

Enter the Member States: An Analysis and Evaluation of the Intergovernmental Conference 2003-2004.

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Introduction¹

At the time of the Laeken summit in December 2001 the Member States of the EU decided to have a Convention prepare the next treaty reform, but they made sure that they would take over after the Convention by then holding a traditional Intergovernmental Conference (IGC). Even if the Convention had involved a number of members of national parliaments and the European Parliament along with representatives of the member state governments the latter insisted on staying the 'masters of the treaty'. They wanted to be as much in control as possible. They therefore duly organized the IGC, which took place from October 2003 until June 2004.

In this paper we start by briefly reminding the reader of the main contents of the Draft Constitutional Treaty produced by the Convention on the Future of Europe, from 28 February 2002 until mid July 2003. Next we will see how the proposal fared during IGC 2003-2004. How much of the text did the member states change and why? Further, we will try to evaluate the treaty: What are its strengths and weaknesses? And at the end we will briefly touch upon ratification of the Constitutional Treaty: What kind of battles lies ahead?

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The Convention's Draft Constitutional Treaty²

At the meeting of the European Council in Thessaloniki, Greece, 19-20 June 2003 the President of the Convention, Valéry Giscard d'Estaing, presented a Draft Constitution (CONV 724/03). Later on July 18 a final draft, which also included section III on policies, was presented to the Italian Presidency at a meeting of the European Council in Rome (CONV 850/03).³

The draft constitutional treaty proposed by the Convention included a number of changes. The following were among the most important: The pillar structure would be abolished and the Union would have *legal personality* (Art. I-6). The *Charter of Fundamental Rights* would be incorporated into the treaty and thus become legally binding. Union competences were separated into *exclusive* and *shared* competences as well as areas where the Union may take *supporting, coordinating and complementary action*.

Concerning Common Foreign and Security Policy (CFSP) the Draft Constitution proposed to create a post as EU Foreign Minister, but CFSP would continue to be decided by unanimity, although in some cases “the European Council may unanimously decide that the Council should act by qualified majority” (Art. I-39). Specific provisions for implementing common defence policy on the other hand only included unanimity (Art. I-40). One new development in the Draft Convention was the possibility of closer cooperation with regards to defence, which was excluded in the Treaty of Nice.

One of the most debated novelties was the proposal for a permanent European Council Chair or President: “The European Council shall elect its President, by qualified majority, for a term of two and a half years, renewable once” (art. I-21). Other Council formations would retain some kind of rotating Presidencies.

In the Council of Ministers the use of qualified majority voting (QMV) would become normal practice (Art. I-22). In an important move away from past weighting of votes, it was proposed that “such a majority shall consist of the majority of Member States, representing at least three fifths of the population of the Union” (Art. I-24). This would abolish the cumbersome system of weights adopted by the Treaty of Nice and make the voting system more transparent.

² For more on this, see Finn Laursen, “The Convention's Draft Constitutional Treaty: Towards a more federal EU?” *L'Europe en formation*, Année 2003, No. 2, pp. 59-76. For detailed accounts of the Convention, see Peter Norman, *The Accidental Constitution: The Story of the European Convention* (Brussels: EuroComment, 2003), Alain Dauvergne, *L'Europe en otage? Histoire secrète de la Convention* (Paris : Éditions Saint-Simon, 2004), and Olivier Duhamel, *Pour l'Europe: Le texte integral de la Constitution expliqué et commenté* (Paris: Éditions du Seuil, 2003).

³ European Convention, *Draft Treaty Establishing a Constitution for Europe* (Luxembourg: Office for Official Publications of the European Communities, 2003).

The Commission would be limited to 15 members, including the President and Foreign Minister. “It may call on the help of Associate Commissioners” (Art. I-25). This would allow all Member States to have either a Commissioner or an Associate Commissioner, allowing all member states to be represented. In the future the Commission president would be elected by the European Parliament, albeit on a proposal from the European Council (Art. I-26). So the proposal would not lead to a full ‘parliamentarization’ of the relation between the European Parliament and the Commission.

Concerning the Council it was stipulated that it would meet in public “when it is discussing and adopting a legislative proposal” (Art. I-49).

The role of the European Parliament was also increased in some ways, especially by making the co-decision procedure the normal procedure. The Parliament would also have increased powers in respect to the budget.

A Protocol on the application of the principles of subsidiarity and proportionality would give national parliaments a special role in supervising the compliance with subsidiarity: “When reasoned opinions on a Commission proposal’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the Member States’ national Parliaments and their chambers, the Commission shall review its proposal” (CONV 724/03 Annex 1).

Enter the Member States

The IGC started on 4 October 2003 in Rome during the Italian Presidency. The big question then was, to what extent would the member states reopen the compromises found during the Convention? Would they mess it up? Or would the IGC be able to agree on the draft Constitutional Treaty from the Convention without too many changes?

The Presidency based its work on answers to questionnaires from the member states. In parallel a group of legal experts worked on the texts and some issues that followed from the adoption of one text to replace all existing treaties. The Presidency foresaw ministers meeting about every two weeks. Ministers would meet a final time in Brussels on 9 December. The Heads of State or Government would also meet, including for a final meeting in Brussels 12-13 December discussing the overall package and possibly adopting a draft Constitutional Treaty.

Although a declaration passed in Rome said that the IGC should finish before the elections to the European Parliament in June 2004 it seems that the Italians hoped to finish before Christmas, despite known disagreements on some of the issues.⁴

When the IGC opened it was clear that some member states were not ready to accept the draft from the Convention. The proposed new definition of a QMV, viz. at least 50% of the states, representing at least 60% of the EU population, was not acceptable to the Spanish and Polish governments, which wanted to retain the formula of the Treaty of Nice that gave them more formal influence.⁵

Some countries had problems with the extended use of QMV. In particular the British had some so-called 'red lines', i.e. non-negotiable items. These focused upon Common Foreign and Security Policy (CFSP), taxation, budget sources and financial frameworks, social security and criminal justice. The British also wanted further clarification concerning the incorporation of the Charter of Fundamental Rights.

The question of the composition and size of the Commission was still an issue. Most small member states wanted to retain a voting Commissioner from their country in the future.

The French and German governments were among the few that had no problems with the proposed Constitutional treaty. They were pressing the other states for a speedy conclusion of the negotiations. In general the original six member states of the European Communities were the most favourable towards the Convention's proposal. The new member states from Central and Eastern Europe largely sided with other small member states like Austria, Finland and Portugal insisting on retaining a voting member of the Commission in the future.

Prior to a ministerial conclave in Naples 28-29 November the Presidency put forward proposals on 25 November (CIG 52/03 and CIG 52/1/03). One of the issues discussed in Naples was whether the preamble should include a reference to Christianity. The proposal was supported by Poland and some other Catholic countries and Christian Democratic political parties, but opposed by France, the Nordic countries and some Socialist and Liberal political parties.⁶ Another issue discussed was defence. Real progress was made on this issue in Naples. This included structured cooperation and a mutual defence clause. The former should be based on objective parameters and the latter should not prejudice the specific character of the security and defence

⁴ Thomas Fuller, "In Europe of 25 Equals, No Consensus on a Charter," *The New York Times*, October 6, 2003.

⁵ "Positions of Member States and Candidates or Acceding Countries on the Eve of the Intergovernmental Conference," *Europe Daily Bulletins*, No. 8555, 3 October 2003.

⁶ Charlemagne, "God meets the lawyers," *The Economist*, December 6, 2003.

policy of certain member states and be compatible with NATO. This moved the four countries, France, Germany, Belgium and Luxembourg, which had had a defence summit in Brussels on 29 April and the other member states closer to each other. The three big countries, Germany, France and the UK also had a meeting on 20 September, where defence had been on the agenda.⁷

Compatibility with NATO was especially stressed by Poland and Turkey. On mutual defence Ireland and other non-aligned member states wanted a voluntary commitment. Italian Foreign Minister Franco Frattini welcomed the fact that “Europe is coming together around a common vision of defence founded on military capabilities and complementarity to NATO.”⁸ Afterwards the Italian Presidency produced a new text on ‘permanent structured cooperation’ and ‘closer cooperation on mutual defence’ (CIG 57/03, 2 December 2003 and CIG 57/1/03 REV 1, 5 December 2003).⁹

On December 9 the Presidency published its proposals to the IGC meeting of Heads of State or Government, 12-13 December in Brussels. One document, CIG 60/03 Add 1, contained concrete proposals on a number of issues. The Presidency considered that it had taken into account the different views of the delegations and that this document constituted a balanced package. The other document, CIG 60/03 ADD 2, addressed the more sensitive political issues. They should constitute the focus of the discussions on 12-13 December (see also CIG 60/03). The sensitive issues were: the preamble (question of reference to Christianity), composition of the Commission (reduction or one member per member state?), definition of QMV (double majority or the Nice formula) and scope of QMV (taxation, etc.) as well as minimum threshold for seats in the European Parliament (should the proposed minimum of four seats be increased to five or six?).

The Failure of the Brussels summit in December 2003

But the summit in Brussels in December 2003, which the Italian Presidency had hoped would conclude the negotiations, failed to reach an agreement.¹⁰ Afterwards the mood was sombre. Some blamed the poor handling of the summit by the Italian Prime Minister Silvio Berlusconi. Others blamed Spain and Poland for their intransigence on the definition of a QMV. But meeting the press afterwards most heads of state or government said that it had been a collective failure.

⁷ Claire Tréan, “La crise irakienne a rapproché Londres de Paris et Berlin sur le projet de défense,” *Le Monde*, September 23, 2003; Ambrose Evans-Pritchard and Kate Connolly, “Blair ‘backs plan’ to give EU army more power,” *The Daily Telegraph*, September 22, 2003; and “Kampfbereit – auch ohne Nato,” *Der Spiegel*, 13 October 2003.

⁸ “Europe Comes together around a Common Vision of Defence,” *Europe Daily Bulletins*, No. 8596, 2 December 2003.

⁹ See also Bosco Esteruelas, “Avanza la Europa de la defensa,” *El País*, 22 December 2003.

¹⁰ “La Europa de los 25 fracasa en su intento de acordar una Constitución,” *El País*, 14 December 2003.

However, both the German Chancellor Gerhard Schröder and French President Jacques Chirac now talked about the possibility of a smaller group of member states going ahead if the 25 could not agree. If the IGC were to fail definitely in 2004, said Chancellor Schröder, “Then two-speed Europe would be the logical consequence. We do not want this, but we are prepared to do so.” President Chirac referred to his speech to the German *Bundestag* in 2000, where he had talked about the possibility of a ‘pioneer group.’ “I continue to think that it is a good solution, because it will give impulsion and set an example. I think this will allow Europe to go faster, further and better”, he said.¹¹

Schröder also linked the situation with the forthcoming financial perspective for 2007-13, saying that Germany would insist on expenditure no greater than 1% of GDP. Shortly after the failure in Brussels the six net-contributors to the EC budget, Germany, France, United Kingdom, Sweden, Austria and the Netherlands issued a letter where they all suggested to limit EU expenditures to 1% of GDP instead of the current limit of 1.27%.¹² Since the second largest budget item is constituted by the structural funds such a limitation could hurt Spain and Poland, among others.

The Irish Presidency

After the failure in Brussels in December 2003 it was up to the Irish presidency to try to rescue the negotiations during the first six months of 2004. The Irish set out slowly and carefully. They consulted with all member states to seek an agreement to restart the negotiations. The Irish stressed that a restart would presuppose a political willingness to find a compromise.

During 2003 there had been separate meetings of the Big Three, France, Germany and the UK. They had, as mentioned, dealt with defence issues in Berlin in September. They had also sent a delegation to Iran which neither included the Italian Presidency nor the EU’s High Representative for CFSP, Javier Solana. The three held another meeting on 18 February 2004. When the meeting was announced the Italian foreign minister Franco Fratini expressed the fear of a *directoire*: “There can be no directorate, no divisive nucleus that risks putting European integration in danger.” Earlier the British Foreign Secretary Jack Straw had told a French newspaper that

¹¹ Quoted from “25 Heads of State and Government fail ‘collectively’ to give Europe a Constitution,” *Europe Daily Bulletins*, No. 8606, 15 December 2003.

¹² Carlos Yarnoz, “Schröder, Chirac y Blair quieren limitar al 1% del PIB el dinero destinado a la UE,” *El País*, 16 December 2003.

“associating the UK with the Franco-German motor seems logical.”¹³ Fear of a *directoire* also existed in Spain and Poland.

Analysing the issue of the *directoire*, Quentin Peel in *Financial Times* concluded: “Much still divides France, Germany and Britain. But when they do agree, it is more likely to remove blockages to EU progress than to lead to diktats.” The main reasons seen for the meetings of the Big Three were the disagreements over Iraq and the looming enlargement.¹⁴ In the end the Big Three mainly discussed economic reforms at their meeting in February.¹⁵

The possibility of an avant-garde or pioneer group remained on the agenda. But one of this possibility’s early architects, German Foreign Minister Joschka Fisher, now concluded that this would not be a very good solution. In an interview with a German newspaper he said: “A small Europe would be too small in the strategic dimension to deal with the new threats and challenges of terrorism and globalization.” Europe had to “command a continental weight.”¹⁶

In March 2004 the IGC was restarted.¹⁷ The change of government in Spain after the elections on 14 March was one of the factors that increased the chances of success.¹⁸ The election followed shortly after the terrorist bombing attack in Madrid on 11 March.¹⁹ The meeting of the European Council on 25-26 March confirmed that the 25 European leaders would work to reach a compromise ‘no later than the June European Council’ scheduled for 17 June.²⁰ In a document to the summit the Irish Presidency had concluded: “The Presidency’s assessment is that there is a strong case for bringing the Intergovernmental Conference to an early conclusion, and that there is reason to believe that an overall agreement acceptable to all delegations is achievable if the necessary political will exists” (CIG 70/03, 24 March 2004).

As expected the new Socialist government under Rodriguez Zapatero moved Spain to a more pro-EU line. He appointed the EU’s representative to the Middle East, Miguel Angel Moratinos, as Foreign Minister.²¹ Spain now indicated a willingness to accept the double majority proposed by the Convention, although the exact percentages might have to be changed. This

¹³ Tony Barber, “Italians fret as EU’s big three forge closer ties”, *Financial Times*, January 23, 2004, and Judy Dempsey, “Small partners fret as Europe’s ‘Big Three’ combine on defence,” *Financial Times*, January 30, 2004.

¹⁴ “Don’t be afraid of the *directoire*,” *Financial Times*, February 12, 2004.

¹⁵ “Europe’s ‘big three’ set out reform programme,” *Financial Times*, February 19, 2004.

¹⁶ “Fischer shifts away from support for two-speed EU,” *Financial Times*, March 1, 2004.

¹⁷ *EU Constitution Project Newsletter*, April 2004

¹⁸ “Spain change raises hopes over new EU constitution,” *Financial Times*, March 16, 2004.

¹⁹ “Spanish turn to Socialists in wake of Madrid attacks,” *Financial Times*, March 15, 2004.

²⁰ “EU leaders signal fresh unity as summit ends,” *Financial Times*, 27-28 March, 2004.

²¹ Francisco Aldecoa Luzarraga, “La CIG confirma el Tratado Constitucional de la Convención” Documento de Trabajo No. 44, Real Instituto Elcano, p. 9.

isolated Poland on this issue. So the Poles also indicated a willingness to compromise.²² The Polish government was very weak, which made it more difficult for it to compromise. The Polish Prime Minister Leszek Miller announced after the March summit that he would resign on 2 May, the day after Poland joined the EU.²³

So the mood changed in March. Quentin Peel saw three factors. The first was shame: “Failure to agree last time proved much more damaging than some EU leaders expected.” The second were external shocks, culminating in the bombings in Spain: “At a time of insecurity the EU leaders need to demonstrate unity and a sense of purpose.” The third factor was a realization that “postponing a decision will only make matters worse.” This included upcoming negotiations about the next financial framework and decisions concerning membership negotiations with Turkey.²⁴

Let us mention also at this stage that it was on 20 April that British Prime Minister Tony Blair told the House of Commons that the Constitutional Treaty would be put to a referendum in Britain. Obviously frustrated by the domestic debate he said, “It is time to resolve once and for all whether this country, Britain, wants to be at the centre of European decision-making or not.”²⁵ Whatever the exact reason for the British u-turn, it forced the other member states to listen even more to the British ‘red lines’ in the end-game.

The End-Game in June 2004

The Irish Presidency succeeded getting an agreement at the summit in Brussels, 17-18 June 2004. This followed shortly after the elections to the European Parliament, where the turn-out had been extremely low.

On the 16th of June the Presidency presented two documents to the IGC. One contained a set of texts which the Presidency considered would find consensus in the framework of the final agreement (CIG 81/04). The other contained proposals on outstanding issues (CIG 82/04). The first one included text on Council configurations (pre-established groups of three Member States for a period of 18 months), the EU Foreign Minister, budget procedures, own resources (unanimity), financial frameworks, judicial cooperation in criminal matters (possibility of transferring draft framework law to the European Council), defence policy (permanent structured

²² “Poles clear path for deal on EU constitution,” *Financial Times*, March 19, 2004.

²³ “Poland’s premier resigns in wake of party split,” *Financial Times*, 27/28 March, 2004.

²⁴ “It’s crunch time for the constitution,” *Financial Times*, March 25, 2004.

²⁵ Quoted from “Blair stakes all on constitution vote,” *Financial Times*, April 21, 2004.

cooperation, incl. QMV, and “closer cooperation on mutual defence”), QMV in the field of CFSP (basically for implementing decision, with the possibility of referring the decision to the European Council for a decision by unanimity), decision-making in the area of the Common Commercial Policy (normally QMV, but unanimity for cultural and audiovisual services as well as trade in social, education and health services), social security (possible referral to the European Council), taxation, enhanced cooperation and a number of other issues. It also included a preamble that did not contain a reference to Christianity. Further, the text included simplified procedures for amending the constitution, viz. the possibility of the European Council by unanimity deciding to move some policy area from unanimity to QMV, referred to as a *passerelle*, (with the exception of defence) and the possibility of changing internal policies of Part III through unanimity in the European Council, i.e. avoiding an IGC. The text also included a protocol on Denmark making the Danish opt-outs from 1992 part of the new treaty.²⁶

The document with compromise proposals from the Presidency included a definition of the QMV of 55% of the states representing 65% of the population thus increasing both elements by 5%, but a Blocking minority should also include at least four states. This meant that three big states, such as Germany, France and the UK, would not be able to bloc a decisions supported by all the other member states. The minimum number of seats in the European Parliament was raised to six. The Commission would have one member per member state until 2014 when it would be reduced to 18 members. The document further included proposed texts for economic governance, especially for the member states that have introduced the euro, multi-annual financial framework (unanimity) and explanations relating to the Charter of Fundamental Rights.

The final solution on QMV reached in Brussels on 18 June 2004 was at least 55% of the states, comprising at least 15 of them, and representing at least 65% of the EU population.²⁷ The further stipulation about the blocking minority was retained: A blocking minority must include at least four states (CIG 84/04, p. 7). This applies to decisions based on a proposal from the Commission. In cases of decisions not based on proposals from the Commission, e.g. some decisions within CFSP, JHA and EMU, “the qualified majority shall be defined as 72% of the

²⁶ On Denmark’s special problems, see Finn Laursen, “Denmark and the Intergovernmental Conference: a Two-Level Game,” in Per Carlsen and Hans Mouritzen (eds.), *Danish Foreign Policy Yearbook 2004* (Copenhagen, Danish Institute for International Studies, 2004), pp. 91-119.

²⁷ The 15 member state stipulation will become superfluous by the entry into force in 2009, if, as expected Bulgaria and Romania join in 2007. 55% of 27 states is 14.85, which presumably would mean 15.

members of the Council, representing Member States comprising at least 65% of the population of the Union.”²⁸

According to a protocol the new QMV will enter into force from 2009. Further, a declaration included an Ioannina-type stipulation.²⁹ If Council members representing at least three quarters on the member states or three quarters of the EU population required to form a blocking minority state their opposition then the Council will continue to discuss the issue during a “reasonable time” with a view to answering the concerns expressed by these states.³⁰ The decision shall be in force from the entry into force of the new QMV in 2009 until 2014 after which ‘the Council may adopt a European decision repealing it.’³¹ What had started as a simple formula for a QMV gradually got more complex during the IGC.

The small states eventually accepted a compromise on the size of the Commission. The new Commission from November 2004 will have one Commissioner per member state. So will the next Commission (2009-2014). But from 2014 the Commission will be reduced to two-thirds the number of member states and equal rotation will be introduced, “unless the European Council, acting unanimously, decides to alter this figure” (CIG 84/04, p. 4).

The minimum number of seats in the European Parliament was set at six. The maximum is set at 96, meaning three less for Germany, which currently has 99. The total membership is increased from 736 to 750.

The British ‘red lines’ were to a large extent accepted by the IGC. Some areas where the draft from the Convention had foreseen QMV were moved back to unanimity. (This included own resources, multi-annual financial framework, indirect taxation and company taxation). The British threat of veto was credible. The Irish Presidency was very inventive in finding language that would reassure those fearing to be outvoted on important issues. In some cases this included the emergency break of sending an issue to the European Council or further negotiations to try to reach consensus (social security for migrant workers). In some cases closer cooperation was mentioned as a possibility in case no consensus could be found (judicial cooperation in criminal matters). In the

²⁸ Council of the European Union, *Draft Treaty Establishing a Constitution for Europe as approved by the Intergovernmental Conference on 18 June 2004*. Volume I (Luxembourg: Office for Official Publications of the European Communities, 2004).

²⁹ On the 1994 Ioannina compromise, see for instance Finn Laursen, “Institutions and Procedures: The Limited Reforms,” in Finn Laursen (ed.), *The Amsterdam Treaty: National Preference Formation, Interstate Bargaining and Outcome* (Odense: Odense University Press, 2002), p. 566.

³⁰ *Europe Daily Bulletins*, No 8730, 21 June 2004. See also Francisco Aldecoa Luzzaraga, *op. cit.*

³¹ “Declaration on Article I-25” in Council of the European Union, *Draft Treaty Establishing a Constitution for Europe as approved by the Intergovernmental Conference on 18 June 2004. Protocols. Declarations*, Vol. II. (Luxembourg: Office for Official Publications of the European Communities, 2004), pp. 375-377.

end this made the Constitutional Treaty adopted by the IGC a more complex document than the one adopted by the Convention. From an efficiency point of view these changes constituted steps backwards.³²

Let's finally take note of the fact that a demand from Catholic countries, especially Poland and Italy, to have a reference to Christianity in the preamble, was not accepted by the IGC. France, Belgium and the Nordic countries were strongly against such a reference.

Afterwards the Irish Taoiseach and European Council President Bertie Ahern presented the new treaty as “fundamental progress.” “We are all winners,” he said. British Prime Minister Tony Blair said he had “won a victory for the United Kingdom and Europe.” He welcomed the strengthened role of national parliaments and said that the treaty ensured the United Kingdom of a right of veto in sensitive areas such as taxation, social security, foreign policy and defence.³³ Chancellor Gerhard Schröder talked about a “truly historic” decision. Prime Minister Jean-Claude Juncker from Luxembourg talked about a “qualitative breakthrough” and said that the constitution was “good for Europe, as it makes the Union more transparent, more democratic because of the increased powers of the European Parliament and more effective.”³⁴

The new Polish Prime Minister Marek Belka said that the Constitution was a “great success as we have assured Poland a strong position in the EU, stronger than that provided for at Nice, even if this seemed impossible.” He added that “the greatest success we have achieved concerns the introduction of the Ioannina mechanism, which establishes population thresholds still more favourable for Poland.” He did regret, however, that the preamble did not include a reference to Christianity.³⁵

Analysis I: Why a new treaty?

Why then was it decided that the EU needs a new treaty so soon after the Treaty of Nice? And why was it decided to call it a constitution?

Looking at treaty reforms from the Single European Act (SEA) in the mid-1980s, over the Maastricht, Amsterdam and Nice Treaties in the 1990s to the Constitutional Treaty there are

³² See also Giovanni Grevi, “Light and shade of a quasi-Constitution: An Assessment,” *EPC Issue Paper* No. 14 (23 June 2004).

³³ “Twenty-five adopt Constitutional Treaty but are unable to agree on who will be future Commission President,” *Europe Daily Bulletins*, No. 8730, 21 June 2004.

³⁴ Quoted from *ibid*.

³⁵ *Ibid*.

certain trends. Over time the use of QMV has been increased, usually linked with successive enlargements. Over time the policy scope has increased, although this was not really part of Nice and the Constitutional Treaty. Over time the EP has gradually become more involved in decision-making through various procedural changes, including co-decision in the Maastricht Treaty, which now becomes the normal decision-making procedure according to the Constitutional Treaty.

Why has the EU gone so far? Scholars disagree on how far the EU has gone as well as the reasons for these advances in integration. On one hand we have intergovernmentalists, who argue that the member states are still very much in control, and who see the EU as an international regime created to assure the implementation of joint decisions. Other scholars, such as neo-functionalists, see built-in forces that take the process further and further – through spill-over processes, bargaining exchanges, actor socialization and learning processes.³⁶ In a similar vein historical institutionalists see a certain path dependency where the states are no longer fully in control.³⁷

Andrew Moravcsik gave a rationalist inter-governmental explanation with emphasis on economic interests. He called his approach liberal intergovernmentalism. He studied national preference formation and interstate bargaining with emphasis on power elements such as threats of exclusion and threats of veto.³⁸ Later he added a third phase, institutional choice, where he explained the pooling and delegation of sovereignty, which has taken place in the European Communities, as a way to assure ‘credible commitments.’³⁹

Moravcsik’s explanation makes a lot of sense if we study the Treaty of Rome establishing the European Economic Community (EEC) and the Single European Act (SEA) outlining the single market programme. The EMU part of the Maastricht Treaty also fits in reasonably well. These advances in European integration were very much responses to increasing economic interdependence.

But other parts of the Maastricht Treaty, Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA) cooperation, do not fit in well with Moravcsik’s explanation. Maastricht was negotiated after the end of the Cold War and German unification.

³⁶ See for instance Leon N. Lindberg and Stuart A. Scheingold, *Europe’s Would-Be Polity: Patterns of Change in the European Community* (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1970).

³⁷ Paul Pierson, “The Path to European Integration: A Historical Institutional Analysis,” *Comparative Political Studies* Vol. 29, No. 2 (1996), pp. 123-63.

³⁸ Andrew Moravcsik, “Preferences and Power in the European Community: A liberal Intergovernmentalist Approach,” *Journal of Common Market Studies* Vol. 31, No. 4 (1993), pp. 473-524.

³⁹ Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca, NY: Cornell University Press, 1998).

Geopolitics, brushed aside by Moravcsik, was an important reason for turning the Communities into a Political Union in the early 1990s.⁴⁰

The main reason for recent treaty reforms, from Amsterdam to the Constitutional Treaty was the eastern enlargement which finally took place on 1 May 2004. We admit that there were economic interests in having the eastern enlargement. But some of the members of EU-15 had doubts about the economics of enlargement. The French knew that enlargement would put pressure on the Common Agricultural Policy (CAP) from which the country benefits. The Spanish, Portuguese and Greek governments knew that enlargement would mean greater competition for money from the structural funds. All in all, it is difficult to explain the eastern enlargement fully by economic factors using a rational model like Moravcsik's.

A fuller explanation will have to look at how the increased interactions between the member states affected their interest, creating shared norms and ideas. Part of the process of treaty reforms in the 1990's was to put increased emphasis on the democratic nature of the EU, including the rule of law and respect for human rights. The Treaty of Amsterdam strengthened the treaty base for these rights and made respect for these a condition for membership. This process was crowned with the incorporation of the Charter of Fundamental Rights into the treaty by the Constitutional Treaty.

Although national identities are strong in Europe the process of integration has created elements of a European identity. In the end it was because of this identity that the EU could not say no to the former Communist states in Central and Eastern Europe.⁴¹ Rhetorical action of the driving states legitimized liberal-democratic norms. They shamed "the reticent majority into acquiescence with enlargement."⁴²

The new responsibilities of the EU in the post-Cold War situation and enlargement forced the member states to also look at the institutional issues. In the end Amsterdam, Nice and the Constitutional Treaty have been about getting a legitimate and efficient Union also after becoming a much wider Union.

⁴⁰ Finn Laursen, "Explaining the Intergovernmental Conference on Political Union," in Finn Laursen and Sophie Vanhoonacker (eds.), *The Intergovernmental Conference on Political Union: Institutional Reforms, New Policies and International Identity of the European Community* (Maastricht: European Institute of Public Administration, 1992), pp. 229-248.

⁴¹ Frank Schimmelfennig, *The EU, NATO and the Integration of Europe: Rules and Rhetoric* (Cambridge: Cambridge University Press, 2003).

⁴² Frank Schimmelfennig, "Liberal Intergovernmentalism," in Antje Wiener and Thomas Diez (eds.), *European Integration Theory* (Oxford: Oxford University Press, 2004), pp. 75-94, at p. 91.

On some of the specifics of the post-Maastricht treaty reforms Moravcsik's liberal intergovernmentalism can still help us understand the political process. The extended use of QMV only took place after hard-fought battles where domestic economic interests were decisive for national positions. Moravcsik's scheme seems most applicable to the question about increased use of QMV. It was on this point that we saw restrictions in the advance in the IGC version of the Constitutional Treaty because of the British 'red lines'.

Concerning preferences in respect to re-weighting of votes during the Nice negotiations the most important variable was size. These issues were largely pitting the large against the small member states. The large states wanted a re-weighting in their favour. The small states resisted this. Using Moravcsik's terminology this would be a kind of geopolitics.

Many large countries wanted to reduce the size of the Commission. Many small countries wanted to retain 'their' Commissioner. This issue re-emerged in the Convention and IGC 2003-04. The compromise eventually found postponed the reduction of the Commission size to a number of members corresponding to two thirds of the member states until 2014 (Art. I-26).

The questions concerning the Council and the Commission were fundamental questions about institutional design. What kind of considerations do actors make when they design institutions? Since institutions are about future decisions, actors are interested in increasing their influence and control. Voting weights are directly linked to influence. Control is linked to the 'blocking minority' which depends on the definition of a QMV. That is why the definition of a QMV became one of the most difficult issues in Nice as well as the Convention and IGC 2003-04.

This battle for future influence was an important element in the Convention and IGC 2003-04, with the Spanish and Poles fighting to retain the favourable weights of votes decided in Nice. They lost the battle in the Convention, but reopened the issue in the IGC. In the end they accepted the double majority proposed by the Convention with increased percentages. Instead of 50-60%, it became 55-65%. But an additional stipulation that a blocking minority should contain at least four member states was added. Neither Spain nor Portugal wanted three of the biggest members to be able to dominate the EU. To that came the Ioannina-type formula for at least the period 2009-2014.

Looking at the specifics of the inter-state bargaining during IGC 2003-04 we find the mechanisms singled out by Moravcsik. There were threats of veto from Spain and Poland concerning the definition of QMV and the UK concerning the scope of QMV. On the other hand there were threats of exclusion from France and Germany when they talked about a pioneer group

going forward. In the end the former threats were more credible than the latter. Compromise solutions were found by changing and adding various provisions. The QMV definition found raised the thresholds and added further safeguards for those fearing that that three big member states might dominate and the number of veto points were increased by limiting the transfer of policy areas from unanimity to QMV to satisfy the British 'red lines'.

When we compare the negotiation of the Constitutional Treaty with other treaty reforms there is one further element to be considered, viz. the use of the Convention method. The Convention included a number of representatives from national parliaments and the European Parliament. A large part of the Convention was 'deliberation', not hard inter-state bargaining. Good arguments took the place of national power. The end product therefore could claim a lot of legitimacy because of the wider involvement of parliamentary actors. Further, the Convention was very transparent with public meetings and documents quickly put on the Convention's web-site. IGCs on the other hand have traditionally been rather secretive. Although IGC 2003-04 made the documents public it did meet behind closed doors. These factors made it difficult for the member states to tamper too much with the Convention's proposal during the IGC.

And why then has it become a constitutional treaty? Officially it is a treaty establishing a Constitution for Europe. Basically it is still a treaty. It has to be ratified by all member states to enter into force. But it does deal with many issues that we normally associate with a constitution, including separation of powers, institutional checks-and-balances, and individual rights. The third part on policies would normally not be included in a constitution. The sense of community and trust among the member states has not been sufficient to make it possible to write a short constitution and leave specific policies to day-to-day legislation. The EU has many quasi-federal elements, but it is not a fully fledged federal state. It is however interesting to see how the new 'constitutionalist' discourse started by the Laeken summit in 2001 has become widely accepted by political leaders. It remains a big question, though, whether the voters in those states which will hold referendums will accept this advance in integration.

Analysis II: Why did the Irish succeed where the Italians had failed?

The question here is a question of efficiency of negotiations. Again, different theoretical perspectives will give different answers. Andreas Dür and Emma Mateo have compared the bargaining efficiency of IGC 2000 that negotiated the Treaty of Nice with IGC-2003-04 that finalized the Constitutional Treaty. They criticise Moravcsik's inter-state bargaining theory by

saying that “intergovernmental bargaining theory fails to appreciate that efficient bargaining can produce agreements even if on individual issues some parties favour unilateral solutions; compromises require issue linkages, rather than overlapping win sets on all issues.” They suggest two preconditions for efficient intergovernmental bargaining, namely preparation and mediation. “Extensive preparation can put enough issues on the negotiating table to allow for future issue linkages,” and “mediation by a third party can resolve the problem of all participants concentrating on distributional bargaining rather than ‘value creation’, namely maximizing joint gains.”⁴³

Overall they considered IGC 2003-04 efficient, because it produced a treaty proposal without leaving issues on the table. It did not leave the kind of left-overs that both Amsterdam and Nice had left. But they do see differences between the Italian and Irish Presidencies. They admitted some progress during the Italian Presidency, but said: “The main problem of the Italian Presidency, rather than partiality in the negotiations [which had been France’s problem during the Nice negotiations], was that it failed to seriously consider the Spanish and Polish threats with a veto against any change in the decision-making rules in the Council of Ministers.” The Irish consulted and conducted confidential meetings. “This cautious approach helped the Irish Presidency gain the trust of other member governments.” Effective mediation by the Irish Presidency was an important factor that explains the successful conclusion of the IGC. “The persistence of some conflicts ... until the end serves as an indicator that agreement was due to issue linkages rather than a convergence of preferences.”

Beyond these elements discussed by Dür and Mateo we should also remember the factors of the changing mood in March 2004, including the terrorist bombing in Madrid and the election victory of the more pro-European Socialists in Spain. In December 2003 the atmosphere among the member states was rather bad because France and Germany had broken the rules of the Growth and Stability Pact. Further, the disagreement over Iraq earlier in the year had not been completely overcome.

Evaluation: Strengths and Weaknesses of the Constitutional Treaty⁴⁴

When you evaluate a treaty you need to have criteria, and you must decide whether you compare it with what exists or what might possibly exist. We can use the official criteria of efficiency and

⁴³ Andreas Dür and Gemma Mateo, “Explaining Bargaining Efficiency: A Comparison of the IGCs of 2000 and of 2003-04”, *CFES Working Paper* No. 18/2004 (Odense: Centre for European Studies, University of Southern Denmark).

⁴⁴ For a useful discussion, see also Janis A. Emmanouilidis, “Historically Unique, Unfinished in Detail – An Evaluation of the Constitution,” *Reform Spotlight* 2004/03. Munich: Centre for Applied Research, and Gütersloh: Bertelsmann Foundation.

legitimacy mentioned in the Laeken declaration and compare with the consolidated treaty as it looked after Nice.

From the perspective of efficiency the increased use of QMV should make some decision-making easier. According to Olivier Duhamel the Constitutional Treaty proposed by the Convention would move 27 policy provisions from unanimity to QMV.⁴⁵ According to an information document produced by the Commission the Constitutional treaty produced by the IGC will move “some twenty provisions” from unanimity to QMV.⁴⁶ So we experienced a slight regression here, first of all in respect to own resources and the multi-annual framework, taxation as well as parts of judicial cooperation in criminal matters and police cooperation. Where QMV has been retained but an emergency brake added it would be fair to see that as a weakening, too.

Some other institutional provisions, including the *passerelle* provision may possibly help increase efficiency in the future. The new more permanent President for the European Council as well as the new Foreign Minister may also help give the Union more continuity and strategic direction. But there are risks of turf wars between these and the President of the Commission.

Although the pillar structure is abolished and the Union becomes a legal person, the policy-making mechanisms of CFSP will largely remain intergovernmental. Whereas the Laeken declaration singled out the Union’s international role as a challenge, the Convention did not extend the Community method to CFSP by pooling and delegating sovereignty in that area. Nor did the IGC go in that direction. Given the differences in foreign policies of the Member States – as demonstrated in connection with the war in Iraq – it is clear that the EU is not about to become a coherent international actor. The new structured cooperation in the area of defence may, however, open up some possibilities of advances in that area in the future.

We also notice that, despite the fact that the IGC deleted the specifics about closer cooperation in mutual defence in Part III the IGC included the following text in Part I of the Constitution: “If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all means in their power, in accordance with Article 51 of the United Nations Charter” (Art. I-41(7)). Although this is supposed to be consistent with neutrality and NATO, it is the first time such a ‘collective defence’ obligation is mentioned in an EC/EU treaty.

⁴⁵ Duhamel, *Pour l’Europe*, pp. 133-34.

⁴⁶ *A Constitution for Europe. Constitution adopted by the Heads of State and Government. Presentation to the citizens* (Luxembourg: Office for Official Publications of the European Communities, 2004), p. 22.

More importantly at this time in history the Constitutional Treaty also includes a solidarity clause saying that ‘The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or victim of a natural or man-made disaster. The Union shall mobilise all instruments at its disposal, including the military resources made available by the Member States ... (art. I-43).

Turning to the question of legitimacy, legitimacy comes in different variants, including input and output legitimacy.⁴⁷ And it may be affected by ‘identity’ factors.⁴⁸ A more efficient Union should according to the notion of output legitimacy *ipso facto* become more legitimate. Concerning input legitimacy the increased role of the European Parliament should from a theoretical perspective constitute a contribution to legitimacy. So making co-decision the normal practice should be welcomed from a legitimacy point of view. But the shift of loyalties that early integration theory mentioned as a possibility has not really taken place.⁴⁹ Or, as others have said, there is not a European people or *demos*. This is seen by some as a limitation of the possibility of getting a more democratic Union. Others are less convinced.⁵⁰

Democracy may be enhanced somewhat by the further involvement of national parliaments. However, this is very much a matter of debate, and the involvement will probably turn out to be very limited. National parliaments cannot stop a proposal; only request a new proposal from the Commission. The election of the Commission by the EP can be seen as a further step towards a European Parliamentary system. But we notice the European Council will still propose names, trying by this rule to keep political control on the evolution of the EU.

Efforts to establish a list of competences were not completely successful. The list of shared competences is the longest, and the draft contains a so-called flexibility clause in line with the existing article 308 TEC, which allows the Council to take steps to realize the aims of the Union by unanimity (Art. I-18). Critics have claimed that this provision has allowed the Union to increase its powers by stealth in the past.

Will the Union become more transparent and simple? Yes, the Constitutional Treaty will increase transparency with public legislative sessions of the Council, and the draft treaty is

⁴⁷ Fritz Scharpf, *Governing in Europe. Effective and Democratic?* (Oxford: Oxford University Press, 1999).

⁴⁸ Lynn Dobson and Albert Weale, “Governance and Legitimacy,” in Elizabeth Bomberg and Alexander Stubb (eds.), *The European Union: How Does it Work?* (Oxford: Oxford University Press, 2003), pp. 156-173.

⁴⁹ Ernst Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950-1957* (Stanford: Stanford University Press, 1958).

⁵⁰ For a useful discussion, see Thomas Risse, “Social Constructivism and European Integration,” in Antje Wiener and Thomas Diez (eds.), *European Integration Theory* (Oxford: Oxford University Press, 2004), pp. 161-176.

much simpler than the existing treaties, although not as simple and short as most national constitutions.

Another yardstick for evaluating the Constitutional Treaty would be an ideal federal union with capacity in trade, money, foreign affairs and defence and a reasonable budget to give the union real capacity and autonomy. From such a perspective the Union may be a relatively strong actor in economic areas, including trade and money (the latter for the Euro zone). But the member states are still holding CFSP as hostage. And the financial means of the Union remain extremely limited compared with existing federal states. So seem from this perspective there is still unfinished business on the European agenda.

Looking ahead: The referendum trap

If we try to look ahead the issue now becomes one of getting the Constitutional Treaty ratified. All 25 member states have to ratify it according to national rules. It seems, depending on the source, that 10-12 may hold a referendum, including Spain (20 February 2005), Portugal (10 April 2005), Belgium (spring 2005) Luxembourg (10 July 2005), the Netherlands (2005), Poland (most likely in 2005) and France (possibly May 2005), Ireland (late 2005 or in 2006) the United Kingdom (most likely spring 2006) and the Czech Republic (in 2006), Denmark (most likely in 2006).⁵¹ Others may decide to follow. But experience shows that referenda are rather unpredictable.⁵² Voters often see a referendum as a mid-term evaluation of the incumbent government. We know that the Danes voted no to the Maastricht Treaty in 1992 and the French barely accepted it later the same year. In 2001 the Irish voted no to the Treaty of Nice. The Danes and the Swedes have voted no to take part in the single currency, the euro, in 2000 and 2003 respectively. Voters do clearly not always follow the recommendation of the government in power. There is therefore a high statistical risk that one or more member states will vote no to the Constitutional Treaty. No doubt it will take a tremendous amount of national political leadership to pull the required yes votes through.

At the time of writing one member state has ratified the Constitutional Treaty, namely Lithuania, by parliamentary vote on 11 November 2005. 84 members of the 141-seat

⁵¹ From various sources, including Jesper Kongstad, "Efter festen: Nu venter folkets dom," *Jyllands-Posten*, 30 October 2004 and Daniel Keohane, "A Guide to the Referenda on the EU Constitutional Treaty," Centre for European Reform Briefing Note <http://www.cer.org.uk/pdf/briefing_referenda.pdf>

⁵² For a thorough analysis, see Simon Hug, *Voices of Europe: Citizens, Referendums, and European Integration* (Lanham: Rowman & Littlefield, 2003).

Parliament, *Seimas*, voted in favour of ratification, four against and three abstained. 50 MPs were absent.⁵³

What will happen in the case of some no votes? The treaty only stipulates the following: “If, two years after the signature of this Treaty, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council”! (Art. IV-443). Will the answer be ‘closer cooperation’ among those that have ratified? Or will those that have not ratified withdraw voluntarily from the Union and seek some looser association with the EU? Or will the member states seek a renegotiation of the Constitution? At the moment no one really knows the answer to these questions.⁵⁴

⁵³ “Lithuania quick to ratify EU charter,” *International Herald Tribune*, November 12, 2004.

⁵⁴ For a useful discussion, see Jo Shaw, “What Happens If The Constitutional Treaty Is Not Ratified?” text distributed at meeting of Jean Monnet Professors in Brussels, November 9, 2004.