

Maurer, Andreas

**Research Report**

## In detention, repeating the year, or expelled? Perspectives for the realisation of the Constitutional Treaty

SWP Research Paper, No. RP 2/2006

**Provided in Cooperation with:**

Stiftung Wissenschaft und Politik (SWP), German Institute for International and Security Affairs, Berlin

*Suggested Citation:* Maurer, Andreas (2006) : In detention, repeating the year, or expelled? Perspectives for the realisation of the Constitutional Treaty, SWP Research Paper, No. RP 2/2006, Stiftung Wissenschaft und Politik (SWP), Berlin

This Version is available at:

<https://hdl.handle.net/10419/253053>

**Standard-Nutzungsbedingungen:**

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

**Terms of use:**

*Documents in EconStor may be saved and copied for your personal and scholarly purposes.*

*You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.*

*If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.*

# SWP Research Paper

Stiftung Wissenschaft und Politik  
German Institute for International  
and Security Affairs

*Andreas Maurer*

## In Detention, Repeating the Year, or Expelled?

Perspectives for the Realisation of the  
Constitutional Treaty

RP 2  
February 2006  
Berlin

**All rights reserved.**

© Stiftung Wissenschaft und  
Politik, 2006

**SWP**

Stiftung Wissenschaft und  
Politik German Institute for  
International  
and Security Affairs

Ludwigkirchplatz 3-4  
10719 Berlin  
Germany  
Phone +49 30 880 07-0  
Fax +49 30 880 07-100  
[www.swp-berlin.org](http://www.swp-berlin.org)  
[swp@swp-berlin.org](mailto:swp@swp-berlin.org)

ISSN 1863-1053

*Translation by Roderick Parkes*

(English version of  
SWP-Studie 4/06)

# Table of Contents

5	<b>Problems and Recommendations</b>
7	<b>Introduction</b>
8	Referendums: Perspectives and Consequences
9	A Crisis of Confidence or of Communication?
11	<b>Options after the Failure</b>
12	Detention to Save the Treaty
12	<i>Renegotiation</i>
14	<i>A possible lifebuoy? Opting out and opting in</i>
15	<i>The visualisation of the social policy acquis through a protocol, charter, or declaration</i>
17	Repeating the Year: Options for the Reform of the Basis of the Existing Treaties
18	<i>Using the Organs' rights to organise themselves</i>
19	<i>Reform by interinstitutional agreement</i>
22	<i>Reform through decisions of the institutions</i>
23	<i>The bounds of informal implementation</i>
24	Expulsion: Options for Withdrawal, Exclusion, and Re-founding
25	<i>Withdrawal and exclusion from the international organisation of the EU</i>
26	<i>Withdrawal from an independent Union</i>
27	<i>Political conditions for exit</i>
28	<i>Re-founding the EU</i>
29	<b>How to Proceed?</b>
29	The chances of realising the abovementioned options
29	A centre of gravity for the Constitutional Treaty
30	Modular membership as a compromise
31	<b>Draft Protocol/Declaration/Charter on the Union's Social, Solidarity, and Economic Policy</b>
31	Option I – Visualisation
35	Option II – Deepening
36	<b>Abbreviations</b>



**In Detention, Repeating the Year, or Expelled?  
Perspectives for the Realisation of the  
Constitutional Treaty**

The negative results of the referenda on the Treaty establishing a Constitution for Europe (ECT) in France and the Netherlands have thrown the European Union into a deep crisis. For the time being, the decision-making rules and the terms laying down the distribution of competencies as contained in the Treaty of Nice remain valid. Yet within the Council system, the arrangements for weighted votes continue to have various negative effects in an EU of 25: They restrict the Council's capacity for external and internal action, as well as the efficiency of its work. They damage the atmosphere of negotiations in Council meetings and preparatory committees. As for the European Commission, its size, its heterogeneity, and the Commissioners' contradictory positioning have had a negative impact on the EU's external image, as well as upon its power to formulate convincing policies.

Even if the referenda in France and the Netherlands be accorded particular meaning, it is nevertheless the case that—in formal legal terms, but above all on the grounds of democratic respect for those peoples and states that have already ratified the ECT—there is no difference between a “no” vote in these two founding member states and a possible negative vote result in other countries. For this reason, the protagonists of the European Constitutional Treaty (ECT) ought to push for the referenda to be soberly judged, and for the causes for those particular results to be examined. The available options should be carefully and unemotionally weighed up and, after a period of reflection, discussed.

The following question stands at the heart of all this: Should the EU collectively “put itself in detention” in order to improve or complement the Treaty? Or will it plump for “repeating the year,” attempting on the basis of the Treaty of Nice to pursue individual reforms from the ECT in a sub-constitutional manner? Or is an “expulsion” thinkable, whereby those states unwilling to ratify the ECT formally separate themselves from an EU regulated by the ECT?

*The detention option:* This self-decreed delay is risky and the outcome remains open. The success of such a strategy depends largely upon the readiness of Europe's heads of state and government to stick with

the political and institutional reforms aimed at in the ECT. In comparison to the current treaties, these reforms are better suited to the tasks of improving the EU's capacity to act and driving forward its democratisation.

*The option of repeating a year:* A decision in favour of the status quo could entail the EU's relegation to the international league of state systems that are not able—or prepared—to reform themselves. This option can only bring success if the European actors resolutely push for the implementation of the reforms in the ECT which, after all, were agreed to among parliaments, government representatives and a large part of civil society. Guiding this activity should be the recognition that the ECT forms a package: Although some elements of the Treaty could be realised on the basis of existing EU law, it would nevertheless be important to retain that the attendant changes to the institutional framework, the balance of power between the states, and the distribution of competencies of the Union were accepted by all actors that took part in the Convention and Intergovernmental Conference.

*The detention option:* The withdrawal or exclusion of all those states which are not ready to take up the ECT certainly appears politically inopportune at the present time. All the same, this option should not be ruled out at this stage of the debate. Even if this option would spell a rather painful process for all parties involved, it would be foolhardy to disregard it. Only towards the end of the ratification process will it become clear, whether and to what degree new chances have been created for the harmonious co-existence of various models of integration.

The EU's heads of state and government and the European Commission—as well as a multitude of observers—have recommended that a broad public debate about the future of the Union should be held over the course of 2006. Although this recommendation is a good one, alone it appears ill-equipped as a response to the “ratification accidents” in France and the Netherlands: This debate has been running for years, and since at least the argument over the Maastricht Treaty—and more specifically the argument concerning the pros and cons of a currency union—it has been held publicly and controversially. The debate has, above all, reached those who are keen to tackle the complex questions of integration—as a rule only the few who are directly affected by these issues. In the future too, those citizens participating in the debates will largely be made up of representatives of

aggregate interests; this despite well-meaning attempts to expand the scope of the debate on Europe. “Active citizens” are quite right to expect that all of their interests will be represented at all times and in equal measure by these groups. It should be of more interest to politically engaged citizens to see that politicians as well as NGOs struggle for the relative weight of interests and values by advocating the realisation of a certain policy aim that does not change over time.

The impulse for the debate on the future of Europe should thus seek to connect the long-running discourse on the progress of the integration project with concrete goals which are in accordance with those reforms set out in the Constitutional Treaty. Considering the wealth of projects for deepening, enlargement, and association, these aims should consist of implementing those elements of the Constitutional Treaty that modernise the EU's social, justice and home affairs policies, its foreign and security policies, as well as its institutional and procedures policies. After all, nothing is more important at the European level than making an EU of 25—soon to be 27—internally more able to operate and more democratic, and outwardly more capable of acting.

# Introduction

On 17 June 2004 the Intergovernmental Conference (IGC) adopted the Treaty on a Constitution for Europe (ECT).<sup>1</sup> After its language had been examined by legal experts and it had been translated into all the official languages of the EU-25, the Treaty was signed on 29 October 2004 in Rome. Observers reckoned that the ratification procedures in the member states would take up to two years. In the Constitutional Treaty, 1 November 2006 is named as the date upon which it should enter into force, so long as all the certificates of ratification have been delivered. Should there be problems in the ratification process, a declaration adopted by the Intergovernmental Conference explains that the following process is foreseen: If after two years four-fifths of the member states have ratified the Treaty but there are problems in one or more member states, the European Council will consider the problem of ratification. Following the two negative referendum results in the Netherlands and France, the ratification processes in Britain, Belgium, Ireland, Denmark, Finland, Sweden, Estonia, Portugal, Poland, and the Czech Republic were broken off. In mid-June 2005, the European Council decided that it would only deliberate on the further progress of the ratification process during the first half of 2006.

Against this background, the date set out in the ECT cannot be kept to. How intensive the discussion concerning the Constitutional Treaty is, and what conclusion it will reach, are currently open questions. The Austrian European Presidency set out a broad framework for the ratification debate, namely that Belgium, Estonia, and Finland might possibly lift the moratorium on the ECT and ratify the Treaty. The possible momentum arising from this target is by no means negligible: If just one of the countries cited above were to ratify the Treaty, this might give decisive impetus to the ratification roadmap in the other states. The condition for this, however, is that the Austrian, Finnish, and German Presidencies, along with the European Parliament and Commission, agree on how to react to

this kind of “second wind,” and increase the pressure—carefully, but firmly—on France and the Netherlands.

In short: The discussion concerning the ratification of the ECT, which was thrashed out first in the Convention and then in the IGC, is in full flow. Since at least 20 April 2004, when Tony Blair announced that he would break off the British referendum process,<sup>2</sup> the debate on the future of the Treaty, and, beyond that, on the very condition of the member states themselves, has gained momentum. The negative referendum results in the founding states have not put an end to the discussion, but rather lent it new facets. Within this frame, new ideas are being circulated about the future of Europe. These are age-old, but have not previously been expressed with such clarity. Demands for a withdrawal on the part of all those states that have not ratified the ECT, press the case for further integration in a selection of areas dealt with by the Union, both within and beyond the current EU treaties. There is however, no comprehensive strategy anticipating the scenario in which ratification of the ECT fails in one or several states.

The debate has made two things clear: The first is that the discursive process of “constitutionalisation” in the European Union did not end either with the IGC or with the two negative referendum results. The second is that it was, above all, the announcement that referendums would be held in almost half of the EU member states which has fuelled fears since the beginning of 2004 about the possible failure of the ECT. The fear of the peoples’ blocking power has overshadowed consideration of the decisive authority of the parliaments, which would “normally” ratify alone. The latter are more predictable, because the majority of governments are supported by a parliamentary majority. Should parliament signal its unwillingness to ratify an international treaty, governments, majorities, and opposition parties would begin negotiations in order to attain the necessary parliamentary majority through back room negotiations. This creates a time

<sup>1</sup> See: Conference of the Representatives of the Member State Governments, *Treaty on a Constitution for Europe*, Brussels, August 6, 2004 (CIG 87/04, Rev. 1).

<sup>2</sup> See the speech by the British Prime Minister in the House of Commons, April 20, 2004, <http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040420/debtext/40420-06.htm>.



frame which can be used by all actors on the national as well as international (or in this case EU) level to put together a negotiating package that will facilitate parliamentary ratification and which can be fed into the parliamentary process. This option is rather restricted when it comes to referendums: A whole people cannot be won over by arguments between capitals and Brussels, nor can it be drawn into this kind of behind-the-scenes negotiations.

In comparison with the ratification situation of the Maastricht Treaty, there was a higher risk in an EU of 25 that one or more states would not be able to ratify the ECT. This in turn made a crisis for the EU more likely. The possible ratification crisis was fuelled by the relatively high number of states that ratified the ECT by referendum.

## Referendums: Perspectives and Consequences

Referendums poll acute moods. Only certain elements can be communicated to the public, namely those parts of a legal text or—in the case of the ECT—of a treaty from which its direct use becomes clear. The ECT contains such elements; the Charter of Fundamental Rights that was incorporated into the Treaty is one example, another is the extension of the use of qualified majority in the field of Justice and Home Affairs. In these areas, it is relatively easy to make one's mind up whether one agrees with the transfer of sovereignty or not. What about the reform of the budgetary process though? What about the frankly rather complicated hierarchy of norms in the EU's finance system? And what about that opaque conglomerate to be made up of the EU Council Presidency, the Commission President, the Foreign Minister, and the Eurozone President? Those directly taking decisions and enjoying these reforms can scarcely communicate their advantages to the people of Europe. It is a quite different situation for their opponents: The impression of the budgetary procedure alone is enough to provoke a negative disposition towards "Brussels"; a simple enumeration of those people entrusted with leadership tasks in the EU system can relatively easily be turned into evidence of its indecisiveness, opacity, complexity, and distance from citizens.

The French referendum of 29 May 2005 on the ECT ended with a majority "no" vote. With a voter turnout of almost 70 per cent, 54.7 per cent of voters turned

the Treaty down.<sup>3</sup> In just 13 of the 95 *Départements* on the French mainland were the Treaty's advocates able to assert themselves.<sup>4</sup> The turnout was very much at the same level as it had been for the Maastricht Treaty (1992). Three days after the French referendum, the Dutch voted on the ECT.<sup>5</sup> The result was even more decisive than in France: With a turnout of 63.3 per cent, 61.5 per cent of the voters were against the ECT,<sup>6</sup> and none of the Dutch provinces produced a majority "yes" vote.

The reasons for the referendum results in France and the Netherlands can be put down to a variety of factors that are not easily summed up. Among them are the rejection of the Eastern enlargement, and of the possibility of accession on the part of Turkey or the West Balkans, the fear that the "Rhinish" or "continental" social and economic model might collapse in the face of the globalisation of the goods, services, and labour markets, as well as the worries concerning the dominance of the Union's largest states.

The rejection of the Constitutional Treaty also points to a broader political *malaise*, which has its origins neither in Brussels nor in the Constitutional Treaty itself: the lack of communication with citizens on the part of governments concerning issues of European policy. The "no" to the Treaty in France and the Netherlands is not the cause, but rather the symptom of the problems that citizens have with their governments' European policy: As Joachim Schild has written, the ECT served as a kind of "projection screen for citizens' fears about the future in ageing societies, which feel overwhelmed by the rate and direction of economic, social, political, and cultural change. For many citizens, the Union embodies permanent political transformation, uncertain external borders, a sharpening of economic competition, and an extension of the negative internal effects of globalisation, a worsening social situation, and the loss of security

3 Data of the Ministère de l'intérieur et de l'aménagement du territoire, Résultats du référendum du 29 mai 2005, <http://www.interieur.gouv.fr/avotreservice/elections/rf2005/>.

4 Ibid.

5 See: Kai-Olaf Lang/Joanna Majkowska, *Die Niederlande – Europas neue Neinsager? Europolitische Neupositionierung eines Musterlands der EU*, Berlin: Stiftung Wissenschaft und Politik, Juni 2005 (SWP-Aktuell 26/05).

6 See: Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, *Vaststelling Uitslag raadplegend referendum Europese Grondwet*, [http://www.kiesraad.nl/items\\_bovenbalk/persberichten/vaststelling\\_uitslag](http://www.kiesraad.nl/items_bovenbalk/persberichten/vaststelling_uitslag).

arising from the welfare state [this author's translation]."<sup>7</sup>

## A Crisis of Confidence or of Communication?

The crisis surrounding the ratification of the ECT is no novelty in the history of EU integration. The long, drawn-out ratification process for the Maastricht Treaty—which was only completed in October 1993—had already shown that citizens, national parties, the social partners, interest groups, and NGOs were following the process of European integration far more critically than before (certainly in comparison to the way they viewed the founding EEC and Euratom Treaties, or the adoption of the Single European Act (SEA). Already during the negotiations on the Maastricht Treaty, the signs that the citizens of the European Union were retracting their previous “permissive consent” multiplied.<sup>8</sup> Even in the period from March 1991 to November 1992, the “diffuse support” for European integration fell by 14 percentage points.<sup>9</sup> This trend has not since been reversed. A generally positive, though not terribly well-informed,<sup>10</sup> approbation of European integration—a “permissive consensus” as Lindberg and Scheingold have called it<sup>11</sup>—cannot be assumed after Maastricht.

Until the negative referendum results in Denmark, and the near failure of the referendum on the Maas-

tricht Treaty in France, the actors involved in integration policy entertained the assumption that the process of European integration was steered above all by elites, and occurred in relative isolation from popular opinion.<sup>12</sup> For more than forty years, the positions of the population had at most a narrow influence on the progress of European integration. Karlheinz Reif noted in this context that the project of European integration received an overall positive reception thanks to the “majority of the relevant political, administrative, economic, military, and cultural elites. So long as there were no noteworthy contradictions on the part of the elites, so long as no intensive controversies became apparent, a large majority of the population—and one which increased year on year—took up the conviction of the desirability and utility of European integration [this author's translation].”<sup>13</sup>

An assumption can be drawn from this thesis on the conditions necessary for a “permissive consensus” towards European integration on the part of a broad selection of social strata: trends in the level of acceptance or rejection towards broader plans for further integration are induced above all by political elites; active citizens take these opinions up in large part without reflecting on them properly. Another important aspect should be added to these considerations: The intensive cooperation of NGOs critical of the EU and the relatively strong presence of Eurosceptic parties within (EP) and outwith the EU system have led to the fragmentation of the “club” of—what Reif identified as—elites. European policy remains a project steered by elites; however the interests are now rather more diffuse than they were during the first forty years of European integration.

Seen in this light, the rejection of the ECT is not primarily the expression of an independent and massive loss of trust on the part of the citizens of the EU; it is above all the result of numerous negative impressions of the Union that have been fed back by political elites into their respective countries.

For this reason, referendums on an international treaty are extremely risky undertakings. If political

7 Joachim Schild, “Ein Sieg der Angst – das gescheiterte französische Verfassungsreferendum,” in: *Integration*, No. 3, 2005, p. 187; also: Daniela Schwarzer, *Lehren aus den gescheiterten Verfassungsreferenden. Die Europäische Union muß politisiert werden*, Berlin: Stiftung Wissenschaft und Politik, Juni 2005 (SWP-Aktuell 23/05).

8 See: Karlheinz Reif, “Ein Ende des ‘permissive consensus’? Zum Wandel europapolitischer Einstellungen in der öffentlichen Meinung der EG-Mitgliedstaaten,” in: Rudolf Hrbek, ed., *Der Vertrag von Maastricht in der wissenschaftlichen Kontroverse*, Baden-Baden 1993, p. 24.

9 Ibid., p. 4.

10 See: Jürgen Gerhards, “Westeuropäische Integration und die Schwierigkeiten der Entstehung einer europäischen Öffentlichkeit,” in: *Zeitschrift für Soziologie*, Vol. 22, No. 2, April 1993, p. 96; also: Alexander von Brünneck, “Die öffentliche Meinung in der EG als Verfassungsproblem,” in: *Europarecht*, Vol. 24, No. 3, 1989, p. 255; and Karlheinz Reif, “Zustimmungstrends in EG-Europa” (unpublished manuscript for Gesprächskreis Sozialwissenschaft of the Friedrich Ebert Foundation), Bonn, November 20, 1992.

11 See: Leon N. Lindberg/Stuart Scheingold, *Europe's Would-Be Polity: Patterns of Change in the European Community*, Englewood Cliffs, N.J., 1970.

12 See: Ernst B. Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950–1957*, Stanford 1958, p. 17; on the same subject: Stefan Immerfall/Andreas Sobisch, “Europäische Integration und europäische Identität. Die Europäische Union im Bewußtsein ihrer Bürger,” in: *Aus Politik und Zeitgeschichte*, No. B10, February 28, 1997, p. 26.

13 Reif, “Ein Ende des ‘permissive consensus’?” [as note 8], p. 25.

elites from government and parliament do not link such referendums with their own political fate, they can turn the treaty into an innocent victim of their own national foreign and European policies. Citizens are scarcely aware of this; they vote first and foremost on issues of national politics and the communication of general political aims (as well as the failure to communicate these aims properly). The decision for or against a treaty is taken in the context of an artificial confrontation between the “national” and “international” (the “others” or “Brussels”) which is broadly without consequences for political elites.

## Options after the Failure

The danger of the constitutional project's complete collapse has been around since France's referendum ended in a binding negative result.<sup>14</sup> Should the Treaty actually fail, this would have direct effects on day-to-day politics and would lead to a crippling "crisis" for the EU, which would scarcely be blunted by recourse to the Nice Treaty. On the basis of the current situation, a "no" vote in Britain is more likely than a positive result. In other countries (for example, the Czech Republic and Poland) the situation is similar, although a longer debate about the pros and cons of the Treaty might lead to the opinion that the costs of "no Constitution" would be higher in the medium term than the losses to the state's autonomy that the Constitutional Treaty would bring.

As regards the relatively high number of ratification procedures and referendums that are still open, the question of the consequences of a failure to ratify the Treaty is very real, and should be subject to systematic consideration. Three basic options are available: "detention"; "repeating the year" (or "staying put"); "expulsion."

- ▶ The detention option includes all those attempts to resuscitate the process to ensure that the Treaty enters into force. Currently, this option is the basis for the debate on the future of Europe. However, it is hardly to be expected that France will hold the "second referendum" on the Treaty that would be necessary under its constitution without changes being made to the ECT. This possibility is therefore only open if the Treaty is reworked (as in the process following the Danish "no" to Maastricht, or the Irish "no" to the Nice Treaty) so that it is in effect tightened up, or complemented by protocols and accompanying declarations.
- ▶ The option of repeating the year opens "softer" possibilities, in particular those that would put into force individual elements of the ECT within the framework of the Treaty of Nice. The starting point for this variant is the formal freezing of the rele-

vant primary law of the EU. Building on this, it is possible to imagine various ways to implement individual reforms that were agreed at the Convention and the following IGC. Amongst these, it is worth specifically mentioning the reforms possible within the framework of the autonomy afforded to the EU Organs over their rules of procedure, but also those reforms which could be decided upon via an interinstitutional agreement or through measures adopted by the Organs under secondary law.

- ▶ The metaphor of expulsion refers to those procedural variants through which the membership of some member states to the ECT is put in question. Two possibilities are thinkable: a withdrawal from an EU constituted by the ECT on the part of those states unwilling to ratify the Treaty, or the withdrawal from the EU of those states willing to ratify the Treaty. The latter option would then involve the establishment of a Union on the basis of the ECT.

In any discussion of these three options, the fact of the "real" or the "living"—European—"Constitution" should not be lost sight of. This is scarcely mentioned in political debate. The Maastricht Treaty already forms the starting point of an EU, in which not all states simultaneously participate in the full functional breadth of integration as normatively laid down in the treaties: The problems concerning the ratification of the Maastricht Treaty led in 1992–1993 to considerable perturbation in the constitutional architecture of the EU's political-institutional system. Since Maastricht—in the course of, or indeed in the light of, the concurrent ratification procedures—the number of exceptional rules or refusals to participate in certain policies (opt-outs) has consistently grown. Britain, Denmark, Ireland, and Sweden, like the ten new member states, are *de jure* full members of the EU; *de facto*, their membership status is characterised by the way in which they can activate exceptional rules set out in the treaties for certain policy areas. The ten new member states can invoke a long list of transitional rules, which absolve them from the requirement of keeping to all the obligations arising from EU law. Coupled with this are the suggestions for the differentiation and "flexibilisation" of the Union; these

<sup>14</sup> See also: Gian Luigi Tosato/Ettore Greco, "The EU Constitutional Treaty: How to Deal with the Ratification Bottleneck," in: *The International Spectator*, Vol. 39, No. 4, 2004, pp. 8–16.

have become more concrete in recent years. These kinds of consideration were always (fashionable) themes in the debate on European and integration policy. Yet, after the difficult ratification of the Maastricht Treaty, and with a view to the enlargements of 1995 (in which the EU grew from 12 to 15) and 2004 (from 15 to 25), this debate intensified. Numerous contributions from the academic and political spheres deal with one central option—namely the separation of, on the one hand, full EU membership and, on the other, the obligation to participate in all those functional areas of integration contained in the EU treaties. The various labels (“Kerneuropa!,”<sup>15</sup> “Europe à géométrie variable,”<sup>16</sup> “multi-speed integration,”<sup>17</sup> “Avantgarde,”<sup>18</sup> “groupe pionnier,”<sup>19</sup> “union renforcée,”<sup>20</sup> “Gravitationszentrum,”<sup>21</sup> “Enhanced Union”<sup>22</sup>) evidence the confusing diversity of strategies available. They document “the political interest in those kinds of plans, and at the same time the precariousness of forms and processes of differentia-

tion and flexibilisation [This author’s translation].”<sup>23</sup>

Different conceptions of the guiding strategy for European and integration policy are concealed behind the breadth of these variations and within the ambiguity of the terms employed. In the coming years, the decisive question will be whether politically and legally durable options for the solution of the ratification crisis can arise from this debate on a guiding strategy.<sup>24</sup>

## Detention to Save the Treaty

### Renegotiation

Until the beginning of 2006, only a few voices were heard calling for the renegotiation of the Constitutional Treaty. Most problematic about this kind of renegotiation would have been the necessity of unbundling the comprehensive package that was bargained for during the Convention and IGC. In such a case, it is unlikely that only those points criticised by the opponents of the ECT in France and the Nether-

15 See the discussion paper “Überlegungen zur europäischen Politik” by the CDU/CSU from September 1, 1994, <http://www.cducsu.de/upload/schaeublelamers94.pdf>; Christian Deubner, *Deutsche Europapolitik: Von Maastricht nach Kerneuropa?*, Baden-Baden 1995; Karl Lamers, “Kerneuropa – flexible Methode der europäischen Integration,” in: *Wirtschaftsdienst*, Vol. 74, No. 10, 1994, pp. 495–497.

16 See: Jean Pisany-Ferry, “L’Europe à géométrie variable: une analyse économique,” in: *Problèmes économiques*, No. 2454, January 10, 1996, and Alexander Stubb, “A Categorisation of Differentiated Integration,” in: *Journal of Common Market Studies*, Vol. 34, No. 2, 1996, pp. 283–295.

17 See: Eberhard Grabitz, ed., *Abgestufte Integration. Eine Alternative zum herkömmlichen Integrationskonzept?*, Kehl am Rhein/Straßburg 1984.

18 See: Claus Giering, “Vertiefung durch Differenzierung – Flexibilisierungskonzepte in der aktuellen Reformdebatte,” in: *Integration*, Vol. 20, No. 2, 1997, pp. 72–83, on p. 74.

19 See: Jacques Chirac, “Unser Europa,” (Speech before the German Bundestag, Berlin, June 27, 2000), <http://www.bundestag.de/parlament/geschichte/gastredner/chirac/chirac1.html>.

20 See: *Quelle constitution pour quelle Europe? Colloque organisé au Sénat*, June 28, 2000, with contributions from Dominique Latournerie, Alain Juppé and Jacques Toubon.

21 See: Joschka Fischer, “Vom Staatenbund zur Föderation – Gedanken über die Finalität der europäischen Integration,” (Speech at Humboldt University Berlin, May 12, 2000), <http://www.auswaertiges-amt.de/www/de/infoservice/download/pdf/reden/2000/r000512a.pdf>.

22 See: Erik Philippart/Monica Sie Dhian Ho, “Flexibility and the New Constitutional Treaty of the European Union,” in: Jacques Pelkmans/Monica Sie Dhian Ho/Bas Limonard, eds., *Nederland en de Europese grondwet*, Amsterdam 2003, pp. 109ff.

23 See: Wolfgang Wessels, “Verstärkte Zusammenarbeit: Eine neue Variante flexibler Integration,” in: Mathias Jopp/Andreas Maurer/Otto Schmuck, eds., *Die Europäische Union nach Amsterdam. Analysen und Stellungnahmen zum neuen EU-Vertrag*, Bonn 1998, p. 189.

24 On the discussions surrounding the options available in case of failure of the ECT see: Jo Shaw, “What Happens If the Constitutional Treaty Is Not Ratified?,” in: Ingolf Pernice/Jiri Zemanek, eds., *A Constitution for Europe: The IGC, the Ratification Process and Beyond*, Baden-Baden: Nomos, 2005; Bruno De Witte, *The Process of Ratification and the Crisis Options: A Legal Perspective*, paper presented at the Asser Institute Colloquium “The EU Constitution: The Best Way Forward?,” The Hague, October 13–16, 2004; Andreas Maurer, “Austritt, Ausschluss oder institutionelle Anpassung: Optionen nach dem Scheitern des EU-Verfassungsvertrages,” in: *Internationale Politik und Gesellschaft*, No. 1, 2005, pp. 165–184; Aurore Wanlin, *What Would Be the Implications of a ‘No’ Vote for the European Constitution?*, London: Centre for European Reform (CER), November 1, 2004, [http://www.cer.org.uk/articles/wanlin\\_integrate\\_1nov04\\_en.html](http://www.cer.org.uk/articles/wanlin_integrate_1nov04_en.html); David Král, *And What If They Do Not Buy It? Reflections on How to Win the Constitutional Referenda and Consequences of (Non) Ratification*, Prag: Europeum. Institute for European Policy, May 2004, [http://www.europeum.org/doc/arch\\_eur/Constitution\\_ratification\\_commentary.pdf](http://www.europeum.org/doc/arch_eur/Constitution_ratification_commentary.pdf); Jörg Monar, “Optionen für den Ernstfall: Auswege aus einer möglichen Ratifizierungskrise des Verfassungsvertrags,” in: *Integration*, Vol. 28, No. 1, 2005, pp. 17–32; Daniel Keohane, *Referendum Season in Europe: A Guide to the Referenda on the EU Constitutional Treaty*, London: Centre for European Reform, February 2005 (briefing note), pp. 4–5, [http://cer.org.uk/pdf/briefing\\_referenda\\_feb\\_2005.pdf](http://cer.org.uk/pdf/briefing_referenda_feb_2005.pdf).

lands would be readdressed. It is to be expected that other areas would be put in question by actors using the negotiations as an opportunity to place aspects on the agenda which they objected to anyway. The French Foreign Minister, for example, has already made it apparent that France would like to do away with the new system of dual majority in Council decision-making, as laid down in the ECT.

Alongside the ECT's opponents in France and the Netherlands, the traditionally Eurosceptic parties of Denmark, Poland, Britain, the Czech Republic,<sup>25</sup> and sections of the Austrian government, it was only the two MEPs—Andrew Duff (Liberals, GB) and Andreas Voggenhuber (Greens, Aust.)—who called for a reworking of the Treaty: Should the current period of reflection indicate that the Treaty has to be altered in order to renew consent and facilitate ratification, “negotiation should treat the 2004 Constitution as a good first draft.” If this kind of renegotiation occurred, the two MEPs suggested that a “mandate should be prepared for a new Convention to be held during 2008.”<sup>26</sup>

The Parliament's Committee of Constitutional Affairs turned this option down, though, with a convincing majority (22 to 2, with one abstention).<sup>27</sup> Both *rapporteurs* also failed to gain acceptance for their suggested formulation—namely that the ratification process had hit “insurmountable difficulties,” and that for this reason a new Convention should be assembled. The new ECT text would be put to a (non-binding) referendum of the citizens of the EU-25 in 2009. The majority of Christian Democrats (EPP-ED) and Socialists (PES) turned down this approach with the justification that the abandonment of a Treaty text that had already been ratified in 13 states would spur

on not only those forces in the EU opposed to the ECT but also those generally hostile to European integration. Previously, the Parliament's Committee on Foreign Affairs had turned down the idea of reworking the ECT (54 votes to 6, and one abstention). Voggenhuber and Duff only found success with their suggestion of forming common “Parliamentary Forums” with member states' national parliaments, and of elaborating basic documents along the lines of the American *Federalist Papers* of the eighteenth century. These so-called “European papers” would deal with the aims and limits of integration as well as with other central questions. With this kind of activity, the European Parliament remains true to the principle of leaving the Constitutional Treaty unmolested, whilst breathing new life into the debate about the basis of European integration.<sup>28</sup>

As for national governments, the option of renegotiating the ECT has only been seriously considered since the turn of the year 2005/06. The Austrian government's initial plans for its EU Presidency in the first half of 2006 included drawing conclusions from the national debates, which were arranged within the frame of the “period of reflection.” On this basis, the most that could occur would be the elaboration of a “roadmap” for the continued progress of the ratification process. The question of the Constitutional Treaty as such was not an issue towards which Vienna directed its ambitions. Yet even the first days of the Presidency made clear that the Austrian government's official line was rather unclear. Members of the government presented rather different judgments on the Treaty: The Austrian Chancellor and those members of the governing coalition belonging to the Austrian People's Party (ÖVP) advocate the principle of staying with the text; however, it is noticeable that the commitment to the resuscitation of the discussion about the Treaty is better articulated than the “yes” to the Treaty itself. By contrast, the influential ÖVP MEP Reinhard Rack declared the Treaty text dead. The Vice Chancellor and parliamentary leader of the Alliance for the Future of Austria (BZÖ) went against the official government line and called for a new attempt to reform the EU. The President, the Social Democrats

<sup>25</sup> See the individual country analyses in: Andreas Maurer, *Die Ratifikationsverfahren zum EU-Verfassungsvertrag. Wege aus der Krise*, Berlin: Stiftung Wissenschaft und Politik, 10th ed., September 2005 (SWP-Diskussionspapier), [http://www.swp-berlin.org/common/get\\_document.php?id=1135](http://www.swp-berlin.org/common/get_document.php?id=1135).

<sup>26</sup> See: European Parliament/ Committee for Constitutional Affairs, *Proposal for a Report on the Period of Reflection: The Structure, Subjects and Context for an Assessment of the Debate on the European Union*, co-rapporteurs: Andrew Duff and Johannes Voggenhuber, doc. no. 2005/2146(INI), October 13, 2005, p. 7; see also: Andrew Duff, “European Constitution: If at First You Don't Succeed,” in: *Financial Times*, September 15, 2005, and by the same author, “Renegotiating the Constitution,” in: *ELDR In-House Magazine*, August 31, 2005.

<sup>27</sup> See: Europäisches Parlament/Ausschuss für konstitutionelle Fragen: *Bericht über die Reflexionsphase: Struktur, Themen und Kontext für eine Bewertung der Debatte über die Europäische Union*, Ko-Berichterstatter: Andrew Duff und Johannes Voggenhuber, Doc.-No. A6-0414/2005 (final), December 16, 2005.

<sup>28</sup> The European Parliament adopted the Constitutional Committee's altered draft motion for a resolution on 19 January 2006 by 385 votes to 125, with 51 abstentions. See: European Parliament, *Sitzungsprotokoll der Plenarsitzung vom 19. Januar 2006, Anlage: Ergebnisse der Abstimmungen, Punkt 9*, Doc.-No. P6\_PV-PROV(2006)01-19 (preliminary edition PE 368.243).

(SPÖ), and Green MPs also expressed their approval for the idea of revising the Treaty text.

The French Interior Minister and Chairman of the governing Union for a Popular Movement (UMP), Nicolas Sarkozy, advocated changes to the ECT. In his new year's address of 12 January 2006 he advocated the negotiation of a shorter treaty text on the basis of the first part of the ECT. This would restrict itself to the institutional and constitutional modes of organisation of the EU-25.<sup>29</sup> Sarkozy named the following areas of reform: the formation of the Presidency in the Council of Ministers and the European Council; the expansion of the application of qualified majority voting and the co-decision procedure; the creation of a post of European Foreign Minister. Sarkozy left open the question of which procedure should be used to put the Charter of Fundamental Rights—contained in the second part of the ECT—into force, and how the reform of the third and fourth parts of the Treaty should be chosen. It is possible to imagine that—in parallel to the revisions made to the Treaty—the institutional and procedural reforms contained in the third and fourth parts of the Treaty would be merged. The necessary changes could be authorised with reference to the EC or EU Treaties.<sup>30</sup> One thing should be made clear though: This kind of procedure cannot include the material reforms to the Common Foreign and Security Policy (CFSP) or European Security and Defence Policy (ESDP) (the expansion of the Petersberg Tasks, for example) or the extension of competencies (e.g., those dealing with Space Policy) contained in the ECT. Sarkozy's proposal is clearly motivated by the ratification process that he is seeking: He has made clear that a treaty text thus altered would be subject to parliamentary approval alone.

The French Interior Minister's example indicates that the contradictory statements of the Austrian government can have direct effects on the national strategies of the other member states. If the ÖVP within the Austrian government should clearly express its support for the detention option, it would

no longer be possible to rule out the possibility that other governments would call for the renegotiation. The likelihood of this kind of scenario occurring is proportional to the amount of support—expressed by actors involved in European Policy—for the closing of the file on the ECT in its current form, for the option of “repeating the year,” and thus for the filleting of the ECT on the basis of the Nice Treaty (see below).

### A possible lifebuoy? Opting out and opting in

A more pragmatic option that has already proved successful in solving ratification problems is offered by the negotiation of specific opt-out protocols in favour of those states unwilling or unable to ratify. This procedure was employed during the ratification crises in Denmark (Maastricht Treaty) and Ireland (Nice Treaty). It proved its worth in those cases where a first-time ratification had failed because of competence changes (CFSP, justice and home affairs); these were then relativised in subsequent protocols. Yet the ECT was not rejected in the Netherlands or France because a majority specifically objected to competence changes or similar leaps in the progress of integration.

The European Council will examine the reasons for the French and Dutch “no” votes during the Austrian and Finnish Presidencies of the Council. The following will probably be identified as important motives: the fear of Turkish accession; worries about too great a divestiture of national sovereignty; retrospective disapproval of the Eastern enlargement (this pushes France, in particular, to the periphery of “Cape” Europe—in the Derridian sense<sup>31</sup>); and criticism of the political class. It will also become apparent that many citizens voted against the ECT, above all, because they were unconvinced by the political reforms and by those to the EU's competencies—at least insofar as they understood them. Compared with the Single European Act, and the treaties of Maastricht and Amsterdam, the difference is more than apparent: the treaties of 1987, 1993, and 1999 coupled institutional reforms with concrete political reforms; the results in both areas were the object of overarching negotiating packages and bartering. By contrast, the basic reform of single policy fields did not form part of the ECT. French criticism of the ECT focussed—in the words of

<sup>29</sup> Nicolas Sarkozy (Ministre d'Etat, Ministre de l'intérieur et de l'aménagement du territoire, Président de l'Union pour un Mouvement Populaire), *Vœux à la presse*, Paris, January 12, 2006, <http://www.u-m-p.org/site/GrandDiscoursAffiche.php?IdGrandDiscours=164>.

<sup>30</sup> On this subject see: Bettina Thalmaier, *Nach den gescheiterten Referenden: Die Zukunft des Verfassungsvertrages*, München: Centrum für angewandte Politikforschung, November 2005 (CAP-Analyse 2/2005), pp. 11–13.

<sup>31</sup> See: Jacques Derrida, *Das andere Kap – Die vertagte Demokratie. Zwei Essays zu Europa*, Frankfurt am Main: Suhrkamp, 1992.

Joachim Würmeling—“above all on its perceived neo-liberal orientation. After the Europeanisation and globalisation of the economy in the form of imports, low-cost immigrants, and the relocation of firms to the East had created great insecurity, the prospect of more ‘Market’ and greater competition created a real panic [this author’s translation].”<sup>32</sup> The ECT was interpreted as a threat to the French social model, although the Convention laid down a social policy basis (e.g., Article I-3.3 ECT) which might “seek its equivalent in the member states [this author’s translation].”<sup>33</sup> In the Netherlands the ECT was rejected, amongst other things, because the referendum was seen as a chance to punish the government for its immigration policy and change of currency. Moreover, the Dutch “no” was also an expression of the deep dissatisfaction on the part of the population arising from the EU’s larger member states’ treatment of the smaller ones. As regards the ECT itself, the Dutch vote was directed at the institutional reforms, above all at those made to the system of the Council of the EU and the European Council.

The formulation of opt-out protocols is not a practicable option in either the French or the Dutch case. For one thing, the desire for a partial withdrawal from the EU’s Social or Economic Policy is not amongst the French motives for rejection; for another thing, Dutch misgivings cannot be allayed by introducing special voting rules for the smaller states in various policy fields.

Working on the assumption that the criticisms of the ECT, made by the French Left in particular, won over a large swathe of the population and were also a crucial factor in the majority rejection of the Constitutional Treaty, a second option for the realisation of the ECT becomes thinkable: renegotiation with the aim of a specific opt-in, along the lines of Permanent Structured Cooperation (PSC).<sup>34</sup>

Many citizens expect a deepening of the project of EU integration in the areas of environment, and above all, social policy. The Convention hearings, with repre-

sentatives of civil society, indicated this early on.<sup>35</sup> The Convention, and its two working groups on economic governance and social Europe, deliberated intensively about these suggestions. During the negotiations, though, British representatives and those from the Central and Eastern European states succeeded in watering down the working groups’ suggestions. As a result, important social policy principles concerning the relationship between social policy and policies to liberalise the market, as well as those concerning the fundamental rights of the citizens, are anchored in the ECT. Yet a clear-cut “continental” recognition of the concrete goals of the social market economy and of the opportunities and boundaries of policies to liberalise the internal market was not included in the text—despite the hopes of many (not just French) citizens.

### **The visualisation of the social policy acquis through a protocol, charter, or declaration**

All the same, there was a possibility, above all, to counter the French misgivings: It would be possible to begin a “check” of the ECT, one that would be bounded both in terms of the contents involved and the time taken, but which would clarify the European Union’s social and economic dimension. At the end of this process, a protocol, charter, or declaration on the conception of a social union could be elaborated. This conception has been demanded by all sides of the political spectrum for some time, and was actually promised in the context of the debate on the Economic and Monetary Union (EMU). The text would clearly signal the future direction of the EU’s economic, employment, labour, and social policy.

However, in order to avoid the risk of this new text endangering the ratification of the ECT in Britain and a few Eastern European states, one important element must be respected: The contents should be as close as possible to those contained in the ECT, and even elements cautiously leading to a deepening of integration which go beyond the level contained in the ECT should for now be formulated as an option for

<sup>32</sup> See: Joachim Würmeling, “Die Tragische: Zum weiteren Schicksal der EU-Verfassung,” in: Andreas Maurer/Dietmar Nickel, eds., *Das Europäische Parlament. Supranationalität, Repräsentation und Legitimation*, Baden-Baden: Nomos 2005, p. 268.

<sup>33</sup> Ibid.; vgl. auch Armin Schäfer, “Verfassung und Wohlfahrtsstaat: Sozialpolitische Dilemmas der europäischen Integration,” in: *Internationale Politik und Gesellschaft*, No. 4, 2005, pp. 120–141.

<sup>34</sup> On the PSC see Art. I-41.6 and Art. III-312 ECT.

<sup>35</sup> See: Andreas Maurer/Daniela Kietz/Amandine Crespy, “Lückenbüßer oder Legitimationsverstärker? Der Europäische Verfassungskonvent und die ‘Zivilgesellschaft’,” in: Michèle Knodt/Barbara Finke, eds., *Europäische Zivilgesellschaft. Konzepte, Akteure, Strategien*, Wiesbaden: VS Verlag für Sozialwissenschaften, 2005.



only a small number of member states; this option could later be made available to other states.

The advantage of this way of proceeding would be that the ECT as submitted for ratification would remain intact, and no state would be forced to participate in the PSC within the frame of the social protocol or charter. On the other hand, those states that wanted to participate in the social protocol/charter would be obliged to ensure that the necessary critical mass of states was prepared to join in. It should be made clear that a PSC in social policy would only be sensible for those states interested in participating if the number of “free-riders” was small.

The negotiations on a social policy PSC could be carried out at short notice even before the end of the period of reflection, although the mandate would have to be consciously oriented towards those of the two working groups. Two options arise from this:

- ▶ *Option I, “Visualisation,”* consists of the concise compilation of all those social norms of a legal and political nature contained in the ECT; the substance of the ECT would not change (see the SWP’s proposal for such a text in appendix, p. 31).
- ▶ *Option II, “Deepening,”* aims for a substantial extension of the relevant competencies in the scope of application of the signatory states. The ECT should then be submitted for ratification along with these extensions; not only France, but also those states that have already ratified the ECT, would then have to carry out a second-wave ratification (see the SWP’s proposed text in the appendix, p. 35).

In the committee deliberations on the abovementioned Duff/Voggenhuber report, the two Socialist MEPs Carlos Carnero González (Spain) and Richard Corbett (Britain) represented the opinion that it would only be possible to stick with the current text if it were “accompanied by significant measures [...] involving, in all likelihood, declarations interpreting the Constitutional Treaty and possibly protocols appended to it.”<sup>36</sup> Even German Chancellor Angela Merkel put forward at the meeting of the European Council in December 2005 the proposition of saving the Constitutional Treaty with a declaration concerning Europe’s “social dimension.”<sup>37</sup> This declaration

would be attached to the ECT. It would not be legally binding; however it would in fact oblige the EU institutions to pay greater attention to the social effects of the legislation on the internal market.

Behind the proposal for this kind of additional declaration lies the aim of facilitating a “yes” on the Constitutional Treaty from the citizens of France and the Netherlands. This aim should be continued informally during the current Austrian and subsequent Finnish presidencies in tandem with France and the Netherlands. It is to be expected that Merkel’s proposal will be given substance and handed over to the EU’s decision-making process during the German Presidency at the latest.

A considerable precondition for the success of this plan is, however, that the German government has already ratified the ECT, along with other states. This will act upon the governments of France and the Netherlands, pressuring them to start their ratification processes anew.

In France, this process is a duty laid down by the national Constitution. The result of the referendum cannot be annulled by an act of Parliament unless a text that can be differentiated from the ECT in qualitative terms is put to the vote.

By contrast, the Dutch Parliament can decide to ratify the ECT under different conditions—for example against the background of a consultative referendum, or of the current debate on Europe or indeed of the heads of state and government’s willingness to learn from their mistakes as signalled by the social protocol. Before this could happen, several sizable hurdles would have to be cleared, because the Dutch Foreign Minister Bernard Bot declared the Constitutional Treaty as dead in January 2006, and expressed his opposition to quick fixes or “cherry picking.”<sup>38</sup> From the Dutch point of view, Bot stressed that it was not “even open to debate that this Treaty should be re-submitted for ratification [*this author’s translation*].”<sup>39</sup> The Dutch Minister for Europe Atzo Nicolaï was even clearer: The Dutch government would “not submit the European Constitutional Treaty for a second time to the people or Parliament, even if the text were

<sup>36</sup> See the proposed amendment no. 177 by Carlos Carnero González and Richard Corbett to the Duff/Voggenhuber report 2005/2146(INI) 21a, doc. no. PE 364.885v01-00 56/69 AM\586904DE.doc.

<sup>37</sup> See: “Merkel will mit Sozial-Erklärung EU-Verfassung retten,” in: *Handelsblatt*, December 18, 2005; “Text der EU-Verfassung soll unverändert gelten,” in: *Berliner Morgenpost*,

December 20, 2005; “Merkel schlägt ein Sozialkapitel vor,” in: *Der Standard*, December 20, 2005.

<sup>38</sup> See: “EU-Verfassung ist für uns tot,” in: *Kurier*, January 12, 2006, <http://kurier.at/ausland/1241081.php>.

<sup>39</sup> See: “EU-Verfassung für Außenminister Bot tot,” Austria Presse Agentur, January 12, 2006.

changed [*this author's translation*].”<sup>40</sup> With such statements, Bot and Nicolaï have positioned themselves in a well-calculated way in the current period of reflection. It is an open question whether this “no” will still be valid if—after Belgium and Estonia<sup>41</sup>—further states lift the moratoria on ratification, or if the Netherlands should elect a different government in 2007. A practicable, though risky, procedure would be for all parties taking part in the Dutch parliamentary elections to the Tweede Kammer (second chamber) in 2007 to clarify their views on the Treaty. The voters would then be obliged to couple the fate of the Treaty with their vote for parties and persons who will in subsequent years preside over the state apparatus. For their part, the parties would be called upon to present a clear and coherent programme in which European policy would not be a simple instrument, but rather a constituent element of Dutch foreign and European policy.

### Repeating the Year: Options for the Reform of the Basis of the Existing Treaties

In the direct run-up to the summit that adopted the Constitutional Treaty, the German and French governments made it clear that they were already drawing up plans in case of the failure of the Treaty in national referendums. A proposal made by the French Foreign Minister and former Commissioner for Institutional Reform, Michel Barnier, was quoted as saying: “We must add guidelines to the Constitutional Treaty that will allow us scope for further development in certain areas [after the possible failure, A.M.].”<sup>42</sup> According to Barnier the procedures necessary for this were arranged between the French and German governments. Both governments left their partners and the public in the dark about how these procedures would actually look. Instead, they continued to stress that one shouldn’t work from an assumption of the ECT’s failure, and that in the case of a rejection of the

Treaty, the first consideration should be of renegotiations with the affected member states. The possible entry into force of individual chapters—like, for example, that on security and defence policy—would in this context “only” be used as a “threat” with a view to the conclusion of the IGC.

The French President, Jacques Chirac, demanded the reform of the EU on the “basis of the existing Treaties [*t.a.t.*]” at the beginning of January 2006. By the time of their summit in June 2006, the EU heads of state and government should already have “taken the necessary decisions in order to improve the functioning of the institutions on the basis of the existing Treaties [*t.a.t.*]” In more concrete terms, Chirac was thinking of “three areas: internal security and justice, foreign and defence policy, and the greater involvement of national parliaments in European decision-making processes [*t.a.t.*].”<sup>43</sup> Whether he intended thereby to abandon the ECT project, Chirac did not specify. Observers of French European policy interpreted his demand in a rather different manner: The necessary reforms would be “à traité constant,” in other words, possible on the basis of the Nice Treaty.<sup>44</sup> The Dutch Foreign Minister Bot also took the opportunity to criticise the Austrian proposal of resuscitating the ratification procedure, making it clear that it seemed more advisable to his government to concentrate “first on practical steps on the basis of the Nice Treaty [*t.a.t.*].”<sup>45</sup> What instruments are available for carrying

<sup>43</sup> See: “Jacques Chirac plaide contre un ‘statu quo institutionnel’ pour l’UE,” in: *Le Monde*, January 10, 2006; “Jacques Chirac relance le débat sur la Constitution européenne,” in: *Libération*, January 10, 2006; Stefan Brändle, “‘Ursula’ und ‘Philippe’ Hand in Hand. Außenministerin Plassnik zu Gast in Paris,” in: *Der Standard*, January 11, 2006; “Chirac will ‘Pionier Europas’ sein,” in: *Frankfurter Allgemeine Zeitung*, January 11, 2006; Holger Alich/Andreas Rinke, “Chirac will ein Kerneuropa. EU-Verfassung entzweit Paris und Berlin,” in: *Handelsblatt*, January 11, 2006.

<sup>44</sup> See: Arnaud Leparmentier, “Jacques Chirac veut convaincre les Allemands d’appliquer certaines dispositions de la Constitution,” in: *Le Monde*, January 9, 2006.

<sup>45</sup> See: “EU-Verfassung für Außenminister Bot tot,” in: Austria Presse Agentur, Meldung vom January 12, 2006; “‘Wien sollte das Nein respektieren’, Interview mit dem niederländischen Außenminister Bot,” in: *Der Standard*, January 19, 2006; “Verfassungsvertrag: So gut wie tot’, Interview mit dem niederländischen Außenminister Bot,” in: *Die Presse*, January 19, 2006. The Polish Prime Minister and the Czech President as well as leading members of the governing Polish Party “Law and Justice” (PiS) declared the ECT dead, and argued along the same lines as Bot. See: “Wiederbelebung der Verfassung ein Fehler. Auch Warschau und Prag dagegen,” in: *Der Standard*, January 18, 2006; “Für

<sup>40</sup> See: Atzo Nicolaï, “Auf dem Prüfstand der Wirklichkeit: Wie Hollands Regierung die Zukunft der EU sieht,” in: *Der Tagesspiegel*, January 16, 2006.

<sup>41</sup> Belgium concluded the ECT ratification with a positive vote of the Flemish Parliament on February 8, 2006. The Estonian Parliament held its first ratification reading on the same day.

<sup>42</sup> See: Rainer Koch/Daniela Schwarzer, “Paris skizziert Plan B für EU-Verfassung,” in: *Financial Times Deutschland*, May 10, 2004.

out individual reforms from the ECT even after its death certificate has been issued?

### Using the Organs' rights to organise themselves

Analyses of the Constitutional Treaty should not lose sight of one important aspect: Some of the reforms agreed upon at the Convention on the organisation of the Organs simply formalise in primary law practices that have existed within the interinstitutional framework for some time. The rules of procedure of the Commission, Parliament, and Council offer a degree of room for manoeuvre that should not be underestimated.

The reform of the Council system agreed upon in the ECT has been intensively worked on since 1998/99. The 1999 Trumpf/Piris report<sup>46</sup> strongly informed the Conclusions of the European Council in Helsinki (10/11 December 1999).<sup>47</sup> The separation of the General Affairs and External Relations (GAERC) Council's agenda between "horizontal questions" (concerning those issues dealt with by other Council formations) and "foreign affairs" which was called for at that stage was already in practice during the Belgian Presidency of 2001; it is now contained in Article 2 of the Council's rules of procedure.<sup>48</sup> Further, the European Councils of Seville (21/22 June) and Copenhagen (12 December 2002) laid down Council reforms that would be implemented without treaty change: In order to make the Organs more effective, it was decided in Seville to shorten and better organise the rules of procedure, as well as to aim for better functional preparation through the GAERC, and to tighten up the progress of the summit. In order to separate the GAERC's executive and legislative tasks, the EU's Foreign Ministers have been coming together since Seville at specially held meetings

(with separate agendas and sometimes even at different times).<sup>49</sup> The European Council and GAERC's role of lending impetus to the political process was strengthened, with a view to longer-term strategic planning, by reinforcing the European Council's role. The heads of state and government also got to grips with the coordination of the Council Presidencies as well as the pre-planning of Council agendas.<sup>50</sup> The European Council has adopted triannual strategic programmes since December 2003, on the basis of which the two relevant six-month Presidencies draw up a programme for the Council's activities that year.

Even after the possible failure of the ECT, the following reforms could be undertaken:

- ▶ Within the Council system, the reorganisation and re-listing of the internal tasks of the Presidency, and of the cooperation between different functional Council formations and the GAERC, could be implemented in line with the changes contained in the ECT.
- ▶ The European Council could choose a Chair or President. All the same, the extensions to the European Council's and President's competencies, as set out in the ECT, could only be implemented in a limited fashion via Interinstitutional Agreements with the Commission and European Parliament.
- ▶ It would also be possible to make the Council meetings public via a change to the Council's rules of procedure.
- ▶ Equally, the arrangement of functional Council formations and a General Council (Article I-24(1) ECT) as foreseen in the ECT could be adopted via a change to the rules of procedure.
- ▶ Within the Commission too, reforms to its internal functioning could be undertaken without Treaty change; so too could changes to the powers of the Commission President and Vice Presidents *vis-à-vis* the Commission's college. In particular, an increased role for the President of the Commission (Article I-27 ECT) could be achieved by an extension of Article I-3 of the Commission's rules of procedure.

Polens Regierungspartei ist EU-Verfassung tot," in: *Der Standard*, January 16, 2006.

<sup>46</sup> Jürgen Trumpf/Jean-Claude Piris, *Die Arbeitsweise des Rates in einer erweiterten Union. Bericht der vom Generalsekretär des Rates eingesetzten Arbeitsgruppe*, Brussels, March 10, 1999 (Doc 2139/99).

<sup>47</sup> See: European Council (Helsinki), *Schlussfolgerungen des Vorsitzes, Anlage III der Schlussfolgerungen* ("Ein effizienter Rat für eine erweiterte Union – Reformleitlinien und Empfehlungen für Maßnahmen"), SN 300/99, December 10/11, 1999.

<sup>48</sup> See: Council of the European Union, *Beschluss des Rates vom 19. Juli 2002 zur Festlegung seiner Geschäftsordnung*, Brussels, July 19, 2002 (Dok. 10962/02/JUR 278), <http://register.consilium.eu.int/pdf/de/02/st10/10962d2.pdf>.

<sup>49</sup> The part of the GAERC responsible for general affairs deals above all with the preparation for and after effects of the European Council, as well as all institutional questions and dossiers overarching policy areas. The section responsible for foreign affairs bears particular responsibility for CFSP, ESDP, external trade, development, and humanitarian aid.

<sup>50</sup> On this, see: David Metcalfe, "Leadership in European Union Negotiations: The Presidency of the Council," in: *International Negotiation*, Vol. 3, No. 3, 1998, pp. 413–434.

- ▶ Within the Eurogroup it would be thinkable to extend the tenure of the Chair, which was first elected in September 2004, from two to two and one-half years, as set out in Article 2 on the ECT Protocol on the Eurogroup. With an extension of the term of office of the Chair it would also be possible for the Eurogroup to assert itself more visibly on the international stage, and to strengthen its voice on questions of currency and fiscal policy in international and intra-European fora. Currently only the area of monetary policy has a long-term representative: the President of the Central Bank is elected for a period of eight years.<sup>51</sup>

### Reform by interinstitutional agreement

Since the inception of the EEC, interinstitutional agreements have been concluded between the Parliament, Council, and Commission. These occur in the so-called “valleys” between the “summits” at which the heads of state and government authorise the reform of the EU at the highest level. These have sometimes brought meaningful changes to the EU’s institutional and procedural frame.<sup>52</sup> This kind of agreement fleshes out the modifications made by treaty change; they also imply options for future treaty revision, and often anticipate these. Interinstitutional agreements are thus stop-gaps for a political system that is constantly in flux. In this way, treaty reforms cannot be seen to fall from the sky as results of inter-state bargaining. They are much more a reaction to prior trends, and codify institutional developments that have occurred within or outwith the existing Treaty stipulations. They reflect an attempt to sideline institutional and procedural weaknesses that result from the existing Treaty texts. They thus make a contribution to the Union’s efforts to adjust itself to

new internal and external circumstances.<sup>53</sup> Against this backdrop, treaty revisions are an endemic element of the process of European integration. IGCs are not mere independent variables influencing system development, but rather much more an object of a dynamic that the governments of the member states have founded but do not enjoy complete control over. In other words, the institutions and procedures of the EU are simultaneously “creations” and “creators.”

Interinstitutional agreements thus function as a pragmatic solution for solving the tensions and conflicts between the Organs of the EU.<sup>54</sup> In the past, the EU Organs were frequently able to anticipate future treaty reforms—not only in questions of budgetary procedure, but also in the area of the CFSP, the control of the Commission in the frame of the implementation of the Parliament’s and Council’s legislative acts (so-called “comitology”) and the structuring of the work of the Conciliation Committee for the co-decision procedure. Even if interinstitutional agreements cannot formally alter the treaties,<sup>55</sup> they can go beyond the rules decided upon in the treaties.

Through the instrument of interinstitutional agreements, institutional reforms can thus be negotiated, independent of the entry into force or failure of the ECT, in those cases where autonomy over rules of procedure does not suffice as a basis of legitimacy for the entry into force of such changes.

<sup>51</sup> See: Andreas Maurer, “Die Ratifikation des Verfassungsvertrags,” in: Mathias Jopp/Saskia Matl, eds., *Der Vertrag über eine Verfassung für Europa. Analysen zur Konstitutionalisierung der EU*, Baden-Baden: Nomos, 2005, pp. 493–521; Daniel Thym, “Weiche Konstitutionalisierung: Optionen der Umsetzung einzelner Reformschritte des Verfassungsvertrags ohne Vertragsänderung,” in: *Integration*, Vol. 28, No. 4, 2005, pp. 307–315.

<sup>52</sup> See: Florian von Alemann, *Die Handlungsform der interinstitutionellen Vereinbarung. Eine Untersuchung des Interorganverhältnisses der europäischen Verfassung*, Berlin 2006; Waldemar Hummer, “Interinstitutionelle Vereinbarungen und ‘institutionelles Gleichgewicht,’” in: id., ed., *Paradigmenwechsel im Europarecht zur Jahrtausendwende*, Vienna, 2004, pp. 121–190.

<sup>53</sup> Thomas Christiansen/Knud E. Jorgensen, “The Amsterdam Process: A Structurationist Perspective on EU Treaty Reform,” in: *European Integration Online Papers*, Vol. 3, No. 1, 1999, p. 1.

<sup>54</sup> See: Jörg Monar, “Interinstitutional Agreements: The Phenomenon and Its New Dynamics after Maastricht,” in: *Common Market Law Review*, Vol. 31, No. 4, 1994, p. 717; Daniela Kietz/Andreas Maurer, “Interinstitutional Agreements in the Legislative Process – Formal Powers, Rule Interpretation and Informal Rules,” Vienna 2005 (EIF Working Paper No. 20); Isabella Eiselt/Johannes Pollak/Peter Slominski, “Interinstitutionelle Vereinbarungen im Bereich des EU Budgets,” Vienna 2005 (EIF Working Paper No. 13); Andreas Maurer/Daniela Kietz/Christian Völkel, “Interinstitutional Agreements in CFSP: Parliamentarisation through the Backdoor?,” Vienna 2005 (EIF Working Paper No. 5); Isabella Eiselt/Peter Slominski, “The Negotiation of the Interinstitutional Declaration on Democracy, Transparency and Subsidiarity,” Vienna 2005 (EIF Working Paper No. 4).

<sup>55</sup> Monar, “Interinstitutional Agreements” [as note 54], p. 719.

**Case I:****Personalising foreign policy and making it more effective**

In Article I-28 ECT, the function of a European Foreign Minister is envisaged. Under the catchword “double-hatted” the Convention and IGC agreed on the fusion of the offices of the Commissioner for External Relations and the High Representative of the Council. The Foreign Minister is supposed to coordinate all aspects of the EU’s external activity (Article I-28(4) ECT). The Minister exercises this competency within the Commission as Vice President and Commissioner for the entirety of Foreign and Security Policy. The ECT gives the Minister only general coordinating powers and no special powers of instruction *vis-à-vis* the other Commissioners dealing with foreign affairs. Moreover, the Foreign Minister is—like other Commissioners—bound to follow the Commission President’s directives. Within the Council, the Foreign Minister would take on the permanent Chair of the Council for External Affairs (Article I-28(3)). The Foreign Minister does not enjoy any particular powers *vis-à-vis* the newly created post of elected President of the European Council. Meanwhile, Article I-22(2) ECT gives the President of the European Council the right “at his or her level and in that capacity, [to] ensure the external representation of the Union on issues concerning its common foreign and security policy.” It may therefore be that the Foreign Minister becomes entangled in a conflict over tasks and aims between the European Council, the Council of the EU, and the Commission. Britain and France favour the idea that the Foreign Minister should be bound relatively tightly to the specifications set out by the European Council; by contrast, the smaller and non-aligned states tend towards the creation of a post of Foreign Minister that is independent from the European Council and its President.

The extension of the functions of the General Secretary and his renaming to “Foreign Minister” would be possible without the entry into force of the ECT. Without a change to the existing Treaty framework, the Foreign Minister could take on the following:

- ▶ the Chair of the Council for External Relations (Article I-28(3));
- ▶ the function of “voice and face” of the Union in the area of CFSP towards third states; carrying out a political dialogue; the representation of the EU’s position in international organisations and conferences (Article III-296(2));
- ▶ participation in the work of the European Council (Article I-21(2) ECT);
- ▶ the production of suggestions to determine CFSP and its implementation by order of the Council of Ministers (Article I-28(2) ECT).

Without supplementary action, it would be impossible to simultaneously make the Foreign Minister a Vice President of the Commission in accordance with Article I-28(4) ECT. It would, though, be thinkable that an agreement between the Council, the Commission, and the Parliament could create a “double-hatted” position that would take on various functions—in the Council: the functions of Chair of the Council for External Relations and the current functions of the High Representative; and in the Commission: the functions of the Commissioner for External Relations. For this purpose, it is necessary to have the EP on board as partner, since questions of the Organs are being dealt with, and the Parliament has a particular role concerning both control and creation—at least *vis-à-vis* the Commission. The EU Treaty is an obstacle to the realisation of this double-hatted post, since, according to Article 213(2) TEC, “the Members of the Commission may not, during their term of office, engage in any other occupation, whether gainful or not.” Formally, the High Representative may not take on the functions of a Commissioner, nor can a Commissioner take on the functions of the High Representative, if both are understood as an “occupation” according to Article 213(2) TEC. The EU Organs could, however, stipulate via an interinstitutional agreement that the functions related to both posts are to be performed by individuals whose occupation lies in the current, politically legitimated office of the EU Organs. It would then be possible to imagine that the functions of the High Representative and the Commissioner for External Relations would be fused. The Foreign Minister’s pay would have to be in line with that of a simple Commissioner.

Following the creation of the post of Foreign Minister, the merging of the external action services of the Commission, Council, and member states, as foreseen in the ECT, should be ensured in combination with an agreement between the member states under international law. In a declaration that is attached to the Constitutional Treaty, the High Representative for the Common Foreign and Security Policy, along with the Commission and the member states, is obliged to begin preparations for the creation of a European External Action Service (EEAS). The starting shot for this action is not the entry into force of the Treaty,

but its signature on 29 October 2004. The formal “pre-implementation” of the EEAS is legally impermissible without the Treaty; yet it finds its parallel in previous activity anticipating a new treaty (Monetary Union and EUROPOL after Maastricht; coordination of employment policy after Amsterdam) and is therefore more than possible. In some national foreign ministries, restructuring on an administrative level has been going on since early 2004. This has been undertaken with the aim of removing the distinctions created by the EU’s pillar structure between questions of CFSP and the Commission’s responsibilities, as sanctioned by the ECT. These are merged into Europe-Departments.

#### **Further reforms through interinstitutional agreements**

More arrangements could be implemented via inter-institutional agreements: the constitutional rules on the election of the Commission; the procedural rules on the citizens’ vote; the rules from both of the Constitution’s protocols on the role of national parliaments and the use of the principles of subsidiarity and proportionality; the rules laid down in the ECT on the system for the implementation of European norms (comitology).<sup>56</sup> These reforms are part of a greater package design to democratise the EU, and should therefore be implemented as a package with an eye to the maintenance of the interinstitutional balance. After all, the upgrading of national parliaments and the creation of an instrument allowing a Europe-wide citizens’ vote impinge on the European Parliament’s prerogatives. An important question is therefore: Will parts of the Constitutional Treaty that strengthen the role of the European Parliament be put into force? In the specialist literature, the *de facto* adoption of the budgetary procedure laid down in the ECT has been discussed; more specifically, the lifting of the distinction between obligatory and non-obligatory spending has been considered.<sup>57</sup> The extension of the EP’s legislative powers independent of the Constitutional Treaty is open to discussion.

#### **Case II: Reforming the European Parliament’s powers of co-decision**

The extension of the co-decision procedure to those areas outlined in the Constitutional Treaty would be attractive from a democratic point of view. It would

be thinkable for the co-decision procedure to be extended—independently of the ECT—to all those areas in which the Council can decide by a qualified majority under the Nice Treaty. This extension would be justified by the fact that the member states have already partially transferred sovereignty to the EU for these issues, and that this occurred by virtue of the EU’s constitutional competence and the rule on qualified majority. In this way, nothing should stand in the way of the governments reaching agreement in the Council of Ministers about their desire to share and exercise competencies transferred to the EU with the European Parliament.

The legal basis for this kind of reform undertaken independently of the ECT could be provided by the internal autonomy granted to the EP, which is expressed in particular in Article 199 TEC (and Article 190(5) TEU). The European Parliament consists, according to Article 189, of representatives of the peoples of the EU member states. The formulation in the Treaty is not clear though about whether an individual parliamentarian represents only the people of his own state or all the peoples of the EU. In the EP’s practical work, the second option appears to be the case, since MEPs from all member states take part in debates and votes even in those areas of Community law which not all member states participate in (for example, the Monetary Union).<sup>58</sup> An MEP represents the “peoples in the Community of united states” and therefore directly represents the Union’s citizens, whilst respecting their national formations (“peoples” not “people”).<sup>59</sup> This is also made clear in the fact that it is not national parties but much more the political groupings in the EP that play a decisive political role. The members of the EP function as representatives of the peoples; they represent them in common and independently. As representatives of the people they are not bound to the instructions of their governments or national parliaments. In the exercise of their duties they are not subject to specific instructions or other arrangements.<sup>60</sup> This independence

<sup>56</sup> See: De Witte, *Process of Ratification* [as note 24], p. 10.

<sup>57</sup> See: Monar, “Optionen für den Ernstfall” [as note 24], p. 22.

<sup>58</sup> Michael Ahl/Thomas Deisenhofer, *Europarecht*, 3. ed., München 2003, p. 25.

<sup>59</sup> Thomas Oppermann, *Europarecht*, 3rd ed., München 2005, Rdnr. 254; P. J. G. Kapteyn/Pieter Verloren van Themaat, *Introduction to the Law of the European Communities*, 3. ed., The Hague 1998, p. 210.

<sup>60</sup> *Ibid.*, p. 209.

from national parliaments has a basis in a number of judgments of the European Court of Justice (ECJ).<sup>61</sup>

The Parliament's right to self-determination is reflected in Article 199(1) TEC. Accordingly, the Parliament has the power to decide on its rules of procedure in an autonomous fashion. The Parliament is "authorized, pursuant to the power to determine its own internal organization [. . .] to adopt appropriate measures to ensure the due functioning and conduct of its proceedings."<sup>62</sup>

The rights of the EP, and thus its powers of organisation and right of self-determination, have been strengthened continuously through the changes made to the EC Treaty by the treaties of Maastricht, Amsterdam, and Nice. In the so-called "Chernobyl Ruling" (C-70/88) the ECJ affirmed that the treaties have created an institutional balance, in that they have constructed a system of competence distribution between the various Organs of the Community. In order to ensure this balance, every Organ must exercise its powers with a mind to the powers of the others.<sup>63</sup> The institutional balance between the Organs reflects, according to the ECJ's ruling C-138/79, a basic democratic principle by which the peoples participate in the exercise of sovereignty through an assembly of representatives.<sup>64</sup> If the rights of national parliaments were strengthened by the pre-implementation of the procedural rules on the role of national parliaments and on the principle of subsidiarity contained in the ECT, there would be no grounds to argue against the EP fighting for an extension of its rights parallel to the ECT.

### Reform through decisions of the institutions

Broadly away from the attention of the public, the European Council decided as far back as November 2004 to anticipate in a wide-ranging way the reforms contained in the ECT on European Justice and Home Affairs Policies. The heads of state and government agreed on the "Hague Programme" for the period 2005–2010 which aimed at the strengthening of

freedom, security, and justice within the EU. This new programme follows the 1999 "Tampere Programme" and now constitutes a considerable instrument of legislative planning for the policy areas of EU citizenship, asylum and immigration, integration, border control, prevention and combating of terrorism and organised criminality, judicial cooperation in civil and criminal law, as well as police cooperation. With the adoption of the "Hague Programme" the Council of Ministers was invited "to adopt a decision based on Article 67(2) TEC immediately after formal consultation of the European Parliament and no later than 1 April 2005 to apply the procedure provided for in Article 251 TEC to all Title IV measures to strengthen freedom, subject to the Nice Treaty, except for legal migration."<sup>65</sup> Article 67 TEC empowered the Council of Ministers from 1 May 2004 to reach a unanimous decision on the shift from unanimity to qualified majority and from simple consultation of the EP to co-decision in the areas of immigration and asylum policy, and judicial cooperation in civil affairs. The Council of Ministers made the transfer with its decision of 22 December 2004.<sup>66</sup> Since January 2005, the majority procedure has been valid in the Council of Ministers, and co-decision has been employed with the EP for almost all matters of European asylum, immigration, and border control policy as well as civil law. Compared with the reforms laid down in the ECT, only the areas of legal immigration, and police and criminal law cooperation require unanimity in the Council of Ministers.

With the use of European secondary law (regulations, decisions, etc.) the establishment of new EU institutions like EUROJUST, the European Public Prosecutor, or the European Defence Agency (Article I-41(3) ECT) could be driven forward as set out in the ECT. Agreements outside the treaties would be both sensible and imaginable for European Security and Defence Policy. A material extension and procedural deepening of Security and Defence Policy along the lines of the European Security Strategy<sup>67</sup> would offer

<sup>61</sup> See: EuGH C-149/85 of July 10, 1986 (Roger Wybot v. Edgar Faure), Slg. 1986, p. 2391.

<sup>62</sup> EuGH C-230/81 of February 10, 1983 (Luxemburg v. Parliament), Slg. 1983, p. 255, No. 38.

<sup>63</sup> EuGH Interim decision C-70/88 of May 22, 1990 (EP v. Council), Slg. 1990, p. 425, No. 17.

<sup>64</sup> EuGH C-138/79 of October 29, 1980 (SA Roquette Frères v. Council), Slg. 1980, p. 3333, No. 33.

<sup>65</sup> See: Europäischer Rat, *Schlussfolgerungen des Vorsitzes, Anhang I: Haager Programm*, Brussels, December 4/5, 2004, pp. 9–33.

<sup>66</sup> See: Beschluss des Rates über die Anwendung des Verfahrens des Artikels 251 [EGV] auf bestimmte Bereiche, die unter Titel IV des Dritten Teils dieses Vertrags fallen, in: *Amtsblatt der EU*, No. L 396/45, December 31, 2004.

<sup>67</sup> See: Europäischer Rat, *Europäische Sicherheitsstrategie*, Brussels, December 12, 2003, <http://ue.eu.int/uedocs/cmsUpload/031208ESSIIDE.pdf>.

the member states the opportunity to advance closer cooperation and—in the medium term—to accomplish Permanent Structured Cooperation (Article I-41(4) ECT) as laid down in the ECT. With the Common Action of 12 July 2004, the Council of the EU decided on the establishment of the European Defence Agency according to the existing rules of the Nice Treaty.<sup>68</sup> The solidarity clause (Article I-43 ECT) was, in practice, called into life after the Madrid bomb attacks on the basis of a framework decision on combating terrorism<sup>69</sup> and a decision on the use of special measures in the fight against terrorism.<sup>70</sup>

The reforms on the number of Commissioners, and the procedures for their rotation, could be implemented without the Constitutional Treaty via a Council decision, namely on the basis of Article 4 of the Protocol on the enlargement of the EU which is attached to the Treaty of Nice. In this article it is foreseen that there will be fewer Commissioners than member states after the accession of the twenty-seventh member state.

### The bounds of informal implementation

A basic overhaul of the EU on the lines of the above-mentioned partial reforms is a tricky and risky business, because it could create—through the back-door of rules of procedure, conventions, and agreements—changes in the relations between Organs and between the member states that could not be forged according to the logic and method of trading concessions as practiced in the IGCs. Every individual question therefore demands a greater readiness for compromise than would be the case at an IGC. Moreover, this way of proceeding would have the disadvantage that the paperwork involved would lead to an increase in the lack of transparency that citizens complain about. One of the principal aims of the Constitutional Treaty—the simplification of primary law—would therefore be lacking. Also, the use of such a

procedure would not cater for the important changes set out in the ECT dealing with the following areas: the legal personality of the EU; the use of the Charter of Fundamental Rights; the hierarchy of norms; the substantial extension of competencies and the accompanying transfer of sovereignty (e.g., in the areas of policy and criminal law cooperation); the changes to the Council's decision-making procedures; the arrangements for the numerical constitution of the Organs (e.g., the Parliament of Court) and the removal of the differences between obligatory and non-obligatory expenditure in the EU's budgetary procedures. Some of the aims of the ECT could be achieved via a further treaty reform or—for accession treaties—via “mini constitutional reforms” on the basis of the Treaty on European Union (TEU). The Charter of Fundamental Rights could be employed as a point of reference for the further development of the basic rights recognised in Article 6(2) TEU. This fleshing out of fundamental rights would however be reserved to the jurisprudence of the ECJ; jurisprudence would then be the definitive source for EU fundamental rights.

It is necessary to warn against the short-sighted filleting of the ECT, before its fate has been definitively sealed. At the present time, efforts to realise the protocols on the role of national parliaments and the use of the principle of subsidiarity can be identified. Jack Straw, the British Foreign Minister, set the ball rolling immediately after the two negative referendum results, when he asserted that the protocols could be implemented without the ECT.<sup>71</sup> On 17 November 2005, the British Presidency of the EU held a first workshop with the Dutch Parliament entitled “Sharing Power in Europe.” On this occasion, the Dutch and British participants made clear their willingness to see the protocol on subsidiarity implemented early. The majority of the participants at the annual Conference on subsidiarity organised by the Committee of the Regions also demanded the implementation of the ECT Protocol on subsidiarity at the end of November 2005.<sup>72</sup> President Chirac joined these initiatives in January 2006, calling for a greater

<sup>68</sup> *Gemeinsame Aktion 2004/551/GASP des Rates vom 12. Juli 2004 über die Einrichtung der Europäischen Verteidigungsagentur*, OJ 2004, L 245/17.

<sup>69</sup> *Rat der Europäischen Union, Rahmenbeschluss zur Terrorismusbekämpfung*, June 13, 2002, Doc.-No. 2002/475/JI.

<sup>70</sup> *Rat der Europäischen Union, Beschluss über die Anwendung besonderer Maßnahmen im Bereich der polizeilichen und justiziellen Zusammenarbeit bei der Bekämpfung des Terrorismus gemäß Artikel 4 des Gemeinsamen Standpunktes 2001/931/GASP*, December 19, 2002, Doc.-No. 2003/48/JI.

<sup>71</sup> See the statement made by British Foreign Minister Straw before the House of Commons on June 6, 2005, <http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm050606/debtext/50606-05.htm>, column 995f.

<sup>72</sup> See: Committee of the Regions, “Conference calls for creation of a ‘real subsidiarity culture’ to meet citizens’ needs,” *Pressemitteilung*, November 30, 2005, [http://www.cor.eu.int/de/press/press\\_05\\_11138.html](http://www.cor.eu.int/de/press/press_05_11138.html).



“involvement of national parliaments in the European decision-making process” on the basis of the Nice Treaty and with recourse to the relevant reforms in the ECT.<sup>73</sup> Such demands do not take into consideration the fact that the affected ECT Protocols formed part of a broader negotiating package in the Convention and IGC that also included: an extension of the EP’s co-decision and budgetary powers; the foundation of a process for a citizens’ vote; and in return for the EP’s rights, a reform of the EU’s financial constitution. If individual parliaments were to splice up this package, it would quickly lead to a crisis of trust between the member states and the EU Organs: The rampant filleting of certain details would give rise to an impression that some governments have given up on the Treaty politically, and moreover that they were *never* seriously interested in its realisation.

### Expulsion: Options for Withdrawal, Exclusion, and Re-founding

What consequences would arise if, at the end of the ratification process, one or more states had not adopted the ECT? Alongside the option of partial reforms, an open discussion on the question of withdrawal is also necessary. The debate on the splitting of the EU may very well seem politically inopportune from today’s point of view; from an academic perspective, though, the bracketing out of this option would be unsound.

The Constitutional Convention adopted a suitable arrangement in the proposed ECT, following lengthy debates on the right to withdrawal (voluntary withdrawal from the Union, Article I-59). The ECT codifies for the first time a right to unilateral withdrawal from the Union: The option of concluding a withdrawal agreement following withdrawal should not be understood as an equivalent to an amicable withdrawal solution; it simply involves the documentation of the legal consequences of a unilateral declaration of withdrawal; consensus with the other Union states is not necessary.<sup>74</sup>

From a political point of view, the danger of a guarantee to a unilateral right of withdrawal lies principally in the fact that this right could be misused for

domestic purposes.<sup>75</sup> After all, a calculated withdrawal would be thinkable as a ploy to gain “better” membership conditions following re-accession. At the Convention, it was above all the accession states that supported the introduction of Article I-59 ECT. Apparently there was a widespread opinion amongst these delegations that they had joined a “normal” organisation. However, the principle that the ECT—like the Community treaties—establishes the Union for an “unlimited period” clashes with this conception. Article I-1 gives the member states the decisive basis of responsibility and legitimisation as the authors of the Community. If one were to interpret the right of withdrawal in this light, abuse should be ruled out in an “ever closer Union of the peoples of Europe.” The following idea should not be underestimated, though: Article I-59 “does not promote states’ propensity to withdraw, but rather ought to facilitate the decision to accede—above all for the new member states—by making it clear that they are not entering a prison of the peoples [t.a.t].”<sup>76</sup>

Currently, there are no arrangements in the EU treaties for withdrawal or for the exclusion of a member state. A suspension of membership rights is laid down in Article 7(1) TEU: If there is a “serious and persistent breach by a Member State of principles mentioned in Article 6(1),” (Article 7(2) TEU), “the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question” (Article 7(3,1) TEU).

Can one conclude from the lack of a clause on withdrawal or exclusion that such a possibility is in principle *impossible*? According to the German Constitutional Court, the member states “which have bound themselves to the Union Treaty for an unlimited period of time (Article 51 TEU) and have justified this with reference to their desire for long-term membership, could dissolve this membership through a contradicting act [t.a.t].”<sup>77</sup> With this statement, the judges of Karlsruhe remained very vague, and it is not clear whether Germany has a right to an amicable or

<sup>73</sup> See the newspaper reports cited in note 43.

<sup>74</sup> Thomas Bruha/Carsten Nowak, “Recht auf Austritt aus der Europäischen Union?,” in: *Archiv des Völkerrechts*, Vol. 42, No. 1, 2004, p. 7.

<sup>75</sup> Jürgen Schwarze, “Ein pragmatischer Verfassungsentwurf,” in: *Europarecht*, Vol. 38, No. 4, 2003, pp. 558f.

<sup>76</sup> Thomas Oppermann, “Eine Verfassung für die Europäische Union – Der Entwurf des Europäischen Konvents (2. Teil),” in: *Deutsches Verwaltungsblatt*, Vol. 118, No. 19, 2003, p. 1242.

<sup>77</sup> German Constitutional Court (BVerfGE) 89, 155, 190, October 12, 1993 (“Maastricht-Urteil”).

to unilateral withdrawal.<sup>78</sup> Some authors draw the conclusion from the whole context and the later statements of the *rapporteur* that Germany has a right to unilateral withdrawal;<sup>79</sup> however, as a legal basis, this remains insufficient.

On the other hand, if all member states decided unanimously to dissolve the EU or to eject a member state, there is—according to the going legal opinion—a right to leave the Union.<sup>80</sup> This becomes problematic when a state wishes to declare unilaterally its withdrawal from the EU: With reference to Article 51 (a Treaty “concluded for an unlimited period”), a right of unilateral withdrawal could be turned down. By contrast, one can only conclude from Article 49 TEU, which allows an EU enlargement solely with the agreement of all member states, that a unilateral right of abrogation is neither desirable nor possible.<sup>81</sup> A right of unilateral withdrawal is deemed impossible on the grounds of the system of the treaties.<sup>82</sup>

It can be inferred from these considerations that the basic question regarding the legal nature of the European Union still has to be asked, and a consensus amongst all 25 states (governments, parliaments, and peoples) must be found, before one addresses the question of whether a right of withdrawal or exclusion could be practically used within the EU framework.

- ▶ If one views the EU as a simple union under international law, in which states remain sovereign, general international law can be employed. In this way, an amicable cessation of membership would be possible at all times. It would merely require a change to the treaties and a unilateral “notice of cancellation” in order to meet the conditions set out in the Vienna Convention on the Law of Treaties. The European Court of Justice does not use international law to interpret EU law; in a judgement of 1997 the judges merely laid down that the Vienna Convention must be respected within Community law.<sup>83</sup>

- ▶ If one characterises the EU as a construct similar to a federal state, the question of withdrawal or exclusion would have to be addressed according to national constitutional law.<sup>84</sup> Membership could only be terminated if this is explicitly recognised by national constitutional law. According to this theory, there is currently no right of termination in the EU, because none of the treaties which have driven integration lays down such a right.
- ▶ It becomes rather more difficult if one views the EU as a compound of states *sui generis*, which cannot be categorised under national or international law, but which—following its inception under international law—has created a new legal order.<sup>85</sup> One of the most important decisions of the ECJ regarding the basic principles of EU law (*Van Gend & Loos*, 1963) supplies the principle that the EC represents a new form of international law and even a new legal order.<sup>86</sup> Since the founding treaties contained no express rule on the question of withdrawal, nothing of the kind can be drawn from its own legal order. Only in the European Coal and Steel Community did the question of withdrawal recede after the fifty year period (Article 97 TECSC) and was thus implicitly solved.<sup>87</sup>

### Withdrawal and exclusion from the international organisation of the EU

If one were to assume that the EC and EU treaties were by nature international law, then the appropriate rules under international law would create the possibility of cancelling membership of the Union. In this regard, the Vienna Convention that entered into force on 27 January 1980 would have to be taken into account. This Convention empowers states to terminate a treaty commitment or to dissolve the Treaty following a considerable infringement by one or more parties. In employing this rule, one could not threaten a state that refused further integration with expulsion, because this would clearly remove its sovereignty. On the other hand, if this state behaved in a manner contrary to the Treaty for an extended period and in a considerable way, a case would have to be brought against it before the ECJ. Only if this step did

<sup>78</sup> Bruha/Nowak, “Recht auf Austritt” [as note 74], p. 5.

<sup>79</sup> Udo Di Fabio, *Das Recht offener Staaten. Grundlinien einer Staats- und Rechtstheorie*, Tübingen 1998.

<sup>80</sup> See: Matthias Pechstein/Christian Koenig, *Die Europäische Union*, 3. ed., Tübingen 2000, no. 458.

<sup>81</sup> See: ebd., no. 459.

<sup>82</sup> Bengt Beutler/Roland Bieber/Jörn Pipkorn/Jochen Streil, *Die Europäische Union*, 5. ed., Baden-Baden 2001, no. 66.

<sup>83</sup> EuGH, Rs. T-115/94, *Opel Austria GmbH v. Rat*, Slg. 1997, II-39, pp. 66ff; Arved Waltemathe, *Austritt aus der EU. Sind die Mitgliedstaaten noch souverän?*, Frankfurt a.M. 2000, p. 82.

<sup>84</sup> Bruha/Nowak, “Recht auf Austritt” [as note 74], p. 2.

<sup>85</sup> Ibid., p. 3.

<sup>86</sup> EuGH, Rs. 6/64, *Costa v. ENEL*, Slg. 1964, p. 1251, and pp. 1269f.

<sup>87</sup> Bruha/Nowak, “Recht auf Austritt” [as note 74], p. 3.

not elicit a positive reaction from the state in question could the other states—which would now find it impossible to stick to the treaties—expel the “enemy of the treaty.”<sup>88</sup>

Article 62 of the Vienna Convention has a completely different meaning, and deals with the effects of the disappearance of the affairs that a treaty is supposed to handle.<sup>89</sup> These provisions can only be used in a very constrained fashion, since the Community treaties contain special norms covering only certain cases—namely when the specific interests of a member state are damaged or if it becomes economically impossible for an individual state to fulfil its duties under the Treaty.<sup>90</sup>

In the concrete EU context, it is very difficult to calculate the risks involved in a use of the rights to withdrawal contained in the Vienna Convention. The most important argument against a unilateral right of “termination” is grounded in economic considerations. With the growing levels of integration, national economies have become more interdependent. For this reason, it would be in the interests of the state seeking to withdraw, as well as the other member states, to create a level of integration below full membership, in order to cushion the economic effects of withdrawal from the EU. In doing so, states would have to make use of a new treaty base under international law, rather than full membership in the existing internal market. This new treaty base would not concentrate

merely on the internal economic aspects; it would also have to focus on questions directly entangled with the internal market, such as training, mutual recognition of qualifications and careers, environmental policy, and policies on consumer protection and social protection. A number of integration tiers that have already been achieved would, with one jump, have to be rebuilt at a lower level—or indeed “built back”; in any case, a standardisation that was legally resilient would be necessary.

In fact, the withdrawal clause of the Constitutional Treaty makes partial or reverse integration possible. These rules would have to respect the jurisprudence of the European Court of Justice on the liability of states. According to the ECJ, states are liable for costs incurred through their failure to adhere to Community law, in cases where Community law accords individuals subjective rights, and when the infringement is sufficient and the costs incurred can be shown to derive directly from this behaviour.<sup>91</sup> The basic freedoms of the EU, which would lend the individual subjective rights in the case of a unilateral declaration of withdrawal, could<sup>92</sup> lead to claims for damages against the state; one doesn’t need much of an imagination to envisage just how many individuals could potentially be damaged by withdrawal, nor the precarious position that national courts would be placed in. The right of withdrawal set out in the ECT thus constitutes an effective means to combat infringements of the subjective rights of Community law following a withdrawal from the Union.

### Withdrawal from an independent Union

Despite these reflections the following remains true: On the basis of the principle of democracy, which even in the ECT is secured not only through the European Parliament but also through the partner states, each member state must enjoy a unilateral right of withdrawal in the final reckoning.<sup>93</sup> Only in this way can each state bear the final responsibility over its own

<sup>88</sup> This option arises from the fact that the ECJ rulings cannot be exercised by the EU Organs and the EU Treaty only foresees the use of fines (Art. 228(2) TEC) or suspension. Expulsion could be based, according to Article 60(2) of the Vienna Convention, on the grounds that a significant infringement of the Treaty by one party permits the others to dissolve the Treaty in part or in whole. In this case, Article 7(1) TEU would in any case be ruled out, since the Vienna Convention is subsidiary to the special procedure set out in the TEU.

<sup>89</sup> In order to employ this, there must be a basic change to the conditions under which the treaty was concluded and which were an important reason for the conclusion of the treaty; this change would not have been foreseen by those party to the treaty. In this way, the change would have to substantially re-form the extent of the treaty duties to be performed, and could not be caused by an infringement on the part of the state or states that are seeking to make the change valid. When these conditions are met, an EC/EU member state could enjoy a right of withdrawal.

<sup>90</sup> What is more, the ECJ offers a specific form of legal protection based on the rules of the Treaty Convention and against treaty infringements made by other states (Art. 227 TEC).

<sup>91</sup> EuGH, Rs. C-178, -179, -188 and -190/94, Slg. 1996, I-4845 (no. 20ff.); Rs. C-5/94, Slg. 1996, I-2553 (No. 24f.); Rs. C-392/93, Slg. 1996, I-1631 (No. 38ff).

<sup>92</sup> See the Francovich-ruling of 1990, EuGH, Rs. C-6 and C-9/90, Slg. 1991, I-5357.

<sup>93</sup> Peter M. Huber, “Das institutionelle Gleichgewicht zwischen Rat und Europäischem Parlament in der künftigen Verfassung für Europa,” in: *Europarecht*, Vol. 38, No. 4, 2003, p. 591; Di Fabio, *Das Recht offener Staaten* [as note 79], p. 124.

future and the future of its people and territory.<sup>94</sup> In this way Article I-60 can be explicitly welcomed, since it provides a detailed process by which a member state can voluntarily withdraw. Yet the right of secession laid down in the ECT remains incomplete in two ways: Bearing in mind the level of integration achieved with the Treaty of Nice, a withdrawal clause would have to contain concrete deadlines and rules on the announcement, cancellation and revision of a claim to secession; secondly, it would be in the interests of transparency and comprehensibility if a justification were demanded of those states desirous of withdrawal in order to legitimate substantially the “political divorce.”<sup>95</sup>

Waltemathe has plausibly shown that EU law is “in no way successful at showing the inherent necessity of remaining in the EU or Communities.”<sup>96</sup> Rather more problematic would be the new status of the citizens in their position as users and subjects of law, following withdrawal. Before withdrawal they would still have been able to call directly upon their rights under Community law *vis-à-vis* member states, authorities and courts; after withdrawal this would no longer be the case. Equally, the exiting state would be freed from its duties *vis-à-vis* its citizens. In practice, this situation would have to be dealt with by transition rules.

With a mind to the arguments presented, the following point stands firm: The withdrawal of a member state would not create any problems that cannot be bridged. Legally, withdrawal from the EU is possible; from a political and socio-economic standpoint it is questionable and certainly bound to certain conditions. For those states withdrawing from the EU, the rights and duties arising from EU membership would no longer be valid.<sup>97</sup> The competencies transferred to the member states would revert to the member states and the direct effect of primary law and regulations would no longer apply. As regards international agreements that have been concluded

by the EU, differentiations must be made: Treaties that the Council has concluded under Article 113 or 133 TEC, and Article 228 or 300 TEC belong to the internal law of the EU.<sup>98</sup> Since, though, this is no longer of importance to the member state quitting the Union, treaties between the Union and a third state are no longer valid for it. A treaty between the EU and a third state would remain in place though. For the remaining member states, a treaty revision would be necessary following the exit of one or more member states, since all the arrangements laying down the member states’ participation in the Community Organs would have to be adjusted.

### Political conditions for exit

A withdrawal from the EU should be accompanied by the negotiation of a special status for those states whose civil societies refuse their consent for the Constitutional Treaty. The withdrawal of those states “unwilling to ratify” must not lead to a situation whereby they “fall into a void.” The Union’s principle of solidarity obliges the member states to uphold the rights that have been legally ensured for citizens over the last fifty years. These rights cannot be terminated at a moment’s notice. Politically, it would be inconsistent if the EU took on the costs and efforts involved in improving relations with those states bordering it, but at the same time refused any form of association to a withdrawing, but nevertheless “European,” state.

The question concerning the conditions and procedures involved in withdrawal must be complemented with the question of where the affected states wish to withdraw to. Given the degree of integration achieved, withdrawal to the European Free Trade Area (EFTA) and European Economic Area (EEA) appears the best option. Those states withdrawing could retain the current normative state of the EU in their national law, but would no longer be able to participate in its development. Their formative powers would thus be confined to established institutions of the EEA. In this case, the “multi-speed Europe” would be strengthened; this is a model that has been discussed in various forms since the 1970s, and has been a reality in the form of the Schengen area and Eurozone for some time.

What may appear politically practicable in the question of EU withdrawal also brings a great degree

<sup>94</sup> Huber, “Das institutionelle Gleichgewicht” [as note 93], p. 591.

<sup>95</sup> Detmar Doering, *Friedlicher Austritt. Braucht die Europäische Union ein Sezessionsrecht?*, Brussels/Trier: Centre for the New Europe, Juni 2002, p. 45, [http://www.cne.org/pub\\_pdf/Doering\\_Friedlicher\\_Austritt.pdf](http://www.cne.org/pub_pdf/Doering_Friedlicher_Austritt.pdf); Harry Beran, “A Liberal Theory of Secession,” in: *Political Studies*, Vol. 32, 1984, pp. 21–31.

<sup>96</sup> Waltemathe, *Austritt aus der EU* [as note 83], p. 182.

<sup>97</sup> Ignaz Seidl-Hohenveldern/Gerhard Loibl, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften*, Köln 2000, no. 532.

<sup>98</sup> *Ibid.*, No. 1553.

of financial insecurity with it; after all, the membership in the EU Organs, the rights of participation, and the financially intensive policies of the Union and rights of access would all have to be renegotiated.

### Re-founding the EU

A second thinkable solution is offered by the withdrawal of the majority of states advocating the Constitutional Treaty from the Nice-EU. They would subsequently accede to a “new EU” based on the Constitutional Treaty.<sup>99</sup> The remaining states would then proceed on the basis of the Nice Treaty, but would have to take care of the financial and personnel/administrative resources of a reduced EU. This solution is questionable from the perspective of integration policy, even if the “new EU” would achieve a greater degree of integration through such a step. This solution would depend upon a “re-foundation” of the EU—a concept that has already been described in Article 82 of the EU Treaty proposal made by the European Parliament.<sup>100</sup> According to this, the Treaty could enter into force if a simple majority of member states representing two-thirds of the Union’s population ratified it.<sup>101</sup> In the context of the Constitutional Convention, this option was again discussed.<sup>102</sup> The European Commission suggested in its “Penelope” proposal for a Constitutional Treaty that the Convention and subsequent IGC should adopt a parallel agreement on “the Entry into Force of the Treaty on the Constitution of the European Union” simultaneously with the Treaty. The parallel agreement would have been ratified within a period of one year before the Treaty. The member states were to lay down in the ratification of agreement whether they wanted to concur

with the Constitutional Treaty or whether they wished to exit a Union which, through the Constitutional Treaty, would reach a new level of integration. If the threshold of two-thirds of the member states were reached, the Constitutional Treaty would enter into force in those states that had ratified it. This “gentle-exit” strategy could be so interpreted that the agreement would be used to trigger a blockade of the ratification process. In order to avoid this kind of blockade, the Commission suggested in its Penelope proposal that the parallel agreement would be deemed to be in force if it had been ratified by at least five-sixths of the member states. The basic principle of the entry into force of the ECT would thereby be implicitly ignored. The Penelope proposal affirmed nothing other than “the need to adopt the ‘constitutional rupture’ approach, that is, the right for the overwhelming majority of states to move ahead with a Constitutional Treaty even against the opposition of up to four countries.”<sup>103</sup> This kind of rupture in the relationship between the treaties appears—given the level of integration and cooperation already achieved—scarcely to be represented politically. On the other hand, the “gentle-exit” option could be realised if it could be shown what kind of association the “remainder-EU” would take.

<sup>99</sup> On this point see: Alfred Längle, “Übernahme der Ergebnisse des ‘EU-Zukunftskonvents’ in die Regierungskonferenz und Lösungsvarianten für allfällige ‘Ratifikationsunfälle’,” in: Erhard Busek/Waldemar Hummer, eds., *Der Europäische Konvent und sein Ergebnis – eine europäische Verfassung. Ausgewählte Rechtsfragen samt Dokumentation*, Wien: Böhlau, 2004, pp. 135–146.

<sup>100</sup> See: Jean-Paul Jacqué, “The Draft Treaty Establishing the European Union,” in: *Common Market Law Review*, No. 19, 1985, pp. 40–41.

<sup>101</sup> See: Richard Corbett, *The European Parliament’s Role in Closer EU Integration*, London: Palgrave 1998, pp. 170–172.

<sup>102</sup> See: the proposal of the European Policy Centre (EPC) at <http://www.theepc.be/Word/EUconst.doc>, and see the Commission’s Penelope proposal at [http://europa.eu.int/futurum/documents/offtext/const051202\\_en.pdf](http://europa.eu.int/futurum/documents/offtext/const051202_en.pdf).

<sup>103</sup> See: De Witte, *Process of Ratification* [as note 24], p. 6.

## How to Proceed?

The negative referendum results in two of the founding states of the European Union have enriched with new aspects the debate that has been running for years on the power, representation, democracy, and legitimisation of the EU. At its heart, this debate is not about the attempt to effect a rapprochement between the process of integration and citizens—an attempt confirmed many times; instead, it is about the democratic placement and responsibility of the decision-makers who have been legitimated in elections in the conflict surrounding the balancing of power and counter-power in the institutions and decision-making processes of the EU. Whether the British answer—the abandoning of the ratification process—leads in the right direction, is dependent upon the question of whether and how the governments—above all those holding the EU Presidency—stand up for the continuation and final realisation of the Treaty project.

### The chances of realising the abovementioned options

Against the background of the debate about the ratification of the ECT—a debate which has intensified since January 2006—the period of reflection should not merely be used to discuss the future of Europe. If the EU enlargement first to 25 then to 27 and more states is to be institutionally absorbed, political road marks have to be set, showing citizens that the EU is capable of action.

At the conclusion of the ratification process in Belgium and following the re-activation of the ratification process in Estonia,<sup>104</sup> the chances for a reprisal in Germany, Sweden, and Portugal should be sounded out and discussions with the governments of Ireland and Denmark about the execution of the necessary referendums there should be initiated. In this context, it should be recommended to the German government and the Bundestag that they pressure the German President to set a clear signal of Germany's commitment to the ECT—namely through his signature of

the German ratification law. The submission of the German ratification certificate is, of course, dependent upon the outstanding ruling of the German Supreme Court on the action of the parliamentarian Peter Gauweiler; however, the current procedure does not stand in the way of the President's formal signature.

Along with the Netherlands and France, where current preferences tend towards the option of "repeating a year," the protagonists of the ECT should take the opportunity to discuss the chances for "detention." Admittedly, the actors of both states are hardly likely to tie themselves to binding statements before the 2007 elections. However, so that the discussions with France and the Netherlands do not fade away before then, it is advisable to guide President Chirac and the de Villepin and Balkenende governments in the direction of a rather more cautious attitude towards the question of the ECT, and one that is open to other results.

Poland and the Czech Republic's choice of the options set out here depends above all upon how Britain positions itself. Between 2003 and 2004, both of the East European states plumped for referendums that are not necessary under their constitutions. For this reason it is advisable not to reach any premature conclusions on the question of how to deal with the ECT. If other states followed Estonia's example and expressed a desire to press on with the ratification process, or indeed to pursue option "detention" and undertake to improve the Constitutional Treaty, this could have a positive effect upon the procedure in these three states.

### A centre of gravity for the Constitutional Treaty

Would it not be sensible, though, to speedily implement individual reforms from the Constitutional Treaty, as far as the consensus between the states and EU Organs allows? In such a case, member states that have already ratified the Constitutional Treaty should build a community of interests, in particular in the deliberations about how to deal with the Treaty and

<sup>104</sup> On February 8, 2006 the Estonian Parliament held the first reading of the ratification procedure for the ECT.

about the necessary changes to the basis of the EU. For democratic reasons, it is unacceptable that the majority of states which have ratified the Constitutional Treaty should be held hostage to those states unwilling to ratify. Against this background, Germany, Italy, and Spain should coordinate the supporters of the ECT in a common effort to resuscitate the ratification procedure. One aim of the initiative should be for the group to agree on the anticipation of certain treaty elements—together with the EU Commission or European Parliament, as the case may be—and to become a centre of gravity for the Constitutional Treaty. The creation of a European External Action Service, as laid down in the ECT, should be continued by this group. All three states share interests with smaller states in this matter, particularly concerning the desire to tie up personnel and financial resources in the areas of diplomacy and to integrate their foreign services under the umbrella of the EU, and in order to make the Union's diplomatic capabilities more effective. An *avant-garde* in this area would not, for example, replace the efforts of the "Big Three" towards Russia or Iran; it would however be attractive for different reasons: Firstly, the smaller states could establish themselves as a leading group in an important field of the EU's foreign policy; secondly, the perspective of a centre of gravity for the Constitutional Treaty could be substantially fleshed out; thirdly, areas of an integrated foreign policy towards organisations like the UN could be tested out to the degree that various compromises for the conflict between Germany and Italy in the question of the reform of the UN Security Council could be identified.

### Modular membership as a compromise

More problematic is the open discussion about the realisation of the "expulsion" option. Precisely those states that most probably caused the failure of the Constitutional Treaty through voluntary referendums are now obliged to sketch out solutions for a crisis that they have helped to bring about. A point of departure would be the expansion of those factually differential levels of EU membership that have covered more and more states and fields since Maastricht. In the EU there has long been a practical separation between a formal, full membership on the one hand, and the realisation of the duties of participation in the functional areas set out in the EU treaties on the

other. This possibility should be put more forcibly to public and parliamentary discussion as a compromise and alternative to simple withdrawal.

Which procedure would be sensible for those states that are rejecting the Constitutional Treaty, and do not already participate in the Eurozone or fully participate in the foreign, security and defence, or justice and home affairs policies of the EU? The governments of these states should make an offer of "faithful co-existence" to their EU partners, in which those states willing to accept the Constitutional Treaty would not be prevented from doing so, whilst the "no" states would be spared withdrawal. This model boils down, in fact, to the negotiation of modular membership: The "no" states would have to confine their voting rights in Council to the areas of integration in which they continued to participate. The rights of nomination concerning the Commission, Court of Justice, and Court of Auditors would be reserved for full members. The plethora of protocols and special clauses on the special situation of these states would then become the rule; further rights of co-determination and representation would then have to be negotiated on this new basis.

The governments are not legally obliged, but they are politically bound to submit the Constitutional Treaty to some kind of ratification procedure. They can do this via a parliamentary route or through a referendum. The idea that a signed treaty can somehow vanish into thin air simply because one or more governments refuse to submit it to ratification should not even be considered.

# Draft Protocol/Declaration/Charter on the Union's Social, Solidarity, and Economic Policy

This draft incorporates all ECT provisions on the Union's fundamental tasks, goals and guarantees with regard to social, solidarity, and economic policy making without amending the substance to the ECT.

## Option I – Visualisation

### I. Preamble

[...]

### II. Values and Objectives

#### The Values of the Union (from Article I-2)

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

#### Fundamental Rights (from Article I-9)

The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights.

The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

### III. Rights

#### Freedom, Equality, and Non-Discrimination (from Articles 1-4, II-83, II-85, II-86, II-92, II-93, III-116, III-118, III-123, III-124, III-214)

The free movement of persons, services, goods and capital, and freedom of establishment shall be guaranteed within and by the Union, in accordance with the Constitution.

(from II-81 und III-118) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Within the scope of application of the Constitution and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited.

In defining and implementing the policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

#### Equality between Women and Men

##### (from Articles II-83, III-116, III-214)

(from II-83 und III-116) Equality between women and men must be ensured in all areas, including employment, work and pay.

The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

(from III-214) Each Member State shall ensure that the principle of equal pay for female and male workers for equal work or work of equal value is applied.

Equal pay without discrimination based on sex means:

- a. that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
- b. that pay for work at time rates shall be the same for the same job.



With a view to ensuring full equality in practice between women and men in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity, or to prevent or compensate for disadvantages in professional careers.

**Family and Professional Life  
(from Article II-93 and II-92)**

The family shall enjoy legal, economic and social protection.

To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

**Rights of the Elderly (from Article II-85)**

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

**Integration of persons with disabilities  
(from Article II-86)**

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

**Freedom to Choose an Occupation and Right to Engage in Work (from Article II-75 and III-133)**

Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Workers shall have the right to move freely within the Union.

Any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment shall be prohibited.

Workers shall have the right, subject to limitations justified on grounds of public policy, public security or public health:

- a. to accept offers of employment actually made;
- b. to move freely within the territory of Member States for this purpose;
- c. to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
- d. to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in European regulations adopted by the Commission.

This Article shall not apply to employment in the public service.

**Right of Access to Placement Services (from Article II-89)**

Everyone has the right of access to a free placement service.

**Fair and Just Working Conditions (from Article II-91)**

Every worker has the right to working conditions which respect his or her health, safety and dignity.

Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

**Freedom of Movement for Workers  
(from Article III-134 and III-135)**

Measures needed to bring about freedom of movement for workers shall aim, in particular, to:

- a. ensure close cooperation between national employment services;
- b. abolish those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an

obstacle to liberalisation of the movement of workers;

- c. abolish all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as impose on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned;
- d. set up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

Member States shall, within the framework of a joint programme, encourage the exchange of young workers.

#### **Right to Education (from Article II-74)**

Everyone has the right to education and to have access to vocational and continuing training.

This right includes the possibility to receive free compulsory education.

#### **Social Security (from Article III-136)**

Measures necessary to bring about freedom of movement for workers by making arrangements to secure for employed and self-employed migrant workers and their dependants are meant to:

- a. aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the different countries;
- b. payment of benefits to persons resident in the territories of Member States.

#### **Workers' Right to Information and Consultation within the Undertaking (from Article II-87)**

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.

#### **Right of Collective Bargaining and Action (from Article II-88)**

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

#### **Protection in the Event of Unjustified Dismissal (from Article II-90)**

Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.

#### **Social Security and Social Assistance (from Article II-94)**

The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.

Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.

In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

#### **Access to Services of General Economic Interest (from Article II-96 and III-122)**

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Constitution, in order to promote the social and territorial cohesion of the Union.

Given the place occupied by services of general economic interest as services to which all in the Union attribute value as well as their role in promoting its social and territorial cohesion, the Union and the Member States, each within their respective competences and within the scope of application of the Constitution, shall take care that such services operate on the basis of principles and conditions, in particular

economic and financial conditions, which enable them to fulfil their missions.

#### **IV. The Social Policy Tasks of the Union (from Articles I-3 and III-117, III-209, III-210, III-211, III-212)**

##### **The Union**

- ▶ shall offer its citizens an area without internal frontiers, and an internal market where competition is free and undistorted. The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment (Art. I-3) /high level of employment (III-117) and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
- ▶ shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.
- ▶ shall promote economic, social and territorial cohesion, and solidarity among Member States.

In defining and implementing the policies and actions, the Union shall take into account requirements linked to the promotion of the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

(from III-209) The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Union and the Member States shall act taking account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy.

They believe that such a development will ensue not only from the functioning of the internal market, which will favour the harmonisation of social systems, but also from the procedures provided for in the Constitution and from the approximation of provisions laid down by law, regulation or administrative action of the Member States.

(from III-210) With a view to achieving these objectives, the Union shall support and complement the activities of the Member States in the following fields:

- a. improvement in particular of the working environment to protect workers' health and safety;
- b. working conditions;
- c. social security and social protection of workers;
- d. protection of workers where their employment contract is terminated;
- e. the information and consultation of workers;
- f. representation and collective defence of the interests of workers and employers, including co-determination;
- g. conditions of employment for third-country nationals legally residing in Union territory;
- h. the integration of persons excluded from the labour market;
- i. equality between women and men with regard to labour market opportunities and treatment at work;
- j. the combating of social exclusion;
- k. the modernisation of social protection systems without prejudice to point (c).

(from III-211) The Union shall promote the consultation of management and labour at Union level and shall adopt any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.

(from III-212) Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements.

##### **The European Social Fund (from Article III-219)**

In order to improve employment opportunities for workers in the internal market and to contribute thereby to raising the standard of living, a European Social Fund is hereby established; it shall aim to render the employment of workers easier and to increase their geographical and occupational mobility within the Union, and to facilitate their adaptation to industrial changes and to changes in production systems, in particular through vocational training and retraining.

## **V. The Economic Policy Tasks of the Union (from Articles III-178, III-179, III-184)**

Member States shall conduct their economic policies in order to contribute to the achievement of the Union's objectives, and in the context of the broad guidelines referred to in Article III-179(2). The Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article III-177.

(from III-179) Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council.

(from III-184) Member States shall avoid excessive government deficits.

## **VI. The Employment Policy Tasks of the Union (from Articles III-203, III-204, III-205)**

The Union and the Member States shall work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change.

(from III-204) Member States, through their employment policies, shall contribute to the achievement of these objectives in a way consistent with the broad guidelines of the economic policies of the Member States and of the Union.

Member States, having regard to national practices related to the responsibilities of management and labour, shall regard promoting employment as a matter of common concern and shall coordinate their action in this respect within the Council.

(from III-205) The Union shall contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action. In doing so, the competences of the Member States shall be respected.

The objective of a high level of employment shall be taken into consideration in the formulation and implementation of Union policies and activities.

## **VII. Economic and Social Solidarity (from Articles III-220, III-221)**

The Union shall develop and pursue its action leading to the strengthening of its economic, social and territorial cohesion. In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions.

(from III-221) Member States shall conduct their economic policies and shall coordinate them in such a way as, in addition, to attain these objectives. The formulation and implementation of the Union's policies and action and the implementation of the internal market shall take into account those objectives and shall contribute to their achievement. The Union shall also support the achievement of these objectives by the action it takes through the Structural Funds, the European Investment Bank and the other existing financial instruments.

## **Option II – Deepening (from the Social Protocol of the Maastricht Treaty)**

The High Contracting Parties,

Noting that (x, y, z = list of participating countries), wish to continue along the path laid down in the 1989 Social Charter, and the Protocol on Social policy of 1992;

1. that they have adopted among themselves an Agreement to this end; that this Agreement is annexed to this Protocol;
2. that this Protocol and the said Agreement are without prejudice to the provisions of this Treaty, particularly those relating to social policy which constitute an integral part of the "acquis communautaire";
3. Agree to authorize those (x, y, z = number of participating countries) to have recourse to the institutions, procedures and mechanisms of the Treaty for the purposes of taking among themselves and applying as far as they are concerned the acts and decisions required for giving effect to the above-mentioned Agreement.

(a, b, c = non-participating countries) shall not take part in the deliberations and the adoption by the Council of Commission proposals made on the basis of the Protocol and the above mentioned Agreement. By way of derogation from Article I-25 of the

Treaty, acts of the Council which are made pursuant to this Protocol and which must be adopted by a qualified majority shall be deemed to be so adopted if they have received [definition of double majority within the group of participating countries]. The unanimity of the members of the Council, with the exception of (a, b, c = non-participating countries), shall be necessary for acts of the Council which must be adopted unanimously and for those amending the Commission proposal. Acts adopted by the Council and any financial consequences other than administrative costs entailed for the institutions shall not be applicable to (a, b, c = non-participating countries).

3. This Protocol shall be annexed to the Treaty.
4. Agreement on Social Policy Concluded between the Member States of the European Union with the Exception of (a, b, c = Non-Participating Countries).

The undersigned (x, y, z = participating countries) High Contracting Parties,  
have agreed as follows:

(definition of the objectives and activities for the enhanced cooperation in Social, Economic and Employment policy)

## Abbreviations

BZÖ	Alliance for the Future of Austria (Bündnis Zukunft Österreich)
CFSP	Common Foreign and Security Policy
ECJ	European Court of Justice
ECT	European Constitutional Treaty
EEA	European Economic Area
EEAS	European External Action Service
EFTA	European Free Trade Area
EMU	Economic and Monetary Union
EP	European Parliament
ESDP	European Security and Defence Policy
EPP-ED	European People's Party-European Democrats
EEC	European Economic Community
GAERC	General Affairs and External Relations Council
ÖVP	Austrian People's Party (Österreichische Volkspartei)
PES	Party of European Socialists
PSC	Permanent Structured Cooperation
Rdnr.	Randnummer
Rs	Rechtssache
Rz.	Randziffer
SEA	Single European Act
SPÖ	Social Democratic Party of Austria (Sozialdemokratische Partei Österreichs)
t.a.t.	This author's translation
TEC	EC Treaty
TECSC	Treaty Establishing a European Coal and Steel Community
TEU	Treaty on the European Union
UMP	Union for a Popular Movement (Union pour un Mouvement Populaire)
vs.	versus