Pierre Gerbet, Analysis of the Constitutional Treaty

Caption: After the finalisation of the European Constitutional Treaty in October 2004 and before its intended ratification, due to take place by 1 November 2006, the historian and European integration specialist Pierre Gerbet produces an analysis of the most salient points of the Constitutional Treaty. He outlines the structure of the treaty and sets the proposed developments in context.

Source: CVCE. Pierre Gerbet.

URL: http://www.cvce.eu/obj/pierre_gerbet_analysis_of_the_constitutional_treaty-en-8980385f-a385-4026-94ba-1d60a9b9cb53.html

Last updated: 28/07/2016

The Constitutional Treaty of 29 October 2004

The Preamble affirms the identity of Europe, drawing attention to the 'cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law'. It defines the *raison d'être* of the European Union: 'Europe, reunited after bitter experiences, intends to continue along the path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived … it wishes to remain a continent open to culture, learning and social progress; and … [it] wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity in the world …; while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny … "United in diversity", Europe offers them the best chance of pursuing, with due respect for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope …'

Principles

Part I begins by defining the Union and its objectives. For the first time, the Union is clearly defined as being both a union of citizens (and a union of states). Hence its dual nature. The states confer competences on the Union to attain the objectives they have in common. It 'shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise on a Community basis the competences they confer on it' (the term 'Community' was chosen because of UK opposition to the term 'federal', although that term applies to the euro and the common commercial policy).

The dimensions of the Union are defined as follows: 'The Union shall be open to all European States which respect its values and are committed to promoting them together.' Those values are then listed: respect for human dignity, freedom, democracy, equality, human rights, pluralism and non-discrimination.

The Union's objectives are stated as follows: 'to promote peace, its values and the well-being of its peoples … offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted.' More specifically: 'The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment … It shall combat social exclusion and discrimination … It shall promote social and territorial cohesion, and solidarity among Member States … [and] shall ensure that Europe's cultural heritage is safeguarded and enhanced.' In its relations with the wider world, the Union, which has a legal personality, shall contribute to peace, security, sustainable development, free and fair trade, eradication of poverty and the protection of human rights, as well as to the observance of international law, including respect for the principles of the United Nations Charter.

With regard to its citizens, the Union guarantees fundamental freedoms and rights and citizenship of the Union, which is additional to national citizenship (the right to move and reside freely within the territory of the Member States, the right to vote and stand as candidates in elections to the European Parliament and municipal elections in their Member State of residence, the right to petition the European Parliament and to apply to the European Ombudsman).

With regard to the Member States, and with a view to reassuring them, 'the Union shall respect the equality of Member States before the Constitution as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security'. For their part, pursuant to the principle of sincere cooperation with the Union, the Member States must ensure fulfilment of the obligations arising out of the Constitution or resulting from the acts of the institutions of the Union and facilitate the achievement of the Union's tasks. Finally, 'the Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.'

The Constitutional Treaty establishes the symbols of the Union: the flag with a circle of 12 golden stars on a blue background, the anthem based on the *Ode to Joy* by Beethoven, the motto 'United in diversity', the euro, and Europe Day on 9 May.

Competences

There follows a definition of the respective competences of the Union and the Member States in the various spheres of activity. In this regard, the Treaty has the merit of clarifying and putting order into the provisions of earlier treaties. The allocation of competence is governed by several principles. First, there is the principle of conferral of competence at European level or at national level: the Union has exclusive competence only in areas where that competence is expressly conferred on it by the Constitution. Secondly, there is the subsidiarity principle, according to which the Union acts only if and insofar as the objectives of the proposed action cannot be sufficiently achieved at national or regional level. Lastly, there is the principle of proportionality, under which any Union action must be adapted to the objective to be achieved. In the use of competences, the Constitution and Union law have primacy over the law of the Member States.

Three categories of competence are defined in detail: exclusive competence, shared competence and competence to carry out supporting, coordinating or complementary action.

The Union has few areas of exclusive competence, and they are of a federal nature:

— the establishing of the competition rules necessary for the functioning of the internal market;
— common commercial policy (except for cultural services at the request of France);
— monetary policy for the Member States whose currency is the euro;
— customs union;
— the conservation of marine biological resources.

The Union has shared competence with the Member States in many areas. This is exercised by the adoption of laws harmonising national laws or regulations. The principal areas are as follows:

— internal market;
— area of freedom, security and justice;
— agriculture and fisheries;
— transport and trans-European networks;
— economic, social and territorial cohesion;
— environment;
— energy;
— social policy (in regard to working conditions, the social protection of workers, worker information and non-discrimination, while the states remain competent for social security, the right of association, the right to strike, and pay);
— consumer protection;
— safety concerns in public health matters;
— definition of research programmes;
— common policy in the areas of development cooperation and humanitarian aid;
— coordination of national economic and employment policies;
— common foreign and security policy.

Competence to carry out supporting, coordinating or complementary action covers important areas that remain within the remit of Member States and do not entail the harmonisation of their laws and regulations, but where the Union may assist them in the common interest. It applies to the following areas:

— industry;
— protection and improvement of human health;
— culture;

— education, youth, sport and vocational training;
— civil protection;
— tourism;
— administrative cooperation.

If action by the Union should prove necessary and the Constitution has not provided the necessary powers, a flexibility clause provides that measures may be adopted, but under very stringent conditions: the Council acts unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament and informing the national parliaments, and solely in the area of shared competence as defined by the Constitution.

The institutions

It is in the institutional field that the Convention made the boldest proposals, which gave rise to most discussion at the Intergovernmental Conference (IGC). The institutional framework is defined in Title IX of Part I and Title VI of Part III on the functioning of the Union.

'The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Constitution. It shall elect the President of the European Commission. The members of the European Parliament shall be elected for a term of five years by direct universal suffrage.' While the Convention had proposed that the number of representatives should not exceed 736, the IGC raised the number to 750 members in order to satisfy the smaller states, although that is regarded as excessive in terms of the efficiency of Parliament. The allocation of seats is degressively proportional, with a minimum threshold of six members per country (whereas the Convention had proposed four) and a maximum of 96. It is up to the European Council to determine the allocation of seats for the next elections in 2009, which will certainly not be an easy task.

The role of the European Council of Heads of State or Government is now clearly defined. It 'shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.' That establishes it in its role of defining political directions and of arbitration, which it has increasingly assumed since it was established in 1974. The President of the Commission and the Union Minister for Foreign Affairs form part of it. The Council decides by consensus or by qualified majority where the Constitution so provides. It meets quarterly. When the situation so requires, the President convenes a special meeting.

The main innovation relates to the fixed presidency of the European Council, replacing the six-monthly rotating presidencies. The Intergovernmental Conference endorsed as it stood the text adopted by the Convention and supported by the large states, despite the reservations expressed by the small states and the President of the Commission, who feared that it might weaken the Commission. The role of the fixed President is, however, defined in restrictive terms. 'The European Council shall elect its President by a qualified majority, for a term of two and a half years, renewable once. In the event of an impediment or serious misconduct, the European Council can end his or her term of office in accordance with the same procedure'. It is a full-time job: 'The President of the European Council shall not hold a national office.' The President is not prohibited, however, from exercising other European functions, which means that he or she could concurrently hold the presidency of the Commission, as some would wish. That would confer considerable authority on the President, which many states would not like to see.

The role of the President is to drive forward the European Council's work, 'to ensure the preparation and continuity of [its] work … in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council'. The President 'shall endeavour to facilitate cohesion and consensus within the European Council … [and] shall present a report to the European Parliament after each of the meetings'. The President 'shall ensure the external representation of the Union on issues concerning its common foreign and security policy' (CFSP), but 'without prejudice to the powers of the Union Minister for Foreign Affairs.' Within those limits, the President's political influence will depend mainly on his or her personality, authority and experience of the Community system.

The Council of Ministers, consisting of government representatives at ministerial level meeting in different configurations in the various areas, is reorganised. The General Affairs Council continues to ensure consistency in the work of the different configurations. To facilitate its task, however, the foreign ministers who make it up will meet in a special configuration under the fixed presidency of the Union Minister for Foreign Affairs. In the case of the other special configurations, there will now be a more stable system under which the presidency is held 'on the basis of equal rotation' among the States, in accordance with conditions to be established by the European Council acting by a qualified majority (the Convention had proposed terms of at least one year). The Conference did not accept the proposal for the establishment of a general legislative council. Indeed the governments prefer the special councils to retain their legislative competence, while introducing the requirement that they must deliberate on legislative issues in public.

The Treaty introduces a major innovation in the definition of a qualified majority for Council votes that do not require unanimity. From the time when the Rome Treaties were signed, each Member State was allocated a number of votes corresponding to its demographic and economic importance, based on a system of degressive proportionality that favoured the small and medium-sized countries. That remained the case under the Treaty of Nice, which favoured such countries far too much compared with the large countries. That is why the Convention proposed a simple and more balanced double majority system: 50 % of the number of Member States and 50 % of the Union's total population. That system will not come into force until 1 November 2009, following the election of a new Parliament and the formation of a new Commission. Even during the Convention, however, and all the more so at the IGC, Spain and Poland opposed these percentages because it meant that they lost the position of 'nearly large' countries that they had secured in Nice. As for the small countries, of which there were many but with a smaller population, they feared being marginalised. That is why the Conference decided to raise the definition of a qualified majority to at least 55 % of the members of the Council, comprising at least 65 % of the population of the Union. That reduces the influence of the large states, in that a blocking minority will have to include at least four states in order to be valid. When the Council does not act on a proposal from the Commission or from the Union Minister for Foreign Affairs — who are regarded as expressing the general interest — the percentage of Member States is increased to 72 % representing 65 % of the Union's population, whereas the Convention had proposed 66 % of states and 60 % of the population.

The Council of Ministers continues to be assisted in preparing its work by a General Secretariat and the Committee of Permanent Representatives of the Member States (Coreper).

The Treaty clearly defines the role of the European Commission, responsible for promoting the general interest of the Union: it is to ensure the application of the Constitution, and measures adopted by the institutions, to oversee the application of Union law under the control of the Court of Justice, to execute the budget and manage programmes, exercise coordinating, executive and management functions as laid down in the Constitution, ensure the Union's external representation with the exception of he common foreign and security policy and other cases provided for in the Constitution and initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements. The Commission plays a vital role: it submits proposals to the Council on which the latter must take a decision, especially in the case of legislative acts. The Commission's term of office is five years. 'The members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt.'

The enlargement of the Union to encompass 15 Member States, then 27 and more, has raised the problem of the number of Commissioners, which must remain limited so as to ensure the college's cohesion and efficiency. The Amsterdam Treaty did not manage to resolve the problem of reducing the number of Commissioners in relation to the number of Member States. Finally, in Nice, the five large countries (France, Germany, the United Kingdom, Italy and Spain) gave up their demand for two Commissioners each instead of one like the other countries. In return, they wanted an overall reduction; but since the future Member States insisted on being represented in the Commission, the Treaty of Nice merely provided that the matter be deferred to the date following the accession of the 27th Member State, and even then on condition that the number of Commissioners was then determined by a unanimous decision of the Council, which would lay

down the procedures for an 'equal rotation' when nominating the eligible countries. The Convention had attempted to propose a formula: as from 1 November 2009 — to allow the new Member States time to become familiar with the functioning of the institutions — the Commission would be reduced to 15 members, appointed by rotation among the states to reflect the Union's geographical and demographic range, while the other Member States would appoint Commissioners without the right to vote. When the new Member States refused to accept this second-class member status, however, the Conference postponed the matter until 2014. That is when the Commission will have to be reduced to two thirds of the number of states, unless the European Council, acting unanimously, decides to alter this number. Meanwhile, the Commission will remain oversized and consist of one national of each Member State, even if the figure of 27 is exceeded.

To make up for this drawback, the position of President of the Commission was strengthened by the Treaty of Nice: which provided that henceforth the European Council would appoint the President, as also the entire Commission, acting by a qualified majority instead of unanimously. The President also acquired greater authority over the Commission by securing the right to allocate areas of responsibility among the Commissioners and, if need be, request the resignation of any Commissioner. The Convention's proposals followed the same line and were accepted in part by the Conference. The President of the Commission will be elected by the European Parliament by a majority of its component members. If Parliament rejects the candidate, the European Council must propose a new one within one month. It is specified that the European Council's proposal for a candidate must take account of the European elections, a provision which strengthens the Commission's democratic legitimacy. On the other hand, the Conference has clearly defined the role of the states, by rejecting the Convention's suggestion that the elected President should be able to choose the Commissioners from a list of three names submitted by each state. Each government will continue to nominate one of its nationals as member of the Commission. Similarly, the Conference did not want to leave it solely to Parliament to appoint the Commission once it had been established by common accord between the President-elect and the members of the European Council. Following a vote of consent by Parliament, it is the Council that will appoint the Commission.

The Union Minister for Foreign Affairs. The creation of this post is a major institutional innovation. It was wanted by the large countries, proposed by the Convention and adopted without amendment by the Conference. The aim was to put a stop to the sharing of competence between the High Representative for the common foreign and security policy (CFSP) nominated by the Council and the Commissioner responsible for the Union's external relations and for financing development aid and cooperation policies. Hence the need to combine these tasks within a single post. The Union Minister for Foreign Affairs will, therefore, wear 'two hats', that of the former 'Mr CFSP' and that of the Commissioner responsible for external relations. On the one hand, he or she 'shall conduct the Union's common foreign and security policy. He or she shall contribute by his or her proposals to the development of that policy, which he or she shall carry out as mandated by the Council. The same shall apply to the common security and defence policy. The Union Minister for Foreign Affairs shall preside over the Foreign Affairs Council.' On the other hand, he or she is one of the Vice-Presidents of the Commission and must ensure the consistency of the Union's external action.

In that dual capacity, the Union Minister for Foreign Affairs is appointed by the European Council, acting by a qualified majority. The European Council may also end his or her term of office by the same procedure. That term should normally be five years, as for the other members of the Commission. One Convention proposal, put forward by Joschka Fischer, the German Foreign Minister, provided for the creation of a 'European external action service' made up of officials from the Commission, the Council, and Member States' diplomatic services. The Union Minister for Foreign Affairs will also be able to draw on the network of the Commission's representations outside the Union.

In the case of the other institutions of the Union, the Court of Justice, the European Central Bank, the Court of Auditors and the advisory bodies (Committee of the Regions and Economic and Social Committee), the Convention's proposals, endorsed by the IGC, merely clarified the wording relating to their role and operating procedures.

Exercise of Union competence

The Convention greatly simplified the many procedures according to which the Union's institutions exercise Union competence. The aim was to simplify the provisions of the successive treaties and make the functioning of the Union comprehensible to citizens. That entailed a complete revision of the legal system. The Intergovernmental Conference made no amendments to it in the Constitutional Treaty.

The Union's legal acts are classed in categories:

— European laws, of general application, are binding and directly applicable in all Member States (these are the former Community 'regulations').
— European framework laws are binding on the states only as to the result to be achieved, leaving to them the choice of form and methods (these are the former 'directives' to be transposed into national legislation).

European laws and framework laws constitute legislative acts. They 'shall be adopted, on the basis of proposals from the Commission, jointly by the European Parliament and the Council'. When the Communities were first established, legislative power was exercised by the Council voting on a proposal from the Commission. Parliament had only a very limited say, which was gradually increased under the 'codecision' procedure between Parliament and the Council. Henceforth, codecision will become the ordinary legislative procedure, placing Parliament and the Council on an equal footing; if the two institutions cannot agree on a legislative act, it will not be adopted. That is, therefore, a major advance towards parliamentary democracy at Union level. Exceptions are provided for, however, in certain sensitive areas, where the Council may legislate alone (such as passports, electoral issues and corporate taxation).

Non-legislative acts are implementing acts in regard to which Parliament has no say:

— regulations, for the implementation of legislative acts and of certain provisions of the Constitution; they may be either binding and directly applicable, or binding on Member States as to the result to be achieved, leaving to the Member States the choice of form and methods.

An innovation of the Convention accepted by the Conference is the introduction of 'delegated European regulations', which are delegated to the Commission by the Council and Parliament for the implementation of laws or framework laws by means of limited and carefully circumscribed technical amendments.

— Decisions are binding either on all the states or only on those to whom they are addressed.

Finally, all the institutions may issue recommendations and opinions, which have no binding force.

The Convention's proposal, endorsed by the Conference, does away with the distinction drawn in the Maastricht Treaty on the European Union between three 'pillars': a Community pillar and two intergovernmental pillars (foreign policy, justice and home affairs). European laws do not, however, extend to all the Union's competences. There are special provisions that do not come under the common legislative procedure in areas deemed too sensitive for the governments.

In the case of justice and home affairs, the Amsterdam Treaty had transferred to the Community pillar most of the substance of the third pillar (except for criminal law), but that communitarisation was only partial, since the states insisted on retaining control of the decision-making process. The Convention's proposal, while extending the common legislative procedure to the entire area of freedom and providing that the approximation of national legislation must be achieved through European laws, adopted by Parliament and the Council acting by a majority and controlled by the Court of Justice, took account of the resistance of several states and provided for a few exceptions. It does not extend the Commission's exclusive right to propose legislation to police or criminal cooperation, where one quarter of the Member States is granted the right to propose legislation. The Council retains decision-making power in regard to passports, identity cards, residence permits and social security and social protection measures. The Intergovernmental Conference added the possibility of referral to the European Council in the case of criminal matters and family law with cross-border implications. Overall, however, there has been major progress with the possibility of democratically adopting an asylum and immigration policy (with Member States retaining the right to determine the number

of third-country nationals seeking employment to be admitted) and the elements of a European civil law and a European criminal law. Lastly, a 'solidarity clause' provides that the Union and its Member States shall act jointly if a Member State is the victim of a natural or man-made disaster, in particular terrorism.

Although there may have been major progress in communitarising the government-regulated area of freedom, security and justice, that does not apply to the common foreign and security policy. That remains the competence of the national governments, which are responsible for developing among themselves cooperation for which the Constitutional Treaty defines the framework and procedures. The aim is the establishment not of a single foreign policy, which is still a utopian vision given the great diversity of national policies, but of a 'common foreign and security policy, based on the development of mutual political solidarity among Member States, the identification of questions of general interest and the achievement of an ever-increasing degree of convergence of Member States' actions.' The aim here is to make up for the shortcomings of the CFSP.

It is up to the European Council to identify the Union's strategic interests and determine the objectives of its common foreign and security policy, which will be put into effect by the Union's Council of Ministers of Foreign Affairs and by the Member States. European laws and framework laws are excluded from this area. The relevant judicial instrument is a European decision based on the adoption of Union positions and actions. The Convention had been faced with the problem of whether to apply majority voting, especially for the adoption of a proposal from the Union Minister for Foreign Affairs. France and Germany were in favour and were confident that others would follow suit. Following the Iraq war, however, the European countries were divided about American policy, which made it unrealistic to apply a majority vote that would have been binding on the minority countries. It was, therefore, decided to retain unanimity, except in the case of a few implementing measures and with the possibility of abstention or referral to the European Council in the event of opposition. On the other hand, there is now a stronger obligation on Member States to consult each other in advance, something that had not been respected during the Iraq crisis.

One very important contribution of the Constitution, proposed by the Convention on a Franco-German initiative and ratified by the Conference, is the organisation of the common security and defence policy, a branch of the common foreign and security policy (CFSP). The Maastricht Treaty on European Union first introduced the concept of a 'common defence policy, which might in time lead to a common defence'. The security and defence policy has been gradually defined and established since the Cologne European Council of June 1999. The Convention worked very hard on the subject, thanks to a Franco-German contribution and at the instigation of Commissioner Michel Barnier. The Convention's text, adopted by the Conference, gives an overall view, enshrining in the Treaty the progress already made and providing for further progress.

The scope of the common security and defence policy is extended and clarified. In addition to the 'Petersberg tasks' (humanitarian, crisis-management and peace-keeping tasks), it now covers joint disarmament operations, conflict-prevention tasks and post-conflict stabilisation, all of which may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories, although not if they intervene elsewhere (e.g. the United States in Iraq). The European Union's defence policy must be consistent with commitments under the North Atlantic Treaty. It includes the progressive framing of a common defence by the European Council, acting unanimously.

The Constitutional Treaty introduces vital innovations in regard to the resources of the European security and defence policies. The Member States undertake progressively to improve their military capabilities, which they make available to the Union. To that end, a European Defence Agency is established, responsible for evaluating the improvement of military capabilities, coordinating armaments programmes, supporting defence technology research and improving the effectiveness of military expenditure in the technological and industrial field. The long-term aim is to develop a European defence industry.

Given that the Union Member States differ widely as regards their military capabilities, the Constitutional Treaty provides that the states that have advanced furthest towards a common defence shall establish 'permanent structured cooperation within the Union framework', which will be authorised by the Council, acting by a qualified majority; i.e. the decision cannot be blocked by one or more hostile states. Only members of the Council representing the participating Member States may take part in the vote on any decisions and

recommendations taken under structured cooperation. That may produce a kind of 'mini-defence Europe', with the UK taking the same position as France and Germany since the link with NATO has been maintained.

Lastly, a mutual assistance clause has been introduced for the event of armed aggression against a Member State, with reference to the UN Charter; that clause already exists in the North Atlantic Treaty and the Treaty on Western European Union (WEU) in regard to their member states. The North Atlantic Treaty Organisation, for those states that are members of it, 'remains the foundation of their collective defence and the forum for its implementation.'

While in the case of defence policy the need is recognised for some pioneering countries to move ahead without waiting for the others, that is not the case for the implementation of the other competences that are shared between the Union and the Member States. The Amsterdam Treaty set up an 'enhanced cooperation' procedure among several states, subject, however, to very stringent requirements that were, in part, relaxed by the Treaty of Nice although they remain dissuasive. In a European Union that has become even more heterogeneous with its enlargement to 25 or more Member States, that system of differentiation is particularly important to some states in that it allows them to move ahead while waiting for the others to be in a position to join them (as in the case of the Schengen Agreements on freedom of movement and the adoption of a single currency). Moreover, the Convention proposed making the required conditions more flexible. Enhanced cooperation is decided by the Council acting by a qualified majority, and the right of veto is abolished (except in the case of the common foreign and security policy, where the Intergovernmental Conference restored the unanimity requirement).

With the disappearance of the 'pillars' introduced by the Maastricht Treaty, the possibility of participating in enhanced cooperation has been extended to all areas except areas of exclusive competence.

Yet some countries still have reservations about enhanced cooperation, fearing that it will establish a legal *acquis* which they will subsequently have to adopt without having taking part in formulating it (that applies to the UK, Spain, the Scandinavian countries and some new Member States). That is why very stringent conditions were maintained. Member States wishing to establish enhanced cooperation between themselves must submit a request to the Commission, specifying its scope and objectives. The Commission may reject it or propose its acceptance to the Council, which decides by a qualified majority after obtaining the consent of the European Parliament (in the case of enhanced cooperation in the area of the common foreign and security policy, the Union Minister for Foreign Affairs and the Commission give their opinion, while Parliament is merely informed, and the Council decides, acting unanimously). A request for enhanced cooperation must justify that the objectives of such cooperation 'cannot be attained within a reasonable period by the Union as a whole' and is adopted 'provided that at least one third of the Member States participate in it', although others may participate subsequently. The acts adopted under enhanced cooperation are discussed in the Council, but the participating Member States alone have the right to vote and are bound by the decisions. Enhanced cooperation is likely to be most justifiable in areas where the unanimity rule still applies in the Council (taxation, social policy, criminal proceedings).

The democratic life of the Union

The Convention, followed by the Intergovernmental Conference, wanted to make the Union more democratic. The Constitutional Treaty specifies the main principles that it must observe: democratic equality; representative democracy, ensured by the European Parliament, the European political parties, Member States' governments in the European Council and the Council of Ministers; and participatory democracy, based on transparency of the institutions, the maintenance of dialogue between the institutions and citizens and — a major innovation — the possibility of a citizens' initiative (not less than one million citizens may sign an initiative inviting the Commission to draw up and submit to the Council a proposal for a Union act in a given area). The Conference confirmed the role of social dialogue at Union level by providing for an annual tripartite social summit. Similarly, it confirmed the role of the European Ombudsman elected by Parliament. It also prescribes transparency in the work of the institutions and bodies of the Union: public debates in Parliament and the Council when the latter considers and votes on a draft legislative act, citizens' right of access to documents, but also protection of personal data. Lastly, the Treaty confirms the Union's respect for the status

of churches and non-confessional organisations, to make up for the refusal to refer to Christianity in the Preamble.

The Union's finances

The Constitutional Treaty sets out the European Union's budgetary and financial principles. The revenue and expenditure shown in the budget must be in balance. The budget may not be in deficit, unlike national budgets. Budgetary discipline must be maintained, and all the institutions must observe the principle of sound financial management. The Treaty stipulates that 'The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.' To that end, it provides itself with 'own resources' (customs duties on imports of industrial products from third countries, levies on agricultural imports, a proportion of VAT, Member States' contributions based on their GNP). The ceiling of these resources, however, is determined unanimously by the Council, and the main contributors are becoming increasingly reluctant to raise it. Hence the inadequacy of resources in relation to objectives. It is very difficult to amend the system of own resources because that would require a unanimous Council decision following mere consultation of the European Parliament and ratification by all Member States (something that the Convention had proposed, in vain, to abolish).

Expenditure remains fixed within the limits of the Union's own resources in the multiannual financial framework, which is laid down in a European law adopted unanimously by the Council. The Convention had proposed a majority decision, but the Intergovernmental Conference refused it, granting in compensation the need to obtain the consent of the European Parliament acting by a majority of its members instead of mere consultation. The annual budget is established in a multiannual financial framework, adopted jointly by the Council and Parliament. Budgetary procedure is simplified (Part III, Article 404). The Commission draws up the draft budget, the Council adopts its position and forwards it to the European Parliament, which approves or amends it. In the latter case, a Conciliation Committee reaches an agreement on a joint text, which must be adopted by a qualified majority of members representing the Council and members representing Parliament. In the event of disagreement, the Commission submits a new draft budget. When agreement has been reached in the Conciliation Committee, the joint text is approved by Parliament and the Council. If the Council alone rejects it, Parliament may have the final word, acting by a majority of three fifths of its members. If Parliament rejects it, the Commission must submit a new draft budget.

The Union and its neighbours

At the initiative of the Chairman, Valéry Giscard d'Estaing, the Convention adopted a text, included in the Treaty, on the Union's relations with neighbouring countries with a view to establishing 'an area of prosperity and good neighbourliness, founded on the values of the Union …' For that purpose, it may conclude 'specific agreements' containing reciprocal rights and obligations. This text introduces the concept of 'neighbours' as a solution to the problem of establishing special relations with neighbouring countries without going as far as membership of the Union. The wording is consistent with that of the 'European Neighbourhood Policy' proposed by the Commission.

Union membership

The Treaty repeats the wording used in Article I-1 concerning the establishment of the Union. 'The Union shall be open to all European States which respect its values and are committed to promoting them together.' The accession procedure remains unchanged: the Council receives an application, consults the Council, asks for the consent of Parliament, acting by a majority of its members, and acts unanimously. A major innovation was introduced, however, on a proposal from the Convention: as soon as an application for accession has been made, the European Parliament and national parliaments are notified. That means that the national debate can begin at the time of application without awaiting ratification following the signature of the accession treaty by the governments. That is a major advance in the democratisation of the Union and the involvement of citizens in the accession of a new Member State.

Membership of the Union consists not only of rights but also of obligations. If they are not respected, the

Constitution follows the procedure introduced in the Nice Treaty concerning the state in question, which can lead to the suspension of certain of its rights, including the right to vote in the Council of Ministers.

Finally, the Constitution introduces the right of a Member State to withdraw from the Union, something which did not exist in the earlier treaties. It is a major innovation. It covers only voluntary withdrawal and not expulsion, since that would be contrary to treaty law, which is based on the agreement of all the parties. It confirms the voluntary nature of accession to the Union. Withdrawal can take place only after negotiation, must obtain the consent of the European Parliament and be concluded by the Council, acting by a qualified majority. The agreement sets out the arrangements for withdrawal and defines future relations with the Union, taking account of any overlapping interests.

The Charter of Fundamental Rights of the Union

Part II of the Constitutional Treaty consists of the Charter of Fundamental Rights of the European Union, which was drafted by a separate Convention that began its work in December 1999 and was solemnly proclaimed at the Nice European Council (December 2000) by the Council, the Commission and Parliament. The UK had opposed its inclusion in the Treaty of Nice because that would give it binding legal force. At the Convention on the Future of Europe, however, it had to accept the Charter's inclusion in the draft Constitution, provided that the final article on the interpretation of rights and principles included the possibility of a restrictive interpretation by the Court of Justice assigning shared competence between the Union and the Member States. The aim was to preserve the primacy of UK law in instances where no Union act or European legislation has been adopted that still requires unanimity in regard to social policy.

Institutionalised in this way, the Charter of Fundamental Rights of the Union represents considerable progress. It goes further than the Convention on the Protection of Human Rights and Fundamental Freedoms that the Council of Europe adopted in 1950 because it enshrines not only civil and political rights but also economic and social rights. In many instances, the Charter offers more protection than the Convention.

In terms of implementation, the Charter distinguishes between rights as objectives and general principles, and rights amenable to the courts, which impose an obligation on the Union and the Member States as to the results to be achieved. Compared with the original text of the Charter, that of the Constitution narrows the scope of social rights.

The policies and functioning of the Union

Part III of the Constitutional Treaty, which is by far the most voluminous, is devoted to the policies conducted by the Union and their scope, and to the functioning of the institutions as it affects them. It was agreed to include it in the Constitution because the object of constitutions is to define an institutional framework within which policies may be conducted that are dependent on successive majorities and governments. To constitutionalise policies would equate to perpetuating them, 'setting them in stone'. That interpretation does not take account of the fact that the European institutions that adopted these policies may amend them and apply the simplified revision procedure.

Above all, incorporating policies in the Constitution, although that burdens it with numerous highly technical chapters and makes it more difficult to interpret, is vital for the preservation of the legal value of the commitments entered into in the wake of the successive treaties that the Constitution replaces and that have constituted the 'Community *acquis*' for half a century. The substance of those treaties was, therefore, taken over without major changes. The Convention's mandate was not to undertake any substantial revision of the objectives and content, but to fine-tune them and ensure legal consistency with the reformed institutional structure. For the rest, the European Council left the Convention little time to work on Part III. Most of the Convention's activities related to the move from unanimity to qualified majority decisions and from consultation of the European Parliament to codecision with the Council, but the Intergovernmental Conference endorsed only some of its proposals.

At least the Convention did useful work in grouping the various policies by subject matter, taking account of

the allocation of competences. It wanted to begin by setting out provisions of general application with a view to ensuring consistency between policies and respect for all the Union's objectives and the principle of conferral of powers. Title I repeats that the aims are: to eliminate inequalities between women and men, to 'combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation', environmental protection and consumer protection. To these proposals, which it adopted, the Intergovernmental Conference added that, in implementing policies, the Union must take into account 'requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.' The Conference also added requirements relating to animal welfare.

The role of services of general economic interest (i.e. public services) is recognised, particularly in promoting the Union's 'social and territorial cohesion'. These services operate on the basis of principles and conditions that enable them to fulfil their missions, which are established by European laws without prejudice to the competence of the Member States. That means that the Union now has a legal basis for legislating on the guarantees granted to these services in relation to the rules of competition.

Title II defines the procedures of Union action to ensure respect for the rules prohibiting discrimination, on freedom of movement, the right of citizens to vote and to stand as a candidate in municipal and European elections and on the diplomatic and consular protection of citizens of the Union.

After these general provisions, the Constitution presents the internal policies and action (Title III): internal market, economic and monetary policy, policies in other areas (employment, social policy, economic, social and territorial cohesion, agriculture and fisheries, environment, consumer protection, transport, trans-European networks, research and technological development and space, energy), area of freedom, security and justice and, finally, areas where the Union may take coordinating, complementary or supporting action. For all these internal policies, the Constitution goes back to the provisions of the earlier treaties with some added flexibility as regards unanimous voting.

Title IV concerns the association of the overseas countries and territories. It repeats the text of the earlier treaties with just a few changes to the wording.

Title V on the Union's external action groups together the formerly dispersed provisions on the Union's relationship with the outside world, whether diplomatic, military, commercial or in relation to humanitarian aid.

As in the case of Title III on internal policies, Title V begins with provisions having general application. They reiterate the principles which underpin the Union's external action (including democracy, the rule of law, respect for human rights and international law) and its objectives (which include to safeguard the Union's values, security and interests, support democracy, preserve peace, assist the developing countries and promote an international system based on stronger multilateral cooperation). The Union must ensure consistency between the different areas of its external action and between these and its other policies. The European Council plays a predominant role in identifying the Union's strategic interests and objectives and taking unanimous European decisions, which are implemented by the Council of Ministers, the Minister for Foreign Affairs and the Commission in accordance with the appropriate procedures for each area.

Title V then lists the various areas. In the area of the common foreign and security policy (CFSP), it takes over the earlier provisions, adapting them to take account of the creation of a Union Minister for Foreign Affairs. It emphasises the need for solidarity among the Member States. In regard to the common security and defence policy (CSDP), which remains an integral part of the CFSP, a separate section establishes it as an autonomous policy for which the Union may use civilian and military means in support of its foreign policy. Financial provisions cover the distribution of expenditure between the budget of the Union and the Member States. Next comes the common commercial policy of the European customs union in relation to the Union's external action. The earlier provisions are reiterated, with the European Parliament being granted more extensive powers. France managed to ensure the retention of unanimity in the Council for commercial agreements in the field of trade in cultural and audiovisual services, where these 'risk prejudicing the Union's cultural and

linguistic diversity'. The policy of cooperation with third countries covers development cooperation, economic, financial and technical cooperation, and humanitarian aid.

The Union's international agreements are covered by a chapter grouping and systematising the dispersed provisions of the various earlier treaties and specifying the various types of agreement. It sets out a uniform procedure for negotiating and concluding such agreements. The provisions on the Union's delegations in third countries and at international organisations now place these delegations under the authority of the Union Minister for Foreign Affairs. Finally, there is a solidarity clause to be implemented in the event that a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster.

Title VI on the functioning of the Union virtually repeats the procedures laid down in the earlier treaties, while adding the substantive changes set out in Part I on the institutions.

The revision procedure

Part IV of the Constitution sets out the general and final provisions. It covers the repeal of earlier treaties, the legal continuity of the Community *acquis*, the territorial scope of the Constitutional Treaty and the procedure for revising it.

The ordinary revision procedure obviously requires unanimity among the signatory states of the Treaty, with ratification in accordance with their constitutional rules. That is how the Treaties of Rome were revised following the adoption of new treaties (Single Act, Maastricht Treaty, Amsterdam Treaty and Nice Treaty). Revision by a majority decision would have given the Union a federal character, which most governments opposed. Given, however, the successful experience of the Convention and the strengthening of the European Parliament's role, the revision procedure is no longer confined to an Intergovernmental Conference.

Henceforth, any Member State government, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaty. The Council submits these proposals to the European Council, and the national parliaments are notified. The European Council, after consulting the European Parliament and the Commission, may adopt, by a simple majority (for this is a question of procedure), a decision in favour of examining the proposed amendments. Its President must then convene a Convention composed (like the one that drew up the draft Constitution) of representatives of the national parliaments, the governments, the European Parliament and the Commission. That Convention adopts by consensus recommendations to an Intergovernmental Conference that determines the amendments to be made. Should this not be justified by the extent of the proposed amendments, the European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention and to define for itself the terms of reference for the Intergovernmental Conference. The amendments to the Constitutional Treaty must be ratified by all the Member States. A degree of flexibility was introduced, however, to take account of the difficulties encountered during earlier ratifications (Denmark's demands in 1992 in relation to ratification of the Maastricht Treaty, initial Irish vote against ratification of the Nice Treaty). If, two years after the signature of the treaty amending the Constitution, four-fifths of the Member States have ratified it and one or more Member States have encountered difficulties in so doing, the matter is referred to the European Council (as had formerly been the case). It is then up to the latter to find a solution that is not specified in the Constitution.

Outside the rather complex ordinary procedure, a simplified revision procedure is provided for amendments to Part III. It is known as the '*passerelle*' or bridging clause, which allows the Council to move from unanimity to acting by a qualified majority in a given area or case in order to facilitate the adoption of the decision in question and to move from the special legislative procedure to the ordinary legislative procedure, which is less binding, for the adoption of laws and framework laws. The earlier treaties provided for this '*passerelle*' only in exceptional and carefully defined cases. Henceforth it applies to all the provisions of Part III except those with military implications or in the area of defence. The European Council alone takes the initiative. It notifies the national parliaments, which have a period of six months in which to approve it. If just one national parliament opposes it, the European Council cannot adopt the decision. In the absence of opposition, the European Council acts by unanimity after obtaining the consent of the European Parliament, given by a majority of its

members.

With regard to internal Union policies and actions, their inclusion in the Constitution must not prevent their being adjusted in order to cope with future developments. A special simplified procedure is set out. It is still the governments, the Commission and the European Parliament that may submit a proposal for a European decision, but the procedure does not include the convening of a Convention or an Intergovernmental Conference, nor are the national parliaments notified. The European Council acts by unanimity, and all the Member States must ratify the decision. The adopted decision must not increase the competences of the Union, as laid down by the Constitution, but it may entail substantive changes that go further than the more flexible procedure allowed by the '*passerelle*' clause.

Ratification

The final provisions stipulate that the many protocols and annexes form an integral part of the Constitutional Treaty. This Treaty is concluded for an unlimited period, as has been the case since the signing of the Rome Treaties. It must be ratified by all the states in accordance with their respective constitutional requirements. It will enter into force on 1 November 2006, or later if there is a delay in ratification by the last signatory state. A Declaration provides that, if Member States encounter difficulties, the matter will be referred to the European Council, without specifying what steps the latter could take.

On 12 January 2005, the European Parliament approved the Constitutional Treaty by an overwhelming majority: 500 votes in favour, 137 against and 40 abstentions. Those against were, of course, the communists and the far right, but also members of the European People's Party (34 UK, Czech and Portuguese members). In terms of nationality, 'yes' voters were in the minority in the case of the UK (29 out of 70 members), Poland (15 out of 53) and the Czech Republic (7 out of 22). Parliament's resolution is not, however, equivalent to ratification, which is a matter for the Member States alone. The process of national ratification is due to run until the first half of 2006.