The EU's Constitutional Treaty

French and Dutch voters rejected the EU's Constitutional Treaty by a wide margin in the summer of 2005. Since the Treaty must be ratified by all EU members, these negative votes were huge blow to the Constitution, probably a fatal one. EU leaders reacted by suspending the formal ratification timetable, notably the deadline by which all EU members were supposed to have ratified the Treaty (November 2006), and allowed individual Member State to decide how to proceed. Some went on with their ratification plans; others decided to wait and see. As of early 2006, neither the French nor the Dutch governments had a plan for reversing the fatal 'no' so there is no plan for putting the Constitution into force.

No means No

Although the Maastricht and Nice Treaties survived 'no' votes, the Dutch and French rejections are quite different, as Box 1 argues. Polls indicated that French and Dutch voters are unlikely to reverse themselves, so it is unlikely that any French or Dutch government will ask their citizens to voting again. For this reason, most independent observers believe that the Constitutional Treaty – as it now stands – will never become law. The future course of action was unclear in early 2006, and it seems likely that the situation will remain that way until after the French Presidential elections in 2007.

Yet even if the Constitutional Treaty never enters into force as written, the document and controversy surrounding it are important. The Treaty contains many hard-fought compromise-solutions to real problems facing the enlarged EU. Many of these solutions are likely to be adopted in other ways.

This essay outlines the Constitution and highlights the major changes it implies. The essay also considers which elements of the Constitution could be implemented with a new Treaty. Before turning to these matters, however, the essay studies the forces and events that produced the Constitution in the first place. Such study is crucial since it allows us to distinguish between the Treaty elements that are absolutely essential to the enlarged EU and those that the EU could live without.

Box 1: The French and Dutch voters are different

The Danish voted no to the Maastricht Treaty, and the Irish said no to the Nice Treaty, but both entered into force. In those cases, EU leaders provided the reluctant voters with various assurances, and the voters reversed their rejections in second plebiscites. One might think the same could happen now, but the situations are really quite different.

First, the number of no-voters involved is quite different. In the first Irish poll on the Nice Treaty, less than a million people voted and only 530,000 said 'no.' In the French plebiscite, 29 million voters cast ballots with 15.5 million saying no. In the Netherlands, the 61.5% no-vote meant 4.7 million Dutch rejected the Treaty. While EU leaders could 'work around' 530,000 nay-sayers, it is hard to ignore a 'no' from 20 million voters.

Second, in the Irish and Danish cases, leaders could identify specific concerns held by specific groups of no voters and this allowed them to make compromises that ensured enough no-voters would switch their minds in a second vote. EU leaders assured Danish voters that they would extend to Denmark the 'opt out' that Britain had won in the Maastricht Treaty concerning the right to stay out of the eurozone. In the case of the Irish 'no', the solution was to provide assurances that the Nice Treaty would not be a threat to Irish neutrality (an important concern to several fringe voting groups).

How did the EU end up needing the Constitutional Treaty?

In June 1993, EU15 leaders confirmed that the Central and Eastern European nations would eventually become EU members. From this point on, it was clear to everyone that EU institutions and procedures would have to be reformed. Structures designed for six members were groaning under the weight of 15 members. Adding a dozen newcomers would surely bring down the house.

The quest to reform EU institutions began in 1996 when the EU started the Treaty-writing exercise – called an Intergovernmental Conference (IGC) in EU jargon – that produced the Amsterdam Treaty in 1997. The priority tasks of the 1996 IGC were three institutional reforms that everyone agreed were necessary:

► Reform of the number of members of the European Commission,
► Reform of the Council of Ministers' qualified majority voting rules.
► Reduction in the number of issues decided by unanimity in the Council rather than by qualified majority voting.
(These goals were explicitly set out by EU leaders in the 'Conclusions' to various European Council summits; See Baldwin 2006 for details.)

As illustrated in Chapter 2 and 3 of our textbook, the Council of Ministers is the key decision-making body in the EU, so its reform – namely the second and third points – were always going to be the most controversial.

Amsterdam Treaty: Failure #1

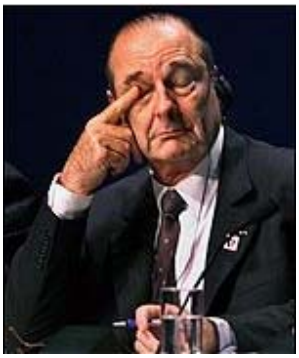
While the ambitions for the Amsterdam Treaty were high, the IGC failed to produce agreement on the three main institutional reforms. The IGC did not end in failure. It produced a treaty that is best thought of as a tidying up of the Maastricht Treaty. The substantive additions included a more substantial role for the EU in social policy (UK Prime Minister Tony Blair cancelled the British opt-out). The European Parliament powers were modestly boosted, and the notion of flexible integration, so-called 'closer cooperation', was introduced.

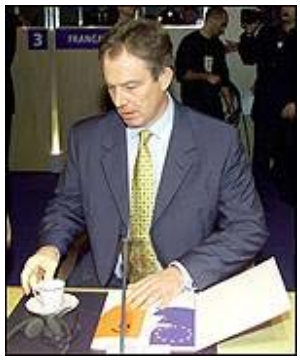
Admitting their failure, EU leaders agreed to a list of issues that had to be solved before the enlargement – the so called Amsterdam leftovers – and then agreed to launch a new IGC in 2000. This list was explicitly set out by EU leaders in the Conclusions to their post Treaty summit. Importantly, these leaders also committed themselves to not enlarging the EU before the Amsterdam Leftovers were cleaned up.

Nice Treaty: Failure #2

The IGC 2000 lasted about a year, with frequent meetings of national experts laying extensive groundwork for the institutional reforms. A handful of options for each of the three main areas were developed in preparation for the Summit.[1] EU leaders met in the French city of Nice in December 2000 to wrap up a new treaty that was to adjust EU institutions to the impeding enlargement. France had the Presidency of the EU at the time, so the Nice Summit was under the guidance of French President Jacques Chirac.

The longest EU Summit in History: Nice December 2000.





Rather than adopting one of the carefully thought-out and well prepared options discussed in the IGC, Chirac proposed a brand-new, highly complex proposal on Council voting. This tactic threw off the Summit's timetable, forcing an extension since EU leaders had promised themselves that enlargement could not proceed unless they addressed the 'Amsterdam Leftovers.'

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1 The IGC 2000 was the first were almost everything was posted on the web. See europa.eu.int/comm/archives/igc2000/index_en.htm for the compete archives.

At 4:15 on Sunday morning under a hazy full moon, the longest European Council meeting in history announced political agreement on a new Treaty. Due to Chirac's stratagem, the leaders did not have a legal text in front of them in, so there as no actual Treaty for them to sign. Indeed, the summit ended before everything was settled; it took two months of post-summit negotiations to finalise the Nice Treaty and some numerical inconsistencies were left in the Treaty.[2] The final signing ceremony was on 26 February 2001.

At the end, the small nations sacrificed power to allow the enlargement to proceed. In exchange, the Nice summit Conclusions had to declare the Nice Treaty a success and the enlargement could proceed. The Nice European Council Conclusions states: "This new treaty strengthens the legitimacy, effectiveness and public acceptability of the institutions and enables the Union's firm commitment to the enlargement process to be reaffirmed. The European Council considers that, as from the date of entry into force of the Treaty of Nice, the Union will be in a position to welcome new Member States once they have demonstrated their ability to assume the obligations of accession and the negotiations have been brought to a successful conclusion."[3]

Three days later Chirac told the European Parliament that the Nice reforms would be enough to allow the EU to function effectively and legitimately even after enlarging the club from 15 to 27. He said: "We feel satisfied that we overcame the difficulties blocking the path towards the much sought-after aim of fulfilling the commitments that were given at Helsinki to the candidate countries without destroying the Union, of enabling tomorrow's Europe to continue to function effectively. I think I can say that we met these conditions. … It responds to the challenge we were presented with, which was to provide the Union with the ability to take decisions and to act once Europe has gone ahead with enlargement on an unprecedented scale. … As we promised, there are no leftovers from Nice."[4,5]

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[2] Declaration 20 of the Final Act says the Council vote threshold for the 27 listed nations is 258, but Declaration 21 says that once all the listed nations are in and we have a EU27, the blocking minority is 91, which implies a winning threshold of 345-90=255, which is notably different than 258, at least to anyone with a calculator to hand. Another oddity is with the threshold expressed in percentages. Declaration 21 says that while the enlargement has not yet been completed (i.e. not all 12 have joined), the Council vote threshold will move, "according to the pace of accessions, from a percentage below the current one to a maximum of 73,4%. When all the candidate countries mentioned above have acceded, the blocking minority, in a Union of 27, will be raised to 91 votes, and the qualified majority threshold resulting from the table given in the Declaration on enlargement of the European Union will be automatically adjusted accordingly." The QMV threshold at the time was 71.26%, and 91 votes to block in the EU27 implies a threshold of 73.91%, so where does the 73.4% come from?

[3] Presidency Conclusions, Nice European Council Meeting, 7, 8 AND 9 DECEMBER 2000, paragraph 4.

[4]Transcript from European Parliament. www.europarl.eu.int/dg7/debats/data/en/00-12-12.en

[5] Some of Chirac's colleagues on the European Council were more realistic. On 11 December 2000, UK Prime Ministers told reporters: "As far as Britain's national interest in concerned, this was a very successful summit in that we achieved everything we set out to achieve, for example on tax, social security, defence, more power for Britain within the EU. So far as Europe is concerned, we cannot do business like this in the future. The ideas that we outlined a few weeks ago in Warsaw on how we improve the way we work and

The leftovers from Nice

The complexity of Chirac's proposal clouded issues for a while, but it rapidly became clear that the Treaty of Nice was not a success. There were indeed some "Nice Leftovers" and they were basically the same as the Amsterdam Leftovers. On Commission reform, the Nice Treaty adopted a temporary, makeshift reform – temporary since it applied only up till the 27th member has joined; and makeshift since a long-term solution was not agreed. On the extension of qualified voting issue, the Treaty was basically a house-cleaning exercise with little or no change in the areas to be subject to majority voting. On Council decision-making reform, the Treaty of Nice actually made things worse, as the calculations explained in Chapter 3 of our book shows. In the end, Nice shifted a lot of power to big members without meeting the goal of improving decision-making efficiency of the enlarged EU.

In fact, EU leaders at the Nice summit knew that the Treaty was incomplete. As part of the final political deal on the Treaty, they agreed to commit themselves to another IGC in 2004 in order to complete the reform process. This "Declaration on the future of the Union" highlighted four themes:

- defining a more precise division of powers between the EU and its members;
- clarifying the status of the Charter of Fundamental Rights proclaimed in Nice;
- making the Treaties easier to understand without changing their meaning;
- defining the role of national parliaments in the European institutions.

Importantly, there was no mention of the need for an EU constitution. Nor was there any mention of institutional reform since EU leaders had to claim that the Nice Treaty solved all the enlargement-related institutional issues.

As history would have it, almost the same set of leaders who were in Nice that on that chilly winter morning agreed in 2003 to a constitution they did not ask for because it solved a number of pressing matters – basically the four listed above, plus the fix-up of the Nice Treaty's foul-up of institution reform, but that is getting ahead of the story.

Irish voters narrowly reject Nice Treaty, but approved it in a second vote.

Despite the difficult negotiations, EU leaders at the Nice summit knew that the Treaty was incomplete. As part of the final political deal on the Treaty, they agreed to commit

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take decisions have to be part of the agenda for the future. We now have the decision we need on enlargement but there are real improvements we now have to make in the way that we work." www.pm.gov.uk, Press Briefing: 11am Monday 11 December 2000,

themselves to another IGC in 2004 in order to complete the reform process. This "Declaration on the future of the Union." highlighted four themes:

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The Laeken Declaration, 15 December 2001

Recognition that the Nice Treaty voting rules failed to address the urgent-and-obvious institutional problems posed by enlargement took some time. Moreover, EU leaders could not explicitly admit their failure because the small members were selling the Treaty to their national audiences as painful but necessary to allow enlargement to proceed. Since urgent-and-obvious problems still needed to be addressed, EU leaders adopted a new tactic. Instead of setting up a new IGC, and adding institutional reform to its agenda, they unanimously adopted a long list of questions that included the urgent-and-obvious problems. Then they set up a Convention to consider them.

The Laeken Declaration, 15 December 2001

One year after Nice, the European Council in Laeken adopted the "Declaration on the Future of the European Union" that started a process leading to the third try at EU institutional reform. Given that IGC96 and IGC2000 had failed to produce the necessary reform, and especially in light of the difficult Nice Summit talks, the Laeken Council decided to try a novel working method. It convened the "Convention on the Future of Europe" that came to be known as European Convention. This was a gathering of representatives from member state governments, the national parliaments, the European Parliament, the Commission, and the candidate countries.

As the Convention's formal name suggests, the Convention was supposed to study the fundamental questions that enlargement posed for the future of Europe, and to define various solution. The output of the Convention was then to be taken as a point of departure for standard intergovernmental negotiations at an IGC.

Admitting the Nice failure

The Laeken Declaration contains a long list of questions that the Convention was supposed to consider. The 56 questions were grouped into the main themes of the Nice Declaration, but Laeken included two crucial novelties.

► The Declaration implicitly admits that the Nice reforms were insufficient by asking "how we can improve the efficiency of decision-making and the workings of the institutions in a Union of some thirty Member States" – despite the fact that this was the main goal of Nice Treaty, and EU leaders had asserted that the Nice Treaty reforms were

sufficient. In effect, they asked the Convention to consider reforms of the Nice Treaty reforms, even before the Nice reforms were implemented (most Nice Treaty changes took effect only with the Eastern enlargement).

► While the Nice Declaration made no mention of a constitution, the word does appear in the Laeken Declaration. The Laeken Declaration did not instruct the Convention to write a constitution, but it did include a section entitled "Towards a Constitution for European citizens." As part of the Laeken Declaration's list of questions, it states in the context of simplification theme: "The question ultimately arises as to whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in the Union. What might the basic features of such a constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union?"

Presidential podium at the plenary session debate on institutional questions, January 2003. From the left, Jean-Luc Dehaene (Vice-Chairman, Belgium), Giuliano Amato (Vice-Chairman, Italy) and Valéry Giscard d'Estaing (Chairman, France).

The Presidium toasts their accomplishment 13 June 2003

The European Convention, February 2002 to July 2003

The European Convention was run by former French President Valéry Giscard d'Estaing with the assistance of two Vice-Chairmen (see **Error! Reference source not found.**). It started slowly and many early observers expected its large size and ill-defined objectives to result in a muddled outcome. However by mid 2002, President Giscard d'Estaing had managed to redefine the Convention's purpose. The "Convention on the Future of Europe" set up by Laeken was transformed into a constitution-writing convention. The new goal was to present the EU heads of state and government with a fully written constitution. From that point forward, the tone of the Convention changed and EU member states started sending heavy-weight politicians in place of low-level representatives. All arguments over the need for a constitution were dropped; discussion turned instead to its content.

The Chairman Valéry Giscard d'Estaing was firmly in charge. The Convention's decision-making procedure involved no voting by representatives and indeed no standard democratic procedure of any kind. The Convention was to adopt its recommendations by "consensus" with Valéry Giscard d'Estaing defining when a consensus existed. The

representatives of the candidate countries participated fully in the debate, but their voices were not allowed to prevent a consensus among the representatives of the EU15.

Chairman Giscard d'Estaing had enormous control over the debate and final control over the actual text. One professor of political science who studied the Convention process closely, George Tsebelis, noted that Giscard: "expanded the authority of the Convention, and shaped the document that it produced. By eliminating votes, he enabled the presidium and the secretariat (which means himself) to summarize the debates. By stretching the concept of agenda in order to place issues in the debate, by using time limits in as a way of limiting possible opponents from making proposals, by selecting the staff members himself, and taking them away from every possible source of opposition he was able to shape the document in a very efficient way. … This is one of the reasons that the process is encountering significant problems for ratification. (Tsebelis 2005)".

One point where the Chairman's prerogative was crucial was in the list of the working groups that were set up. On the issue that would be central to the entire grand bargain, the issue that had been central in IGC96 and IGC2000 – the reform of Council of Ministers voting rules – Giscard choose not to set up a working group. The proposal that he pulled out at the last moment and included in the near-final draft – a dual-majority scheme – attracted a good deal of criticism but Giscard suppressed the debate with time limits. The Member States who knew they stood to lose massive amounts of power under Giscard's scheme decided to hold their fire until the IGC 2003 where the elected leaders of the Member States, not the unelected Giscard – would be in control.

The draft framework that Giscard d'Estaing presented in October 2002 was fleshed out into a draft that was presented to the June 2003 European Council meeting. Leaders of EU15 leaders accepted the draft as a starting point for the IGC.

The Italian failure: IGC 2003

The IGC that considered the draft Constitutional Treaty started in October 2003. Differences that had been papered over by the Convention's unusual decision-making procedure re-emerged. The most contentious issues were the same ones that caused trouble for the IGCs in 1996 and 2000 – institutional reforms, especially of Council of Ministers voting and Commission composition. In part this may have been due to ineffectual management by the Italian Presidency, which tip-toed around the most contentious issue – Council of Ministers voting. The issue was not broached until the fifth Ministerial IGC meeting at the end of November 2003, just weeks before the final December 2003 summit that was supposed to approve the Treaty. The Commission's summary of the 28-29 November 2003 'conclave' in Naples says it all: "As for the most contentious issue, i.e. double majority voting in the Council, the Conference discussed the principle itself (double majority proposed by the Convention or retention of the voting system provided for in the Treaty of Nice) and the various proposals for amendment of States' thresholds and population necessary to adopt a legislative measure. The Presidency did not make any specific proposals." (europa.eu.int).

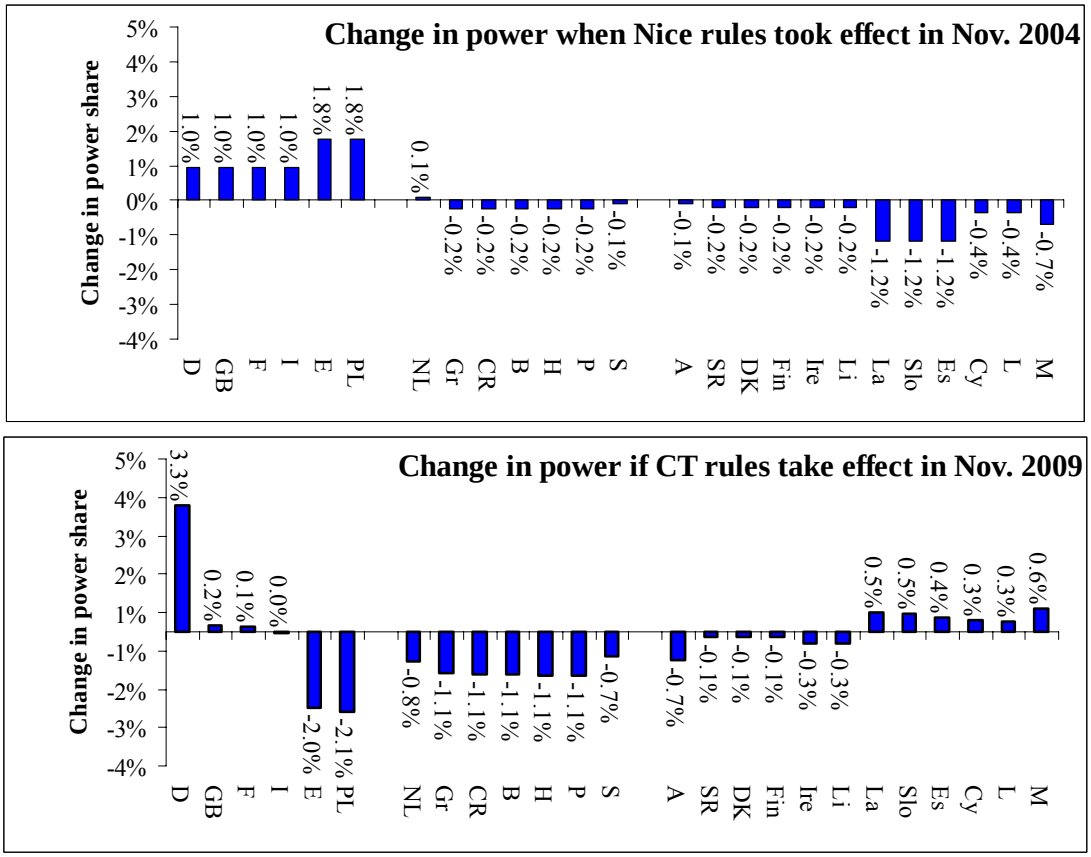
It is worth going into some detail on the negotiating history of the voting rules, since these rules still need to be fixed, and the debate in the IGC 2003 provides a good deal of

information on what sort of arrangements could attract unanimous support of the EU25 (the IGC96 and IGC2000 where conducted by the EU15, not the EU25, and the issue was decided by Giscard in the Convention, so the IGC 2003 is the best source of information on what Member States' positions might be in any future revision of the Nice Treaty rules). The Commission's website summary of the debate states:

> "The Italian Presidency was unable to make a concrete proposal by the end of its six-month period. However, it proposed several options, which were presented informally to the delegations:
>
> - preservation of the system laid down by the Treaty of Nice;
> - establishment of a rendez-vous clause;
> - agreement on the principle of the double majority, but with modified thresholds;
> - preservation of the Convention's proposal.
>
> None of these options was acceptable to all States and, when the Irish Presidency took over, there was still complete disagreement."

The final draft produced by the Italian Presidency was rejected by the European Council in December 2003. Although many members had problems with many parts of the draft, the final hold-up was the voting rules which greatly reduced the voting power of Spain and Poland (compared to the Nice Treaty rules) and greatly increased the voting power of Germany.

Figure 1: Winners & losers under the Nice vs Constitution voting rules



Note: CT stands for Constitutional Treaty. Baldwin and Widgren (2004). Download from www.ceps.be.

The Irish Presidency's compromise

Given this failure, enlargement and the European Parliament's election proceeded without agreement on the new Treaty in the summer of 2004. The next European Council to consider the Treaty consisted of 25 members. Importantly, the Spanish Prime Minister José María Anzar, who so forcefully opposed the new voting rules in December 2003, lost his national election and the new Prime Minister, Jose Luis Zapatero, proved more flexible on the voting issue. This, combined with skilful diplomacy by the Irish Presidency, permitted a grudging and difficult but ultimately unanimous acceptance of the Irish Presidency's draft of the Constitution at the June 2004 summit of EU25 leaders.

The final compromise was a combination of the Italian Presidency's first and third options. The Constitutional Treaty retains the Nice Treaty rules up to November 2009 (to assuage Poland and Spain who lose so much power under the new rules) and it modifies Giscard's double majority scheme by switching the majority thresholds from 50% to 55% of the Member States and from 60% to 55% of the population (this increased all member's power to block a proposal).

Figure 1 shows which nations win and lose from the Nice rules (compared to the pre-Nice rules that were in effect for the first few months after the May 2004 enlargement) and from the Nice rules that are today in operation and the Constitutional Treaty rules that would go into effect if the Treaty is ratified. The reason for Spain and Poland's resistance in the IGC 2003 is quite obvious from the chart, as is Germany's rather strong support for the Treaty.

Ratification difficulties and 'un-necessary' referendums

EU Treaties must be part of each Member State's law. This means that Treaties must be ratified by each member according to its own constitutional requirements. In many EU nations, this involves a vote by the national parliament. In others, it involves a referendum. For a variety of reasons, four EU nations that would normally have ratified by parliamentary vote opted for referendums; two of these voted 'no', one postponed the vote indefinitely and the fourth voted 'yes.'

Early in the IGC process, British Prime Minister Tony Blair declared that the UK would put the Treaty to a referendum. This served his domestic political interest in that it removed the issue from the 2005 General Election (Brits could reject the Constitution without rejecting Blair who supported it). But it also strengthened Britain's hand in the negotiations. Britain could credibly claim that any Treaty that was too integrationist would be rejected by UK voters. Soon afterwards, French President Jacques Chirac also announced that he would put the Treaty to a popular vote. Again this served his domestic political aims (the opposition Socialists were deeply divided over the Constitution and a referendum was expected to damage their cohesion before the 2007 Presidential election, and in fact it did just that). It may also have been viewed as a necessary counter-weight to the 'ultimatum' created by the British referendum.

The Dutch referendum was called for by the Dutch parliament – and this against the wishes of the Christian Democrats, the biggest government coalition party. The Dutch referendum was to be the first ever held in the Netherlands since it became a parliamentary democracy in 1848. The vote was not to be legally binding although all parties agreed to respect the outcome. Likewise, Luxembourg scheduled a consultative referendum – its first since referendums got a very bad name in Europe in 1936 – and the parliament promised to respect the outcome.

Chirac failed to convince French voters.

French President Jacques Chirac during a live, 2-hour debate with 83 young adults; "I think that a great democracy must use a referendum as a means of expression. Unfortunately in France, it's not part of our tradition, and so we have difficulty with it," Chirac commented. "Domestic policy has its own rules, rhythms and demands," the French president said. At the moment when we are about to make a fundamental decision for the future of our country, for the future of Europe... I don't want that to be mixed up with the day-to-day politics of a European country."

The outcome of the unusual French and Dutch votes are well-known while the outcome of the UK referendum will probably never be known. Luxembourgers voted 'yes' by a wide margin. French and Dutch voters rejected the Constitutional Treaty by a wide margin in mid 2005. These two no-votes posed a very different problem than did the Danish and Irish no's to the Maastricht and Nice Treaties. France and the Netherlands are founding members and their citizens are considered solid supporters of the European ideal. The number of no-voters was also quite different. In the first Irish poll on the Nice Treaty, less than a million people voted and only 530,000 said 'no.' In the French plebiscite, 29 million voters cast ballots with 15.5 million saying no. In the Netherlands, the 61.5% no-vote meant 4.7 million Dutch rejected the Treaty. While EU leaders could 'work around' 530,000 no-sayers, it is hard to ignore 20 million no voters. In July, Luxembourg held a consultative vote on the Treaty in which 56.5% of 221,000 voters said yes; Luxembourg's parliament had already approved the constitution two weeks in advance of the referendum. The only other referendum held was Spain where 10.8 million out of 14 million voters said 'yes' in February 2005.

Despite an official campaign for a 'yes (Ja)' the Dutch said No ('Nee').

Post 'Nee' Press conference, 1 June 2005. EU Commission President Jose Manuel Barroso (centre), EU Council President Jean-Claude Juncker (right) and Chairman of the European Parliament Josep Borrell discuss the Dutch No vote.

In reaction to the Dutch and French votes, EU leaders decided to suspend the formal ratification timetable, notably its deadline of November 2006. Since the Constitutional Treaty can only enter into force if it is approved by France and the Netherlands, many independent observers believe that the Constitutional Treaty will never become law.

What's in the Constitutional Treaty

The Constitutional Treaty, formally the "Treaty establishing a Constitution for Europe," was signed by EU leaders in Rome on 29 October 2004. This section reviews the main changes implied by the Constitution. The changes are important even if the Treaty is abandoned. Many of the changes, like most of those reflecting the desire to 'bring the EU closer to the people', can be implemented without a new Treaty and so probably will be put into place in coming years. Others, represent changes that are absolutely necessary, for example reforming the Council's voting rules; these are likely to be enacted in the future, somehow or the other.

Basic constraints

The Constitutional Treaty is an awkward document – 350 pages of legalese and intricate cross references to articles that cross reference other articles.[6] It fails almost completely in its assigned task of simplification. It is probably fair to say that most law professors, even those specialising in European law, do not really understand the Treaty as a whole, nor its full implications for Europe.

This outcome, however unfortunate, was unavoidable. The EU cannot have a Constitution that looks like a constitution in the traditional sense of the word – i.e. a succinct statement of goals and a description of the allocation of power among decision-making institutions amounting to less than, say, 20 pages. The problem turns on legal logic. A constitution in the standard sense of the word would create a new level of European law. The existing Treaties are now the highest level of law with Directives and the like forming secondary law. The new top level of law would pose a threat to legal certainty throughout the EU legal system since one could never be sure when a judicial interpretation of ambiguities between the Constitution and other Treaties might alter existing law. The Conventioneers realised this almost immediately. A real constitution, they concluded, "might well prove a permanent source of conflict."[7]

In short, legal logic tells us that a constitution is the easiest way to arrange the affairs of an organisation like the EU, but the constitution would have had to have been written at the beginning. Legal logic tells us that writing a constitution (in the standard meaning of the word) is basically impossible for an organisation that has been making laws for 50 years without one.

This is why the Constitutional Treaty had to be so long, so complex and so legalist. It had to include every existing Treaty, Protocol and Annex so as to keep all the 'primary law' at the same level. By one estimate, only about a fifth of the Constitution contains new or substantially amended articles.[8] This is also why it had to repeal all the existing Treaties.

Basic structure of the Constitution

The Constitution begins with a short Preamble. The 'meat' is in four "Parts." Parts are divided into "Titles" which are divided into "Chapters" which are divided into "Sections" and finally into individual "Articles." Articles are numbered consecutively, 1 to 448, but are usual preceded by the Part number. For example, Article II-104, which gives EU citizens the right to petition the European Parliament, can be found in Part II.

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[6] Serious students of European integration should at least skim the Constitutional Treaty; see the Commission's excellent site http://europa.eu.int/scadplus/constitution/index_en.htm for the full text and extensive commentary and perspective.

[7] CONV 250/02, as quoted in Peter Norman's excellent book, "The Accidental Constitution" page 64.

[8] "Guide to the New Constitutional Treaty", The Federal Trust for education and research, a 60 year old British think tank that "studies the interactions between regional, national, European and global levels of government." Much of the section is based on this article.

The four Parts are:

Part I: Principles

This is the key part of the Treaty, the part that all students should read. It is a statement of the principles on which the EU's legal and political order is based. Its Titles:

- define the goals of the Union
- define fundamental rights and citizenship of the Union
- lists the areas in which Members States have fully or partially transferred sovereignty to the EU (areas of 'exclusive' or 'shared' competences in EU jargon) and sets out the principles of 'subsidiarity' and 'proportionality'[9]
- explains the EU's institutions, their powers and interrelationships
- details the EU's legal instruments and the procedures for adopting them (this basically codifies existing procedures, but reduces the number of instruments)

Part II: Charter of Fundamental Rights

Part II contains the Charter of Fundamental Rights of the Union. This was agreed in the Treaty of Nice, but the Constitution makes it binding on all members. This Part also contains guarantees that the Charter only applies to the institutions and to the Member States when they are implementing EU law. It states explicitly that the Charter does not transfer new powers to the European Union. This messy political compromise helped overcome the British government objections to making the Charter legally binding.

Part III: Policies and Decision-making Details

This is the longest Part and the hardest to read. It incorporates most of the of the Rome and Maastricht Treaty articles as modified by subsequent treaties. Particularly important is II-396 since this sets out the 'Ordinary Legislative Procedure', i.e. the standard way of making new laws, which roughly speaking, is the same as the existing Codecision procedure.

Part IV: General and Final Provisions

This part defines the procedures for ratification and amendment of the Constitution. One innovation is that it foresees future treaty reforms as starting with a convention, but ending, as before, with an IGC.

The Constitution ends with a Final Act that gives an overview of the Protocols and Declarations. Protocols have the same legal status as main Treaty Articles, but Declarations have no legal value apart from facilitating future interpretations of Articles and Protocols.

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[9] These mean the EU should act only to the extent that action by individual members is insufficient to accomplish the goal at hand, see Chapter 3.

Institutional changes

The Constitution is the third 'scene' in the EU's institutional reform 'play' (Amsterdam and Nice were scene one and two). It contains important but not radical changes for the Big-5 institutions. The largest changes by far are for the Commission.

Commission

Fierce debate surrounded the Commission reform proposals. Almost everyone realised that a Commission with too many members would be ineffective, but who should sacrifice the right to have a Commissioner? Small members – who view the Commission as a key protector of their rights – felt a Commissioner was critical. Given the skewed size distribution of EU members (see section **Error! Reference source not found.**), large members felt it essential that there be a Commission from each of the six big members who together account for three-quarters of the Union's population.

The compromise was to stick with the Nice Treaty's one-per-member up to 2014, after which the number is capped at two thirds the number of EU members, with Commissioners rotating equally among Member States. The rotation system is not specified and it might never occur, even if the Constitution takes effect. By 2014, the Commission would have had almost a decade of working with 25-plus members. Critically, the Constitution grants the European Council the power to change the number of Commissioners with a unanimous vote (i.e. without a new Treaty), so the Council might well decide to stick with the one-per-member rule.

Council of Ministers

Little changes here in terms of organisation except some Council meetings will be held in public. This is one of the many 'PR' changes in the Constitution. The Council, of course, could decide to meet in public with or without a Treaty change, but bundling such 'openness' and 'closer to the people' changes with the changes that really do require a Treaty change was viewed as good public relations (PR) – a way of showing the Constitutional Treaty was meant to bring the EU closer to the people.

The big changes are in the Council's voting rules and in the creation of the European Minister for Foreign Affairs.

► **Voting**. From 2009, the Council has a new majority voting rule, a so-called "double majority" rule where approval require a 'yes' vote from members representing at least 65% of the EU's population and at least 55% of Member States. This is widely viewed as essential to guarding the EU's ability to act (see Chapter 3)

This was the most fiercely contested issue in the IGC – the issue over which Spain and Poland vetoed the Italian Presidency's draft of the Constitutional treaty in December 2003 (See Chapter 1). The Constitution's voting rules change the power of various member states compared to the Nice Treaty rules. For example, it substantially raises Germany's power and substantially lowers that of Poland and Spain (see Chapter 3). The compromise was to stick with the Treaty of Nice rules until 2009.

► **European Minister for Foreign Affairs**. One of the most important institutional innovations is creation of a "Minister for Foreign Affairs" for the EU. This would almost surely boost the EU's role in world affairs. The new Foreign Minister would conduct Common Foreign and Security Policy (CFSP, i.e. the old third pillar) including European Security and Defence Policy (ESDP). The new Minister would represent the EU on CFSP issues, conduct political dialogue with third nations, and express the EU's position in international organisations and at international conferences. This would be an extremely high-profile position – at least as prominent (if not as powerful) as the President of the European Commission, European Parliament and European Council.

Currently, responsibility for the CFSP is split between the High Representative for the CFSP (Javier Solana) who sits with the Council of Ministers, and European Commission's External Relations Commissioner. Neither currently has much power and plays, at best, a coordinating function. The new position mergers the two current posts (so the EU Foreign Minister would sits on both the Council and Commission). Critically, the new Minister would have the power of initiative in the Council. The Council would still act on a basis of unanimity on most critical CFSP issue – especially military and defence matters – so the Member States are still firmly in charge. But the power of initiative can matter a great deal. Many initiatives are suppressed by backdoor pressure from reluctant Member States who do not want to say 'no' in public.

European Council

The Constitution makes only one big change here. Up to now, European Council meetings were chaired by the nation holding the EU Presidency, which rotates every six months. The Constitution creates a new post, European Council President, to boost stability and coherence of the European Council's work. The President, who will be elected by members of the European Council for a two and a half year term, renewable once. The election is decided on the basis of qualified majority voting. Again, this post as little direct power since the European Council must approve thing unanimously (by 'consensus'), but the President's 'agenda setting' power could prove to be important (see Chapter 3). The chair of the Council of Ministers, by contrast, continues to rotate. Since nothing the European Council decides can come into law without passing through the Council of Ministers, rotation of the Council of Ministers' chair dampens the power of the President of the European Council.

European Parliament

The Constitution implies few changes here. The Parliament's powers of EU legislation have been incrementally boosted by every Treaty since the 1986 Single European Act and the Constitutional Treaty is no exception. The Parliament gets an equal say in a few more areas, most notable on the annual budget (up to now, the Parliament could not vote on CAP spending since Member States feared that the Parliament would cut or reorient the monies). Also, the number of Members of European Parliament (MEPs) is capped at 750. The allocation of these among members is to be decided before the standing Parliament's term ends in 2008.

European Court

There are no major organisational changes here. However, since the Constitution eliminates the 3-pillar structure of the EU, the Constitution substantially widens the range of issues on which the Court should ensure that the law is observed. Article III-376 explicitly says the Court has no jurisdiction over Common Foreign and Security Policy. Such explicit exclusions, however, were not provided for second pillar issues, or the Social Charter.

Role of national parliaments

One of the closer-to-the-people elements of the Treaty is a commitment by the Commission to send all legislative proposals to the national parliaments who can, in turn, complain to the European Parliament, Council and Commission if they feel the proposal violates the principle of subsidiarity. If at a one third of the national parliaments share this belief, the Commission would have to review its proposal.

This is another of the PR changes. Currently, the Commission consults with all member states before making a proposal (after all, the member states will have to vote on it in the Council), and the member state governments almost always have a majority in their national parliaments. Thus the fact that the proposal would be formally sent to national parliaments changes little. In fact, proposal can be downloaded from the web even now. Moreover, the objections of national parliaments have no real legal force under the Constitution. The Commission is only supposed to "review" its proposal. This is one of the first changes that are likely to be implemented even without the Constitution.

Legislative processes

The changes here are mainly cosmetic. The Constitution re-labels what is the Codecision Procedure into the 'Ordinary Legislative Procedure.' It eliminates a number of minor legislative procedures that are holdovers from the increasing powers of the European Parliament (Member States have sought to limit that Parliament's power by creating special procedures on sensitive issues). This would make it a little easier to understand the EU, but will change little in practice.

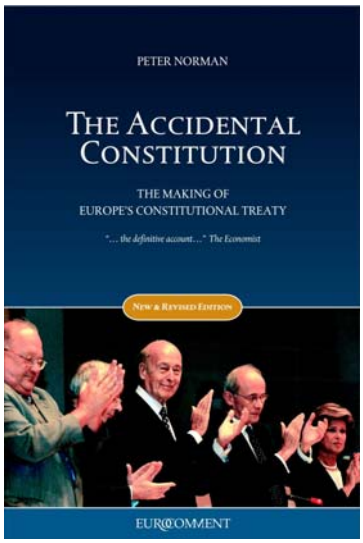
The one big change concerns a new process of modifying the Constitution itself. EU leaders understood that negotiating and ratifying new Treaties in a Union of 25-plus members would be extremely difficult. This would have had the effect of slowing, or stopping the broadening of EU powers to new areas, such as social policy and foreign policy. To avoid this, the Constitution contains 'passerelle' clauses that allow the European Council to change its own decision-making rule from unanimity to the Ordinary Legislative Procedure. (More on this below.)

EU law

The Constitution implies few changes in EU law, however, it codifies existing principles, such as direct effect, primacy and autonomy (see section **Error! Reference source not found.**).

Motivations and uncertainty

How did the EU Constitution come about? EU leaders never directly asked the Convention to write a Constitution. Not in the Nice Declaration that set the stage for a new Treaty, nor in the Laeken Declaration that set up the Convention, nor in any of the half dozen Conclusions of the Presidency which discussed the Convention's progress. This was due to disagreement among EU members themselves.



The 'federalists' among EU members, such as Belgium and Germany, thought the Constitution was a natural destination for the long road to building an ever closer union among the peoples of Europe. More importantly, they felt it was critical to maintaining momentum towards deeper integration in a grouping of more than 25 extremely diverse nations. The 'intergovernmentalists', such as the UK and Denmark, felt that a Constitution would be a step too far. The full answer must wait the judgement of history, but the most likely answer is contained in the title of one of the first books on the Constitutions, "The Accidental Constitution," by Peter Norman (a journalist for the Financial Times newspaper). Somehow it got started and from then on opposing the Constitution was a sure way of reducing a nation's influence over the final document, so everyone supported it.

Given this lack of consensus on the need for a constitution, there was never a clear mandate for what the constitution should accomplish. The result was a lack of major, bold initiatives and an abundance of subtle changes that might or might not have far reaching effects. This uncertainty allowed the highly federalist former Belgian Prime Ministers to declare in June 2004 that "This constitution marks the passage of the European Union from socio-economic Europe under Maastricht to a more political Europe which will need to be further fleshed out in the years ahead. This is a step along the road." While British Prime Minister Blair told the House of Commons that the Constitution put clear limits on the degree to which further British sovereignty could be transferred to the EU, and Irish Prime Minister Bertie Ahern said: "It is not a super state; it's not a federal state. It's about a group of nations, a group of peoples working to a Constitution."

The subtle, unpredictable changes fall into two categories, the EU's power to extend its own powers, and extension of the EU Court's jurisdiction to new issues.

The power to extend its EU powers: the passerelles and flexibility clauses

The Constitution has two novel provisions that make it possible to broaden EU supranationality without subjecting the changes to national referendums or national parliamentary ratification procedures. First, the "passerelle" clause (Article 444) would grant the European Council the power to change the law-making procedure in many

policy areas from unanimity (intergovernmental) to majority voting (supranational). Doing this would require unanimous agreement of the European Council.[10] The Constitution also allows any national parliament to veto the switch, and the European Parliament must also approve. However, the leaders on the European Council include all the leaders of national parliaments, and the European Parliament gains power under majority voting so two additional conditions are unlikely to act as constraints.

For example, under both the current Treaties and the Constitutional Treaty, EU laws on corporate taxation must be decided by unanimous vote in the Council of Ministers. Under current practices, this could be changed only with a new Treaty that would have to be ratified by all members. Under the Constitution, a unanimous vote by the European Council can change this, making all future laws on corporate taxation subject to majority voting (Ordinary Legislative Procedure). A key effect of these provisions would be to avoid national referendums on initiatives that extend EU supranationality to new areas. Note that the passerelles are one-way; they do not allow EU leaders to switch a policy area from majority voting to unanimity, so they can only deepen EU integration.

This is one of the main reasons why proponents of an ever deeper EU are strongly in favour of the Constitution (the Germany government and the European Commission, for example). It is also why opponents of an ever deeper EU are strongly against it (the Economist magazine and British conservatives, for example).

The flexibility clause is the second provision. Article I-18 grants the EU the power to give itself the power necessary to attain its objectives, even if that power is not granted by the Constitution. This clause exists in the Treaty of Rome and was the source of 'creeping competency' and the main reason the Maastricht Treaty set up the pillar structure. However, under the current system, the pillars limit the flexibility clause to first pillar issues (basically economic integration). The Constitution would apply to every area mentioned in the Constitution, except those where it is explicitly excluded, notably defence policy and the Charter of Fundamental Rights.

In truth, no one can know what the full implications of the passerelle and flexibility clauses would be. Europhile have faith that the new powers would be used wisely. Euroskeptics fear that they would be abused by out-of-touch elites to force through more integration than many EU citizens want.

Extension of the EU Court's jurisdiction

The removal of the pillars and the formal inclusion of the European Council in the EU's institutional framework might or might not have important effects. The crux of the matter is that the Constitution, like any political document, is filled with messy political compromises, but the Court works on the basis of legal logic. One than once in the EU

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[10] "Passerelle" is often translated as 'bridge' in English, but it would be better described as an "overpass", like the aerial walkway between two building, since the provision allows EU leaders to avoid the "busy traffic" of negotiating, signing and ratifying a new Treaty.

history, the Court's application of logic has had unforeseen consequences (classic examples of this are the Costa v ENEL and Cassis de Dijon cases).[11]

The Constitution states that the EU Court "shall ensure that in the interpretation and application of the Constitution the law is observed." Without the pillars explicitly limiting the Court's jurisdiction, the Court gains power over every aspect of EU activity except those where it is explicitly denied, such as the Common Foreign and Security Policy (III-376). No one can know what the effect of this will be, especially in the area of social policy.

There are many potential conflicts between the Charter and EU members' social policy laws since the Charter views some workplace issues as 'Fundamental Rights.' For example, 'protection in the event of unjustified dismissal' (II-90) and 'fair and just working conditions' (II-91) are framed as Fundamental Rights. The Constitution says the Charter should not be used to create new laws, but the Court is charged with enforcing the law. What would the Court rule if a British worker complains that some UK law violates her right to working conditions which respect her health, safety and dignity (II-91)? No one can know how the contradictions between the Charter and EU members' national laws would be resolved, but case law could – over time – lead to a significant expansion of EU control of the labour and welfare policies of EU members.

Moreover the fact that the Constitution makes the European Council an EU institution may give the EU Court some power of the European Council. Currently, the European Council is essentially a voluntary gathering of political leaders that is not directly linked to the EU in strictest legal sense. This is one of the many ambiguities in the Constitution that would have to be sorted out over time. The EU Court, of course, would be the ultimate arbitrator of such ambiguities, and reversing a Court decision would require a Treaty change.

Summary & Conjectures about the Future

Enlargement of the EU demanded institutional reform – everyone knows that. But so far the EU has failed to reform itself sufficiently. It tried and failed with the Amsterdam Treaty, the Nice Treaty and now with the Constitutional Treaty. Something will have to be done, but what and how? It seems that almost all of the main institutional changes in the Constitution – especially those involving Council of Minister voting and composition of the Commission – are probably necessary to ensure that the EU continues to run

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[11] One of many hypotheticals runs as follows. The fact that it is called a Constitution and explicitly includes the primacy principle, might, logically speaking, make the EU Constitution supreme to national constitutions. While such a conclusion is far-fetched it is not be extremely far from the reasoning the Court used in Costa v ENEL to establish primacy. The Court will eventually have to decide cases where the issue is a conflict between a Member State's constitution and the EU Constitution.

smoothly. The other big changes, however, are less important from an efficiency perspective. The removal of the pillars, the Passerelle, and inclusion of the Social Charter were included in order to balance the trade-off between federalists and Intergovernmentalist that has plagued the EU since its start (see Chapter 1 of our textbook).

Since the constitutional treaty route seems to be blocked by big and small obstacles, how can the necessary reforms be adopted? The obvious point is that the Nice Treaty reforms have been in place for less than two years, so the call for a wait-and-see how-it-works is likely to be part of any answer. The next enlargement (Bulgaria and Romania) has long been foretold and will almost surely happen in 2007 or 2008. Once that is done, eyes will turn to the next enlargement (Croatia and other Balkan nations?). At that point, the need to reform EU institutions may look fresh enough and the experience with the Nice Treaty institutions disappointing enough to justify a new Treaty revision exercise. But all this is just conjecture over which reasonable analysts could differ. Time will tell.

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