

THE EUROPEAN CONSTITUTION AND EMU: AN APPRAISAL

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1. Introduction

The Treaty establishing a Constitution for Europe was signed in Rome on 29 October 2004. It constitutes the latest twist in a long process of amendments to the constitutional law of the Union,¹ and provides for a consolidation of the present Treaties upon which the EU and the European Communities are based. In the future, a single document – plus attachments – contains the many current texts of a primary law nature. The Constitution, once ratified, will replace all existing Treaties.² Legal continuity with the current Community and Union legal orders is assured.³ Apart from this consolidation, the constitutional treaty unifies the pillar structure of the EU by amalgamating the overarching Union (the “temple frieze”) with the three pillars, creating a single institutional framework and a single legal person,⁴ codifies some major elements of Community law, strengthens the institutional framework for an enlarged and enlarging Europe and provides for other amendments.

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1. After the European Single Act (effective 1 July 1986), the Maastricht Treaty on European Union (1992, effective 1 Nov. 1993), created an overarching Union structure and amended the original EEC Treaty (1957, which became the EC Treaty) as well as the ECSC (1951, which was concluded for a 50-year period and lapsed in 2002; see Protocol No. 35 attached to the Constitution) and Euratom (1957) Treaties. The Amsterdam Treaty (1997, effective as of 1 May 1999) amended both the EU Treaty and the EC Treaty, also renumbering both, whereas the Nice Treaty (2000, effective 1 Feb. 2003) was the latest in the series of major Treaty changes. In addition, the Accession Treaties, lastly the Treaty of Athens (2003, effective 1 May 2004), amended the Treaties with a view to the accession of new Member States.

2. Except the Treaty establishing the European Atomic Energy Community (Euratom), see Art. IV-437 and Protocol No. 36 to the Constitution.

3. See Art. IV-438.

4. Apart from Euratom and the separate legal persons established by the Treaty, such as the European Central Bank (ECB) and the European Investment Bank (EIB).

This contribution⁵ discusses the consequences of the new Treaty for a core element of the Union's functioning, Economic and Monetary Union (EMU). After a brief sketch of the place of the European Constitution (hereafter: "the Constitution") in the history of EMU (section 2) and a short focus on the impact of institutional changes on EMU (section 3), the provisions on EMU themselves are studied. Here, I follow my traditional threefold approach: EMU consists of an internal-market "substratum" (capital and payments; section 4) and both an economic (section 5) and a monetary union (section 6, focusing on the ESCB). Some other EMU aspects (section 7), and the question whether the wishes of the ECB have been heeded (section 8) will then be discussed. After a few words on the current regime for EMU and enlargements of the Union (section 9), I come to a critical overall appraisal (section 10) and draw conclusions (section 11).

This article does not seek to establish the history of the provisions adopted. The history leading to the major EMU provisions of the Maastricht Treaty can be traced elsewhere.⁶ The Convention and the Intergovernmental Conference apparently intended to leave EMU largely unaffected. This should make the history of the few amendments that were adopted rather uneventful.⁷

2. The European Constitution against the history of EMU

2.1. From Maastricht to Rome, again

In assessing the outcome of the IGC that adopted the European Constitution, it is useful to recall the history of its genesis from an EMU perspective.

5. This text is based on two presentations, one given at the Legal Colloquium organized by the ECB for the Legal Committee of the ESCB in Frankfurt (D) on 7 Sept. 2004, and the other before the "Workshop on A Constitutional Treaty for an Enlarged Europe: Institutional and Economic Implications for Economic and Monetary Union", organized by the *Oesterreichische Nationalbank (OeNB, the Austrian Central Bank)* in Vienna (A) on 5 Nov. 2004. I would like to thank the persons organizing these seminars and the participants therein for the stimulating exchange of views on both occasions, some of which led to insights included here. The proceedings of the Vienna Workshop will be made available on the *OeNB's* website: www.oenb.at early in 2005.

6. E.g. Van den Berg, *The making of the Statute of the European System of Central Banks, An Application of Checks and Balances* (PhD thesis, 2004, Amsterdam (ISBN: 90 5170 997 8)). For a recent overview of EMU law, see Louis, "The Economic and Monetary Union: Law and Institutions", 41 *CMLRev.* (2004), 575–608.

7. Someone close to the work in the IGC would be better placed to describe the genesis of the adaptations as the considerations and power play on the legal texts are hardly visible for this author who stood outside the circle of constitutional drafters.

When monetary union was agreed as one of the results to be achieved by the European Community with the adoption of the Maastricht Treaty, its authors were aware that the political integration which monetary union made necessary was not fully achieved. After all, the measure of integration that was considered a corollary of the relinquishing of monetary sovereignty, could not be said to flow out of the meager provisions on the Common Foreign and Security Policy (CFSP) of “Maastricht”. Closer to the issue of a the single currency, the economic governance established by the 1992 Treaty on European Union was a continuation of previous economic policy co-ordination already agreed on the basis of the EEC Treaty.⁸ Therefore, the Maastricht Treaty provided, in Article N(2), that a new IGC was to be held within five years of the conclusion of the Treaty on European Union.

In Amsterdam (1997), further amendments to the Treaties and the Stability and Growth Pact were agreed. Yet, again, it proved impossible to tackle all the “leftovers” of Maastricht, whereas the impending enlargement of the Union made the politicians acutely aware that its efficiency and effectiveness were at issue. Hence, a third effort was undertaken at Nice. This almost completely failed. The Nice Treaty’s decision-making innovations, which are currently applicable, needed to be rectified.

The Laeken European Council (2001) adopted conclusions to that effect and called for a “deeper and wider debate about the future of the European Union”. The “finality” of European integration had become a focus of attention among policy-makers.⁹ A special forum was convened to prepare for the new Treaty amendments. It prepared a Draft Constitution:¹⁰ a largely trans-

8. See the 1990 Convergence Decision (Council Decision 90/141/EEC of 12 March 1990 on the attainment of progressive convergence of economic policies and performance during stage one of economic and monetary union), O.J. 1990, L 78/23 which, itself, was based upon, and expanded the 1974 Convergence Decision, adopted in the – failed – process of establishing EMU in the 1970s. On the history of economic policy co-ordination see Smits, *The European Central Bank – Institutional Aspects* (PhD thesis, 1997 (2000 reprint)), at pp. 42–43, 46–47 and 53–56.

9. For an overview of this debate, see Smits, *The European Central Bank in the European constitutional order* (inaugural address, University of Amsterdam, 2003), at p. 9.

10. Draft Treaty establishing a Constitution for Europe, O.J. 2003, C 169. The draft was based on input from its members, representing the Governments and Parliaments of the Member States and the ten newly acceding States, the European Parliament, the Commission, as well as from civil society. See further Kokott and R  th, “The European Convention and its Draft Treaty establishing a Constitution for Europe: Appropriate answers to the Laeken questions?” 40 CML Rev., 1315–1345. It may be recalled that Romania, Bulgaria and Turkey were represented during the Convention but not at the IGC. Their representatives signed the Final Act of the IGC, not the European Constitution itself, as a sign of their involvement in, and

parent process as its documents were available on the Internet¹¹ and proposals from interested citizens welcomed.¹² The Draft Constitution, presented by Valéry Giscard d'Estaing, President of the Convention, to the European Council of Thessaloniki in June 2003, was considered a good basis for negotiating a new Treaty. The IGC stalled in December 2003 – notably about the allocation of voting rights in the Council of Ministers – but the Treaty establishing a Constitution for Europe was signed on 18 June 2004,¹³ and now faces ratification in all 25 States.¹⁴

2.2. An EMU-focused assessment of the Constitution

The mandate of the Convention and, by implication, of the subsequent IGC, was to make Europe more effective, efficient, democratic and closer to its citizens. These yardsticks should provide the test to apply in considering the European Constitution a success or failure. In the specific context of EMU, the assessment should include whether the economic governance of Europe has been strengthened and whether the overall outcome brings the needed political union closer. Also, a test to be applied is whether major achievements of “Maastricht”, such as the price stability objective and independence of the monetary authority, have been maintained. Finally, it will be necessary to evaluate the incidence on EMU of further elements of change induced by the Laeken Declaration, e.g. on the division of competences between Union and Member State, subsidiarity, the distinction between legal instruments, the questions of democratic legitimacy and transparency, the efficiency of decision-making in a Union of perhaps as many as thirty States, as well as the possibility of a restructuring of the primary legal texts.

commitment to, the process. The Turkish signature is especially important since it marks the first such close involvement in the process of Union building.

11. See the website of the Convention which still carries these and other documents, at: european-convention.eu.int/doc_register.asp?lang=EN&Content=DOC

12. See the Futurum website at: europa.eu.int/futurum/civil_society_en.htm

13. It was later checked by linguists/jurists, translated in all 20 languages and consecutively numbered, to be signed by the Heads of State or Government. See O.J. 2004, C 310 for the final text.

14. Several Member States will hold a referendum. At the time of writing, Hungary, Lithuania and Slovenia have already ratified the Constitution. See: europa.eu.int/constitution/futurum/ratification_en.htm

3. Institutional issues relevant for EMU

3.1. *General institutional issues: Conferral, exclusive competences and Council voting*

The attribution of competences and the modification of the functioning of the institutions operating beside the ECB are of crucial importance to and EMU-focused assessment of the Constitution.¹⁵

3.1.1. *Conferral and attribution; primacy of Union law*

The newly introduced *principle of conferral*, already enshrined as the *principle of attribution* in the current Treaties,¹⁶ now refers to conferral of competences upon the Union *by the Member States*. Article I-1(1) of the Constitution reads as follows:

“Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common”

Article I-6 also speaks of “exercising competences conferred on it”. Article I-11 provides that the limits of Union competences are governed by the principle of conferral, and elaborates the subsidiarity and proportionality principles. Its second paragraph reads as follows:

“Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States.”¹⁷

15. For an overall assessment of the Constitution see, notably, Dashwood and Johnston, “The Institutions of the Enlarged EU under the regime of the Constitutional Treaty”, 41 CML Rev. 1481–1518, and Lenaerts and Gerards, “The structure of the Union according to the Constitution for Europe: The emperor is getting dressed”, 29 EL Rev (2004), 289–322.

16. See Art. 5 EC and, for the ESCB, Art. 8 EC and Art. 1.1 ESCB Statute (“The European System of Central Banks (ESCB) and the European Central Bank (ECB) ... shall perform their tasks and carry on their activities in accordance with the provisions of this Treaty and of this Statute.”).

17. Note that the 10th amendment to the United States Constitution adds that powers not attributed to the Union (“delegated”, the US Constitution says in language reminiscent of the European use of the term “conferral”) are reserved to the States “, or to the people”)

These provisions seem to imply that the Union is dependent on the States instead of exercising its own, albeit attributed, competences. Remarkably, the traditional attribution language is also to be found in the Constitution, in respect of the ECB and the other institutions.¹⁸ It is not clear in how far this state of affairs deviates from the *Costa/ENEL* judgment¹⁹ and the *EEA* Opinion²⁰ of the European Court of Justice. Arguably, Article IV-438(4) guarantees continuity of this case law. Article I-6 provides that Union law (i.e. the Constitution and secondary law) has primacy over State law, a codification of the case law established first in *Van Gend en Loos*,²¹ which is of prime importance to the area of monetary union with its exclusive competences.

3.1.2. *Exclusive competences*

The Constitution intends to draw a clear demarcation line between competences that the Union can exercise exclusively and those that belong to both the federal and the State sphere: so-called shared or mixed competences. Article I-12 sets out the principles governing this division of labour, Article I-13 lists the exclusive competences of the Union,²² and Article I-14 the areas of shared competence.²³ Article I-15 then mentions specifically the coordination of economic policies. Furthermore, Article I-16 is devoted to the CFSP and Article I-17 lists areas wherein the Union may undertake supporting, coordinating and complementary action, apparently without a shared competence with the Member States. Although the coordination of economic and employment policies is not mentioned under “shared competences”, I still consider these to be such. My view that the coordination of economic policies is a shared competence can be based on Article I-14(1):

“The Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles I-13 and I-17.”

18. See Art. I-19(2) (“Each institution shall act within the limits of the powers conferred on it in the Constitution, and in conformity with the procedures and conditions set out in it. The institutions shall practice mutual sincere cooperation.”) and, for the ESCB and the ECB, Art. 1.2 ESCB Statute, largely taking over the language now contained in Art. 1.1, quoted in note 16 *supra*. The wording between brackets has been left out, as has been “the provisions of”, while “the Constitution”, of course, replaces “this Treaty”.

19. Case 6/64, [1964] ECR 592.

20. Opinion 1/91 (*EEA Agreement*), [1991] ECR I-6079.

21. Case 26/62, [1963] ECR 10.

22. Among which: “monetary policy for the Member States whose currency is the euro”; see section 7 below.

23. The 12 areas listed are called “principal areas”. They are followed by 3 areas where exercise of Union competence shall not pre-empt Member State competence.

Since, as indicated, Article I-13 lists the Union's exclusive competences and Article I-17 the areas of supporting, coordinating or complimentary action, it follows that Article I-15 on coordination of economic policies and of employment policies concerns a shared competence.²⁴ Nevertheless, placing these competences in a separate provision leads one to think that Member States jealously tried to guard their autonomy in the area of economic-policy making. I consider the new wording a step backwards. In this respect, it is also relevant that the provision under which the Council's first task is to "ensure coordination of the general economic policies of Member States" (Art. 202, first indent, EC) is no longer in the Constitution.²⁵ Quoting Kapteyn, one may say that: "... care is taken to avoid anything that could be explained as conferring on the Union itself a competence to co-ordinate the economic and employment policies of the Member States".²⁶

3.1.3. *The institutions*²⁷

Among the institutional changes that the Constitution brings, two merit extra attention from an EMU-based perspective: new qualified majority voting (QMV) rules in the Council and the possibility to introduce QMV where unanimity is still required, and the role of the European Council.

The new formula for achieving a decision by QMV in the *Council* will, as of 1 November 2009,²⁸ require that 55 percent of the Council members, comprising at least 15 States, representing 65 percent of the Union population, agree with a proposal from the Commission or from the Union Minister

24. My conclusion is shared by Lenaerts, "The structure of the Union according to the Draft Constitution for Europe", in De Zwaan, Jans, Nelissen (Eds.), *The European Union – an ongoing process of integration*, Liber Amicorum Alfred E. Kellermann (T.M.C. Asser Press, 2004), pp. 3–21, at p. 20.

25. Cf. Arts. I-23 and III-342 and et seq.

26. Kapteyn, "EMU and Central Bank: Chances missed", in *1 European Constitutional Law Review* (2004), 123–150, at 125.

27. For a transparent overview of the current functioning of the institutions, see Van der Meulen and Van der Velde, *Food Safety Law in the European Union* (Wageningen Academic Publishers, 2004), at pp. 61–119.

28. The waiting time until 1 Nov. 2009 derives from Protocol No. 34 on transitional provisions. It sets out a different voting regime until that time, i.e. the system of Art. 205 EC as of 1 Nov. 2004. Under this system, introduced in Nice, a decision is carried by QMV when 232 out of the 321 weighed votes are in favour of a Commission proposal, i.e. 72% of the Council votes (not: members, as under the Constitution from late 2009 onwards). When the Council acts without a proposal from the Commission, these 232 votes should represent at least two-thirds of the Council's members (at present: 17 out of the 25). In both cases, a State can ask that a check be undertaken that the votes are carried by States representing at least 62% of the Union's population. Should that not be the case, the decision is deemed not adopted.

of Foreign Affairs (MFA). A blocking minority consists of at least 4 Member States. When the Council decides in other cases, 72 percent of the Council members (at present: 18 States) representing 65 percent of the Union population are required to carry a decision.²⁹

The same voting procedure applies to the *European Council*. In this gathering of the Heads of State and Government and the President of the European Commission,³⁰ the votes of its full-term President, to be elected for two-and-a-half years on a once renewable mandate, and of the President of the Commission, are not counted.³¹ The European Council, hitherto legally a mere “body” of the Union,³² has been elevated to the position of a full institution, even mentioned in second place.³³ 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”.³⁴ In the context of EMU, the latter raises the question whether the absence of legislative functions may impact the European Council’s previous resolutions on the Exchange Rate Mechanism between the euro and other Union currencies (ERM-II) and its Resolution on the Stability and Growth Pact (SGP).³⁵ The answer can be found in Article IV-438(3) on legal continuity:

“... the resolutions or positions adopted by the European Council ... shall also be preserved until they have been deleted or amended.”

This suggests that the European Council can still amend its resolutions even if the legal basis for them at the time of adoption was thin, or absent. My

29. Art. I-25 Constitution. See also Declaration No. 5 on Art. I-25, attached to the Constitution, which sets out a draft decision to be adopted specifying the voting procedures between 2009 and, at least, 2014, thus codifying the “Ioaninna compromise” and permitting stalling of voting by three-quarters of a blocking minority in the Council opposed to the adoption of an act.

30. Art. I-21 (2). The MFA is to take part in the European Council’s work.

31. Art. I-25(4) Constitution.

32. Art. 4 TEU.

33. After the European Parliament, but before the Council, the Commission (and its President and the MFA) and the Court of Justice.

34. Art. I-21 Constitution. The European Council is competent to “adopt European decisions in the cases provided for in the Constitution” (Art. I-35). An example is Art. IV-440(7): “The European Council may, on the initiative of the Member State concerned, adopt a European decision amending the status, with regard to the Union, of a Danish, French or Netherlands country or territory ...” – unanimously after consulting the Commission).

35. Additionally, a question arises as to its competence to adopt conclusions on the use of Art. 111(2) EC: general orientations for exchange rate policies in relation to non-EC currencies, as well as those on economic policy coordination (December 1997 Luxembourg European Council Resolution).

view is that the interference by the European Council in the sphere of EMU was without a proper legal basis.³⁶ The Constitution does not alter this state of affairs. Hence, any measures in the area of EMU should be adopted by the Council, the Commission or the ECB, as the case may be, not by the European Council.

Pursuant to Article III-396, the procedure now known as the “co-decision procedure” will be the *ordinary legislative procedure*. This considerably enhances the influence of the European Parliament (“EP”). Article IV-444(2) provides that the European Council may introduce this ordinary legislative procedure where Part III of the Constitution (“The policies and functioning of the Union”) subjects the adoption of European laws and framework laws to a special legislative procedure. Such a decision³⁷ is to be notified to national parliaments. Should any national parliament object to this decision being adopted within six months from the notification thereof, it shall not be adopted. A similar system is introduced in respect of unanimous decision-making in the Council in the area of Part III, which the European Council may decide to alter into QMV pursuant to Article IV-444(1).

In the area of EMU, the Constitution provides that *unanimity* as well as a *special legislative procedure* will be required in the following cases:

- i) adoption of a European law or framework law (*unanimously* by the *Council alone*) enacting measures which constitute a step backwards in the liberalization of capital movements in respect of third countries (Art. III-157(3));
- ii) adoption of a European law (*unanimously* by the Council after consulting the EP and the ECB) laying down “appropriate measures to replace the Excessive Deficit Protocol” (Art. III-184(13));
- iii) adoption of a European law (*unanimously* by the Council after consulting the EP and the ECB) conferring specific tasks upon the ECB “concerning policies relating to the prudential supervision of credit institutions and other financial undertakings with the exception of insurance undertakings” (Art. III-185(6)), the so-called enabling clause in respect of banking supervision.

These special procedures will be subject to the aforementioned possibility of amendment by the European Council to be replaced by the ordinary legislative procedure, thereby enhancing the influence of the EP. It should be added that (normal) European laws are required for laying down the detailed rules for the multilateral surveillance procedure (Art. III-179(6)). It is through this procedure that economic-policy coordination among the States

36. See *The European Central Bank – Institutional Aspects*, *supra* note 8, at pp. 467–469.

37. Taken by consensus pursuant to Art. I-21(4), without the votes of the President and the President of the Commission (Art. I-25(4)).

is conducted. The (normal) QMV rules apply to adopting decisions on the Union's own economic policy measures (Art. III-180). Yet, should the European Council so decide, it could grant the EP a say over the replacement of the Excessive Deficit Protocol which contains the budgetary criteria of "Maastricht" that are central to economic convergence and the Stability and Growth Pact ("SGP").

Amendments to specific provisions of the ESCB Statute³⁸ require a special procedure (namely, after a proposal of the Commission and consultation of the ECB, or on a recommendation of the ECB and after consultation of the Commission) but imply the normal legislative procedure for the remainder.³⁹

Many EMU measures⁴⁰ are adopted not in the form of legislative acts but as acts of a non-legislative nature; Articles I-33 to I-35 set out the distinctions that will henceforth apply. Thus, the procedure of Article IV-444 cannot

38. Officially the Statute of the European System of Central Banks and of the European Central Banks.

39. Thus, there is no need, and no possibility, for the European Council to amend Art. III-187(3).

40. A *special procedure, not leading to legislative acts* (namely only European regulations or decisions) is required for:

- 1) specifying the definitions of the prohibition of monetary financing (Art. III-181), the prohibition of privileged access (Art. III-182), and the no-bail-out clause (Art. III-183);
- 2) adopting European decisions or recommendations in respect of the excessive deficit procedure (Art. III-180);
- 3) harmonizing the denominations and technical specifications of coins intended for circulation (Art. III-186(2)), where the Council may adopt European regulations after consulting the EP and the ECB;
- 4) adopting measures referred to in specific provisions of the ESCB Statute (Art. III-187(4));
- 5) adopting a European regulation on the limits and conditions for imposing fines and periodic penalty payments by the ECB on undertakings that fail to comply with obligations under its European regulations and decisions (Art. III-190(3));
- 6) laying down detailed rules for the composition of the Economic and Financial Committee (EFC) (Art. III-192(3));
- 7) adopting eurozone-specific measures for the coordination of economic policies and the surveillance of State budgets (Art. III-194);
- 8) adopting positions or ensuring representation of the eurozone (Art. III-196);
- 9) abrogating a derogation of a Member State (Art. III-198(2));
- 10) adopting decisions in consequence of the abrogation of a derogation, i.e. for the situation of a Member State adopting the euro (Art. III-198(3));
- 11) adoption of an international agreement concerning the exchange rate of the euro (Art. III-326(1));
- 12) formulating general orientations for exchange-rate policy in relation to third currencies (Art. III-326(2));
- 13) deciding on arrangements for agreements with third States or international organizations on matters relating to the monetary or exchange-rate system (Art. III-326(3)),

be used to alter these methods of decision-making. Although this must be regretted from a democratic point of view, and seems to fail the Laeken test of enhancing democratic accountability in a core area of Union competence, it also serves to shield the relatively young monetary competences from all too easy amendment. I expect that, ultimately, even in the area of EMU, a distinction will be made between core constitutional principles set out in a document which is difficult to amend and provisions of lesser importance enshrined in statutory texts that can be changed under strengthened voting requirements in the Union's institutions. The present Constitution does not yet provide for this.

4. Capital and payments

4.1. General

In the area of capital and payments, the basic principle remains unchanged: liberalization of both types of transactions is provided for both intra-EU and *erga omnes* in Article III-156, which is the equivalent of Article 56 EC. Some wording has been adapted: the two paragraphs on capital and payments have been combined and the word "all" before "restrictions" has been deleted. Although financial freedoms extend to the entire world, with respect to third countries pre-existing restrictions of Community or national law can be maintained. Article III-157 (now 57 EC): provides for an exemption for restrictions predating 1994 (for Estonia and Hungary⁴¹: prior to 2000) in four areas. The ECJ follows a restricted reading of these exemptions.⁴² Just as nowadays, under Article 57(2) EC, the Council may vary the restrictions on the movement of capital in respect of third countries falling in these four

and, finally, two sets of decision which may hardly ever be taken as they concern intra-EU balance-of-payments assistance which is available to "out" States only, namely:

14) adoption of regulations or decisions on mutual assistance to Member States outside the eurozone in balance-of-payments difficulties (Art. III-201(2)) and

15) adoption of a Council decision on protective measures adopted unilaterally by a Member State outside the eurozone in balance-of-payments difficulties (Art. III-202(3)).

41. On the basis of the Accession Treaty of Athens, and the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (notably on Art. 18 thereof), published in O.J. 2003, L 236.

42. See Joined Cases C-163/94, C-165/94 and C-250/94, *Sanz de Lera*, [1995] ECR I-4821.

categories. The Constitution provides that a European law or framework law (i.e. adopted by the Council *and the EP*) may vary these restrictions, striving to achieve the objective of free movement *vis-à-vis* third countries. As under current law, “a step backwards” in third-country liberalization may only be enacted by the *Council* acting *unanimously*.

4.2. *Exceptions*

The current regime declaring certain rights of Member States compatible with the free movement of capital and payments is maintained. Article III-158 follows Article 58 EC in declaring distinctions in tax law between taxpayers who are not in the same position as to their place of residence or of investment of the capital concerned to be permitted,⁴³ as well as “all requisite measures to prevent infringements of national law and regulations”. Here, tax and prudential supervision of financial institutions are specifically mentioned. The latter is an oddity in a financial market that should, at least among members of the eurozone, be fully integrated. It is also regrettable that the exception for declarations of capital movements for purposes of statistical or administrative information is maintained: in a single currency area these declarations are obsolete and certainly do not warrant an exemption from the prohibition of restrictions in a constitutional text. The exemption for public policy or public security, also contained in Article III-158(1), is more in place in the Constitution. A novelty is the power of the Commission, or the Council, to

“adopt a European decision stating that restrictive tax measures adopted by a Member State concerning one or more third countries are to be considered compatible with the Constitution insofar as they are justified by one of the objectives of the Union and compatible with the proper functioning of the internal market.”

Such a decision is to be applied for by a Member State. The Commission has a first right to act. Should it not act on the Member State’s request, the competence falls on the Council which is to act unanimously (Art. III-158(4)).⁴⁴

43. Here a temporal restriction is applied for tax measures affecting the movement of capital and payments between Member States: as Declaration No. 7 annexed to the Final Act of the IGC adopting the Maastricht Treaty makes clear, the Member States’ right to apply their tax law measures only holds valid for the relevant provisions which existed at end-1993. For Estonia, this date is end-1999 on the basis of Art. 22 of, and Annex IV to, the 2003 Act of Accession (O.J. 2003, L 236/33). See Art. of Protocol No. 9 to the Constitution, which confirms the permanent deviations set out in Annex IV to the 2003 Act of Accession.

44. The fact that this competence can only be exercised in the absence of a (framework) law

Article III-159 takes over the provision of Article 59 EC which permits the Council, on a proposal of the Commission, to adopt safeguard measures should, in exceptional circumstances, capital movements to or from third countries (threaten to) cause serious difficulties for the functioning of EMU. This “ring-fencing” of EMU by making inflows or outflows of capital more difficult, as – exceptional – economic circumstances necessitate, applies to the Union as a whole, whereas it is clear that only the single currency members need such protection. In a document which, as we shall see further down, meticulously introduces distinctions between rules applying to all and those only applying to States which have adopted the euro, the general application of this provision is a strange oversight, explicable only by EU-wide capital liberalization. As now, the Council is to act by QMV after consulting the ECB.

Article III-331 contains the text that can now be found in Article 295 (*ex* 222) EC: the Constitution “shall in no way prejudice rules” in the Member States “governing the system of property ownership”. This provision was pleaded extensively, but to no avail, in the ECJ’s “golden share” case law.⁴⁵

Finally, the two-tiered decision-making (CFSP and Community measures) on interruption of economic and financial relations with one or more third countries is maintained, but severance of both economic and financial relations is henceforth regulated in a single provision: Article III-322 combines what is nowadays provided for in Articles 301 (interruption or reduction of economic relations with one or more third countries) and 60 (measures in respect of capital and payments as regards third countries) EC.⁴⁶ Under the

provided for in Art. III-157(3) means that the legislative route to enact or condone (tax) restrictions on the field of capital movements *vis-à-vis* third countries is the preferred option. Unanimity in the Council is required because, otherwise, the option to declare State restrictions compatible could be used to undermine the intention that a step backwards in the liberalization *erga omnes* requires unanimity. For a critique of the new regime, see Vigneron and Steinfield, “L’effet ‘erga omnes’ de la libre circulation dans la Constitution européenne: retour en arrière?,” (2004) *Euredia*, 365–378.

45. See Cases C-463/00, *Commission v. Spain*, and C-98/01, *Commission v. United Kingdom*, [2003] ECR I-4641, notably the Opinion of A.G. Ruiz-Jarabo Colomer of 6 Feb. 2003.

46. See Council Regulation (EC) No. 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No. 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, O.J. 2002, L 139/9, based on Arts. 60, 301 and 308 EC, most recently amended by Commission Regulation (EC) No. 2034/2004 of 26 Nov. 2004 amending for the 40th time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida

Constitution, the Council is to act on a joint proposal of the MFA and the Commission and merely has to inform the EP.

Additionally to what the EC Treaty now provides, but in line with current practices, the Constitution specifies that restrictions can be imposed against natural or legal persons, and against groups and non-State entities, not only *vis-à-vis* third States. These restrictions can also be put into operation if necessary for achieving the objectives of an area of freedom, security and justice (defined in Art. III-257), thus preventing and combating terrorism and related activities. This is set out in Article III-160, which is placed at the end of the section on capital and payments in the equivalent place to where we now find Article 60 in the EC Treaty. Both Article III-322 and Article III-160 refer to the “necessary provisions on legal safeguards” to be included, an indication that the authors of the Constitution were aware of the possibility that anti-terrorist measures and economic and financial sanctions may lead to undue restrictions in civil liberties,⁴⁷ an issue which is pending before the courts.⁴⁸ The decision-making process is such that decision-making takes place, first, pursuant to Articles III-298 et seq. by the European Council.⁴⁹ Pursuant to Article III-160, European laws are to set out the framework for administrative measures in the field of capital and payments, which the Constitution specifies to include freezing of funds and assets. Thereafter, the Council is to act by adopting European regulations or decisions on a Commission proposal.

network and the Taliban, and repealing Council Regulation (EC) No. 467/2001, O.J. 2004, L 353/11.

47. In Declaration No. 15 attached to the Constitution, the IGC recalls that respect for fundamental rights and freedoms implies proper attention to be given to due process. It adds that due process and thorough judicial review require that European decisions subjecting an individual or entity to restrictive measures must be based on clear and distinct criteria, tailored to the specifics of each restrictive measure.

48. See the Orders of the Court of First Instance of 7 May 2002 in Case T-306/01 R, *Abdirisak Aden, Abdulaziz Ali, Ahmed Yusuf, and Al Barakaat International Foundation v. Council and Commission*, [2002] ECR II-2387, of 15 May 2003 in Case T-47/03, *José María Sison v. Council*, [2003] ECR II-2047, and of 7 June 2004 in Case T-338/02, *Segi, Aritz Zubemendi Izaga and Aritz Galarraga v. Council*, nyr. See, also, Case T-49/04, *Faraj Hassan v. Council*, pending, O.J. 2004, C 94/52. The author would like to thank Nikolaos Lavranos for drawing his attention to these cases.

49. Normally by unanimity. See Art. III-300(1): decisions on operational action or approach in a matter of a geographical or thematic nature.

5. Economic union

5.1. General

In the area of economic union, not many changes have been introduced. In the largely unchanged picture, the following retouches have been made:

1. some extra competences for the Commission;
2. some voting changes in the Council;
3. recognition of the Eurogroup and introduction of a long-serving Chairman;
4. changes in the voting rights in the Council, both under the multilateral surveillance procedure and under the Excessive Deficit Procedure;
5. the adoption of a Declaration on the SGP.

It has already been remarked that economic policy coordination has been put in a special position, not mentioned in the list of “shared competences” which, nevertheless, it is. Overall, the impression of the few changes that have been made is that the authors of the Constitution have missed a chance to make the Union’s economic governance more effective and democratic.⁵⁰

5.2. Economic policy coordination and multilateral surveillance

As to the *Broad Economic Policy Guidelines* (BEPG) and the *multilateral surveillance procedure*, Article III-179 regulates the subject matter that is now covered by Article 99 EC, with the following notable elements:

- a first warning on a deviation from the BEPG can be issued by the Commission instead of by the Council;
- recommendations to a Member State are still to be adopted by the Council on a Commission *recommendation* instead of a Commission proposal;
- publication of such a recommendation is still to be agreed by separate Council decision on a Commission *proposal*;
- the *Member State concerned does not take part in the vote on a recommendation* to be issued to it. The Constitution provides that, as from 1 November 2009, QMV for these Council decisions require 55 percent of the votes of the other members (than the Member State concerned), representing 65 per-

50. Kapteyn, op. cit. *supra* note 26 writes at p. 129: “The asymmetry of the ways economic and monetary policy objectives are to be pursued under the Constitution presents one of the main problems facing the future working of e.m.u. ..., the asymmetry renders it difficult to achieve a coherent policy mix and may result in a too great dominance of the pursuit of monetary objectives over the economic ones.”

cent of the population of the other Member States, whereas a blocking minority requires a minimum number of Member States representing 35 percent of the population of the other Member States plus one Member State.

The system of adopting the BEPG, beginning with a Commission recommendation, followed by a draft from the (Ecofin) Council, to be put on the agenda of the European Council which is to “discuss a conclusion” thereon and, finally, to be adopted by the Council in the form of a recommendation of which the Parliament is informed, has remained unchanged (para 2).

Article I-15(1), second sentence, already states that, in economic policy coordination, special provisions are to apply for the Member States whose currency is the euro. This is elaborated in Article III-179(2) and Article III-194(1)(b) where it is provided that special parts of the BEPG concern the euro area generally,⁵¹ these parts to be adopted without the vote of “out” States according to Article III-197(4), which also provides that recommendations to Member States of the euro area are adopted without the votes of the “out” States, and without the vote of the Member State to which a recommendation is addressed

5.3. *Exercise of control over States' adherence to the budgetary rules*

The *Excessive Deficit Procedure* has also essentially remained the same; the following amendments have been introduced in Article III-184 compared to Article 104 EC:

– after the Commission’s report on the basis of the unchanged – qualitative – criteria, which refer to the quantitative reference values contained in the relevant Protocol (a budget deficit below or at 3 percent of GDP and government debt below or at 60 percent of GDP) and after the EFC has given its opinion, the Commission can address an opinion to a Member State, should the EU executive consider that it has run an excessive deficit. It is to inform the Council thereof. Nowadays, it is for the Council to give a preliminary warning.⁵²

51. See also Art. III-197(2)(a).

52. Based, not on Art. 104 EC, which (in paragraph 5) provides for a Commission opinion to the Council after which the latter can establish the existence of an excessive deficit, but on the basis of Art. 6 of Council Regulation (EC) No. 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and coordination of economic policies, O.J. 1997, L 209/1. This provision, referring to Art. 103(4) EC, requires (“shall”) the Council to give an “early warning” to a Member State whose budgetary position diverges significantly from the medium-term budgetary objective contained in its stability programme.

In this context it should be noted that the SGP requires, in addition to the Treaty's obligation to avoid excessive deficits, *balanced budgets* over the medium term. Member States in the eurozone are to submit annually a stability programme, i.e. an overview of each Member State's medium-term budgetary objective, the main assumptions about expected economic developments and the policy measures planned or executed to achieve medium-term budgetary balance. States with a derogation are subject to the excessive deficit procedure but not to the sanctions which it provides for members of the eurozone.⁵³ The United Kingdom has a special position and is not obliged to avoid excessive deficits, only to "endeavour to avoid" them.⁵⁴ The Constitution maintains the special exception for the United Kingdom.⁵⁵

- the Council establishes the existence of an excessive deficit on a Commission *proposal* instead of a Commission recommendation;
- the Council's decision on whether an excessive deficit exists is taken *without the vote of the Member State concerned*, whereas currently the Member State concerned participates in the initial assessment of the existence of an excessive deficit in its own budget;
- the Council is to address recommendations to the Member State concerned "*without undue delay*".⁵⁶

The Council's recommendations are still unpublished, unless it is expressly decided to make them public.⁵⁷ Not publishing forthwith Council recommendations on deviation of economic policies, or on an excessive deficit, is unwarranted in an open democracy and not in line with current practice, both under the multilateral surveillance and the Excessive Deficit Procedure.⁵⁸

53. Member States outside the eurozone submit convergence programmes, on the basis of which the Council can also address an early warning to them (Art. 10(2) Regulation 1466/97).

54. Pursuant to Paragraph 6 of the United Kingdom Opt-out Protocol and Art. 116(4) EC.

55. Art. 5 of Protocol 13, the UK Opt-out Protocol.

56. Language which reflects the speeding up of the Excessive Deficit Procedure under the SGP, notably Council Regulation (EC) No. 1467/97 of 7 July on speeding up and clarifying the implementation of the excessive deficit procedure, O.J. 1997, L 209/6.

57. Furthermore, some immaterial wording has been changed e.g.: "until the excessive deficit has, in the view of the Council, been corrected" (Art. 104(11), third indent, EC) becomes: "until the Council considers that the excessive deficit has been corrected" (Art. III-184(10) sub (c) Constitution).

58. An example is the recommendation to Ireland in 2001 under the multilateral surveillance procedure (Council Recommendation of 12 Feb. 2001 with a view to ending the inconsistency with the broad guidelines of the economic policies in Ireland (2001/191/EC), O.J. 2001, L 69/22, published by Council Decision of 12 Feb. 2001 making public the recommendations with a view to ending the inconsistency with the broad guidelines of the economic policies in

The differences between the voting powers under the Excessive Deficit Procedure as they exist nowadays and under the Constitution can be summarized as follows, where “MS” stands for “Member State(s)” and “n.a.” means that a situation is “not applicable”:⁵⁹

<i>Voting under Excessive Deficit Procedure in respect of States outside the Euro area</i>		
	<i>Article III-184 Constitution</i>	<i>Article 104 EC</i>
finding excessive deficit recommendation	all MS minus MS concerned	<i>all MS</i>
publication of recommendation	all MS minus MS concerned	<i>all MS minus MS concerned</i>
notice to deviant State	n.a.	n.a.
sanctions on deviant State	n.a.	n.a.
abrogation of finding	all MS minus MS concerned	<i>all MS minus MS concerned</i>
<i>Voting under Excessive Deficit Procedure in respect of States inside the Euro area</i>		
	<i>Art. III-184 Constitution</i>	<i>Art. 104 EC</i>
finding excessive deficit recommendation	€ MS minus MS concerned	<i>all MS</i>
publication of recommendation	€ MS minus MS concerned	<i>all MS minus MS concerned</i>
notice to deviant State	€ MS minus MS concerned	<i>€ MS minus MS concerned</i>
sanctions on deviant State	€ MS minus MS concerned	<i>€ MS minus MS concerned</i>
abrogation of finding	€ MS minus MS concerned	<i>all MS minus MS concerned</i>

It may be recalled that, as elsewhere, after 1 November 2009, QMV under the Excessive Deficit Procedure requires a vote in favour by 55 percent of the other members of the Council (besides the State concerned, which does not participate in the vote) representing 65 percent of the population of the

Ireland (2001/192/EC), O.J. 2001, L 69/24. In the area of Art. 104, see the Council Decision of 21 Jan. 2003 on the existence of an excessive deficit in Germany – Application of Art. 104(6) of the Treaty establishing the European Community, O.J. 2003, L 34/16.

59. The exclusion of the votes of the States outside the eurozone in respect of the *notice* (Art. 104(9)) and the *sanctions* (Art. 104(11)) is regulated in Art. 122(5) in conjunction with Art. 122(3) EC. The exclusion of the votes of the States outside the eurozone in respect of the *notice* (Art. III-184(9)) and the *sanctions* (Art. III-184(10)) is regulated in Art. III-197(4)(b) in conjunction with Art. III-197(2)(b). The exclusion of the votes of the States outside the eurozone in respect of the *finding* of an excessive deficit (Art. III-184(6)), the *decision-making procedure* (Art. III-194(7)), the *publication* of a Council recommendation (Art. III-184(8)) and the *repeal* of measure under the Excessive Deficit Procedure (Art. III-184(11)) is regulated in Article III-197(4)(b).

other Member States, whereas a blocking minority requires that the minimum number of Member States representing 35 percent of the population of the other Member States, plus one Member State, vote against.⁶⁰ The ECJ ruled on the consequences if no measure can be adopted in its decision in the SGP mishap in autumn 2003.⁶¹

5.4. *The Eurogroup*

Finally, a few words on the Eurogroup, which is recognized in a special Protocol. As now, this Group will not have any formal decision-making powers. These remain with the Ecofin Council under the special voting procedures, as just explained, and as Protocol No. 12 makes unmistakably clear:

“The Ministers of the Member States whose currency is the euro shall meet informally. Such meetings shall take place, when necessary, to discuss questions related to the specific responsibilities they share with respect to the single currency”.

The Commission is to take part in the meetings and the ECB is to be invited to take part as well. The Eurogroup will have a President who can be elected for two-and-a-half years by a majority of the participating Member States.

5.5. *Future of the Stability and Growth Pact*

This sketch of the provisions on economic union would not be complete without a reference to the *Declaration on Article III-184*, which states that the IGC “confirms that raising growth potential and securing sound budgetary positions are the two pillars of economic and fiscal policy of the Union and the Member States”, and also confirms its commitment to the SGP as “the framework for coordination of budgetary policies in the Member

60. See Art. III-184(6) – in respect of a recommendation – and (7) – in respect of the publication of a recommendation, a notice, sanctions and the repeal of the measures under the Excessive Deficit Procedure. Art. 2(4), fourth indent, Protocol No. 34 on the transitional provisions relating to the Institutions and bodies of the Union provides that the third and fourth subparagraphs of Art. 179(4) take effect on 1 Nov. 2009. This means that the voting arrangements provided for by Art. 205 EC and Art. 2(2) of said Protocol will apply until then.

61. See the Court’s judgment of 13 July 2004 in Case C-27/04, *Commission v. Council*, nyr, on the non-application of the rules of the Excessive Deficit Procedure and the Stability and Growth Pact in respect of France and Germany in November 2003. See Maher, “Economic policy coordination and the European Court: Excessive deficits and ECOFIN discretion”, 29 *ELRev* (2004), 831–841.

States". Just before the ECJ was due to decide on the dispute between the Commission and the Council on the "putting on ice" of the SGP in respect of France and Germany, the IGC "confirms that a rule-based system is the best guarantee for commitments to be enforced and for all Member States to be treated equally". The IGC reaffirms the "Lisbon Strategy" which aims to make Europe the most competitive economy by the end of this decade, and should lead to job creation, structural reforms and social cohesion. The Union is said to aim at balanced economic growth and price stability. Member States should use economic recovery actively to consolidate public finances and improve budgetary positions. Finally, the Member States say they welcome proposals to strengthen and clarify the implementation of the SGP.⁶² The Declaration does not, however, prejudge the future debate on the SGP. These are lofty words. But, with the basis for the SGP – the "Maastricht" budgetary reference values of 3 percent and 60 percent – unaltered in the Constitution, one wonders what changes the authors of this Declaration had in mind. After all, any amendments can only relate to the SGP proper (the medium-term aim of budgetary balance, the procedures for submitting annual stability or convergence programmes and the speeding up of the Excessive Deficit Procedure, as well as the advance agreement on how to assess certain economic situations) and not to the much-debated "Maastricht criteria" themselves. For these to be amended, a full-blown Treaty amendment or, once the Constitution has replaced the Treaty, either the procedure of Article IV-443 (ordinary revision) or that of Article IV-445 (simplified revision in respect of internal Union policies) needs to be followed. All of these require ratification of amendments by all Member States. Also, the absence of real progress in the surveillance of budgetary policies, and of general economic policies, with minimal extra powers for the Commission, means that the Constitution, regrettably, maintains the inherent weaknesses in the current system of economic governance of Europe.

6. Monetary union: The ESCB

6.1. The ECB as an institution

The main novelty introduced by the Constitution is the elevation of the ECB to the position of an "institution". The exact legal position of the ECB has

62. Interesting proposals to take into account a State's contributions to the EU budget in assessing its budgetary discipline, have been proposed, *inter alia*, by Stefan Collignon. See www.stefancollignon.de/. See, also, his *Vive la République européenne*, 2004.

been the focus of much debate in legal writing,⁶³ as well as before the ECJ, where it defended its independent position, also in the context of legislative measures. The measure at issue related to the fight against fraud through the Commission's investigative arm OLAF. The ECB lost this initial battle. The Court considered that the ECB "... falls squarely within the Community framework", whereas it further found that "recognition that the ECB has such independence does not have the consequence of separating it entirely from the European Community and exempting it from every rule of Community law".⁶⁴ By placing the ECB in a second subchapter of Title IV on "The Union's institutions and bodies", called "Chapter II – The other Union Institutions and advisory bodies" and specifying, in Article I-30, that the ECB is an institution and has legal personality, the authors of the EU Constitution have settled the question of the ECB's status. It surely is the central bank of the European Union, although acting as such for the Eurozone States only, as long as not all States have adopted the euro.

6.2. Mentioning "the Eurosystem"

This brings us to the question of the distinction between the ESCB acting for the Union as a whole and the ECB plus the NCBs of the Member States which have adopted the euro. In the ESCB Statute, this distinction follows from Articles 43 et seq., yet does not lead to different names attributed to the ESCB acting in its capacity of monetary authority for the euro or in its wider capacity as body serving the entire Union. For this wider role, which primarily focuses on coordination of monetary policies between the "ins" and the "outs" and on preparing the latter for their participation in the single currency area, a third temporary decision-making body of the ECB has been created.⁶⁵ In the so-called General Council, the President and Vice-President of the ECB convene with the Governors of all EU central banks, rather than with those of the NCBs of the "in" States only.⁶⁶ Early in 1999, the ECB had

63. See Zilioli and Selmayr, *The Law of the European Central Bank* (2001), Torrent, "Whom is the European Central Bank the central bank of?: reaction to Zilioli and Selmayr", 36 CML Rev. (1999), 1229–1241, and my inaugural address, *supra* note 9.

64. Paras. 92 and 135, respectively, of the ECJ's judgment in Case C-11/00, *Commission v. ECB*, [2003] ECR I-7147. For commentaries to this landmark case, see Lavranos, "The limited, functional independence of the ECB", 29 EL Rev. (2004), 115–123 and id. "Die begrenzte, funktionelle Unabhängigkeit der Europäischen Zentralbank", (2003) EuR, 878–887, by Odudu in 41 CML Rev., 1073–1092, and by Elderson and Weenink in (2003/2) *Euredia*, 269–301.

65. Art. 123(3) EC and Arts. 45–47 ESCB Statute.

66. In this composition they constitute the Governing Council (Art. 112 EC and Art. 10

introduced the term “Eurosystem” for the ECB plus the NCBs of the States which have adopted the euro. This term is now taken over by the Constitution in Article I-30 (1). The consequence of adapting the ESCB Statute accordingly has not been drawn, so that a reader of the latter document⁶⁷ needs to think twice and will need to consult Article 42 thereof⁶⁸ in order to establish which provisions are for the “ins” (Eurosystem) and which for the “ins” and “outs” (ESCB).

6.3. *Further fundamental rules*

The Constitution makes clear that it is for the Eurosystem to conduct the monetary policy of the Union. It specifies that the ECB alone may authorize the issue of the euro.⁶⁹ The ECB’s independence is specifically mentioned in the fundamental provisions; Article I-30(3) states that:⁷⁰

“It shall be independent in the exercise of its powers and in the management of its finances. Union institutions, bodies, offices and agencies and the governments of the Member States shall respect that independence.”

The reference to financial independence is an indication of the importance of the ECB being outside the Union budget and of its separate finances, both

ESCB Statute), the supreme decision-making body of the ESCB (Art. 12 ESCB Statute).

67. Attached to the Constitution as a 4th Protocol.

68. Currently, Art. 43. Because the authors of the Constitution shed the ESCB Statute of several provisions, its numbering has been slightly altered. Art. 37 on the seat of the ESCB has been removed (See Protocol 6 to the Constitution), as has been Art. 50 on the initial appointment of members of the Executive Board. Because of this, it no longer is clear from the primary legal texts that its members serve staggered terms, an important measure of their independence since it prevents the – political – appointing authority from replacing the Board in one stroke. It is also remarkable that Art. 51, derogating from Art. 32’s principles for allocating NCB’s monetary income, has not been removed. Since the alternative method of distributing monetary income is to apply “for not more than five financial years after the start of the third stage”, the latter started on 1 Jan. 1999 (Art. 121(4) EC – not taken over in the Constitution) and the financial year for the ECB and (all) NCBs runs parallel to a calendar year (Art. 26.1 ESCB Statute), the possibility to invoke Art. 49’s alternative method and disapply the main rule as laid down in Art. 32 ESCB Statute [new numbering] will not exist after ratification of the Constitution. Actually, the possibility would seem to have lapsed already when the Constitution was drafted, in the 6th financial year after 1 Jan. 1999. Only a reading following which the third stage is considered to have started fully only upon the introduction of bank notes and coins in euro (as from 1 Jan. 2002) would explain the maintaining of the alternative method.

69. See Art. I-30(3), taking over language nowadays found in Art. 106(1) EC. See, also, Art. III-186(1) Constitution and Art. 16 ESCB Statute.

70. See also Art. III-188 and Art. 7 ESCB Statute which refer to Union institutions, bodies, offices or agencies, as having to respect the independence. Nowadays, the reference (in Art. 108 EC and Art. 7 ESCB Statute) is to “Community institutions and bodies”.

in terms of capital (provided by the NCBs) and of the holding and management of the Member States' foreign reserves. The special wording in the Constitution devoted to the recognition of financial independence, one of the elements of independence that can be distinguished,⁷¹ is a welcome sweetener after the OLAF débâcle.

Article I-30 further provides for the governance of the ESCB by the ECB's decision-making bodies, establishes that the ESCB's primary objective shall be to maintain price stability and adds that, as a secondary objective, it is "to support the general economic policies in the Union in order to contribute to the latter's objectives."⁷² New is the sentence that the ESCB shall conduct other central bank tasks in accordance with Part III of the Constitution and the ESCB Statute. Also, the provision that the ECB is to "adopt such measures as are necessary to carry out its tasks in accordance with Articles III-185 to III-191 (the section devoted to monetary policy, RS) and Article III-196 (one of the provisions on external aspects, RS), and with the conditions laid down in the (ESCB Statute)" is a novelty. It seems to imply that the ECB may assume all powers necessary to perform its tasks, in language not equal to, but reminiscent of Article 6(4) TEU, according to which "(t)he Union shall provide itself with the means necessary to attain its objectives and carry through its policies".⁷³

What Article I-30 does not do is settle the status of the ESCB, or of the Eurosystem itself. To me, the combination of the ECB and the NCBs, whether all of them or only those of the "in" States, cannot be considered other than as a body of the Union. I consider the absence of a qualification of the ESCB and the Eurosystem a systematic error in the Constitution. Nevertheless, this does not affect their position as the body entrusted with coordinating and preparatory tasks in relation to, and that entrusted with the monetary policy of the Union itself, respectively.

6.4. *Mutual participation in meetings: Lesser role for the Commission continues*

The Commission's lesser role as compared to the Council in this area (the Council's President may submit a motion for deliberation to the Governing

71. See this author's "Central Bank Independence and Accountability in the Light of EMU", in Giovanoli (Ed.), *International Monetary Law – Issues for the New Millennium* (2000), at pp. 245–266.

72. Here, the Constitution is fully in line with current primary law, laid down in Art. 105(1) EC and Art. 2 ESCB Statute.

73. Language which, of course, has been deleted from the Constitution. See the general remarks at the beginning of this contribution.

Council of the ECB, while both the Council President and a member of the Commission may participate on a non-voting basis in the Governing Council's meetings),⁷⁴ has been maintained. Also, the absence of parallelism in the mutual participation in meetings (the President of the ECB does not have a right to sit in at Commission meetings, whereas he or she is to be invited at Ecofin meetings "when it is discussing matters relating to the objectives and tasks of the European System of Central Banks")⁷⁵ is continued. The Protocol on the Eurogroup also provides that the ECB President is to be invited to take part in its meetings. Yet, an invitation for the President of the Eurogroup to attend Governing Council meetings is remarkably absent. The reporting requirements for the ECB and the required appearance before the EP by its President continue to be regulated as at present.⁷⁶

6.5. *Appointment procedure*

According to Article III-382, the Executive Board members are to be appointed by the European Council acting by QMV. Article III-197 makes clear that only members representing States which have adopted the Euro are eligible to vote.⁷⁷ At present, the Board members are appointed by common accord of the Governments of the Member States at Head of State or Government level.⁷⁸ The nomination is on recommendation by the Council after consulting the EP and the Governing Council of the ECB itself, and only "persons of recognized standing and professional experience" can be nominated – this is unchanged as compared with the present situation. Appointments will continue to be for an eight-year term.

6.6. *Legislative and non-legislative acts*

In view of the new hierarchy of norms introduced by the Constitution, which introduces "European laws" as the equivalent of the current "regulations" and "European framework laws" as the equivalent of the current "directives", yet maintains the possibility to adopt regulations,⁷⁹ the ECB provisions had

74. Art. III-383(1), currently Art. 113(1) EC.

75. Art. III-383(2), currently Art. 113(2) EC.

76. Compare Art. III-383 and Arts. 113(3) EC and 15 ESCB Statute.

77. See para 5 in conjunction with para 2 sub (h). I assume that the Constitution did not intend to change the current rule that only "in" Heads of State or Government take part in the vote (see Art. 122(5) in conjunction with (3) EC) although, technically, Art. III-197 relates to Council decisions only (not: European Council decisions).

78. Art. 112(2)(b) EC. Only "in" Member States vote: see Art. 122(3), (4) and (5) EC.

79. Art. I-33.

to be adapted as well. In line with the new distinction between legislative acts (European laws, European framework laws) and non-legislative acts (regulations and decisions), Article I-34(3) provides that the former may be adopted on ECB recommendation if so provided specifically. Article I-35(2) specifies that the ECB can adopt European regulations – a new type of legal act of general application with the effects of either the current EC regulations or the current EC directives – and European decisions, where so provided. Article 34 ESCB Statute on the ECB's regulatory power has been adapted accordingly. As at present, the ECB can also make recommendations and adopt opinions.⁸⁰

7. Other EMU aspects of the Constitution

7.1. *Exclusive competences*

The Constitution, in Article I-13(1)(c), clearly states that monetary policy is an exclusive Union competence for those Member States whose currency is the euro. I consider that the term “monetary policy” is to be read here in the sense of the heading of section 2 (“Monetary policy”) of Chapter 2 (“Economic and monetary policy”) of Part III, and not in the sense of Article III-185(2)(a) alone.

Article III-185(2) enumerates as the basic tasks to be carried out through the ESCB:⁸¹

- (a) to define and conduct the Union's monetary policy;
- (b) to conduct foreign-exchange operations consistent with Article III-326;
- (c) to hold and manage the official foreign reserves of the Member States;
- (d) to promote the smooth operation of payment systems.

It is the wider concept of all four elements of “monetary policy” mentioned above which is an exclusive Union competence, to be carried out by the ECB and the NCBs of the “in” Member States. Even the further competences which are exclusive to the Eurosystem, such as those pertaining to the issue of euro banknotes or the approval of the issue of euro coins should be considered covered by this exclusivity.⁸² The German text of the Constitution makes this clear as Article I-13(1)(c) refers to “*Währungs-*

80. Art. 110(1) EC and Art. 34.1 ESCB Statute, and Arts. I-35 (3) and III-190, as well as Art. 34(1)(c) ESCB Statute, respectively.

81. Meaning: the Eurosystem.

82. See the ECB's Opinion on the Constitution, referred to under 8 below.

politik” (policy in respect of the currency)⁸³ whereas Article III-185(2)(a) mentions “*Geldpolitik*” (monetary policy in the sense of the activities intended to influence the purchasing power of money). Unfortunately, the German text seems to be too strict itself where it refers, in Article III-177, to “*eine ... einheitliche ... Geld- sowie Wechselkurspolitik, die beide vorrangig das Ziel der Preisstabilität verfolgen*”, in a translation of the objective of the establishment of monetary union which, in English, reads as follows: “a single monetary policy and exchange-rate policy, the primary objective of both of which shall be to maintain price stability”.⁸⁴ After all, the internal aspect of the overall “currency policy” (“*Währungspolitik*”) includes the “*Geldpolitik*” ((a) in Art. III-185(2)), as well as the smooth operation of payments systems (d), the other two elements (b and c) indeed being the external, or exchange-rate policy elements of the exclusive competence of the Union in these matters.⁸⁵ As indicated above, the coordination of economic policies is a shared competence.⁸⁶

7.2. *Wording of the Union’s objectives and the means to achieve these*

The Constitution has replaced the Community’s objective of sustainable and non-inflationary growth⁸⁷ with “sustainable development of Europe based on balanced economic growth and price stability”.⁸⁸

Also, the establishment of EMU as a means to achieve the EC’s objectives, currently to be found in Article 2 EC,⁸⁹ is no longer in the task-setting provisions but has been relegated to a place in Part III where Article III-177 takes over the wording of Article 4 EC.⁹⁰ Article I-3 on the Union’s objec-

83. Similarly, Art. I-30(3).

84. See, currently, Art. 4(2) EC.

85. For a strong statement of the exclusive nature of the Community’s exchange-rate competence, see section 13 of the ECB’s Opinion of 4 Nov. 2004 at the request of the Belgian Ministry of Finance on a draft law introducing a tax on exchange operations involving foreign exchange, banknotes and currency (CON/2004/34), to be found at: www.ecb.int/ecb/legal/pdf/en_con_2004_34_f_sign.pdf

86. See Art. I-14(1) and I-15(1).

87. Art. 2 EC.

88. Art. I-3(3).

89. “The Community shall have as its task, by establishing a common market [first means, R.S.] and economic and monetary union [second means, R.S.] and by implementing common policies or activities referred to in Articles 3 [enumeration of policies and activities, R.S.] and 4 [basic provision on EMU, R.S.] [third means to achieve the objectives], to promote throughout the Community [follow the objectives of the Community, R.S.]”

90. On the fact that the term “EMU” cannot be found in Part I of the Constitution, Kapteyn, *op. cit. supra* note 26, at 123.

tives mentions, in its first paragraph, the promotion of peace, the Union's values and the well-being of its peoples and, in the second, mentions "an area of freedom, security and justice without internal frontiers" and "an internal market where competition is free and undistorted." Foregoing the traditional distinction between the means and the ends, paragraph 3 then mentions what "(t)he Union shall work for". The absence of a reference to EMU and the recurring specification of the provisions which are applicable to euro States only give the impression that language which regards the achievement of EMU as the normal situation was deliberately avoided.⁹¹

However, the reference to "stable prices, sound public finances and monetary conditions and a stable balance of payments" as the guiding principles to be complied with in establishing EMU⁹² is still to be found in the Constitution.⁹³ Similarly, the "principle of open market economy with free competition, favouring efficient allocation of resources"⁹⁴ has been retained.⁹⁵

7.3. *Legislative competence in respect of the euro*

Article III-191 of the Constitution contains a new legislative competence in respect of the euro: "European laws or framework laws shall lay down the measures necessary for the use of the euro as the single currency". This competence is "(w)ithout prejudice to the powers of the [ECB]" and should be exercised after consultation of the ECB. The normal legislative procedure is to be used (Art. III-191).⁹⁶ This development is to be welcomed. It will no longer be necessary to make use of either Article III-172 (the equivalent in the Constitution of Art. 95 EC) or Article I-18 (the equivalent of the current Art. 308 EC) in order to adopt the necessary legislation on e.g. payments in euro. I consider it necessary to introduce common rules for bank payments as well as for cash transactions in view of the divergent national legislation and practices which make the single currency a rather "uncommon" common good.⁹⁷

91. Kapteyn, *op. cit. supra* note 26, at 124.

92. Art. 4(3) EC.

93. In Art. III-177.

94. Arts. 98 and 105(1) EC, and Art. 2 ESCB Statute.

95. In Art. III-178, Article III-185(1) and Art. 2 ESCB Statute.

96. This power is to be seen distinct from the power of the Council to adopt measures for the rapid introduction of the euro in former derogation States which adopt the single currency. This power is provided for in Art. III-198(3). As now, under Art. 123(4) EC Treaty, the Council will be able to adopt measures by unanimity among the participating Member States, on a Commission proposal after consulting the ECB, the EP not even being mentioned.

97. The divergent practices on usage of one-cent and two-cent coins, and absence of a com-

7.4. *Further novelties*

Mention should be made of a few instances where the Constitution introduces a novelty.

The single currency is named “euro” instead of “ECU” as is the case under the current Treaty, reflecting the political decision to adopt a given instead of a generic name.⁹⁸

A decision to abrogate a derogation, i.e. to allow a Member State into the eurozone, is to be preceded by a recommendation of a qualified majority of Council members that have already adopted the single currency.⁹⁹ Just as at present,¹⁰⁰ the Council is to act by QMV of all its members on a Commission proposal after consulting the EP and after a discussion in the European Council on the basis of convergence reports by the Commission and the ECB.¹⁰¹

The Protocol on transition to Stage 3 has been deleted,¹⁰² as could have been expected since the transition to the final stage of EMU has gone smoothly. Although there was no longer a need to bind all Member States to

mon rules recognizing the validity of bank transfers in discharging monetary debts, are cases in point. At least one rather old piece of European model legislation already exists, namely on the place of payment of money liabilities. See the Council of Europe’s Convention No. 75 of 16 May 1972, not yet entered into force, at: conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=075&CM=8&DF=02/12/04&CL=ENG. On payments, see the Consultative Document COM (2003)718 (01) of 2 Dec. 2003, Communication from the Commission to the Council and the European Parliament concerning a New Legal Framework for Payments in the Internal Market, to be found at europa.eu.int/cgi-bin/eur-lex/udl.pl?REQUEST=Service-Search&LANGUAGE=en&GUILANGUAGE=en&SERVICE=all&COLLECTION=com&DOCID=503PC071, and the ECB’s Third progress Report on a Single Euro Payments Area of 2 Dec. 2004, to be found at: www.ecb.int/pub/pdf/other/singleeuropaymentsarea200412en.pdf

98. This decision was taken by the European Council at its meeting in Madrid in December 1995 and is reflected in the preamble to Regulation (EC) No. 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro, O.J. 1997, L 162/1, as amended, and Regulation (EC) No. 974/98 of 3 May 1998 on the introduction of the euro, O.J. 1998, L 139/1, as amended. Problems with the uniform spelling of the single currency’s name in Latvian and Hungarian led to the adoption of a 50th(!) Declaration attached to the Constitution in which Latvia and Hungary spell out that the uniform spelling of “euro” in the Constitution, reflecting the spelling on bank notes and coins, does not change spelling rules in these two languages.

99. See Art. III-198(2), second subparagraph.

100. See Art. 122(2) EC.

101. See the Commission’s and ECB’s convergence reports for 2004, to be found at www.europa.eu.int/comm/economy_finance/publications/european_economy/2004/cr2004_en.pdf and www.ecb.int/pub/pdf/conrep/cr2004en.pdf, respectively.

102. Protocol No. 24 to the EC Treaty.

the process of preparing for the single currency, this also means that the wording on the “irreversible character” of the Community’s moving to the third stage of EMU will have gone once the Constitution is in force. Significantly, this Protocol preceded the Opt-out Protocols of the United Kingdom and Denmark. These have undergone only minor changes in wording.¹⁰³

7.5. *External competences*

The external competences in the area of EMU, well laid out in the EC Treaty but put into practice only in a minimalist fashion, have been taken over and somewhat expanded. The competence to enact measures establishing a system of fixed exchange rates between the euro and third currencies, à la IMF (the so-called “Bretton Woods” system (1946-1970)) and, in the absence thereof, the competence for the Ecofin Council to adopt “general orientations for exchange-rate policy” in relation to third currencies, contained in Article 111(1) and (2) EC, have been taken over in Article III-326(1) and (2).¹⁰⁴ Also, the treaty-making powers of Article 111(3) EC and the purported reservation of Member State powers in respect of external aspects in Article 111(4) EC¹⁰⁵ have been taken over in Article III-326(3) and (4), respectively.¹⁰⁶

103. In the *UK Opt-out Protocol*, the words “move to the third stage” have been replaced by “adopt the euro” and the two notifications of non-participation already given by the UK Government are mentioned. The exceptions from the consultation of the ECB on draft legislation in the latter’s fields of competence and from the monetary union objective, and the weaker budgetary rule (the UK is only to strive for avoidance of excessive deficits and can keep a special government facility at the Bank of England which would seem to run counter to the prohibition of monetary financing) have all been maintained. In the *Danish Opt-out Protocol*, the notification of non-participation has likewise been mentioned. The Danish exemption from monetary union implies that it is in the normal situation of a derogation State, whereas only the United Kingdom has negotiated more far-reaching exceptions.

104. In paragraphs 1 and 2, one only finds a slight rearrangement in wording. E.g., in paragraph 2, the recommendation of the ECB precedes the recommendation from the Commission – either may be the basis for the general orientations which the Council may adopt, whereas in Art. 111(2) the order is the reverse; but see paragraph 1 where the ECB’s recommendation always came first. Also, some wording has been slightly changed (“non-Community currencies” becomes “the currencies of third States” and, of course, as throughout Constitution, the term “ECU” is replaced by “euro”). These changes do not seem to have any material effect.

105. This competence is “without prejudice to Union (EC Treaty: Community) competence and Union (EC Treaty: Community) agreements as regards economic and monetary union” and, hence, in view of the exclusive Union competence for monetary policy and exchange-rate policy, non-existent.

106. In paragraph 3, a small change in wording can be found as “agreements concerning monetary or foreign exchange regime matters” becomes “agreements on matters relating to the

A new Article III-196 replaces Article 111(4) EC on international representation and position-taking by the Union in EMU matters. The new provision in the Constitution mentions the need “to secure the euro’s place in the international monetary system”. It does not make the same distinction between competences related to the economic union and the monetary union, as does Article 111(4) EC – which referred to the allocation of powers in Articles 99 (economic union) and 105 (monetary union) EC, respectively. The Constitution requires the Council (“shall”) to “adopt common positions on matters of particular interest for EMU within the competent international financial institutions and conferences”. Further, the Council “may adopt appropriate measures to ensure unified representation within the international financial institutions and conferences”. Both competences are to be exercised on proposal from the Commission and after consultation of the ECB. The provision specifies that only Member States whose currency is the euro are to participate in the vote which is taken by QMV.¹⁰⁷

In spite of the difference between the two instances, my view is that the Council is legally bound to adopt a measure ensuring unified representation at the IMF and in G8 conferences when exchange rates and economic policy coordination are at issue. For monetary and exchange-rate matters, this follows from the exclusive competence in monetary affairs at Union level (Art. I-13(1) sub c) and the implied external powers which are given under *ERTA* case law, codified in Article I-13(2) of the Constitution, albeit only in respect of international agreements, and not extending to unilateral actions at the international level. For economic policy coordination this follows not from the Union’s exclusive competence, which does not exist in this field, but from the fact that only *ex ante* coordination and unified representation can ensure that the exigencies of a single currency area and the requirements of Article I-40(5)¹⁰⁸ are fully met. Otherwise, those Member States which are represented may adopt positions and accept undertakings which the other Member States, and the Union’s institutions, are bound to follow in practice, or even at law if the latter’s inaction results, under the public international law doc-

monetary or exchange-rate system”. I take this to be a clarification of the intended wide scope of the terms. The peculiar addition to Art. 111(3) *in fine* EC that the agreements “shall be binding on the institutions of the Community, on the ECB and on the Member States” has been left out.

107. QMV to be applied under Art. III-326(2) must be that defined in Art. I-197(4) i.e. 55% of the other members of the Council (i.e. the Member States whose voting rights have not been suspended, therefore the “participating Member States”) comprising at least 65% of the population of the participating Member States.

108. See below, under (iv).

trine of acquiescence, in tacit acceptance of the course of action adopted by the Big Four Member States' governments, which are represented at G8 conferences. This does not amount to a loyal form of cooperation between Union and Member States (Art. I-5).

The following varied provisions on external action by the Union may affect the functioning of EMU:

- (i) the Commission is to represent the Union externally except in the area of CSFP "and [in] other cases provided for" – which may be read as implying a reference to EMU (Art. I-26);
- (ii) the Union Minister of Foreign Affairs is to conduct the CFSP, presides over the Foreign Affairs Council, and "ensures consistency of the Union's external action" (Art. I-28);
- (iii) the Foreign Affairs Council shall ensure that the Union's [external] action is consistent (Art. I-24 (3)); and
- (iv) Member States are to consult one another in the European Council, or the Council "(b)efore undertaking any action on the international scene or any commitment which could affect the Union's interests". They are to ensure that Union can "assert its interests and values on the international scene" (Art. I-40(5)).

In addition, the permanent Eurogroup President may strive to see himself as "Mr Euro" – an epithet which only comes naturally for the ECB President, in view of the central competences for the management of the euro with which the central bank is entrusted, certainly in the absence of formal exchange-rate agreements or general orientations from the Council.¹⁰⁹ If unchecked, this panoply of uncoordinated provisions on external action may lead, in the field of EMU, to a hexagonal representation of the Union (see diagram).¹¹⁰

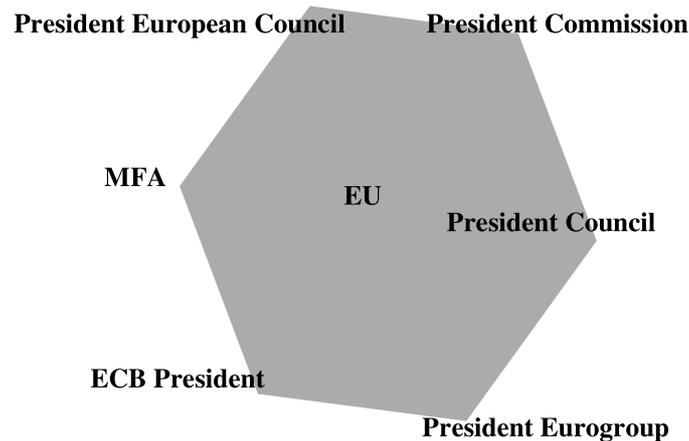
The spreading of external and internal power, and the excess of intergovernmental accents, could be diminished by following the original advice of the Liberals in the EP during the Convention, which was to make the President of the Commission president of the (European) Council.¹¹¹ Recently,

109. I refer to the unfortunate squabbling about the term "Mr Euro" after Mr Jean-Claude Juncker was appointed president of the Eurogroup, in a very advanced application of the Constitution, in the Autumn of 2004.

110. The shape of this figure resembles that of France which, however, only has dual, not hexagonal, external representation in case of co-habitation between a president and a government of different political colours.

111. See Andrew Duff's amendments to Art. 16 a of the proposed Constitution, namely to suppress the idea of a permanent president of the European Council, proposing instead an integrated presidency of the executive formations of the Council with that of the Commission, as reported in *Agence Europe*, No. 8456, 7 May 2003, p. 5. Then Commission President Romano

Hexagonal external representation of the EU



the same proposal came up in legal writing.¹¹² This would help alleviate one of the main shortcomings in the institutional set-up of the Union according to the Constitution, and diminish confusion about the external representation of the EU on the part of third countries and organizations.

8. Impact of the ECB on the outcome

The ECB sent two letters to the Convention, one on 8 May 2003¹¹³ and another on 5 June 2003,¹¹⁴ and delivered an official opinion to the IGC dated

Prodi also supported the idea of combining the Commission and Council Presidents. See “Prodi launches counter-attack against Giscard proposals”, in *European Voice*, 15–21 May 2003, p. 1. For this information and my own ideas, see my inaugural address, *supra* note 9, at pp. 45–48.

112. See De Zwaan, “The role of the European Commission over the years: changes and challenges”, in De Zwaan et al op. cit. *supra* note 24, pp. 53–70, at p. 69: “An interesting option might be to formally appoint the President of the Commission as the President of the European Council. The President of the Commission could then give up his or her seat on the European Council.”

113. To be found at: www.ecb.int/pub/pdf/other/pr030508_ecblettervge_en.pdf

114. To be found at: www.ecb.int/pub/pdf/other/pr030605_ecblettervge_en.pdf

19 September 2003,¹¹⁵ accompanied by a letter of 22 September 2003¹¹⁶ and, finally, sent a letter to the IGC dated 16 April 2004.¹¹⁷ In these documents, the ECB put forward its views on the wording of the EMU provisions in the draft Constitution. Its main concerns were that:

- price stability should be included among the Union’s objectives, a wish that was granted in Article I-3(3);
- the ECB should become an “other institution” and the Eurosystem should find mention in the Constitution, both wishes being fulfilled in Article I-30(3) and (1), respectively;
- the ECB’s financial independence should be explicitly recognized, as has been done in Article I-30(3);
- the requirement of consultation of the ECB should be inserted in the simplified revision procedure concerning internal policies (see under 10 below), as Article IV-445(2) shows, this was indeed done;
- that the independence of the NCBs should be specially mentioned – which the IGC did not do, apparently considering that the general independence provision in Article III-188 (now Art. 108 EC) suffices, as it does encompass the NCBs as well as the ECB;

and

- that the provision on international representation of the Union explicitly refers to the ECB’s responsibilities, a wish that the IGC, again, did not grant.¹¹⁸

Further concerns were the difference in voting requirements in the Council for acts proposed by the Commission (55-65 percent thresholds) or recommended by the ECB (72–65 percent thresholds) when simplified amendment of the ESCB Statute or complementary rules thereto are at issue. The IGC maintained the general pattern resulting from Article I-25: the lower thresholds apply when a Commission proposal is the basis for a Council act, whereas the higher thresholds apply in other cases. This is the only case where the Commission has gained importance in the field of EMU, but

115. Opinion of the European Central Bank of 19 Sept. 2003 at the request of the Council of the European Union on the draft Treaty establishing a Constitution for Europe (CON/2003/20), O.J. 2003, C 229/7.

116. To be found at www.ecb.int/pub/pdf/other/pr030922enletteren.pdf

117. To be found at www.ecb.int/pub/pdf/other/letter040427.en.pdf

118. Here, the ECB specifically requested that Art. III-90 (which became Art. III-196 in the text of the Constitution as adopted), would refer to the division of competences specified in what now are Arts. 99 (economic union) and 105 (monetary union). It has already been noted that this distinction has not been maintained. Nor has the ICG adopted the ECB’s suggested addition of “monetary and” to the term “financial institutions and conferences”, or to the replacement of “conferences” by “fora”.

this is really to the detriment not of the Council but of the ECB, because acts recommended by the ECB still require the higher threshold within the Council.

On the meaning of the term “monetary policy” in the description of exclusive competences, the ECB specifically finds that it is not confined to the first of its basic tasks (“to define and implement the Union’s monetary policy”) but to all exclusive competences related to the euro especially those contained in what now are Articles III-185 and III-186, i.e. including the issue of euro banknotes.¹¹⁹

The ECB had proposed to amend the provision concerning the third economic convergence criterion for the adoption of the euro. The “Maastricht criteria” require a State with a derogation, or a State with an opt-out wishing to “opt in”, to have price stability and no excessive deficit, to have observed the normal fluctuation margins in the exchange-rate mechanism (ERM) and to show durable convergence in the level of its long-term interest rates. On top of these economic conditions, an acceding State should have achieved the necessary legal convergence, notably, compatibility of its national legislation with the EMU provisions of the Treaty and ESCB Statute.¹²⁰ The ECB had pleaded for replacing the legally insecure reference to the observance of the “normal fluctuation margins” by “participation in” the ERM. One of the difficulties in the application of this criterion is the following. Shortly after the adoption of the Maastricht Treaty, the normal fluctuation margins in the European Monetary System – the mechanism for keeping the exchange rates of the then currencies of the Member States within prescribed bands – had been widened from 2.25 percent on each side of the central rates that each participating currency had in terms of the another currency, to 15 percent. The IGC did not follow the ECB’s advice. It also, unwisely, left the text of the exchange-rate stability criterion largely as it is. It refers to the European Monetary System, a mechanism intended, *inter alia*, to stem currency fluctuations, that came to an end upon the introduction of the single currency. It was replaced by the ERM-II in which other Union currencies can be linked to the euro. Nevertheless, in one instance of adaptation, the requirement that a State acceding to the eurozone should not have devalued, is now specified: no devaluation against the euro should have occurred. A chance to tidy up

119. See the text accompanying note 82 *supra*.

120. See Art. 121(1) EC and the Convergence Criteria Protocol. In the Constitution, see Art. III-198(1) and Protocol No. 11 on the convergence criteria.

obsolete texts and replace them with clear-cut obligations was missed,¹²¹ perhaps out of fear that the question of prior participation in the ERM would become an issue of discussion. The United Kingdom is opposed to sterling's participation in ERM-II for two years prior to any assessment of its abiding to the convergence criteria for the adoption of the single currency, should it ever come to that.

As the ECB had pleaded, the voting modalities for the Governing Council, adopted in Article 10.2 ESCB Statute just prior to the accession of ten new Member States, has been maintained. This brings us to the issue of enlargement.

9. EMU and enlargement

The Treaty of Nice had amended Article 10 of the ESCB Statute, on the Governing Council of the ECB, by adding the possibility, in Article 10.6, of adopting a new voting procedure. The Governing Council of the ECB had proposed such a new voting procedure,¹²² which the Council was quick to adopt and recommend for ratification by the Member States.¹²³ The newly worded Article 10.2 ESCB Statute became effective on 1 June 2004 on the basis of pre-accession ratification by the "old" Member States. The system, which is supposed to be continued under the Constitution, introduces a rotating voting scheme, as follows.

As long as there are 21 members of the Governing Council or less, all members vote. This situation pertains, with six Executive Board members sitting in the Governing Council, as long as the number of NCB Governors is less than fifteen. Currently, the six Executive Board members plus the twelve Governors of the "in" NCBs form an eighteen-person strong Governing Council.

As soon as there are more than 21 Governing Council members, all members of the Executive Board keep their vote but, among the NCB Governors,

121. On the application of the convergence criteria to the newly acceding States, see Kenen and Meade, "The accession countries: what is equal treatment?" in 14/3 *Central Banking (Quarterly Journal)* (2004), pp. 54–62.

122. Recommendation, under Art. 10.6 of the Statute of the European System of Central Banks and of the European Central Bank, for a Council Decision on an amendment to Art. 10.2 of the Statute of the European System of Central Banks and of the European Central Bank (ECB/2003/1; 2003/C 29/07), O.J. 2003, C 29/6.

123. Decision of the Council, meeting in the composition of the Heads of State or Government of 21 March 2003 on an amendment to Art. 10.2 of the Statute of the European System of Central Banks and of the European Central Bank (2003/223/EC), O.J. 2003, L 83/66.

only fifteen members will have a vote. Their rotating voting rights are assigned to two groups, one of five Governors with 4 votes, the others Governors sharing 11 votes. Governors have equal voting rights within their group. As soon as there are 28 members in the Governing Council or more, the same number of 6 (Executive Board) plus 15 (NCB Governors) votes can be cast, but the Governors are divided into three groups. One consists of five Governors with 4 votes; half the number of Governors will share 8 votes, and the other Governors will be assigned 3 votes. The composition of these groups will be based on a ranking of the NCBs which the Governors represent, based for five-sixths on their Member States' share in GDP at market prices and for one-sixth on the aggregate balance sheet of the monetary financial institutions (MFIs) in their State.¹²⁴

The provisions on voting in person have been maintained with only teleconferencing and, if a Governor is absent for a prolonged period, replacement by an alternate member, as possible alternatives for meeting in person in Frankfurt or elsewhere. Furthermore, the rule that intra-ESCB financial decisions – concerning capital contributions to the ECB, transfer of foreign reserves to the ECB, allocation of the NCBs' monetary income and of the ECB's profits and losses – are taken by all Governors without the vote of the Executive Board, has also been maintained. Finally, the requirement of a unanimous decision of the Governing Council, requiring consent by all Governors of the "in" NCBs plus the members of the Executive Board when proposing changes to the ESCB Statute in the simplified amendment procedure, has also been maintained.¹²⁵ Most fundamentally, the NCB Governors will continue to be bound by the European interest when formulating opinions on monetary policy proposals or taking decisions on them. They do *not* represent their State and are to act in the interest of price stability within the Union, or at least within the eurozone.

The adopted system implies that all members of the Governing Council will be able to discuss monetary policy decisions with only an important but limited number among them voting. Since actual voting does not seem to be the prevalent practice when ECB decisions are taken, the practical result may be that a potentially rather large group discusses and decides monetary policy. The intricate rotating system does not enhance the transparency of the

124. MFIs are defined as the financial institutions forming the money-issuing sector of the euro area. They include the ECB, the national central banks of the "in" States, and credit institutions and money market funds located in the euro area. See the ECB's Monthly Bulletin for November 2004, p. XIV.

125. Art. 41 Statute.

functioning of the Eurosystem. Criticism has also been leveled against the lack of courage to make the transition from decision making which nominally represents the “in” NCBs to a system in which a few experts are entrusted with the task of formulating monetary policy.¹²⁶ It is regrettable that the opportunity to amend the decision-making process, making it more efficient, easier to explain and less reliant on the idea of national representation, was not seized upon by the Convention or the IGC.

10. Critical overall appraisal

10.1. *General*

The Constitution is tainted by weaknesses which diminish its potential success as a true constitution, i.e. a basic law governing the Union and setting out the principles of (economic) governance, thereby granting the necessary powers to the federal institutions to implement them. In this regard, the successive IGCs have failed in their task of underpinning monetary union with political union. Apart from the issues already indicated, the following elements deserve to be mentioned.

10.2. *Review clauses*

A constitutional text should enable future generations to work with the document by amending it to take into account developments and changes in political preferences. The “writing in stone” of details concerning the far-reaching measure of independence of the monetary authority, and laying down in a constitutional text the precise quantitative reference values for State budgets (the central element of the Excessive Deficit Procedure and the SGP) reflect the opposite tendency. To this author’s mind, amendments to principles and values of the Constitution should be difficult to adopt when they concern the core elements of the constitutional set-up, areas which are crucial for binding together the *demos* in a constitutional order. One might think of principles of democracy, the rule of law, human rights and fundamental freedoms, the division of competences between the Union and the States, and core elements of economic governance – a borderless internal

126. See the *Financial Times* in a leader of 18 Feb. 2003 (“The ECB’s game of musical chairs”) and the criticism quoted in my inaugural address, *supra* note 9, at pp. 35–36.

market, competition policy geared towards well-functioning markets, the single currency and independence for the monetary authority, social policy elements. Also, the representation of the people and of the States would seem to be elements that can only be altered with the consent of each State and its people. In other areas, the possibility to adopt changes without unanimous approval by each State would seem to be the only practical way forward. When one looks at the Constitution from this angle, one can only regret the absence of truly innovative amending mechanisms; the review clauses of the Constitution are inappropriate.

Although it is to be welcomed that, for *ordinary revision*, the Convention method has been enshrined – EP consent being required to deviate from it¹²⁷ – and although the possibility to adopt QMV and insert the ordinary legislative procedure into provisions by a *simplified revision procedure*, requiring unanimity in the European Council and EP consent, as well as the absence of any veto by a national parliament,¹²⁸ is welcome, the *simplified revision procedure concerning internal Union policies and action* falls short of a feasible constitutional mechanism. It provides for amendment of internal policies only by unanimous European Council decision ratified by all Member States.¹²⁹ Comparing this cumbersome requirement with other constitutional texts¹³⁰ shows that the European Constitution, with its many provisions detailing policy matters, is far removed from other constitutions in this respect. Even the treaty laying down the global governance of monetary and exchange-rate matters, the Articles of Agreement of the International Monetary Fund (IMF), may be amended through approval of an amendment by the IMF's Board of Governors and acceptance by three-fifths of members having 85 percent of voting power. Exceptions are made for certain amendments, such as the right to withdraw and the requirement of consent for changing a member's quota (marking its financial contribution to the IMF and its voting rights within the organization), as well as for changing the "par value" of a member's currency, for which unanimous acceptance is required.¹³¹

127. See Art. IV-443(2), second para.

128. See Art. IV-444.

129. See Art. IV-445.

130. E.g. the US Constitution can be amended by a convention called on a proposal by two-thirds of Congress or by two-thirds of the States. Its outcome should then be ratified by three-fourths of the States except that "no State, without its consent shall be deprived of its equal suffrage in the Senate". (Art. Five).

131. Art. XXVIII.

The only positive thing about this state of affairs is that, the unanimity requirement for amendment of the provisions on internal policies provides a shield for monetary union competences, which, in the early stages of EMU, may still require time to firmly take root. Thus, when tested against the criterion of preservation of core achievements of “Maastricht” in the area of EMU, such as the primacy of price stability, this is a positive outcome. From a longer-term perspective, the current document is disappointing.

10.3. *Entry into force of the Constitution*

Also, the absence of a clause allowing the Constitution to become law without the ratification of all Member States is regrettable. This may mean that a legal limbo continues for as long as the ratification process or possible amendments of the Constitution are on the agenda, which may affect the functioning of the Union negatively, and thereby undermine the effectiveness of EMU, whereas the single currency needs to be embedded in a secure constitutional order.¹³² The European Constitution merely declares that, if two years after the signature of the Constitution, four fifths of the States have ratified it and one or more States “have encountered difficulties in proceeding with ratification”, the matter will be referred to the European Council.¹³³ But this body cannot do anything but start the process leading to the reopening of the IGC, or discuss other methods of proceeding – among those that have ratified the Constitution – along the lines laid down therein. While acknowledging the difficulty of resolving legal issues arising out of the continued applicability of the existing treaties, it is my opinion that the parliament or, in the case of decisive referendums, the inhabitants of a small and even of a large Member State should not hold the power to prevent the adoption of the Constitution among the other States. For EMU, this may mean that a political union may be even further down the road.

10.4. *Exit clause*

A major fault in the new Constitution consists in including an exit clause. Article I-60 on “voluntary withdrawal” contains the possibility for a Member State to withdraw from the Union. Not only is the clause badly drafted, it

132. By way of comparison, the US Constitution provided that ratification by 9 (out of the then 13) States would “be sufficient for the establishment of this Constitution between the States so ratifying the same.” Art. Seven.

133. Declaration No. 30 attached to the Constitution.

also potentially threatens the stability of the single currency. In order to assess its potential impact on EMU, it is necessary to describe the procedure set out.

A Member State wishing to withdraw from the Union must notify the European Council of its intention to do so, following which negotiations on an exit agreement will begin, for which the European Council is to set guidelines. The negotiation of the agreement is subject to Article III-325(3), giving the Commission the power to submit recommendations to the Council for the latter to adopt the decision authorizing the negotiations.¹³⁴ The exit agreement is to be concluded by the Council, acting by QMV, and has to get the consent of the EP. The exit clause states that the Constitution ceases to apply from the entry into force of the withdrawal agreement or two years after notification of the intention to withdraw, unless the European Council, in agreement with the exiting State, unanimously extends this period. The State wishing to leave the Union does not take part in the discussions in the Council or the European Council, or in the adoption of decisions.

As is clear from the above, exit does not hinge upon an exit agreement being concluded and ratified, for, failing this, the end of the two-year notice will mark the cessation of applicability of the Constitution. Any change to this scheme of things requires the consent of the State wishing to leave the Union. Similarly, it is clear that withdrawal from the Union is envisaged, not from the monetary union. There is no legal way for a separate exit from the eurozone. So, an intention to give up the single currency can only be realized by negotiating an exit agreement or, failing successful conclusion thereof, leaving after the two-years' notice period.

Finally, it should be noted that the right to withdraw is not connected with the adoption of a constitutional change that a Member State cannot accept, but introduced without such restrictions.

From the above description it is clear how badly designed the exit mechanism is. Apart from the fact that, failing a proper exit agreement, numerous provisions of an institutional nature will be unworkable in practice after the secession of a Member State,¹³⁵ as will be provisions of material law,¹³⁶ the

134. How the European Council's guidelines relate to the Commission's proposals or the Council's decision is not immediately clear.

135. Its voting rights in the Council, its representation in the European Parliament, its members in the Commission and the Court, its rights to finance under the budget, etc.

136. What will be the status of nationals and residents, of corporations, and of goods and services produced in the exiting State in the other members of the Union? How will its capital and payments be treated?

possibility for a State that wishes to leave to stall negotiations and leave “on its own terms” is clearly available.¹³⁷ In case of a State which has adopted the euro, even the threat of withdrawal will affect the euro’s stability and may lead to speculation against the single currency.¹³⁸ A mature monetary union does not rely on weak enforcement mechanisms such as these, but is firmly rooted in the will to belong together, for an unlimited period of time.¹³⁹

Previously, I have taken the view that the only acceptable way to withdraw from the Union is an agreement, ratified by all Member States, which sets out the terms of withdrawal. This agreement constitutes an amendment to the original Treaties. The same procedure, followed once in respect of (a part of) a Member State that withdrew,¹⁴⁰ should also apply to the Constitution.¹⁴¹ Any lesser procedure grants a State a right of unilateral secession and is inappropriate in a constitutional document worthy of the name.¹⁴²

137. Although it would equally clearly violate the loyal cooperation clause (Art. I-5) which the Commission, however, will find it hard to enforce through the usual mechanism of court action in case of a State wishing to leave.

138. In this respect, the open speculation by a major financial institution, on the possibility of reintroducing national currencies is a foreboding sign. See the advertisement in the Financial Times of 17 Aug. 2003 by Morgan Stanley.

139. Art. IV-446 makes clear that the Constitution is concluded for an unlimited period, as the present Treaties are.

140. In respect of Greenland in 1975. See the Treaty, amending with regard to Greenland, the Treaties establishing the European Communities, O.J. 1985, L 29/1, concluded between Denmark, acting for Greenland, and the Member States.

141. For a recent article confirming my views and, after analysing the right to withdraw under Community and public international law, concluding that, although inserting the exit clause cannot be said to be against the law, one should hope “that this clause will never be used”, Juli Zeh, “*Recht auf Austritt*”, 7 *Zeus*, *Zeitschrift für Europarechtliche Studien*, *Europa Institut der Universität des Saarlandes* (2004), 173–210. The author argues that the conclusion of the EC Treaty for an unlimited period (Art. 312) implies that exit was not considered as an option by the Treaty authors (at 177). She also concludes that invoking the Vienna Convention on the Law of Treaties does not lead to a different result: exit is at present legally not permitted (at 187). Only a Treaty amendment (Art. 48 TEU) can lead to the retreat of a Member State (by unanimous agreement with the other States): “... *dass kein Recht zur einseitigen Kündigung besteht.*” (at 189). The exit of Greenland is considered an exceptional restriction of the territorial applicability of the Treaty, which she compares with the “exit” by Algeria in 1962 (at 192). I consider this case not to be comparable, as the latter did not take place on the basis of a specifically concluded treaty, whereas the exit of Greenland did. The author argues that the loyalty clause is to be taken into account when interpreting the exit clause (p. 199). After exploring the possibility that introducing an exit clause would be contrary to fundamental principles of Community law or would be against international law principles, the author concludes that the adoption of the exit clause is legally permissible (at 209).

142. See my inaugural address, *supra* note 9, at p. 44.

11. Conclusions

Looking at the Constitution from the angle of EMU, i.e. from the perspective of the need to underpin monetary union with a secure political union, I consider that the document is too intergovernmental in nature and, in some respects, constitutes a retrograde step. The texts are too State-centered (the reader is reminded of the inclination to refrain from attributing a coordination competence on the Council in respect of economic policies) and the Commission has not been strengthened sufficiently in the area of EMU, where the Council is still predominant, even without proper involvement of the EP in EMU matters. The external representation is badly organized and will lead to confusion and inter-agency debate about who is going to represent the Union, with dual (the ECB and the Eurogroup President), triple (including the Commission President), even quadruple or "hexagonal" presidencies (including the fixed and rotating presidencies of the different Council formations).¹⁴³ To my mind, the European Council has been "institutionalized" too far where a proper attribution of powers to the Council in the composition of the Heads of State and Governments would have involved the States' highest representatives and kept the number of political institutions at three (Commission, EP, Council).¹⁴⁴ The texts on EMU, where amended, have been changed without fully thinking through the consequences and, sometimes, with contradictory results.¹⁴⁵ Fortunately, the hard core of the

143. The European Council has a permanent President without right to vote (Arts. I-21 and I-25(4)), there is the Council Presidency on the basis of equal rotation (Art. I-24(7)), whereas in Foreign Affairs configuration the Union Minister of Foreign Affairs (also Vice-President of the Commission) presides (Art. I-28(3)). The Commission President, to be proposed by the European Council and elected by the EP (Art. I-27(1)) concludes this enumeration of "general" (i.e. outside the area of EMU) presidents.

144. Especially when one considers that the President of the European Council and the Commission President do not have the right to vote (Art. I-25(4)), the difference between the Council and the European Council does not seem to warrant calling the latter a separate institution. Of course, from a Convention chaired by the proud "inventor" of the regular meetings of the Heads of State or Government, nothing else could have been expected.

145. One such contradiction which the present Treaty already contains has been maintained, as well. According to the Treaty provision on derogation (Art. 122 EC), the "out" Member States are not bound to the objectives and tasks of the ECB (Art. 105(1), (2), (3) and (5) EC) whereas the ESCB Statute only excludes the tasks clause (Art. 3) from application to the States outside the eurozone. This becomes important when one considers the requirement of "out" Member States to make their legislation compatible with the EMU provisions (Art. 109 EC). Are their NCBs bound to price stability and the support of the general economic policies in the Community? On the basis of the Treaty the answer would be negative, on the basis of the Statute positive. The same results from the Constitution (Art. III-197(2)(c) versus Art. 42

“Maastricht” *acquis* in the monetary area (independence of the monetary authority whose primary objective must be to maintain price stability) has been preserved.

From a wider angle, the Constitution is a long document which is difficult to read. It lays down too many competences, but gives too little power. Since the Maastricht Treaty, we have seen a gradual extension of competences for the Union, even into areas such as energy, space, culture, civil protection and tourism, instead of a strong focus on core elements of federal government, such as the internal market, EMU, CFSP, an area of freedom, security and justice plus adjacent areas. Better drafting could have restricted the Constitution to these core elements and would have relied on the adoption of “organic laws” to lay down rules for the many policy areas now contained in Part III.

In spite of my strong misgivings on the outcome of the Convention and the IGC, I would suggest that the following aspects are taken into account before deciding whether to support the Constitution or reject it. One should accept the fact that the building of the European Union entails a continuous constitutional process, which is certainly not finalized, or even halted for the next fifty years, with the signing of the Constitution. Further amendments, hopefully taking on board some of the ideas put forward here, are to be expected. Also, it would seem wise to work on centripetal forces to keep the Union going, rather than to focus on the imperfections of the Constitution. It would seem wise for Europeans to continue to look across the Atlantic, not so much for a power shield, but for constitutional law inspiration. The US system continues to have a great attraction for any federal set-up and, even in these times, the Americans are the Europeans’ main allies sharing our democratic values and ideas about effective and efficient government. Upon ratification of the Constitution, the powers it offers can be utilized to the maximum, even though a better legal underpinning for further developments would have been desirable. Constitutional law develops even outside the legal texts, as we have just witnessed with the confirmation of the Barosso Commission. While this process continues, Europeans should forge their commonalities: an effective use of second languages, taught from an early age at school, and emphasis on common symbols.¹⁴⁶ Also, they are faced

ESCB Statute [new]). I would argue that NCBs of Member States with a derogation are bound by the primary objective of price stability and the secondary objective of support for the economic policies within the Union meaning, in practice, of their own Member State.

146. Such as the euro which is called the Union’s currency in Art. I-8, alongside the anthem, the flag, the motto and Europe Day which “shall be celebrated on 9 May throughout the

with major challenges which should not make them focus on the imperfections of their Constitution: I refer to the need to fight terrorism and its causes, and govern wisely in view of cultural and religious divisions, the self-imposed Lisbon Agenda and the decision on Turkey's future membership of the Union. Looking to the outside world, Europe's commitment to reach the Millennium Goals,¹⁴⁷ combating the extremes of underdevelopment, requires forceful action and, hence, streamlined decision-making. Fostering what we have in common may pave the way, after the current period of apparent euroscepticism, to the adoption of an improved Constitution that would also benefit the working of EMU. Considering the alternative, the Treaty of Nice, which was so lacking in forthright progress, a vote in favour of the Constitution would be the best option for the governance of Europe.

Union" – a suggestion which those in charge of economic policy should take to heart when they strive to diminish, or redistribute (also for reasons of religious diversity) the current official holidays.

147. See www.un.org/millenniumgoals/ and www.un.org/millennium/declaration/ares552e.pdf