

An alternative constitutional treaty for the European Union

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Abstract. We propose an alternative to the Constitutional Treaty drafted by the European Convention. Our proposal effectively limits the domain of government at the Union level. It takes the incentives of the European public actors into account. We propose a second chamber of European Parliament composed of delegates of the parliaments of the member states and a second court composed of delegates of the highest courts of the member states. These institutions will be the guardians of the subsidiarity principle. The principle of the separation of powers is implemented by abolishing the Commission's monopoly of legislative initiative and by curtailing the Council's legislative role. Treaty amendments will not be drafted by an inter-governmental conference but by an inter-parliamentary conference. We propose to change the method of financing and introduce referenda.

JEL classification: F02, K33

1. Introduction

On 18 July 2003, the European Constitutional Convention appointed by the European Council has presented the proposal of a European Constitutional Treaty¹ which was subsequently adopted as a basis for negotiations in the Intergovernmental Conference starting in October 2003. In 1983 and 1993, the European Parliament had drafted similar constitutional proposals. From the point of view of constitutional public choice theory, these proposals may be criticized in several respects:

1. They do not close the gap between the people and the European institutions.
2. They do not aim at a constitutional consensus.
3. They do not effectively constrain the power of government.
4. They do not adequately respect the diversity of preferences, the need for choice and the

principle of subsidiarity.

5. They do not improve the separation of powers.
6. They do not pay sufficient attention to the incentives of public actors at the European level.

This is why we and our colleagues founded the European Constitutional Group, an independent and interdisciplinary association of economists, lawyers, political philosophers, historians etc. who take an active interest in European constitutional analysis. We published our first proposal for a constitutional treaty in 1993.ⁱⁱ We now take the opportunity to present an alternative to the Convention proposal. It updates, improves and condenses our earlier proposal. We have tried to present the model of a constitution inspired by public choice theory. We hope that it will be useful as a standard of comparison in evaluating the shortcomings of the Convention proposal and as basis for constitutional reform in the future.

The other members of the European Constitutional Group are Charles B. Blankart (Humboldt University, Berlin), Francisco Cabrillo (University Complutense, Madrid), Detmar Doering (Friedrich Naumann Foundation, Potsdam), Lueder Gerken (Stiftung Marktwirtschaft, Berlin), Elena Leontjeva (Lithuanian Free Market Institute), Angelo Petroni (University of Bologna), Joachim Rueckert (University of Frankfurt), Jiri Schwarz (Liberal Institute, Prague), Peter Stein (Stein Brothers, Stockholm) and Jan Winiecki (President of the Polish Society of Economists).

2. Proposal of a Basic Constitutional Treaty

TREATY

COMMENTS

Article 1. What the European Union Stands For.

The European Union aims to constitute and secure an area of freedom, peace, cooperation and the rule of law for its people.

This provision makes the concept of individual ‘freedom under the law’ the founding principle of the Union. The reference to ‘cooperation’ emphasises that the Union is based on the voluntary wishes of the people of Europe. The reference to ‘secure’ reminds people that freedom is not maintained without effort. No further statement of objectives is included because such statements undermine attempts to limit the powers of government and contain the kind of rhetoric that people rightly distrust.

Article 2. Membership.

(i) Any European State that respects the principles set out below in paragraphs (ii) and (iii) may apply to become a member of the Union.

(ii) The applicant state must give evidence of its respect for fundamental human rights, respect the principles of a free and open market in the organisation of its economy and observe democratic principles in the organisation of its political life.

(iii) Evidence of respect for fundamental human rights will be provided by the applicant being a member in good standing of the Council of Europe and a signatory of its Convention for the Protection of Human Rights and Fundamental Freedoms.

(iv) Detailed arrangements for membership shall be based on the terms and conditions accepted by existing members, subject to periods of adjustment needed on both sides and any special conditions or exceptions that may be justified by the circumstances of the applicant.

(v) Any member state may leave the Union at any time according to its own constitutional procedures. In this case, the Union and the seceding state shall maintain in force the free exchange of goods, services, capital and free movement of people unless the seceding state

The reference to the principles of a ‘free and open market’ is to freedom of contract and the right to private property.

The reference is to the Convention signed in Rome in 1950. The first 15 articles of the Convention set out what is meant by freedom under the law – including, for example, the right to a fair trial and no punishment without law.

This means that applicants for membership in the Union will be treated equally.

This provision emphasises the voluntary and non-coercive nature of membership in the Union. The reference to ‘own constitutional procedures’ reflects the status of the constitution as a treaty between states.

introduces a different policy in regard to the four freedoms with third countries.

(vi) A member state may have its membership suspended if the European Court of Human Rights determines that it is in material and persistent breach of the European Convention on Human Rights.

Because democracy is relatively recent for the majority of members of the Union, members need to provide for the possibility that a member state may slide back. In such a case this clause provides for suspension of membership based on a judicial process.

Article 3. The Protection of Rights.

(i) The responsibility for protecting the rights that reside with their peoples rests, in the first instance, with the Member States and their constitutions. In addition, if domestic remedies have been exhausted, their peoples may call upon the protections offered by the European Convention of Human Rights of the Council of Europe to which their states are signatories.

This provision draws attention to the principle that rights belong to people rather than to governments and that legislation and adjudication about the interpretation of rights should take place as close as possible to the people and the context in which a claim arises. Appeals to the European Court of Human Rights should occur only in exceptional circumstances.

(ii) The European Union and its institutions hereby accede to the European Convention of Human Rights and its procedures.

The 1950 Convention is established as the authoritative statement of the principles of freedom under the law.

These principles include: freedom of thought, conscience and religion; freedom of expression; freedom of assembly and association.

The EU's Charter of Fundamental Rights is excluded because it mingles those rights that define the framework for freedom under the law with those rights that are the subject of political debate about priorities within a system of law. It therefore cannot serve as the basis for a system of limited powers. Moreover, minorities in the Union are better protected by a court of a more encompassing international organisation in which the majority of the Union may itself be a minority.

(iii) If a Union law or measure is found to be incompatible with the European Convention of Human Rights by the Court of Human Rights the law or measure shall be suspended.

Article 4. The Internal Tasks of the Union.

The Union and its Member States undertake the following tasks within the Union:

- (i) To ensure the free movement of persons, goods, services and capital without regard to nationality, the freedom of where to establish a business and the freedom for people to choose where to live in the Union.
- (ii) To permit the free use and full convertibility of currencies within the Union while supporting the duties of the European Central Bank to maintain price stability in the area where Member States have adopted the Euro as their currency.
- (iii) To submit their economic policies to mutual examination, to avoid excessive government deficits, to prohibit borrowing from the European Central Bank by official bodies, and to conduct economic policies favourable to an efficient allocation of resources so as to achieve sustainable and non-inflationary growth.

Articles 4 and 5 divide the tasks of the Union into internal tasks within the Union and external tasks for relationships with the outside world. Different considerations govern each.

The division of responsibilities between the Union and Member States is largely determined by the procedural rules set out in Articles 6 and 7 below rather than by demarcating separate policy areas. Areas of policy that are to be the sole preserve of either the Union (trade policy) or the Member States (taxation policy) are specified as exceptions rather than the rule. No general provision for the Union to take on new functions (as under the existing treaties) is included.

No enumeration of further competences is needed if all policies have to be justified by reference to these four principles.

The provision for the free use of convertible currencies means that EU citizens have a choice of currencies. It also means that they themselves exert an external discipline on the ECB. The main duties of the European Central Bank are specified in Article 7 (v).

This provision recognises that the economic policies of Member States are a matter of common concern.

(iv) To secure free competition by implementing effective rules against restrictive practices and by protecting it against distorting action of state institutions.

This provision recognises the need for a common competition law. In many cases, the application would be left to the competition authorities in Member States.

(v) To secure the quality of the environment.

Article 5. The External Tasks of the Union.

(i) The Member States undertake to treat their external policies as a matter of mutual concern.

This objective is deliberately modest so that the wording reflects reality. At the same time, if all external policies are treated as a matter of mutual concern, the Member States of the Union will increasingly develop trust and cooperation.

(ii) The external policies embraced by this undertaking include foreign and security policy including measures against international terrorism, defence policy, aid policies, measures against international crime, global environmental policy and immigration policies.

(iii) In carrying out these policies the Union is to work within the rules established by the United Nations, the World Trade Organisation and other relevant international organisations and will contribute to the building of international rules of good behaviour and the rule of law.

This article recognises that the international activities of regional unions such as the European Union are best placed within a global framework.

(iv) Individual Member States may maintain their own membership in such international organisations and are free to join with non members of the Union in other international alliances that contribute to the external tasks of the Union.

This article recognises the increasing importance of task-specific international coalitions of 'the willing and able' in support of international rules of good behaviour. It also recognises the importance of other international alliances outside the EU such as NATO.

(v) In its common trade policy the Union shall always strive for the free movement of goods, services and capital. The policy will be mandated by the Member States under the qualified majority procedure set out in Art. 9 below.

This article distinguishes trade policy from other external policies. Different rules for taking decisions on trade are specified in Article 9.

Article 6. The Scope and Form of Legislation.

(i) In carrying out its tasks, the Union will not legislate in cases where the public policy concerned can be carried out by Member States acting individually or in small groupings or where methods of coordination can be used that do not require the passage of Union laws.

This article on the general demarcation of powers and responsibilities creates a presumption in favour of the most local jurisdiction and in favour of the least onerous form of legislation, including the use of private market solutions.

(ii) The laws of the Union shall provide general legislative frameworks, leaving to the Member States the choice and form of methods for achieving results with comparable effect (directives). The Union will also be able to enact measures that are directly applicable in all Member States (regulations).

This defines the legal instruments of the Union in terms of the traditional distinction between a 'directive' and a 'regulation'.

(iii) The laws of the Union will apply only to cross border transactions between members, will give priority to mutual recognition of laws in the Member States and shall not pre-empt Member State legislation in the same field other than on matters agreed in respect of external trade policy.

This provision limits the law-making authority of the Union so as to give a general protection to the law-making capacity of localities, regions and Member States so that they can reflect the preferences of their voters. Specific protections follow.

The term 'cross border transactions' should be understood to apply for example to immigration and pollution and not just to goods and services. The provision limits the law making authority in this way because other criteria are too vague to offer judicial protection against the overstepping of powers (for example whether actions in one member state 'affect' another).

(iv) The Union will have no powers to interfere with the freedom of contract unless such contracts restrain competition.

This provision places a specific restriction on Union activities in order to protect a basic market principle. In particular, the power to regulate or deregulate labour markets is to rest with Member States in order to allow Member States the greatest possible flexibility to achieve full employment as well as to learn from best practice.

(v) Matters concerning the tax systems of Member States or the rates and levels at which taxes are levied are to be decided within each Member State and not by the Union or its institutions.

This means that taxes will reflect voter preferences in each member state. It will prevent high tax jurisdictions exerting pressure on low tax jurisdictions to raise their tax rates or levels.

This provision will also prevent the governments of Member States unanimously forming a tax cartel at the expense of citizens. Tax collusion raises the citizens' cost of legal tax avoidance and thereby the average level of taxes.

(vi) In cases where Union laws are envisaged they shall be prepared and implemented according to the following procedures:

Any proposed law with a significant economic effect (including those envisaged as part of an international treaty or commitment) must be supported by an assessment of its impact and a justification of why Union law rather than other methods of achieving comparable results including market remedies has to be chosen .

The assessments must be made publicly available in time for independent peer review as well as democratic scrutiny.

The assumptions on which the assessments have been carried out must also be made public so that the assessments can be reproduced in the scrutiny process.

Article 7. Institutions.

(i) The European Council.

The European Council composed of the heads of government or of state of the Member States is the highest body in the Union. It will set the direction of the internal and external policies in the Union, define the general political guidelines for the future development of the Union and supervise the Commission. It has the exclusive right to propose legislation at the request of a chamber of parliament and may veto laws passed by the Parliament.

The European Council may appoint a President for a period of office not to exceed four years and may also appoint High Representatives to assist it in carrying out its tasks.

(ii) The Council of Ministers.

The Council of Ministers shall ensure that the objectives set out by the European Council are attained. Its members shall work with the Commission in helping to prepare draft legislation.

It shall meet in different formations depending on the subject and each formation will consist of one minister or senior civil servant from each member state authorised to commit the government of that member state.

The mutual review of the general economic policies of the Member States shall be ensured by the Ministers of Finance or of Economics.

A General Affairs Council shall ensure together with the Commission that legislative preparation follows the procedures set out in Art. 6 above.

This article establishes the European Council as the 'gatekeeper' of Union activities.

In the arrangements that follow ministers of Member States (the Council) and the Commission share the 'executive' tasks of preparing, administering and implementing Union measures while national parliaments (in the form of a chamber of parliamentarians) and a directly elected chamber of the European Parliament share the task of determining the final contents of legislation. As explained in section (iv) each chamber may request the Council to submit proposals for legislation. Since the Council no longer determines the final contents of legislation, a better separation of powers is achieved. The Council is a more effective supervisor of the Union bureaucracy than Parliament.

Implementation of Union measures rests largely with Member States. In addition, much of the work of preparing Union measures has to be undertaken in the Member States because the required information is there and because much communication takes place directly between national capitals. However the Commission often can gather a superior overview of the situation across the Union. Therefore it makes sense in theory and in practice for both Council and Commission to prepare legislation together.

This obliges the Council of Ministers as well as the Commission to place greater emphasis on the quality of legislative proposals and the reasons for them.

(iii) The Commission.

The Commission shall be fully associated with all activities of the Council in carrying out the general directions for the Union established by the European Council. More specifically it shall perform the following functions:

It will help coordinate the departments and agencies of the governments of Member States in carrying out the internal tasks of the Union.

It may be charged by the Council to act for the Union in carrying out selected external policy functions, such as negotiating international trade or environmental agreements. In such cases it will have a duty to act impartially on behalf of all Member States in carrying out its mandate.

It will have a duty to ensure that the procedures for the making of Union laws (Art. 6) are followed, and shall ensure that systems are in place to monitor the effects of Union laws and to measure their results.

In respect of the expenditures of the Union it shall have a duty to work with the Member States to ensure that expenditures go to the purposes intended. If it cannot be so assured it has a duty to suspend those expenditures.

Each member state shall have the right to nominate a Commissioner for either a senior or junior post in the College of Commissioners. Special consideration is to be given to the representation of the nominees of smaller Member States in the senior posts. Member States may combine in order to make a joint nomination. No Commissioner shall be appointed for longer than two four year terms. In the event of incompetence or malfeasance the European Council may dismiss a Commissioner. The College shall agree on its own head from among its senior members.

These provisions designate the Commission as the partner of the Council of Ministers. They emphasise its role as a 'network manager'. They also 'depoliticise' its role in respect of external trade matters and in carrying out judicial or quasi-judicial tasks such as in respect of competition policy. They also emphasise its duty to prevent the misuse of funds.

These arrangements are consistent with the Commission assisting the Council of Ministers. Arrangements for parliamentary oversight follow later.

(iv) Parliament

The European Parliament comprises two chambers, the directly elected Assembly (First Chamber), and the Chamber of Parliamentarians (Second Chamber). The Second Chamber is a body composed of representatives of national parliaments determined by lot.

The First and Second Chambers shall each have the right of taking the legislative initiative by requesting the Council to submit a proposal.

The two chambers together shall have the right to summon Commissioners and heads of Union agencies, including the President of the ECB in order to hold hearings or inquiries into their actions.

The Second Chamber shall ensure that national parliaments receive all proposals for Union legislation in sufficient time to hold their governments to account for their role in decisions to be taken in the Council and to ensure that the law making procedures set out in Art.6 above of the Union have been observed.

The Second Chamber shall also help oversee the financial procedures set out in Art. 8 below and may suspend expenditures on particular items in the event of adverse audit findings by a national authority or Union institution.

The Second Chamber shall have the power to block legislation.

This clause places a joint responsibility on national parliaments and the European Parliament for holding the Union and Member States to Account. Both chambers of the European Parliament together are necessary to ensure that the acts of the Union are legitimate in the eyes of the people.

A right of legislative initiative traditionally belongs to any parliament. The Council assisted by the Commission is best qualified to draft legislative proposals. The Council does not have the right of legislative initiative.

This clause provides the chamber of parliamentarians with a special responsibility for financial oversight since funding will have come from national governments and to ensure that audit procedures have 'teeth' in the event of misspending.

Following Council acceptance of the request and the proposal of a bill, the First Chamber may approve, amend within the scope of the legislation, or block the proposed law. Any amendments shall have been assessed under the procedures set out in Art. 6 above.

The First Chamber shall not block laws proposed by the Council that simplify or annul previous Union laws.

The membership of the First Chamber shall not exceed 500 and constituencies shall be approximately of equal size except that each member state shall have at least two members. Elections shall take place every four years. A Union-wide method of election may be proposed by both Chambers jointly subject to approval by the Member States according to their own constitutional procedures.

(v) The European Central Bank.

The primary objective of the European Central Bank shall be to maintain price stability in the eurozone (and more specifically to keep the harmonised index of consumer prices published by the European Statistical Office between zero and two percent per annum). In carrying out this task it shall not seek or take instructions from any other institution or person. In particular it shall not take instructions with regard to the exchange rate.

The members of the Governing Board shall have tenure up to the statutory retirement age. They are accountable for achieving the constitutional objective of price stability. If the inflation rate of the Euro exceeds 3 per cent per annum over a period of four years, the Governing Council may be dismissed by the two chambers of Parliament acting jointly. .

The aim of this clause is to counter the tendency of EU laws to accumulate and to ease simplification.

The method of election provides either for a constituency based system of representation or for a change to a Union wide system in which each voter may vote for candidates from all Member States. In the case of the Second Chamber, determination by lot avoids problems of self-selection and corruption.

A provision to secure maximum personal independence for governing Board members follows in the next clause. An alternative would be to provide for one eight year term without reappointment.

If the central bank is independent of government and parliament, its democratic legitimacy must derive from the constitution. However, the central bank must be accountable for attaining its constitutional objective. If the central bank does not fulfil its constitutional task there must be democratic checks and remedies.

(vi) Courts.

The European Court of Justice supported by the Court of First Instance shall interpret the laws of the Union with the exception of those involving the interpretation of human rights or the distribution of competencies between the Union and the Member States. Justices shall serve one eight year term without reappointment so as to guarantee their independence.

The European Court of Human Rights shall hear all cases involving human rights aspects of EU laws and institutions in line with Article 3 above.

A European Court of Review shall hear all cases potentially involving the distribution of competencies between the Union and the Member States. It shall be composed of justices designated by the highest courts of the Member States for a maximum period of 6 years. No person shall be a judge unless he or she is at the same time a judge of a supreme court of a member state. Any citizen, member state or institution of the Union may raise a case in the Court or request a preliminary ruling in advance of an actual case. The Court shall decide whether or not to accept a case or a request for a preliminary ruling.

An Independent Competition Authority shall enforce the law against restrictive practices provided for in Article 4(iv).

A Court of Auditors shall ensure that the processes of the institutions of the Union and of the Member States provide for the auditing of the expenditures and laws of the Union. These processes shall ensure that expenditures are for the purposes intended and provide value for money as well as measure whether the laws of the Union achieve the purposes intended within the costs intended. The Court shall carry out its own audits as a check on procedures.

Theory and historical experience shows that constitutional courts tend to develop a vested interest in political centralisation. For this reason, the assignment of competencies between the Union and the Member States ought to be judged by a separate court that is provided for below.

The Court of Review is linked to the supreme courts of Member States so that it will not develop a self interest in favouring Union powers over the powers of Member States. The link with the supreme courts of the Member States also ensures a better integration of European and national adjudication procedures.

Article 8. The Financing of the Union.

(i) The annual expenditures of the Union shall be decided within the limits established by a five year annual framework. The limit on the total shall be expressed as a proportion of the total GDP of the Union.

This provision reflects actual practice. The starting limit should reflect the current level of 1.27% GDP.

(ii) The Union shall have no power to tax. Funding shall be provided by Member States in accordance with their relative capacity to pay as measured by the size of their gross public expenditures.

The effect of this provision is to ensure that the Union institutions cannot bid to increase their powers by promising more money to voters because the money has to come from the Member States. Central taxation interferes with national taxation by reducing the latter's tax base. Such negative 'fiscal externalities' lead to excessive taxation. By linking contributions to the gross public expenditures of the Member States, this provision creates an incentive to avoid overspending at the level of the Member States.

(iii) The annual budget shall be in balance. Its composition shall be decided by the Council subject to the approval of the European Parliament.

(iv) Funding levels for the five year frameworks shall be decided by the Member States, subject to the approval of appropriations by their parliaments.

This provision reinforces actual practice.

Article 9. Taking Decisions in the Union.

In carrying out the tasks and duties contained in this treaty the following voting procedures shall apply:

(i) The European Council and Council of Ministers will act by a qualified majority of two thirds of the Member States accounting for two thirds of the population of the Union with the following exceptions: the financing of the Union where Art.8 above will apply; external policies, other than trade, where decisions shall be taken by consensus.

This clause makes qualified majority voting the normal rule for internal matters plus trade and consensus the normal rule for external policies other than trade. The double majority protects the preferences of the peoples of the smaller member states as well as recognising the more populous states.

(ii) As a further exception to these general rules, any member state may claim in all respects other than trade that a decision is against its vital national interests. In this case it may opt out from the decision if such action is supported by a majority of its voters in a referendum.

This writes into the constitution the unwritten rule that a vital national

interest will not be overruled. It also protects against a majority of Member States from imposing costs on a single member. The need for a referendum however prevents arbitrary government use of the opt out.

(iii) Each chamber of the European Parliament shall take decisions by a simple majority of their membership.

(iv) Nothing in the rules and procedures set out above shall prevent the Union associating non-Member States with particular areas of policy. In addition, nothing shall prevent Member States forming more closely cooperating non-exclusive partnerships of varying sizes for different purposes. Union institutions may not be involved in such arrangements. However the European Council and the Commission must be kept fully informed.

This recognises current practice of associating non Member States with particular Union policies. It also allows for flexible arrangements for cooperation within the Union while preserving the role of Union institutions to act for the membership as a whole.

Article 10. Final Provisions.

(i) Any citizens of the Member States of the Union may make a complaint of mal-administration by a Union institution to an Ombudsman appointed by the European Parliament.

(ii) A qualified minority of the national parliaments (one third) or of the population of the European Union (one quarter of one percent) may petition for a referendum on any law or act of the Union that in their opinion violates the procedural, institutional or substantive limits established by this treaty and may also petition for the repatriation of any powers granted under this treaty. The result of a referendum shall be binding when supported by a two thirds majority of voters in a majority of Member States.

This clause and the subsequent clause introduce provisions for direct democracy within the Union. These will help combat the impression that people are powerless within the Union and help offset the situation that Union bodies are only weakly representative.

(iii) Any increases to the limits of the financial framework of the Union (expressed as a proportion of the GDP of the Union, Art.8 above) shall require the support of a simple majority of voters in each of the net contributing Member States.

This article provides a special defence against the spending power of governments being used to centralise power.

(iv) If, in two thirds of the national parliaments of the Member States there is a vote in favour of amending a provision of this treaty, an inter-parliamentary conference of national parliaments shall be called to draft amendments. The amendments shall enter into force after being ratified in each member state in accordance with their constitutional requirements.

This provision entrenches the principle that changes in a Union constitution should not be prepared by Union bodies or national executive bodies with a self interest in strengthening their own powers.

Notes

ⁱ The proposal is available from the website <http://european-convention.eu.int>

ⁱⁱ European Constitutional Group, A Proposal for a European Constitution, European Policy Forum, London, December 1993.