, LoI). The Agency should also be tasked with strengthening the industrial and technological base of the defence sector. It should also incorporate the appropriate elements of the cooperation that most member states undertake within the WEAG.*”⁴⁵

The incorporation of existing initiatives in the field of armament into the context of EU policies, accentuate the need for modalities allowing for the participation of third States and the willingness of the member states, to substitute national regulatory frameworks and preferential economic relations by a common approach in this field. This particularly true given the fact that only a small number of them have significant defence industrial sectors. In other words, most member states are consumers rather than producers of defence equipment. However most details on the participation, the role of the Commission or on procedural aspects regarding the incorporation of OCCAR, WEAG/WEAO and LoI are not exhaustively dealt with in the treaty text.

By contrast, the objectives of the agency are well-defined, encompassing the fields of procurement, research and the establishment of a common defence market. However, the exclusion in primary law of the application of competition rules in the defence sector is in direct opposition to the envisaged profile of the European Defence Agency.⁴⁶ The unconditional transfer of Article 296 TCE into the framework of the text (Article III-436 TCE) despite of prominent voices opposing it, may raise concerns on the seriousness of the Agency project. In return, due to the voluntary nature of participation in the Agency, any full application of the competition rules on the defence sector would not be acceptable. It would be more realistic to adapt the relevant provision accordingly or to agree on

44) See CONV 451/02, para 64.

45) WEAG – group for armaments cooperation between 19 European countries (14 of which are members of the European Union and 16 members of NATO), the objective being harmonisation of operational programmes and standards, cooperation on research and technology and the opening up of contracts.

46) See Article 296 para 1 TEC.

a general waiver with regard to the use of Article 296 TEC in order to boost the European defence market.⁴⁷

The establishment of a European Armament Agency was originally intended to become part of the new Constitution that had been expected to enter into force in 2007 or 2008. This schedule became confused when the European Council of Thessaloniki in June 2003 endorsed the idea of a Defence Agency and explicitly tasked the „*appropriate bodies of the Council to undertake the necessary actions towards creating, in the course of 2004, an intergovernmental agency in the field of defence capabilities development, research, acquisition and armaments.*“⁴⁸ In the following the Council decided to appoint an ‘Agency Establishment Team’ (AET) in order to prepare the institutional setting.⁴⁹ Subsequently this led to the establishment of the European Defence Agency under a Joint Action of the EU on 12 July 2004.⁵⁰

This engenders two questions: The first one regards a legal problem. Due the preparation and setting up of the Defence Agency far before of the coming into force of the Treaty establishing a Constitution for Europe, it is likely to significantly pre-determine its substance. Secondly, the intended incorporation of the above mentioned cooperation programmes into the Agency (to which participation is purely voluntary) and the option to set up exclusive industrial arrangements finds itself in direct opposition to the Nice Treaty provisions excluding enhanced cooperation from issues having military or defence implications. In return one has to emphasise that the Agency is not based on enhanced cooperation but on a Joint Action, decided by all member states.

The new Defence Agency absorbs the provisions contained in Article III-311 TCE as regards content and objectives, while respecting the national security and defence competences of participating member states. The Agency, which has legal personality, shall be subject to the Council’s authority. The Council is entitled to issue guidelines annually determining

47) See Communication of the European Commission, *Towards an EU Defence Equipment Policy*, COM(2003) 113, 11.03.2003.

48) European Council of Thessaloniki, 19-20 June 2003, *Presidency Conclusions*, para 65.

49) *Council Decision* of 17.11.2003 creating a team to prepare for the establishment of the agency in the field of defence capabilities, development, research, acquisition and armament, OJ L 318, 03.12.2003, 19.

50) Council Joint Action of 12 July 2004 on the establishment of the European Defence Agency, OJ L 245, 17.07.2004, 17.

the priorities of the Agency’s work programme. The Agency is headed by the SG/HR for the CFSP who equally chairs the Steering Board composed of one representative of each participating country. The steering board is likely to meet at least twice a year at the level of Defence Ministers. The actual conception of the Agency clearly builds on intergovernmental concerns. However, with regard to efficiency a more independent construction would certainly have been preferable.

The necessary revenue in order to cover expenditure will to a large extent draw from contributions by the member states participating in the Agency based on the gross national income scale. In other words, except of specific earmarked revenue granted on a case-by-case basis for specific purposes, the Agency will receive no financial contributions from the general budget of the European Union.⁵¹ However, in addition the Agency shall also carry out ad-hoc projects or programmes which will be funded by associated budgets that may even be completed by Community contributions. Among them one may differentiate between projects/programmes in which all participating member states are presumed to participate (Category A) and those which may implemented by a reduced group (Category B). Participating member states involved in latter one are solely bound to make financial contributions. Thus *flexibility within flexibility* was introduced into the realm of European Union law. Another meaningful aspect regards the option to include third parties contributions to a particular ad-hoc project or programme after approval of the Steering Board. The question of third party contribution was raised for the first time in the framework of the Joint Action, thus shedding light on an important aspect of the future functioning of the Agency (Article 23 of the Joint Action).

Moreover the Agency is intended to “*develop close working relations with the relevant elements of OCCAR, the LoI Framework Agreement, and WEAG/WEAO with a view to incorporate those elements or assimilate their principles and practices in due course, as appropriate and by mutual agreement*” (Article 25 para 2 of the Joint Action). Particular concern is paid to the non-EU WEAG members, which shall enjoy the fullest possible transparency with regard to the Agency’s specific projects in order to attract their participation as appropriate. A specific consultative committee will be set up to guarantee regular exchange of views and information on relevant matters

51) Article 15 of the Joint Action.

of mutual interest. It follows, that in the initial phase the Agency will work as a sort of coordination forum while the effective employment of its full range of operational functions is to be expected only after the incorporation of the above mentioned cooperation programmes.

However, with regard to the unknown future of the Constitution two questions arise: firstly, does the now established agency fully correspond with the Defence Agency foreseen the Constitution? Secondly, does the eventual entering into force of the Constitution require another European decision according to Article III-311 para 2 TCE in order to (re-)establish the Agency under the new treaty? With regard to the first question, the similarity of both concepts may necessarily be assumed to a great extent. Examining the scope of functions attributed to both agencies reveals them to be identical, although the shape and key functions of the now existent agency are outlined in a more detailed manner. As to the second question, it is important to refer to provisions on succession and legal continuity enacted in Article III-438 TCE. According to paragraph 3, all acts adopted on the basis of the former treaties, then repealed by the Constitution, remain in force. Moreover, their legal effects will be preserved until those acts are repealed, annulled or amended in the implementation of the Constitution. In other words, the Joint Action establishing the European Defence Agency, which is clearly based on Article 14 of the TEU, will remain in force until it is altered in the way outlined above. Thus, the Council will be entitled to re-establish the Agency by a separate European Decision and even change its mandate as long as it respects the Constitution. The shift of the constitutional regime does not run counter the preservation of the original legal basis whose legal continuity is ensured by constitutional law.

VI. FLEXIBLE INTEGRATION OUTSIDE THE TREATIES

A. WEAG/WEAO, OCCAR, Letter of Intent (LoI)

Three fora tackling with armament and procurement policy figure among the most important cooperation mechanisms in the realm of foreign and security policy but outside the European treaty framework. These are WEAG/WEAO, OCCAR and the members to the framework agreement LoI.⁵² The WEAG followed the Independent European Program Group (IEPG) which was founded in 1976 by European NATO-members (with the exception of Ireland). In December 1992 the IEPG defence ministers decided to transfer the functions of IEPG to the WEU where the WEAG is intended to coordinate programmes and co-operations in the field of armament among 19 equal European States. This includes the endeavour to harmonise programmes and operative standards, to strengthen technological and research cooperation and the liberalisation of relevant markets. Subsequent to the introduction of the CFSP into the Treaty of Maastricht the WEAG tasked an ad hoc study group to review the possibilities of creating a European Armaments Agency. However this attempt failed because of lacking political, legal and economic support. Nevertheless, by drawing on the preliminary studies it was possible in 1997 to create the WEAO as a formal subsidiary body of WEU. WEAO and WEAG are still assigned to the organisational sphere of the WEU, despite of the massive decomposition of the WEU. The WEAO mainly focuses on defence research and technology activities, but as the potential precursor for the proposed agency the relevant Article 7 of the WEAO Charter provides for a broad mandate of possible activities.⁵³

OCCAR was created on 12 November 1996 by France, Germany, Italy and the United Kingdom.⁵⁴ It aims at improving efficiency in the management of collaborative defence equipment programmes. Among the most impor-

52) WEAG/WEAO (Western European Armament Group/Western European Armament Organisation), OCCAR (Organisation Conjointe de Coopération en matière d'Armement), LoI (Letter of Intent).

53) Article 7 of the WEAO-Charter states: „In order to carry out the aim defined in Article 6 above (...) the WEAO may undertake, in the name of the WEU and on behalf of one or more participants, the following functions: a) defence research and technology activities; b) procurement of defence equipment; c) studies; d) management of assets and facilities; e) other functions necessary to carry out the aim of the organisation”.

54) The OCCAR Convention was signed on 9 September 1998, ratification of the Convention was completed in December 2000 and OCCAR attained legal status on 28 January 2001.

tant programmes figure “Tiger” (combat helicopter), “Boxer” (armoured utility vehicles) and “A400” (airlift). The latter one is important since it includes third States for the first time namely Spain, Turkey, Belgium and Luxembourg. According to Article 8 of the Convention OCCAR’s mandate encompasses a comprehensive range of activities which makes it eligible to become a fully-fledged armaments agency.⁵⁵

LoI is based on a common initiative by the six leading European armament producing countries (UK, France, Germany, Italy, Spain and Sweden) signed on 6 July 1998 pursuing the objective to harmonise existing regulations. They set up a number of working groups which mainly focused on issues of crossborder-restructuring and aspects of security in the realm of armament supply and information. A comprehensive report was produced on the basis of their findings which shall, after ratification by the national parliaments, become an international treaty.⁵⁶

The incorporation of these mechanisms into the European treaty regime must be given highest priority in order to fully exploit the potential synergies which eventually may lead to a common policy in this field.

B. Close bilateral cooperation between the member states or in the framework of NATO or WEU

According to Article 17 para 4 TEU „[t]he provisions of this Article shall not prevent the development of closer cooperation between two or more member states on a bilateral level, in the framework of the Western European Union (WEU) and NATO” provided such cooperation does not run counter to or impede the implementation of the CFSP. This kind of cooperation does not depend upon prior approval by the Council nor of the fulfilment of specific criteria as developed with regard to enhanced cooperation. The most important exam-

55) Article 8 of the OCCAR Convention stipulates: „OCCAR shall fulfil the following tasks, and such other functions as the member states may assign to it: a) management of current and future cooperative programmes, which may include configuration control and in-service support, as well as research activities; b) management of those national programmes of member states that are assigned to it; c) preparation of common technical specifications for the development and procurement of jointly defined equipment; d) coordination and planning of joint research activities as well as, in cooperation with appropriate military staffs, studies of technical solutions to meet future operation requirements; e) coordination of national decisions concerning the common industrial base and common technologies; f) coordination of both capital investments and the use of test facilities”.

56) For more comprehensive information see SCHMITT (2000) particularly 59.

ples of such cooperation are the WEAG/WEAO, OCCAR and the LoI. It is important to note that this clause has not been inserted into the Constitution, which however, must not be interpreted as a *contrarius actus*.

In addition there exists a variety of multinational forces. Best known of them is, of course, the Eurocorps which was created in 1992 on the basis of a Franco-German initiative. Meanwhile it draws its components from five countries (Germany, France, Spain, Belgium and Luxembourg) and is frequently referred to as the nucleus of a future European army.⁵⁷ Based on a similar conceptualisation are the land and sea forces EUROFOR and EUROMARFOR which have been created in 1995 by France, Spain and Italy. Another concrete example stems from the German-Dutch Corps, which in 2003 assumed leadership of ISAF in Afghanistan. Accordingly the Constitution invites participating member states to make these forces available to future EU-led operations.⁵⁸

C. No mechanisms of flexible integration outside the constitutional treaty foreseen

Strikingly the constitutional treaty does not provide a single legal basis on the admissibility or not of co-operations outside the Treaty framework. The obvious lack of any clarifying provision may be interpreted as implicitly precluding cooperation outside the treaties. In return one may assume general admissibility as long as it does not affect the fundamental principles of the Union and the established system of competences. Preference should be put on the second option since the imposition of a general ban of cooperation outside the Treaties would significantly limit national sovereignty of the member states going far beyond the scope covered by the principle of solidarity as enacted in Article 11 para 1 TEU. This principle aims at preventing harmful action by the member states against the Union but it does not exclude per se activities outside the Treaty framework. It follows that cooperation remains admissible provided it respects the primacy of Community law.⁵⁹

57) For detailed information on the Eurocorps see WASSENBERG (1999).

58) Article I-41 para 3 TCE states: “member states shall make civilian and military capabilities available to the Union for the implementation of the common security and defence policy, to contribute to the objectives defined by the Council. Those member states which together establish multinational forces may also make them available to the common security and defence policy.”

59) DEHOUSSE, COUSSENS and GREVI (2004), p. 16.

A second question refers to the aspect of conditional admissibility. It has to be clarified whether the legitimacy of cooperation outside the Treaties builds on a multi-level process. Following this assumption any objective of cooperation outside the Treaties would require previous attempts to implement the matter within the framework of Union law. In case of failure the interesting member states would have to try to pursue their aim by using the mechanism of enhanced cooperation. Solely if both initiatives remain unsuccessful it should be possible to take recourse to cooperation outside the legal and institutional framework of the Union. The legal foundation to bolster up this assumption in the field of CFSP is to be found in Article 11 para 2 TEU:

“The member states shall support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. The member states shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.”

As noted above, Article 11 para 2 TEU exclusively bans harmful action against the Union set by the member states but it does prohibit cooperation outside the treaties. As a result one may not deduce any obligation to run the different levels spelt out before. If at all, this would only be possible by means of the stronger duty of faith in the realm of Community law (Article 10 TEC).⁶⁰

CONCLUSIONS

In conclusion one may observe, that the measures of flexible integration discussed above, contain promising elements towards a more functional CFSP. However a balance has to be struck between the objective of increased efficiency and strengthened unity as well as between legal security and necessary ad-hocism.

⁶⁰ Article 10 TEC states: „member states shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.”

The objective of enhancing efficiency has led to significant improvements. In other words, not only the restricted scope of implementation with regard to enhanced cooperation has been extended thereby overcoming the sole option of constructive abstention, but it has been seriously contemplated to additionally include institutionalised models of integration, designed for the shorter or longer term. Apart from a more positive connotation, these types of cooperation offer the advantage to be directly adaptable to the respective needs and objectives.

The requirement to comply with the principle of unity confronts us with the dilemma that the underpinning reason for the creation of these flexibility instruments is the persisting reality that often unity could not be reached among the member states. Likewise the extent of flexibility remains a controversial issue as illustrated by the political resistance provoked by some of the mechanisms proposed by the Convention. As a consequence massive redrafting and substantial restrictions to the relevant provisions occurred during the IGC.

The aspect of being institutionally anchored is decisive in view of the potential impact exercised by mechanisms of flexibility and the member states concerned. Only where the inherent link to the European Union remains visible, it is possible to attribute the relevant action to it. Moreover, in order to meet the principle of consistency it is important to have a clear-cut delimitation of competences. This is even more true since legal grounds for external action are spread over the fields of Community law as well as of CFSP/ESDP.

However, mechanisms of flexibility in the realm of CFSP shall also allow for spontaneous reactions on important global questions in case that no consistent answer could have been found in the Council. To this end member states may avail themselves of the instrument of enhanced cooperation. In addition, in the more operative-military sphere of ESDP particular mechanisms shall allow for rapid reaction. To this end the respective normative foundations have been left rather vague and does not even clarify the degree of delegation of decision making competences nor the interplay between the member states concerned and several crucial functions currently attributed to sub-organs such as the PSC or the Committee of Contributors. This is particularly true with regard to future operations carried out by ad-hoc groups of willing and able member states.

Extending the scope of applicability of enhanced cooperation to all policy areas and thus the CFSP holds high potential to eventually unify loose cooperations and deliberate coalitions under a more solid and institutionalised umbrella within the framework of the European Union. This versatile tool will bundle synergies and optimise the external profile of the Union not only through the guarantee of assured recourse to the internationally accepted institutional framework. However, in the ideal case enhanced cooperation is not designed as a permanent instrument. On the contrary, measures of enhanced cooperation shall provide a legitimate transitional frame for innovative and pro-integrationist initiatives, which after having successfully passed their proof of value may finally lead to full integration into the Union.

The already established defence agency forms part of the Union *acquis* from the beginning, although based on voluntary participation. Hence, this construction means a conversion of the classical concept of flexibility within the EU. So far there have been various attempts to bring together the existing variety of formats of armament and defence programs paving the way for a specific institution. In this respect the exclusion of the relevant rules and obligations of the single market constitutes one of the most important challenges. The final success of the defence agency will considerably depend on the question whether participating member states may refrain from employing Article 296 TEC.

The instrument of permanent structured cooperation pursues the objective to create the desired *avant garde* by setting up a catalogue containing pre-defined criteria which shall give participating member states an orientation for military transformation and allow them to assume leadership in this field under an EU umbrella. Given the highly institutionalised concept, the clear-cut procedures and the option to suspend participating States hint for a more durable institution. Permanent structured cooperation is by far the most integrated and predetermined form of flexibility of all those discussed in this paper, and comes near to concepts such as Schengen or the EMU.

One of the most striking innovations within the framework of the CFSP refers to the (former) concept of closer cooperation in form of a limited collective defence clause, which stipulates the obligation to give aid and assistance in case of an armed aggression against a member states however, without defining specific procedures, institutions or competences.

It should be noted, that only the form of closer cooperation as enacted in the Draft Constitution contains elements of flexible integration whereas the revised clause incorporated into the final version has general effect. Solely the obligations to take national particularities into consideration (above all the status of neutrality or non-alignment) and to respect the primacy of the NATO contain remnants of flexibility. All in all, this approaches point at the objective of establishing collective defence within the EU legal framework, however without effectively realising it.

The multi-faceted range of forms of flexibility bears the potential to meet new challenges without too much deviating from the path of Jean Monnet. The possible recourse to the mechanism of flexibility in the domain of security and defence does neither replace former instruments of flexibility nor does it preclude flexible integration outside the Treaty framework. The effective interplay of the new variants of flexible integration, namely enhanced, structured and armament cooperation could spark off an integrationist process which may allow the most progressive member states to proceed. The profits could be exploited by all if it succeeds to make these forms effective on the basis of solidarity, whereby bridging the gap between a policy of logjams and ambitions for directorates.

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CHAPTER 8

EU Development Policy in the Constitutional Treaty: a Step forward?

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SUMMARY

Strengthening the EU's role in the world and its external action were important points during the debate about the future of Europe, the proceedings of European Convention and Intergovernmental Conference. As a consequence, the future shape of European development cooperation has also been influenced. In this connection, the provisions of the constitutional treaty should be analysed with regard to the links among all aspects of EU's international relations.

The following points have to be considered:

1. International solidarity is quoted as one of EU's underlying vocations. However, as the European Union and its member states are already the biggest donors of development assistance worldwide and this part of EU's activities is widely accepted by society, one may miss a stronger commitment in the constitutional treaty to international solidarity as a guiding principle in the formulation of the EU's role in the world.
2. In the treaty, development policy remains in a special category of shared competence, where the so-called principle of pre-emption does not apply. This confirms development cooperation and the provision of humanitarian aid as first and foremost a national prerogative.
3. Although the goal of reducing poverty is elevated to an objective of EU external action (and its importance is repeated three times in the main treaty text), the possible tensions between different areas of external action seem not to have been thoroughly considered. It is hypothesised that this could lead to internal conflicts in the EU's external action in the future.
4. The treaty differentiates between development cooperation, financial, economic and technical cooperation and humanitarian aid; however there is no clear definition of the development cooperation as such.
5. The concept of coherence between policies has been upgraded, and an article on coherence as a requirement for all EU's policies has been placed at the beginning of Part III of the treaty.
6. Creation of a double-hatted post of European Foreign Minister (EFM), responsible in the Council for CFSP and in the Commission for external relations and coordination of other aspects of EU's actions, may lead to situations where the EFM's personal interests and attitudes will have a disproportionate influence on the EU development cooperation policy.
7. As a treaty does not include radical change on the Commission structure, the position of the development cooperation may also depend on the personal decisions of the Commission's President.

8. Creation of European External Actions Service will contribute to the strengthening of the EU strategic vision. However, the possible inclusion of development specialists into the External Service remains an open question. This is important for the proper realisation of development cooperation in EU foreign policy, although appropriate management procedures would have to be put in place to support such institutional change.

INTRODUCTION

“As any other power in the world, the European Community is predestined to speed up the necessary global changes of our awareness. It is, in fact, an example, how hostility, contradictions and social discrepancies may be overcome thanks to common efforts. Therefore it is the most obvious task that the Union should contribute to the propagation of its fruitful cooperation model in the world.”¹

The development cooperation (called also interchangeable development policy) includes different forms of aid, exchange and contacts between developed and developing countries undertaken for the purpose of economic and social development of the latter. Development cooperation can be conducted in the bilateral or multilateral contacts within international organisations. In the case of European Union's member states the situation is much more complicated as the Community also has its own development policy.

History, development and diversity of this cooperation are subjects for separate analysis. It is worth pointing out that the EU and its member states are the biggest donor of development aid worldwide. Public opinion polls show that this form of EU activity has a wide public support. Almost 75 per cent of the population agreed that helping the poor in Africa, South America and Asia is important or very important². One can even argue that the international solidarity is an important step towards establishing a bona fide European identity.

1) Barbara Simons, MEP, [quoted in:] epd – Entwicklungspolitik, no 17/1997, p. 16.

2) EUROBAROMETER 50.1, p. 2.

In the new member states, public knowledge about development issues is very poor. For example, although Poland signed the United Nations Millennium Development Declaration and there are many non-governmental organisations dealing with development issues, *the majority of society is unaware of the significance of development*³. This is nothing strange – Poland has never been a colonial power and contacts with the Third World countries during the Cold War were seldom and limited to these few countries which decided at some stage to follow the socialist model of development. After the Cold War, along with other East European countries willing to access the European Union, Poland became a rival for the money from the Community budget rather than a partner. Despite it, during the accession negotiations the candidate countries agreed to adopt the *acquis* on foreign policy without transitional periods. The European Commission Progress Reports on the adoption of the Community law underlined that even if development issues were not of a great significance in the accession countries, six of them – the Czech Republic, Estonia, Hungary, Slovakia and Poland made since 1999, according to the OECD Development Assistance Committee, some progress in the implementation of OECD guidelines on development policy.

Despite this, only few people take into consideration that as an EU member state Poland became a part of many agreements with developing countries, putting some obligations on the Community members. One of these is the Cotonou Treaty, which has to-date been signed by 79 African, Caribbean and Pacific countries. This situation bears a lot of potentials of undertaking activities in new areas, in which we have not been active yet.

The future shape of development policy does not depend solely on international agreements. It will be also influenced by the discussion on the future relations with developing countries going on within the organization. In this context, it is important to consider the provisions from the draft constitutional treaty, which reflect that debate.

The Convention and the IGC

Debate on the future of Europe – the process launched in Nice in 2000 by the adoption of the Declaration of the Future of the Union⁴ calling for

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- 3) Jakub Boratyński, Batory Foundation, [quoted in:] MICHAUX Valérie (2002), p. 19.
4) CONFERENCE OF THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES (2000), Declaration on the Future of the Union (Declaration no 23 to the Treaty of Nice).

a wide-ranging discussion with all interested parties – reached a key juncture at Laeken in December 2001. At this meeting the European Council drew up a Declaration containing appropriate initiatives for the continuation of the debate in a more structured way. In the Laeken Declaration, EU leaders decided that:

In order to pave the way for the next Intergovernmental Conference as broadly and openly as possible the European Council has decided to convene a Convention composed of the main parties involved in the debate on the future of the Union. In the light of the foregoing, it will be the task of that Convention to consider the key issues arising for the Union's future development and try to identify the various possible responses.

A long list of questions (approximately 80) was identified in the declaration to be answered by this Convention. They were divided into categories of fundamental questions about the role of the EU, division of competencies in the European Union, simplification of the Union's instruments, functioning of EU institutions and their democratic legitimacy, and a single voice for the EU in the world⁵.

The Convention opened its proceedings in February 2002. Eleven working groups were set up to discuss the various issues. Working Group VII dealt with EU External Action and presented its final report in December 2002⁶. In July 2003 a Draft Treaty establishing a Constitution for Europe (DCT)⁷ was presented, a document that formed the basis for negotiations at the Intergovernmental Conference (IGC), launched in October 2003. The IGC adopted the text of the constitutional treaty (CT) at the Brussels European Council on 18 June, 2004⁸. The text has now to be ratified in all member states.

In the external action area, which incorporates development cooperation, the member states agreed from the beginning on the necessity of establishing a stronger external policy, but had quite different opinions on how this should be carried out. First of all, there is a perceived conflict between EU

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- 5) CONFERENCE OF THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES (2001), Declaration on the Future of the European Union (quoted as: Laeken Declaration).
6) EUROPEAN CONVENTION (2002), Final Report of Working Group VII on External Action, CONV 459/02.
7) EUROPEAN CONVENTION (2003), Draft Treaty establishing a Constitution for Europe, CONV 850/03
8) CONFERENCE OF THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES (2004), Treaty establishing a Constitution for Europe.

foreign policy, which is relatively short term and immediate in its concerns, and development policy, more long term and strategic in its approaches. Finding the balance and right space for each of the policies was not easy. There is also the on-going debate on coherence among different external actions and increasing their effectiveness and visibility. Perceptions and priorities for EU external action differ in many areas: intergovernmental versus supranational approaches; member states which have sought to professionalize their development cooperation and focus on poverty eradication, versus other donors who link cooperation more closely to national interests; and member states interested in the least developed countries, especially Africa, versus the new member states, with a focus on the near abroad⁹.

The following quotation by ECDPM concludes the controversies faced by the member states during the IGC:

The key question is how the EU can enhance and maintain its development focus while contributing to world security, peace and prosperity. This implies recognizing that, while there is no security without development, there is also no development without security. The fight against poverty takes on a political role and it becomes critical to clarify its status in the geopolitical debate of the European Union. It also means that development needs to be discussed in the context of a broader policy for global security. This requires greater understanding on both sides of the debate – foreign affairs and development – of how the two can work together but also of the limitations and comparative advantages of each¹⁰.

The outcome of the IGC is a compromise among differentiating opinions achieved after months of negotiation. The issues which were the most controversial were the structure of the European Commission or qualified majority voting. On the development cooperation side, despite the efforts of non-governmental organizations and development experts, debate on this subject did not find enough consideration, being relevant only for these directly engaged in this issue. The campaign launched by the humanitarian organizations from many European countries whose objective was to influence the decisions of the Convention and IGC only partly succeeded. Some of their preferences were incorporated into the treaty text, some were omitted. The experts indicated also raised concerns over some apparently harmless provisions, which may significantly affect future EU relations with developing countries.

9) See also: MACKIE, BASER, FREDERIKSEN and HASSE (2003), p. 9.

10) Ibid., p.10.

Structure

The provisions on development cooperation are placed mostly in Part III of the Treaty, under Title V: The Union's external action, which consists of 8 chapters:

- ▶ **Chapter 1:** General provisions
- ▶ **Chapter 2:** CFSP
- ▶ **Chapter 3:** Common Commercial Policy
- ▶ **Chapter 4:** Cooperation with third countries and humanitarian aid
- ▶ **Chapter 5:** Restrictive measures
- ▶ **Chapter 6:** International agreements
- ▶ **Chapter 7:** The Union's relations with international organisations and third countries and Union delegations
- ▶ **Chapter 8:** Implementation of the solidarity clause

However, significant provisions for development cooperation are included not only in Part III relating to EU policies and its functioning, but also in Part I, among articles about the Union's overall objectives.

Solidarity as a common value

According to the Preamble, international solidarity is one of Europe's underlying vocations. It states that: *Europe reunited after bitter experiences (...) wishes (...) to strive for peace, justice and solidarity throughout the world.* The reference to that humanitarian concept is also included in Article I-2. Solidarity is recalled as one of the values prevailing in European society. The Union's other values are respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights, pluralism, non-discrimination, tolerance, justice and equality between men and women.

This reference to European common values constitutes an important recognition of motives behind many European contacts with developing countries; however, in this aspect a stronger commitment to international solidarity as the basis for the Union's role in the world is absent. Such a statement would be important as the EU is the biggest provider of assistance worldwide. Globally, the European Community and its member states provide more than 55% of Official Development Aid, more than two-thirds of this as grants¹¹.

11) EUROPEAN COMMISSION (2001), EuropeAid Cooperation Office. Report on the implementation of the European Commission External Assistance, p. 4.

A little “different” shared competence?

The clear division of competences between the Community and the member states was one of the crucial tasks for the European Convention. Categories of competences are listed in Article I-12.

According to Article I-13, development cooperation and humanitarian aid belong to the area of shared competencies, but as stated in point 4: *In the areas of development cooperation and humanitarian aid, the Union shall have competence to take action and conduct a common policy; however, the exercise of that competence may not result in member states being prevented from exercising theirs.* In this way, a special shared category has been created, in which the principle of pre-emption does not apply. This exception reflects the perception of development policy as the prerogative of national policies. Including development cooperation into the “normal” shared competencies would mean that the member states can exercise their competence only *to the extent that the Union has not exercised, or has decided to cease exercising its competence.*

New strategic vision – the place of development cooperation in the EU’s external action

Title V on the Union’s external actions identifies the following external policies:

- ▶ Common Foreign and Security Policy, included Common Security and Defence Policy,
- ▶ Common Commercial Policy,
- ▶ Cooperation with third countries and humanitarian aid, consisting of Development Cooperation, Economic, financial and technical cooperation with third countries, and Humanitarian aid.

Article III-292 at the beginning of that Title quotes principles and objectives for all fields of EU external action. It recalls the values that should guide and inspire the Union’s activities on the international scene from Article I-3 and then formulates a set of objectives for all EU external relations. According to that Article, the Union’s external actions should be pursued in order to:

- ▶ *safeguard its common values, fundamental interests, security, independence and integrity;*
- ▶ *consolidate and support democracy, the rule of law, human rights and international law,*

- ▶ *preserve peace, prevent conflicts and strengthen international security in conformity with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;*
- ▶ *foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;*
- ▶ *encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;*
- ▶ *help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources in order to ensure sustainable development;*
- ▶ *assist populations, countries and regions confronting natural or man-made disasters;*
- ▶ *promote an international system based on stronger multilateral cooperation and good global governance.*

The inclusion of the poverty reduction as one of the EU’s common external objectives is no doubt a very positive decision. In practice it means that the CFSP or Common Commercial Policy will also have to consider, in their activities, the fight against poverty. However, the conflict between different areas of external relations is easier to foresee than to avoid. In this situation, a clear statement about the primacy of the poverty eradication principle, especially for the Common Commercial Policy, would be of great importance for preventing these kinds of possible controversies in the future.

The constitutional treaty does not mention nor identify different links and mutual relationships between enlisted external policies. If the place of development cooperation among other EU external actions was better defined, for example, with regard to the development’s contribution to the attainment of the Union’s principles, it would strengthen the position of development cooperation and humanitarian aid. Unfortunately, the treaty does not provide a bridge between, on the one hand, promoting the values and interests of the Union and the need for peace and security and development cooperation, the eradication of poverty and the relief of suffering on the other. Such a provision would create a clear framework for external action which would promote a coherent policy that looked not only at short-term political considerations but also at longer-term sustainable development. Development cooperation and humanitarian aid would become essential building blocks of overall foreign policy.

A link between the effectiveness, impact and quality of development work and a long-term strategic approach based on field experience and the participation of beneficiaries with regard to the development policy is also missing. In this respect, the usually short time frames in which many foreign policy actions operate are at odds with the longer time frames necessary for sustainable development¹².

Some authors point out that some of the treaty's provisions create a legal basis for using development cooperation and humanitarian aid resources for the CFSP. Article I-40 states: *The common foreign and security policy shall be put into effect by the Union Minister for Foreign Affairs and by the member states, using national and Union resources.* The same expression is used in the Article I-41 about the Common Security and Defence Policy: [For implementation of CSDP, including missions] *the Union Minister for Foreign Affairs may propose the use of both national resources and Union instruments, together with the Commission where appropriate.* There is also lack of clarity in the definition of the tools that can be used in the framework of the solidarity clause in Article I-43 (*The Union shall mobilise all the instruments at its disposal*). On the top of that, Article III-309, stipulates that actions carried out in the frames of Common Defence and Security Policy (to which Article I-41 refers) can include *joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces undertaken for crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.* The text suggests that humanitarian aid can be used to support third countries in the fight against terrorism. This is contrary to every definition of *humanitarian*, as the principles of impartiality and independence from political considerations would disappear within the fight against terrorism. In fact, *the only fight to which humanitarian aid should be called is that against poverty and human suffering*, as expressively stated in the European NGOs position paper¹³. Unfortunately, this opinion did not find recognition and the above imprecise formulations were preserved in the final version of the treaty. Their practical implications for the development cooperation will depend on the interpretation of these provisions.

12) MACKIE, BASER, FREDERIKSEN and HASSE (2003), p. 11.

13) CIVIL SOCIETY CONTACT GROUP (2003), Reactions to the 2nd Draft of the European constitutional treaty. Perspective on humanitarian aid and development cooperation, p. 6.

Focus on Poverty

One of the major achievements of the constitutional treaty is the clear definition of poverty reduction/eradication as an objective of the Union and of its external policies. This triple anchoring of poverty reduction as a Union objective is consistent with current EU policy and Council decisions, for example with the Statement on the EC's Development Policy from November 2000¹⁴.

The Union's objectives from Article I-3 include promotion of peace, its values and the well-being of its peoples. In relations with the wider world the Union should uphold and promote its values and interests and *contribute to peace security, the sustainable development, solidarity and mutual respects among peoples, free and fair trade, eradication of poverty and protection of human rights and in particular the rights of the child.* These provisions are reinforced in Part III at the beginning of Title V on the Union's external action. The focus on poverty reduction is defined here as one of several objectives of all external policies, which is no doubt a positive change. It is important to note that the goals of development cooperation had previously been inserted to the development-related articles of the Nice Treaty.. The new constitutional position of these objectives among provisions of underwriting all external action is an elevation for development policy however. Further, the fact that Article III-292 puts emphasis on international collaboration in searching for solutions to common problems, and the need to build partnerships with third countries, which is of particular importance as far as poverty eradication measures are concerned. Finally, for the third time, the priority of fight against poverty is included in Chapter IV on Cooperation with third countries and humanitarian aid in Article III-316. It underlines that development cooperation shall be conducted within the framework of the external action's objectives, with the primary objective of reduction, and in the long term the eradication of poverty.

Definitions

Chapter IV: Cooperation with third countries and humanitarian aid consists of three sections:

14) See also: Eurostep (2003), Working Group on the Future of Europe, IGC Development Pack, Towards a Responsible Europe, p. 5.

- ▶ **Section 1:** Development cooperation
- ▶ **Section 2:** Economic, financial and technical cooperation with third countries
- ▶ **Section 3:** Humanitarian aid

Unfortunately, development cooperation has not been included in the title of Chapter IV. It is a worrying signal, taking into account that the Union and its member states are the biggest donor of development assistance worldwide. Moreover, in the Section about development cooperation, the scope of development cooperation is not explicitly extended to all developing countries as defined by the OECD-DAC, and there is no special emphasis placed on assistance to the most disadvantaged or Least Developed Countries¹⁵. Such provisions, which were postulated by European NGOs, would strengthen EU development policy's profile, EU international credibility and its commitment to adherence to international standards and targets. Last but not least, it would ensure clarity in the treaty. Defining the economic, financial and technical cooperation with third countries, as referred to in Section 2 in Article III-319, as cooperation *with third countries other than developing countries* is only a partial solution. Development practitioners also regret not considering the principles of participation, ownership and partnership as relevant in development policy¹⁶. That compliance with the approach promoted, for example, in the relationships with ACP countries in the Cotonou Agreement would pave the way for new standards in development cooperation.

The completely new Article III-321 on humanitarian aid defines it as ad-hoc assistance, *intended to provide relief and protection for people in third countries who are victims of natural or man-made disasters in order to meet the humanitarian needs*. As the Treaty states only, that assistance should be conducted within the framework of objectives of the external actions of the Union, the NGOs point out that a stronger commitment to the principle of solidarity and needs-based aid direct to beneficiaries would be more adequate, especially in such a sensible area as humanitarian aid¹⁷. However, this is ensured by including the principles of international law, neutrality, impartiality and non-discrimination in point 2. Finally, the provisions on establishment of European Voluntary Humanitarian Aid Corps are to be judged as at

15) MACKIE, BASER, FREDERIKSEN and HASSE (2003), p. 14.

16) *Ibid.*

17) See: CIVIL SOCIETY CONTACT GROUP, p. 5.

least controversial. As correctly pointed out by NGOs, humanitarian aid functions in emergency contexts such as war and natural disaster where know-how and quick reactions are essential, and dangerous, horrific and traumatising events are the norm. It is a setting for experienced, trained professionals and Voluntary Corps might be more appropriate in the context of long-term development cooperation¹⁸.

Three Cs – enhancement or only repetition?

The constitutional treaty repeats in Article III-316 the Maastricht Treaty requirements for complementarity between the development policies of the Union and the member states. Moreover, it states that they shall not only complement but also, what is new, *reinforce each other*.

As far as coherence is concerned, the provisions from Article 178 TEC are recalled word for word as in the Nice Treaty: *The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries*.

Article III-318 requires the member states and the Union to coordinate their efforts in order to promote the complementarity and efficiency in the field of development cooperation. Article III-321 repeats the same for humanitarian aid.

The consistency and coherence of both are furthered by the requirement of compliance with international commitments. In both cases, the Commission may take any useful initiative to promote the coordination.

These provisions do not bring an upgrade of the coherence's concept, often postulated by those interested in the development issues. However, among the general provisions some can contribute to the better implementation of the three Cs. For instance, Article I-1 provides the Union for coordination of member states policies. Article I-5 requires the member states to cooperate in order to *facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives*. The single legal personality for the EU allows for more coherence and more credibility in international forums (Article I-7).

18) *Ibid.*, p. 6.

Article III-115 has a special meaning. It states: *The Union shall ensure consistency between the different policies and activities referred to in this Part, taking all the Union's objectives into account.* The same requirement for coherence and consistency between different areas of its external actions and external aspects of other policies is included in Article III-292. Apart from that, it also calls for respect for international commitments and affirms the importance of international collaboration.

The inclusion of these requirements at the beginning of Part III and as relevant for the entire area of external action gives much more strength to the need for all Union policies to be coherent¹⁹. In fact, it means that the concept of coherence got a higher status than previously. However, an explicit underlining of the necessity for some policies, such as trade or agriculture, to take into account the development objectives or a clear enumeration of these policies, as stated in the Council's resolution, or amendment, could be a step further in ensuring the coherence.

INSTITUTIONS OF THE UNION AND DEVELOPMENT POLICY

The Foreign Minister: new opportunities or further subordination of development cooperation?

As a result of a long discussion, the constitutional treaty provides for the European Council to appoint a Foreign Minister (literally, in the constitution, the Union Minister for Foreign Affairs) who will conduct the Union's CFSP and at the same time that person would be a Vice-President of the Commission responsible for the Community's external relations.

Due to the appointment by the Council and the high position as a Vice-President of the Commission, EFM will probably enjoy a considerable authority in the College of the Commissioners. According to the Treaty, s/he will be responsible for international relations and *for coordinating other aspects of the Union's external action* (Article I-28). It suggests a position similar to that currently taken by Benita Ferrero Waldner. In exercising the duties within the

19) MACKIE, BASER, FREDERIKSEN and HASSE (2003), p. 11.

Commission, the EFM has to act according to the Commission's procedures (Article I-27). Her/his position and role inside the Commission will therefore depend on the future structure and functioning of the College²⁰.

In the Council the EFM will, according to Article III-296, chair the Foreign Affairs Council and in the framework set by the Council (Article I-28), conduct and contribute to the preparation of the CFSP and CSDP (possibly with the support of the Commission) and ensure the implementation of the European Council's and Council's decisions. However, there is a lack of coherence in the constitutional treaty as far as the role of the European Council is concerned, which may confuse the role of EFM. As pointed out by ECDPM, the Articles I-21 and 24 lay out a clear division of responsibilities between the European Council and Foreign Affairs Council: the latter fleshing out the strategic guidelines provided by the former. Article III-292 seems to contradicting this by suggesting that the European Council may make decisions concerning the relations with the specific country or region or be thematic in approach. The decisions *shall define their duration, and the means to be made available by the Union and the member states.* In the next point, the same Article says that such decisions will be taken *on a recommendation of the Council of Ministers*²¹. Probably it will be decided in practice how the responsibilities are divided between the two bodies.

The creation of the European Minister for Foreign Affairs is, first and foremost, an effort to reinforce the strategic vision of the European Union. The proposal for the double-hatted position of EFM, as s/he will be both a servant of the Council and a Vice-President and member of the Commission, grows out of a desire to reduce the current overlap and duplication in positions. In this way the efficiency and coherence in the external relations, particularly between the intergovernmental pillar and the Community's policies should be ensured, and lead to a higher level of coordination between the member states policies and EU's external action. It may be strengthened through the creation of a single legal personality for the European Union (Article I-7). However, despite that the separate pillars were in fact abolished the decision-making processes remains different in the field of CFSP, which may badly influence coherence²².

20) MACKIE, BASER, FREDERIKSEN and HASSE (2003), p. 12.

21) Ibid., pp. 12-13.

22) Ibid., p. 13.

The realisation of the role of the EFM, which is so ambitiously constructed in the Treaty, will depend in practice on personal interests and diplomatic skills of the person appointed to that position. As s/he will be anchored in two institutional bodies and has to balance between them, it could lead to tensions between two roles, and in this tug-of-war between the Commission and the Council, one of them could become the centre of gravity. If the EFM will be pulled towards the Council, it could endanger his/her credibility within the Commission and as a result, weaken the Community's external activities. To sum up, the role of the EFM will require a lot of sensitivity in her/his approaches to the Council and to the Commission and maybe even some new innovative solutions will be invented²³.

Nevertheless, the EU's external action will be strengthened through the post of the European Foreign Minister. The implications of that fact for development cooperation may be doubled depending on the personal attitudes and interests of the EFM. The constitutional treaty provides for the EFM to coordinate the Community's external actions; however, its handling towards other fellow Commissioners is not clear. It could lead to a situation where the Commissioners responsible for other aspects of external actions, such as development cooperation, take a junior position to the EFM. If the EFM is interested in development cooperation as a tool of strategic, long term approach for combating poverty, it may gain much more importance than in the current structure. If not, it will mean a further subordination of development cooperation to foreign policy.

Structure of European Commission

In the context of the position of development cooperation in the future, the structure of the European Commission is also relevant. In an enlarged Union the principle of collegiality, equality of Commission's members, and the representation of every Member State in the Commission may badly affect the effectiveness of the Commission's work. How to ensure the proper functioning of the Commission in the European Union of 25 or more was one of the crucial and very sensitive questions during the European Convention and then also during the IGC. Finally, the representatives of

23) Ibid.

the member states did not accept the proposal from the Draft Treaty, nor the alternative solution proposed by the European Commission²⁴.

The particular controversies referred to the Commission's composition and its internal decision-making process. Finally, the member states agreed in Article I-25 that the first Commission appointed after the constitutional treaty will come into force, and shall consist of one national of each country (including the President and the EFM). After the term of office ends, the next Commission *shall consist of a number of Members, including its President and the Union Minister or Foreign Affairs, corresponding to two thirds of the number of member states unless the European Council, acting unanimously, decides to alter this figure*. The Members of the Commission will be selected on a rotational basis. The IGC did not insert detailed proposals from the Commission, leaving the modalities on future functioning of the Commission to its future President and the Rules of Procedures laid out in Article I-27 of the treaty.

In fact, the system adopted in the constitutional treaty does not mean a radical change and rather reflects a compromise on this sensitive issue. After the accession of Bulgaria and Romania, the first-term Commission will probably have 27 members. In this composition all the Commissioners will have voting rights, however the decision-making would become complex and it might be necessary to form a kind of *inner cabinet*, in which development is unlikely to be represented. Then, the operations of the RELEX group take on a crucial importance²⁵. Nevertheless, the Commission composed of 27 members means that development or humanitarian aid are only 1 or 2 votes out of 27. This could lead to further marginalisation.

In the following years the number of members of the second-term Commission appointed under the constitutional treaty will reach 18. Whether there will be a separate Commissioner for Development and what place development cooperation will take in the structure of the future Commission, may depend on the Commission President's decision, on the personality of the future Development Commissioner and on her/his relationships with the EFM, especially as the treaty acknowledges the EFM's right to coordinate Community external actions.

24) See: EUROPEAN COMMISSION (2003), Communication from the Commission, A Constitution for the Union, p. 6.
25) MACKIE, BASER, FREDERIKSEN and HASSE (2003), p. 15.

European External Action Service

Established on the basis of Article III-296, the European External Action Service (EEAS) should assist the European Foreign Minister in fulfilling her/his mission. The service, as elaborated in a declaration attached to the draft treaty, should consist of staff from relevant departments of the Council's Secretariat and of the Commission. Second, it can involve civil servants from national diplomatic services of the member states. According to the declaration, it should have the responsibility for providing staff for EU delegations in third countries and at international organisations, which are, according to Article III-328, placed under authority of the EFM. If it happens really, it will depend on the Council's decision.

The establishment of the External Action Service raises a number of questions. The treaty does not precisely define who will form the service: only the diplomats working in the Council's Secretariat and in DG RELEX, or will it also include officials from other directorates with relevance to the external action field? Will all delegation staff be a part of the External Action Service? There is an element of risk in every option. Assuming that the External Action Service would also include development or trade specialists, it would mean that they come directly under the authority of the EFM. However, this system should respect the fact that the development is the Community's competence and fully within the executive powers of the Commission. This, in turn, demands new common management structures, because of possible tensions with development services in the headquarters in Brussels²⁶.

A major reorganisation could destabilise and endanger achievements made during the ongoing reform. On the other hand, better career prospects would contribute to the professionalisation of the development service. It would probably also be more advantageous in the end than the situation in which only foreign policy officials would be included into the EEAS and the development issues would be marginalized²⁷.

26) *Ibid.*, p. 16.

27) *Ibid.*, p. 17.

CONCLUSION

The position of development cooperation in the constitutional treaty has been improved in comparison to the previous situation. The most important changes refer to the anchoring of the fight against poverty in the treaty, giving it a clear legal basis. It refers also to the efforts made in order to ensure coherence in the EU's external actions. The treaty strengthens the EU's profile on the international scene and its strategic vision. On the other hand, some other provisions may endanger the positive outcome of IGC. How it will function in practice, for example whether the further subordination of development cooperation to the CFSP will take place or not, is to be seen.

Future developments will also be influenced by the personal skills and policies conducted under the leadership of the new Commissioner for Development, a former Belgian foreign minister, Louis Michel. Will he give new impetus for the EU development policy? The improvements are possible, also before the new treaty will come into force: more complementarity between the development action of the EC and member states, further harmonisation of development instruments, and increased overall effectiveness of EU development cooperation in the eradication of poverty²⁸. The developments up to date show that the Commissioner Michel who is much more visible and active character at the European and international scene than his predecessor, takes a lot of new initiatives and it influences positively the European development policy's position.

Last but not least, a crucial matter is the attitude of newcomers to development cooperation. New member states do not have a lot of experience in contacts with the developing countries and its policy towards them is still to be developed. The same refers to the societies in which development issues are not known, nor are the people used to helping the third world. This situation bears not only dangers. It could also mean that the new member states, the majority of whom do not establish their own policy towards the poorest, will want to channel aid through the EC institutions, thus strengthening its importance. On the other hand, no interest in development cooperation may cause its marginalization and loss of significance, shifting the EC activities' focus towards other issues. Which option will win requires further studies.

28) *Ibid.*, p. 22.

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