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**INSTITUTIONAL SETTLEMENTS FOR AN
ENLARGED EUROPEAN UNION**

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A. Introduction

The process of Constitution-making in the European Union is reaching a critical stage¹. While the accession treaties of ten candidate countries are ready for signa-

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¹ For an excellent analysis of the situation of the debate in Febr. 2003 see: Kirsty Hughes, The Battle for Power in Europe - Will the Convention Get it Right?, in: José María Beneyto Pérez/Ingolf Pernice (eds.), The Government of Europe - Institutional Design for the European Union, 3rd ECLN-Conference, Madrid 2003, <http://www.ecln.net>.

ture² and the referenda in preparation, the Constitutional Convention created in Laeken has yet to agree upon a proposal to the Intergovernmental Conference that will be held later in 2003. Many important points still need to be discussed regarding the implications of enlargement for the functioning of the Union. The crucial question regards the institutions: How to ensure that they will function adequately for a Europe of twenty-five and more Member States. As yet, the member states did not manage to agree upon necessary and substantial institutional reforms. In this regard, the treaty of Nice is a complete failure. It did not prepare the Union for the challenges of enlargement³. New institutional arrangements needed to make the Union function in an effective and democratic way are not yet in sight. According to the timetable, the accession-Treaties are to be signed in May 2003, the Convention is supposed to submit a proposal of a draft Constitution for the Union by May 2003. This proposal will be discussed at the Saloniki-Summit end of June and probably submitted to an Intergovernmental Conference which may finish its works at the Rome-Summit in December 2003. Ratification may follow in 2004, both, of the accession Treaties and the new Constitution, but there is little hope that the election of the European Parliament in spring 2004 will already be possible on the basis of the new Constitution for the enlarged Union.

1. Where are we today ? The state of the discussion

A number of draft constitutions have been submitted, meanwhile, by Members of the Convention, of the European Parliament, by think tanks and academia.⁴ They all contain changes to the existing institutional setting of the Union, and some general trends may be identified. On the other hand, the preliminary draft Constitution issued the 28th of October 2002 by the Presidium⁵ does not contain any indication of a possible solution. No specific working group on institutional issues has been created - except a "Discussion Circle" on the European Court of Justice.⁶ And the debate of the Plenum on this point has just started. The options are characterised by the split between federalists and intergovernmentalists, they turn around a mere presidential system, the preservation of the rotation system at the Council, team presidencies and options combining elements of the different systems.⁷

² Available for example at <http://www.statewatch.org/news/2003/feb/14accession.htm>.

³ For critical comments see e. g. Christoph W. Herrmann, *Common Commercial Policy After Nice: Sisyphus Would Have Done a Better Job*, (2002) 39 CML Rev. 7-29; Eckhard Pache/Frank Schorkopf, *Der Vertrag von Nizza - Institutionelle Reform zur Vorbereitung der Erweiterung*, (2001) NJW 1377 – 1386.

⁴ See the collections available under "Draft Constitutions" at www.whi-berlin.de, and <http://www.cap.uni-muenchen.de/konvent/entwuerfe.htm>.

⁵ Presidium, "Preliminary Draft Constitutional Treaty of the European Union", 28 October 2002, CONV 369/02.

⁶ Discussion Circle on the Court of Justice, having had two meetings meanwhile, see for the agenda: http://european-convention.eu.int/doc_register.asp?lang=EN&Content=CERCLEI.

⁷ An overview of the debate is given by Ingolf Pernice, *Democratic Leadership in Europe. The European Council and the President of the Union*, www.whi-berlin.de/pernice-leadership.htm, with own proposals.

The first high-level initiative was a proposal of Aznar, Blair and Chirac, to appoint an elder statesman as the President of the European Council who would, for a period of some years, represent the Union to the outside and chair the European Council.⁸ Given the strong criticism against this proposal by the smaller Member States, but also the scepticism from Germany, it was the Franco-German "Elysée-Proposal" of January 15, 2003⁹ which has initiated the concrete debate, including that of the first Convention's Plenum on institutions of 20./21. January 2003¹⁰. More recently, the Presidium has submitted a draft of the first sixteen Articles of the Constitutional Treaty, in which some principles and general provisions of the Union are laid down¹¹, none of which regard institutions, however. Yet, many important points seem already reaching broad consensus, including

- to abandon the pillar-structure of the Union and to give the Union legal personality,
- to make the Charter of Fundamental Rights a legally binding instrument and to integrate it into the Constitution,
- to ensure more continuity of the external representation of the Union possibly by a Foreign Secretary or Minister,
- to distinguish the executive from the legislative branch of the Council which shall legislate in co-decision with the European Parliament,
- to introduce qualified majority, as a rule, for the decision-making of the Council,
- to strengthen democratic legitimacy and accountability of the Commission, probably by the election of its president by the European Parliament¹².

Also to call the revised Treaty Constitution of the European Union seems to be largely agreed among the President and the members of the Convention.

2. The challenge: A Union of citizens and states

Many other questions and details remain still open, while there is an agreement upon the aims of the revision of the institutional system of the European Union¹³:

⁸ See Chirac, Discours de M. Jacques Chirac, Strasbourg, 6 March 2002, <www.elysee.fr>, Aznar, Discurso del Presidente des Consejo Europeo, St. Anthony's College, Oxford, 20 May 2002 < www.ue2002.es>; Blair in an interview in May 2002, see George Parker, "France and UK Call for New Force at the Top of EU", Financial Times 16 May 2002.; comments: Cécile Barbier, What Project for Europe, <http://www.ciginfo.net/demain/files/tomorrow7en.pdf> .

⁹ Contribution submitted by Mr. Dominique de Villepin and Mr. Joschka Fischer, members of the Convention, Franco-German contribution to the European Convention concerning the Union's institutional architecture, <http://register.consilium.eu.int/pdf/en/03/cv00/cv00489en03.pdf>, CONV 489/03 of 16 January 2003 (hereafter "Elysée-Proposals").

¹⁰ Synthetic Report, <http://register.consilium.eu.int/pdf/en/03/cv00/cv00508en03.pdf> , CONV 508/03 of 27 January 2003.

¹¹ See <http://register.consilium.eu.int/pdf/en/03/cv00/cv00528en03.pdf>, CONV 528/03 of 6 February 2003.

¹² Synthetic Report, supra note 10.

¹³ These principles can be found already in The Laeken Declaration – The Future of the European Union, 15 December 2001, http://europa.eu.int/futurum/documents/offtext/doc151201_en.

The reform must bring about a simple and more transparent system which can be understood by the citizens of the Union; democratic legitimacy of its decisions and democratic accountability of those who decide must be enhanced, and the efficient functioning of the system must be assured given the enlarged number of members of each institution after the accession of ten or more candidate countries. The institutional reform will have to face the qualitative change of the Union due to the duplication of the number of Member States, to the incorporation of very diverse legal and political cultures and to the specific historic experience these countries have suffered. One of the most difficult issues will be how to accommodate the antinomy of the two faces of equality in the Union comprising countries with more than eighty million inhabitants and others having not more than some hundred thousands: Equality of States versus equality of citizens.

This difficulty brings the discussion to a very basic conceptual point: For an international organisation – what the European Union is definitely not, though it is formally based on treaties concluded among states¹⁴ - the equality of States would be the general principle. However, the Union is of a different nature, from the beginning, although it is formally based on treaties concluded among states¹⁵. It has, since, developed to a full-fledged “supranational Union”, a polity *sui generis*¹⁶. Yet, if it is regarded as a polity based upon the will of, and constituted by its citizens, democratic principles require that all citizens have equal political rights. My view is that, in the light of multilevel constitutionalism¹⁷, in democratic systems legitimacy - including that of supranational institutions - can be derived only from the citizens concerned, acting directly or through the institutions of their respective countries. This does not follow, as clearly as it should, from the terms of the Treaties establishing, as the EU Preamble says “an ever closer union among the peoples of Europe”. But the EC-Treaty not only establishes the right to vote at municipal elections as well as at the elections to the European parliament for “every citizen of the Union” (Article 19 EC) but also refers, in relation to the political parties at the European level, to expression of “the political will of the citizens of the Union” (Article 191 EC). The “Elysée-Proposal” rightly considers Europe to be a “Union of States, peo-

¹⁴ For arguments see Ingolf Pernice, *Multilevel Constitutionalism in the European Union*, 5 27 *ELRev.* (2002), 511 at 517-518.

¹⁵ See Ingolf Pernice, “Multilevel Constitutionalism in the European Union”, *EL Rev.* 27 (2002), 511 at 517 et sequ.

¹⁶ For the term see: Armin v. Bogdandy, *Supranationale Union als neuer Herrschaftstypus: Entstaatlichung und Vergemeinschaftung in staats-theoretischer Perspektive*, 16 *Integration* (1993), 210. A masterpiece describing and analysing this process is: Joseph H.H. Weiler, *The Transformation of Europe*, *Yale L.J.* 100 (1991), 2405, in particular at 2410 et sequ., though, in my view, the particularities of the EC-system as stated in case 26/62 *Van Gend & Loos*, 1963 *ECR* 1, are an original feature of the Community as conceptualised by Jean Monnet, Schuman, Hallstein and others.

¹⁷ See: *ibid.*, p. 514 - 517, and Ingolf Pernice, “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?”, (1999) 36 *CML Rev.* 703 .

ples and citizens"¹⁸, and Alain Lamassoure, a French member of the Convention, rightly calls for "The common theme: the citizens first".¹⁹

3. A new procedural setting: The Constitutional Convention

As we know from federal systems in general, the rational of equality regarding citizens and (federated) states can find various institutional solutions, and the greater the diversity of the component countries the greater the risk for an unsatisfying result. The coming enlargement exposes the Union to unknown difficulties in this respect. Attempts made in Amsterdam (1998) and Nice (2000) to prepare the Union for enlargement led to complete failures. In particular, the complex and confusing rules on weighted votes for qualified majority at the Council do not live up to the challenge of enlargement²¹.

The traditional method of treaty-revision, based on the preparatory works of a diplomatic Intergovernmental Conference is no longer an adequate means to tackle future challenges. It has proved incapable to finding adequate solutions for the difficult problems encountered in constitution-making.²² Much hope is put, therefore, in the capacities of a Constitutional Convention which was created in Laeken. It consists, by two thirds, of parliamentarians of the Member States and of the European Parliament, while one third of its Members are representatives of the national governments and of the European Commission, and representatives of the Candidate Countries are included on an equal basis. This composition reflects the multilevel structure and the dynamism of the political entity which is to be given a revised constitution. It seems to be important to take account of this particular structure also tailoring the institutions for the enlarged European Union.

¹⁸ CONV 489/03, *supra* note 9, p. 1.

¹⁹ Contribution submitted by Mr. Alain Lamassoure, Member of the Convention - Institutional balance, CONV 507/03, <http://register.consilium.eu.int/pdf/en/03/cv00/cv00507en03.pdf>.

²⁰ Cf. Cheryl Saunders, *Federalism and society in the 20th century*, in: Jutta Kramer / Hans-Peter Schneider (eds.), *Federalism and civil societies : an international symposium*, [Deutsches Institut für Föderalismusforschung e.V., Hannover 1996] at 83 – 96.

²¹ Articles 205 EC and point 2 of the Declaration (20) on the enlargement of the Union attached to the Treaty of Nice, see *supra* note 3 and Pieter van Nuffel, *Le traité de Nice*, (2001) *Revue du Droit de l'Union Européenne*, 329; similarly: Dimitris Tsatsos, *The Treaty of Nice. A failure which can only be remedied by means of an effective and properly implemented post-Nice process*, in: D. Melissas/I. Pernice (eds.), *Perspectives of the Nice Treaty and the Intergovernmental Conference in 2004* (2001), p. 10 et sequ.

²² For critical comments see e.g. Antonio López Pina, *Nice - or a reflection upon the difficulties to progress in the European integration under the present iron law of oligarchy*, in: *First ECLN-Conference, Athens 2001*, <http://www.ecln.net>; Elmar Brok, *Die Ergebnisse von Nizza – Eine Sichtweise aus dem Europäischen Parlament* (2001) *Integration* 24 86 – 93 at 92 – 93.

4. Requirements of "multilevel constitutionalism"

The European Union is not, and is not supposed to become a State or Super-State, but its development follows the concept, originally proposed by Jean Monnet and Robert Schuman, of a new - non-state form of political organisation to be a safeguard for peace and welfare in Europe²³. It is not an agency of the Member States, either, as it was argued by Peter Lindseth some years ago,²⁴ but it is a federal system of an original character: The Union, and the treaties by which it is constituted, are based on the constitutions of its Member States, changing them incidentally by establishing joint institutions with specific competencies to meet the objectives specified in the treaties. These treaties, as much as the new Constitution of the Union, are complementary to the constitutions of the Member States and, like them, an expression of a social contract, as J.H.H. Weiler has pointed out already many years ago,²⁵ among the citizens of nations which it binds together, pooling their sovereignty to meet common goals. Accordingly the new Constitution should be conceived and drafted as laying down the terms of a new and enlarged social contract among the citizens of the old and the new Member States who, by doing so, are giving themselves all together the status of citizens of the European Union.²⁶

Consequently, proposals made for the institutional reform of the Union so far must be scrutinised in the light of multilevel constitutionalism, i.e. taking account not only of the need to meet the above-mentioned objectives, but also of the implications which the modifications of the European constitution may have on the national constitutions. Without recapitulating the many different approaches and models for a new institutional setting already on the table, the following analysis will concentrate on the proposals most likely to play a major role in the discussions to come.

B. Institutional reorganisation of the European Union

The candidate countries have applied, quite a couple of years ago, to a European Union which was functioning fairly well, which was based on an internal market and the prospects of a common currency, some complementary policies and the intention to co-ordinate the policies of the Member States in economic, foreign and

²³ See Ingolf Pernice, Walter Hallstein - Erbe und Verpflichtung, WHI-Paper 7/01, <http://www.whi-berlin.de>.

²⁴ Peter Lindseth, Democratic legitimacy and the administrative character of supranationalism: the example of the European Community, 99 Colum.L.Rev. (1999), 628.

²⁵ Josef H.H. Weiler, „...We will do. And Hearken“ Reflections on a Common Constitutional Law of the European Union, in: Roland Bieber and Pierre Widmer (eds.), *The European Constitutional Space*, 413, 439; Peter Häberle, *Europäische Verfassungslehre* 2001/2, 157, 180, 217; Peter Frankenberg, *The Return of the Contract*, *The King's College Law Journal* 2001, 39; Ernst-Joachim Mestmäcker, *Risse im europäischen contrat social*, Hans Martin Schleyer-Preis 1996 and 1997, Hanns Martin Schleyer-Stiftung (ed.) 1997, 54; Miguel Poiaras Maduro, *Europe and the Constitution: What if this is As Good As It Gets?*, ConWEB No. 5/2000, 8.

²⁶ Ingolf Pernice/Franz C. Mayer/Stephan Wernicke, “Renewing the European Social Contract: The Challenge of Institutional Reform and Enlargement in the Light of Multilevel Constitutionalism”, 12 KCLJ (2001) 61.

home affairs. It was clear that with ten new Member States the Union would change in character. But did anybody expect that its constitutional basis would be entirely revised at this stage? It is an opportunity to realise that the Union is a matter of its citizens. By the accession, the citizens of the new Member States make themselves citizens of the Union too, and give the citizens of the other Member States this status in their countries. The institutions of the Union will be their common institutions, and the success of this "joint venture" will depend on how they are organised. The aim, clearly, is to simplify the constitutional texts as well as the procedures and the institutional framework, to enhance its efficiency and to make those who exercise power democratically more accountable²⁷. Thus, the Union to which the candidates will accede, will be based upon a revised social contract, the terms of which, fortunately, are being worked out with the active and equal participation of the parliamentary and governmental representatives of the candidate countries. But what are the questions on which the debate is concentrated ?

It is not the European Court of Justice: The provisions on the ECJ have successfully been revised by the Treaty of Nice, though the question of efficient judicial remedies for the protection of the rights laid down in the Charter of fundamental rights will have to be dealt with together with the integration of this Charter into the constitution.²⁸ It is not the European Central Bank, either, though it is clear that also the ECB will undergo some reform in order to adapt it to the new conditions of the enlarged Union, and there will be a need to consider new competencies regarding the external representation of the Union in monetary policies and, in particular, for the exchange rate policies.²⁹ Advisory bodies like the Economic and Social Committee or the Committee of the Regions will have to be scrutinised regarding their usefulness and efficiency and, as the case may be, they will have to be dropped or, at least, reformed with the view to better define their function and to enhance their efficiency by reducing drastically the number of members.

Therefore, the debate on the institutional reforms mainly concentrates on the European Council and the external representation of the Union, the Council of ministers, the European Parliament and the Commission. The distribution and separation of powers is at stake, as much as the question of principle: National sovereignty vs. supranational powers, or: what will be the role of the Member States in the Union after its reform ? It seems to be useful, first, to develop what kind of general principles can be found for the definition of functions of each of these institutions in a Union which maintains its specific character of a supranational organisation as opposed to a federal State, before considering the concrete powers of each

²⁷ The Laeken Declaration – The Future of the European Union, 15 December 2001, http://europa.eu.int/futurum/documents/offtext/doc151201_en.

²⁸ For some proposals see: Ingolf Pernice, The Charter of Fundamental Rights in the Constitution of the European Union, www.whi-berlin.de/pernice-fundamental-rights, 31 – 36. Also see the final report of Working Group II, CONV 354/02 (www.european-convention.eu.int) at 15 – 16 without any clear conclusions. For a more comprehensive analysis see Daniel Thym, Charter of Fundamenta Rights: Competition or Consistency of Human Rights Protection in Europe, (2002) *Finish Yearbook of International Law* 11 – 36.

²⁹ Cf. Sven Hölscheidt/ Christian Baldus, *Bestandsaufnahme und Perspektiven der europäischen Finanzordnung*, (1997) *Die Öffentliche Verwaltung* 866 – 873.

of these political institutions, and the procedures ensuring transparency, efficiency and democratic accountability in a system of checks and balances among them as well as in their relationship with the institutions of the Member States.

I. Basic principles of the EU institutional framework

Three principles seem to guide the discussion on the future institutional framework of the European Union: Institutional balance, complementarity of the levels of action and the strengthening of the European institutions.

1. Institutional balance

There seems to be consensus or, at least, "political correctness" leads all actors to confess that the institutional balance of the Union shall not be changed or disturbed.³⁰ This balance consists, apart from the judicial function of the ECJ, in a system of checks and balances, but also of close co-operation between the European Commission, the Council and the European Parliament. The European Council is setting the political agenda in defining the general political guidelines of the Union.³¹ The specific function of the Commission, being construed and charged to define and watch the common, European interest, is to work out proposals and to take initiatives on the common policies, and to implement - or to survey the implementation by the Member States of - the decisions taken on its initiative by the Council together with the European Parliament. It also executes the budget and represents the Community to the outside world. The function of the Commission, thus, is basically an executive one, while it is for the Council and, through it, for the Member States to take the decisions, both legislative and on particular political issues including in the areas of pillars two and three. The European Parliament is given the overall democratic control both, upon the behaviour of the Commission and - under the co-decision, the co-operation and the consultative procedures - upon the legislative decisions made by the Council. It exercises control also through its - limited - budgetary rights, the enquiries under the petition-procedures, the ombudsman, written and oral questions as well as public debates on particular political issues.

2. "Multilevel" complementarity

Talking about executive powers at the European level, it is important to note that the Union does not dispose of any means of direct enforcement whatsoever. This is probably the most striking difference to all other federal systems or, more precisely, to federal States. Though the Commission may impose fines in the area of anti-trust, the Court of Justice may state infringements to European law or the Council may

³⁰ K. Hughes, *supra* note 1, p. 9.

³¹ For more details see the Report prepared by the Convention's Secretariat, *The Functioning of the Institutions*: <http://register.consilium.eu.int/pdf/en/03/cv00/cv00477en03.pdf>, CONV 477/03 of 10 January 2003.

decide on common actions in the area of Common Foreign and Security Policies, there is no European military, police or judicial enforcement capacity. The exercise of direct force is entirely left to the Member States, the offices of which - only - may give teeth to the policies decided in common at the European level.³² As opposed to the dualistic federal approach of the United States³³, this interdependence of the two levels of action is the specific character of multilevel constitutionalism in Europe, where competencies to make decisions on questions of common interest are allocated at the European level, while the enforcement finally rests with the national authorities. Both levels of political action are interdependent and complementary, while in the American system - with the words of Richard Briffault - "each level of government enjoys autonomy within its designated sphere: neither is dependent on the other for its powers and responsibilities".³⁴

If the specific supranational character of the European Union is to be maintained and, thus, the Union is not to be developed following the model of a federal state, it seems to be important not to change this fundamental feature of vertical division of powers preserving a maximum of national or regional self-government while matters of common interest are ruled at the European level.

3. Strengthening the European institutions

Yet, the explicit purpose of the institutional reform is to strengthen all the elements of the described institutional triangle: The Commission, the (European) Council and the Parliament. Each of them will face specific problems caused or enhanced by the enlargement:

- The lack of continuity, co-ordination, accountability and identity regarding the European Council and the Council of ministers.
- The lack of democratic legitimacy and efficiency of a Commission with twenty five or more members.
- The lack of real political powers and democratic legitimacy of the Parliament representing twenty five or more peoples or 450 million people.

There is also the general question of representation of the Union externally and regarding the citizens. How can these deficits be remedied in a way which responds to the aspirations of both, the integrationists and the intergovernmentalists in a

³² This can lead to delicate questions concerning the delimitation of responsibilities, see e.g. Case C-94/00, *Roquette Frères SA*, not yet reported, paras 39 - 53.

³³ See George Bermann, *Harmonization and Regulatory Federalism*, in: Ingolf Pernice (ed.), *Harmonization of Legislation in Federal Systems. Constitutional, Federal and Subsidiarity Aspects - The European Union and the United States of America Compared*, 1996, p. 37, at 40: "Initially, the American federal system rather explicitly embraced the notion of dual federalism, i.e., the notion that persons are subject concurrently to the prescriptive and enforcement jurisdictions of both federal and state authorities, each acting within its own constitutional sphere", with reference to Daniel J. Elazar, *Exploring Federalism*, 1987, p. 231 et sequ.

³⁴ Georges Briffault, *Paradoxes of Federalism*, in: Ingolf Pernice (ed.), *Harmonization of Legislation in Federal Systems. Constitutional, Federal and Subsidiarity Aspects - The European Union and the United States of America Compared*, 1996, p. 47.

Union which is based on its Member States being the primary point of attachment and identification of the European citizens? How can such re-organisation also encourage the citizens to identify themselves as citizens of the Union and become aware of their ownership and exercise meaningful rights of participation and control regarding institutions which need to be powerful in order to ensure the cohesion and effective policies in the common interest? The questions will be addressed separately for the European Council and its President, the Council of Ministers, the European Parliament and the Commission.

II. The European Council and its President

The European Council is composed by the Heads of State or Government of the Member States, their foreign ministers, the President of the Commission and a member of the Commission (Article 4 (2) EU). It is chaired by the Head of State or Government of the Member State having the Presidency of the Council, so the chair is rotating every six months. This solution has raised problems already today, problems which will be much more dramatic in a Union of twenty five or more Member States. Tony Blair made this clear in his Cardiff speech of 28 November 2002³⁵:

“The six-monthly rotating Presidency was devised for a Common Market of 6: it is not efficient nor representative for a Union of 25 and more. How can a Council with constantly shifting leadership be a good partner for the Commission and Parliament? How can Europe be taken seriously at international Summits if the Chair of the Council is here today, gone tomorrow? The old system has reached its limits. It creates for Europe a weakness of continuity in leadership: a fatal handicap in the development of an effective Common Foreign and Security Policy”.

In addition, Article 18 (1) EU gives the function of representing the Union in EFSP to the Presidency, i.e. to the foreign minister of the Member State in office. Today, not only the principle of rotating presidencies is questioned. In a Union with up to thirty Member States, every Member State will enjoy the function of the chair or presidency only once every fifteen years. Also the short period of function has proved not allowing a presidency even to become operational before the period is over, and it is difficult to see how a smaller new Member State like the Baltic states, Cyprus or Malta would cope with the workload and responsibilities of the presidency of the Union.

³⁵ Tony Blair, “The Future of Europe: Strong, Effective, Democratic”, Speech at the Old Library, Cardiff, 18 November 2002 <www.number-10.gov.uk>. For the deficiencies of the rotating system see also: Ingolf Pernice and Daniel Thym, “A New Institutional Balance for European Foreign Policy?”, *European Foreign Affairs Review* 7 (2002), 369, at 392-394; Willem Van de Voorde, “Rotationsverfahren in der Ratspräsidentschaft der Europäischen Union”, *Integration* 2002, 318-324 and Steve Everts, “Time to Abolish the EU’s Rotating Presidency”, 21 *CER Bulletin* (December/January 2001/02), 1.

1. EU-Presidency: "Double head" or "double hatting"

Among the solutions which are on the table, the "Elysée-Proposal" of France and Germany seems to have attracted the broadest attention, but also great criticism.³⁶ It just adds together in a "double head"-solution the French vision of a strong President of the European Council, being appointed with qualified majority by the Heads of State and Government for a five - or two and a half renewable - mandate, and the German wish for a strong President of the Commission which would be elected by a qualified majority vote of the Members of the European Parliament. The problems of this proposal are that:

- it concentrates a great amount of power in one person from one Member State, which the smaller fear to be always a larger Member State;
- contrary to the Convention's aims, it vests this person with great powers without providing for democratic accountability and control;
- it ignores the claim of smaller countries to maintain rotation in view of preserving each country equal rights and bringing the Union closer to its citizens;
- it leaves a democratically elected President of the Commission without real political powers and, thus, makes a mockery of his election and legitimacy;
- it perpetuates the confusion for the external world on who represents, and may speak for, the European Union.

The aim to give Europe "a face" and, in particular, to ensure continuity in its representation by a President who is democratically accountable, would not be met either by maintaining the rotation system or by team-presidencies. Given also the said deficiencies of the "double head", a "double-hat" solution was favoured by the German minister of foreign affairs³⁷ and has found some support also by members of the Convention:³⁸ The President of the Commission would not only be elected by, and accountable to the European Parliament, but he/she should also chair and be the President of the European Council.

Given the concrete setting of the European Council, this solution would even more drastically concentrate power in the hand of one person³⁹ and the wishes of the smaller Member States to maintain the rotation of the Presidency of the Council

³⁶ See *supra*, notes 9 and 10.

³⁷ "Fischer fordert EU-„Superpräsidenten“", *Der Spiegel* 50/2002 of 07 December 2002, www.spiegel.de/spiegel/vorab/0,1518,226151,00.html; see also Ingolf Pernice, *supra* note 15, p. 527-529.

³⁸ See Pierre Lequiller, A President for Europe, CONV 320/02, CONTRIB 108 of 7 October 2002, see in particular *ibid.*, p. 5, 7, 11: a President "nominated by the Council and confirmed by the Congress". Andrew Duff/Lamberto Dini, "A Proposal for a Unified Presidency", CONV 524/03 of 31 January 2003, <http://register.consilium.eu.int/pdf/en/03/cv00/cv00524en03.pdf>, p. 3: "There should be one President of the Union who would chair both the Commission and the European Council. He or she will be primarily responsible for delivering the decisions of the heads of government and for running the Commission". With the perspective of joining the presidencies see also Dominique de Villepain, "L'Union Européenne et la Méditerranée", Speech of 2 Dec. 2002, Marseilles www.france.diplomatie.fr/actu/article.asp?ART=30071.

³⁹ For a demonstration see Pernice, *supra* note 7, p. 6, 17 et sequ.

would not be met. Indeed, as the Commission has pointed out, the exercise of the Presidency is an important tool for the mobilisation of the national administrations and the recognition of the European commitment in each Member State⁴⁰.

2. One President for the European Union

It is, therefore, suggested to maintain the system of rotating chairs at the European Council, but to give the elected President of the Commission the power to take the initiative, make proposals and, above all, to represent the Union and its unity to the external world as well as to the citizens of the Union. This solution would allocate the executive function in the Union at its right place: the Commission who is traditionally the guardian of the Community interest. Thus, it would reflect the successful institutional logic of the Community and preserve the decision-making power in the hands of the Member States as represented in the European Council. It would avoid irritations due to the double representation of the Union by the Commission and the Council's presidency at the international level and make sure that the Member States keep their final saying on the general guidelines of the European policies, while democratic accountability is established for the person who initiates and is representing these policies.⁴¹

3. A Foreign Secretary for the European Union

Such a solution would round up a structure, in which also the function of the Commissioner for external relations - actually Chris Patten - and of the Secretary General and High Representative for CFSP - actually Xavier Solana - are merged into a "double-hatted" minister for foreign affairs which is a Member of the Commission and, at the same time, acts as the High Representative at the operational level.⁴² In Working Group VII of the Convention "a large trend" has developed to give this double function to a "European External Representative",⁴³ others prefer talking about a "Foreign Secretary"⁴⁴ or simply a "Minister for Foreign Affairs".⁴⁵ This merger would ensure more coherence between the common external policies of the Union (trade, environment, development) and the intergovernmental cooperation in CFSP, and it is favoured, therefore, by the "Elysée-Proposal" and also

⁴⁰ European Commission, "Communication: For the European Union – Peace, Freedom and Solidarity", 4 December 2002, COM (2002) 728 in section 2.2.2 at 18.

⁴¹ For more arguments: Pernice, *supra* note 7, p. 18 et sequ.

⁴² A number of Members of the Convention seem to favour this proposal, see Synthetic Report on the Plenary of 20/21 January 2003, *supra* note 10, point 10; see also the Final Report of Working Group VII on "External Action", 16 December 2002, CONV 459/02, paras. 5, 33 and 34. This is a proposition also made in the "Elysée Proposals" *supra* note 9.

⁴³ Final Report of Working Group VII on "External Action", 16 December 2002, CONV 459/02 <http://register.consilium.eu.int/pdf/en/02/cv00/00459en2.pdf>, para. 38.

⁴⁴ The term "European Secretary for Foreign Affairs" has been suggested by Ingolf Pernice/Daniel Thym, *supra* note 35 p. 394 et sequ.

⁴⁵ This is the term used by the "Elysée-Proposal", *supra* note 9, point 4 and 5.

by many members of the Convention. It is the institutional condition for an "integrated approach" particularly in security policies, where internal and external aspects cannot any more be separated from each-other.

III. The Council of Ministers: A chamber of States

The Council has a decisive function, both regarding the legislation of the Union under the "Community-method", and intergovernmental co-operation and co-ordination of the Member States in the areas of economic, financial and employment policies as well as in CFSP and home affairs. Though, at the Sevilla-summit in June 2002 important measures to enhance its efficiency by a better preparation and a better organisation of its deliberations and conclusions have already been achieved⁴⁶, there is a need for a more fundamental reform in view of the enlargement. Its key words, again, are: Transparency, democratic accountability, efficiency and coherence of its work.⁴⁷ It is within the Council Member where States exercise the "federal control" on the Union's policies - as opposed to the "democratic control" exercised by the European Parliament: In a procedure of trial and error, the Commission's proposals on what should be the European interest are checked against the national interests, political and legal cultures of the Member States. But the positions and votes of the ministers at the Council are also the channel by which - besides of the European Parliament - the European legislation is provided legitimacy. Yet, a real democratic control of what the ministers argue and support at the Council is largely excluded as far as the meetings and deliberations of this institution are kept confidential.

1. Transparency and political accountability

To ensure transparency and to permit a real democratic control of their ministers, thus, there is broad acceptance already in the Convention on the need of opening all the meetings of the Council to the public, as far as the Council acts in its capacity as a legislative body.⁴⁸ Working Group V has voted in this sense and also the "Elysée-Proposal" favours this idea. How should the national parliaments - as well as the general public of the Member States - otherwise influence or supervise the legislation decided by their governments at the European level, legislation which influ-

⁴⁶ European Council of Sevilla, 21 and 22 June 2002, SN 2002/02, Annex 1. See already the letter of Gerhard Schröder and Tony Blair of 25 February 2002 to the Presidency <www.bundesregierung.de/dokumente/Artikel/ix_70350.htm>, asking to reduce the agenda of the European Council to a few priorities only.

⁴⁷ This is also the opinion of the European Parliament, see: EP-Resolution concerning reform of the Council and transparency, www.epades\adoptes\adoptes_provisoi\02-05\02-05-16de.doc.

⁴⁸ See the Synthetic Report on the Plenary of 20/21 January 2003, supra note 10, point 10. For a critical analysis of the progress made on transparency of the legislative process at the Council see: Christoph Sobotta, *Transparenz in den Rechtssetzungsverfahren der Europäischen Union. Stand und Perspektiven des Gemeinschaftsrechts unter besonderer Berücksichtigung des Grundrechtes auf Zugang zu Informationen*, 2001, p. 144--182, 274-277.

ences and rules upon the life of the citizens much more, in certain areas, than national legislation?

Regarding the Council in its capacity as an executive of the Union, such transparency is much more difficult to achieve. But the policies on which decisions are taken in view of co-ordination at the European level basically remain national policies for which the governments are accountable to their parliaments. Common strategies, positions, or actions in CFSP, broad guidelines of the economic policies of the Member States or (framework) decisions regarding home affairs are negotiated at the Council and do not have direct effect in the Member States. Efficiency may require to keeping most of the deliberations of the Council in these areas confidential, as low - or no - transparency is typical for intergovernmental co-operation in general⁴⁹. On the other hand, matters like economic and employment guidelines or home affairs are not necessarily an exclusive domain of the executive. Deliberations insofar should be opened up to the public, not least for the sake of enhancing democratic governance in the European Union⁵⁰. The citizens need to feel more involved. This can only happen if there is a politicised European discourse which, again, is only possible if there are political leaders to identify with and a European discourse to participate in⁵¹. Otherwise, there would be no accountability and real democratic control possible, neither by the national parliaments nor by the European Parliament.

2. Efficiency and rotation

A Council with twenty five or more members and a chair which is rotating every six months does not allow for effective and rapid decision-making. Not only the traditional "tour de table" giving each Member State delegation the opportunity for a first opinion on important proposals of the Commission would take more time than available, but more importantly, the processes of mediation among diverse interests and of consensus-finding risk to become end- and pointless. The chance to achieve a decision on an issue of priority within the period of one presidency, thus, is diminishing towards zero. Enlargement, hence, will fundamentally change the function of the Council from a team for consensus-building to a "state chamber" where decisions are voted upon - and Member States may be outvoted.

Two important changes are envisaged in this respect. First, rotation is proposed to be for teams of two smaller and one larger Member State each. Second, qualified majority must be the rule for decision-making in the Council. Team presidencies

⁴⁹ Sobotta, *supra* note 48, p. 217-219, 221 et sequ.

⁵⁰ "European Governance: A White Paper", Com(2001) 428 section II esp. at 13 – 14. For an analysis of this notion see Christian Joerges/Yves Mény/Joseph H.H. Weiler (eds.), *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, Jean Monnet Working Paper 6/01, www.jeanmonnetprogram.org/papers/01/010601.html.

⁵¹ Jürgen Habermas, *Die postnationale Konstellation und die Zukunft der Demokratie*, in: Habermas, *Die postnationale Konstellation*, 1998, 91 at 97 – 105. For an elaboration of this idea in the context of European Governance see Philipp Steinberg, *Agencies, Co-Regulations and Comitology – and what about Politics*, in: C. Joerges et al., *supra* note 50, p. 139 – 152.

would be in office for at least eighteen months, could elect their spokesman to provide the team with a single voice and face⁵², and ensure that each (team-)presidency has the capacities required for efficient planning and accomplishment of its work in each formation of the Council.

The other change concerns the decision-making mode at the Council: It is clear that the requirement of unanimity for decision-making in a body of twenty-five or thirty instead of originally six and now fifteen members would considerably reduce the chance of coming to a decision at all. The principle of decision-making by qualified majority at the Council, therefore, is a necessity throughout all European policies, and Working Group VII of the Convention seems to favour a maximum use of QMV even in the framework of CFSP.⁵³ This being accepted, also the compromise of Nice on how qualified majority is to be counted, seems to be - beside its complexity - far from ensuring easy and rapid decisions.⁵⁴ Contrary to the warnings against breaking up the compromise, the proposal to substitute it by a double majority vote seems to win ground.⁵⁵ This would mean that a decision is adopted whenever it gets the support of a simple majority of Member States in the Council and of a majority of the people represented all-together by the ministers supporting the decision.

3. Coherence of European policies

There is an apparent lack of co-ordination and coherence of the decisions of the diverse formations of the Council.⁵⁶ Tobacco-advertising is prohibited by the Council on consumer affairs, while the Council on agriculture supports tobacco-farming with high financial aids.⁵⁷ It is clear that, initially, the necessary co-ordination was expected to take place in the capitals of the Member States, and some Member States have organised the internal procedures accordingly.⁵⁸ The General Affairs Council, meant to have the function of co-ordination at the European level, has lost

⁵² For this see: Thinking Enlarged Group, *Bridging the Leadership Gap. A Strategy for Improving Political Leadership in the EU* (Bertelsmann 2002), p. 6.

⁵³ Final Report, *supra* note 43, points 43 et sequ.

⁵⁴ For strong criticism in this respect see Elmar Brok, *supra* note 22, at 87; Helen Wallace, *Stimmen und Stimmungen aus Nizza. Entscheidungen der Regierungskonferenz 2000 zum Rat*, (2001) *Integration* 24 124 – 132 at 125 – 127. See also the summary in the Secretariat's paper on *The Functioning of the Institutions*, *supra*, note 31, point 19.

⁵⁵ See the Synthetic Report *supra* note 10 at 5 para 11.

⁵⁶ See the summary in the Secretariat's paper on *The Functioning of the Institutions*, *supra*, note 31, point 14; also: Franz Mayer, *Nationale Regierungsstrukturen und europäische Integration*, 29 *Europäische Grundrechte Zeitschrift* (2002), 111 at 112-113.

⁵⁷ Directive (EC) 2001/37 of 5 June 2001 on the production, presentation and sale of tobacco-products on the one hand, Commission Regulation (EC) No 2848/98 of 22 December 1998 laying down detailed rules for the application of Council Regulation (EEC) No 2075/92 as regards the premium scheme, production quotas and the specific aid to be granted to producer groups in the raw tobacco sector, *Official Journal L* 358, 31/12/1998 p. 0017 – 0042, on the other.

⁵⁸ This seems to be the case for France, see Mayer, *supra* note 56, p. 119-120, for a more "flexible" system in Germany *ibid.*, p. 114-117.

the capacity to do this effectively: National Ministers for Foreign Affairs are rather occupied with their genuine function, including the co-ordination of foreign policies in the framework of EFSP. The amount and diversity of policies and legislation on the internal market, agriculture, transport, environment, consumer, social and other specific policies has grown to an extent which exceeds the reach of a "nearby"-responsibility of a minister for foreign affairs. And all these policies are, in fact, basically internal and not foreign policies.

Facing these problems, the Seville-summit has already taken important steps: The number of Council "formations" was reduced from twenty-two to nine, and matters of external relations are discussed in meetings separate from those on general affairs. Some members of Working Group VII of the Convention went further to formally separate the "external" from the "general" affairs formations of the Council.⁵⁹ Strong arguments, finally, exist for the proposal, originally made by Amato, Delors and Dehaene,⁶⁰ of reforming the "legislative Council" into a body which is permanent in Brussels and composed by a full-time Minister for European Affairs from each Member State.

The legislative Council should, indeed, become a real Chamber of States, the members of which would be members of the national Governments, close to the Prime Minister or Chancellor, and participating regularly in the cabinet-meetings of his/her national government. He/she should be the political head of the permanent representation of the Member State and responsible for the co-ordination of the national positions in the Council. Legislative acts of the Council should be prepared at the Council by the specialised working groups and COREPER up to the meeting of the specialised national ministers, while the final discussion and adoption are reserved to the "Legislative Council" where both, the Minister of European Affairs and the respective minister in charge of the matter would have to express, in common, the position of their Member State. General coherence of European legislation would be made sure, thus, by the Ministers of European Affairs, while in each area of action the specialised minister would take the responsibility - before the public and the national parliaments - for the adequate contents of the act in substance.

Regarding the remaining executive functions of the Council, particularly in the fields of CFSP, economic policies and home affairs, on the other hand, the ministers in charge should continue to have full responsibility, while the Commission would be responsible for drawing their attention to problems of coherence with other policies of the Union. In cases of doubt, the Commission may suggest that the Ministers in charge meet jointly with the Ministers of European Affairs in order to find an appropriate solution.

⁵⁹ Final Report, *supra* note 43, points 6 and 25.

⁶⁰ Daily Telegraph of 21 October 2001, see also Mayer *supra* note 56, p. 122, for this and further references.

III. *The European Parliament: Democratic legitimacy and control*

If there is a real problem of democracy with the European Union, it is the lack of democratic accountability, at present, of those who take decisions. The European Council sets the political agenda, but its meetings are held behind closed doors and neither the national parliaments nor the European Parliament nor the European public can effectively sanction anybody if its decisions are felt unwise or wrong. The same applies to the Council of Ministers as long as its meetings remain confidential. The situation of the Commission is not much different. The President and the Members of the Commission are appointed by the Council and confirmed by the European Parliament. Though the Parliament has some control over the Commission's policies and action - through written and oral questions, the motion of censure (Article 201 EC) etc., its influence on the Commission's policies is not transparent and the political majorities in the European Parliament are not reflected in these policies. As long as political leadership rests with the Heads of State and Government, and legislation is mainly in the hands of the Ministers meeting in the Council, it will remain difficult to see what are the real political choices, if any, offered to the citizens at the elections of the European Parliament. Yet, only if there are real choices, these elections will become genuine democratic European elections⁶¹.

In addition, after more than fifty years of European legislation one is compelled to observe that "European" topics are hardly ever an issue in national – or even European – electoral campaigns. Apart from specialised bodies within national parliaments, the importance of European legislation is still ignored by the majority of parliamentarians. Yet, in many most important areas of action the substance of national legislation is largely determined by European directives which are, finally, decided by the Council of Ministers⁶².

How can democratic accountability and control be enhanced? Four remedies of priority should be considered:

1. The participation of Members of the European and the national parliaments in the Constitutional Convention and, thus, in the constitutional procedure for the ongoing revision of the Treaties is one important step and should become a normal part of the procedure for the revision of the Constitution.
2. Co-decision of the European Parliament in all European legislation and the opening of the meetings of the legislative Council to the public would, to-

⁶¹ For an elaboration of this idea in the context of European Governance see Philipp Steinberg, Agencies, Co-Regulations and Comitology – and what about Politics, in: Christian Joerges/Yves Mény/Josph H. H. Weiler (eds.) Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance, Jean Monnet Working Paper 6/01, www.jeanmonnetprogram.org/papers/01/010601.html, 139 at 141 – 145.

⁶² Very often – like in the famous *Maastricht*-Case of the Federal Constitutional Court in Germany, BVerfGE 89, 155 at 173, Jacques Delors is quoted, who argued already in 1992 that 80% of "economic law" is determined by Community rules, see Jacques Delors, in: European Commission (ed.), *Europa im Umbruch. Vom Binnenmarkt zur Europäischen Union* (Europäische Gespräche, Heft 9, 1992) at 12.

gether, give the European and the national parliaments a more direct stake and control in the decision-making process of the Union.

3. The European Parliament should elect the President of the Commission who should function as the President of the Union. Each political family could present its candidate for this office and its political program at the European elections and, thus, give the citizens a real political choice.
4. The budget of the European Union should be given fully into the hands of the European Parliament, including expenses for agriculture, social and regional policies, foreign and home affairs. The European Parliament should co-decide on the own resources of the Union and on European taxes.⁶³

The power of taxation would make the Union and, on its behalf, the European Parliament also financially accountable to the citizens. They would not only decide upon the substance of the Union's policies, but also become more directly aware of - and take responsibility for - their costs. This does not exclude an important say of the Member States in all financial decision-making of the Union, since it is their task to implement European legislation and to bear the costs thereof. The financial co-responsibility of the national governments and parliaments on the one hand, and of the European Parliament on the other hand would reflect, in fact, the double channel of legitimacy of European policies and the composed nature of the system, based on the will of the citizens, national and European.

IV. The European Executive: For a strong and democratic Commission

As already indicated, the application and implementation of European legislation is and should remain, as a principle, a matter for the Member States. It is also clear, that with regard to areas of national competencies and where the policies of the Member States are not more than co-ordinated at the European level, the basic executive function will remain with the national governments. This is the case, in particular, in the area of economic and financial policies, though clearly Community policies like anti-trust, agriculture, regional, budgetary or monetary policies must be seen as economic policies too.⁶⁴ It is also true for foreign and security policies, though it is becoming more and more difficult to distinguish foreign and internal affairs regarding security. Indeed, broad areas of Community policies like commercial, development, environment policies must be conducted as an important part of an "integrated strategy" in European foreign and security policies.⁶⁵ The need for coherence of all these policies plays for a strong role of the Commission in design-

⁶³ See already: Michael Schreyer, Die Europäische Finanzverfassung vor der Erweiterung, FCE 2/00, <http://www.rewi.hu-berlin.de/WHI/deutsch/fce/fce100/schreyer.htm>.

⁶⁴ See Ingolf Pernice/Frank Hoffmeister, The Division of Economic Powers between the European Community and its Member States - *Status quo* and Proposals *de lege ferenda*, in: Armin von Bogdandy/Petros C. Movroidis/Yves Meny (eds.), *European Integration and International Co-ordination. Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (2002), p. 363 at 364 et sequ.

⁶⁵ See Pernice/Thym, *supra* note 35.

ing and co-ordinating coherent European action together with the measures decided at the national level.

The Commission has also some direct executive functions, among which the application of the competition rules, the control on state aids, the establishment and execution of the budget and its powers in the framework of the structural funds are of particular importance. Its right of legislative initiatives and its monopoly to submit proposals to - and to defend them at - the Council may not be qualified as genuinely executive, but it is what is generally the role also of the governments within the Member States and what makes the European legislative process running successfully. Furthermore, its role as the watchdog for the application of European law by the Member States is a condition for the functioning of the Union and typically an executive function. Finally, as mentioned above, the Commission has an important role to play within the European Council and the "executive" Councils dealing with economic and financial policies, employment, home affairs and CFSP.

The election of the President of the Commission would not put an end to the "neutrality" of the Commission, but rather realise the already existing political role of the Commission and take it seriously.⁶⁶ Giving him or her, as proposed, the function as the top of the European executive and the President of the Union would not only ensure coherence of the Union's external and internal policies, but also provide for a certain democratic accountability of the person who represents the Union.⁶⁷ Though the decision-making power will rest with the Council and, as the case may be, the European Parliament, it will be for the President of the Union to frame and propose the common policies, to mediate and strive for consensus at the Council and to execute its decisions - or ensure that the decisions are faithfully implemented by the Member States.

The - elected - President of the Commission should have the power to nominate eleven other Members of the Commission, including the "Foreign Secretary". All these candidates should be heard individually by the European Parliament, before the European Parliament may confirm the Commission as a whole. Again, it would be for the Heads of State and Government to take the decision, by qualified majority, upon the appointment of the Commission so elected. The procedure may have to be gone through again, if such a majority cannot be achieved. In case of a second failure, the Heads of State and Government may dissolve the European Parliament - as they may in case the President of the Commission has lost the confidence of the Council or the European Parliament.

In view of the enlargement it seems to be important to limit and, preferably reduce the number of Commissioners. The optimal number would be twelve, including the President. Their nomination should take account of a fair regional and political balance within the Commission, and a rotation should be envisaged instead of permanent seats for certain Member States. Such a solution would reflect the basic principle that the Commission does not represent Member States but the common

⁶⁶ See also Hughes, *supra* note 1.

⁶⁷ For a detailed explanation of the role of the future president see Pernice, *supra* note 7 at 14 – 16.

European interest. The fact that the determination of what this interest is in concreto is better served if the national and regional cultures, the legal systems and the political spectre of all Member States are represented within the competent body, must be weighted against the experience that the more members this body has, the more difficult it becomes to act efficiently. The principle of geographical balance, a rotation system and solutions like giving other leading posts within the Commission to people from the Member States which are not represented at the top level - Secretary General, Director General of the Legal Service etc. - should be a reasonable solution. Given that, in any event, the "federal control", i.e. monitoring that specific national interests of a Member State are not neglected or ignored, will always be the specific function of the national ministers meeting in the Council, there is no absolute need for composing the Commission the same way.

C. Conclusion

The coming enlargement of the European Union is an opportunity and a challenge for taking decisions on a substantial reform of its institutional framework. After the negative experience of the past Intergovernmental Conferences leading to the Treaties of Amsterdam and Nice, the preparation of the coming IGC by a Constitutional Convention, as it was decided at the Laeken Summit in December 2001 and which is supposed to completing its works in June 2003 gives hope for a settlement which not only prepares the Union for its enlargement from fifteen to twenty-five or more Member States, but also comes up with a entirely revised text of the existing treaties giving them the form of what people can accept as a Constitution of the European Union.⁶⁸ Such a reform is imminent for many reasons, in any event. But the enlargement without substantial changes of its institutional settlement would come close to a suicide of the European Union contrary to the interest of neither the Member States nor the candidate countries. Instead of being inspired by the state-model of political organisation, the Constitution of the enlarged European Union shall be conceived following the principles of "multilevel constitutionalism", as useful tool of the European citizens for the achievement of their common purposes, complementary to, but not substituting the Member States and their Constitutions on which it is based.

Apart from achievements which seem already finding broad consensus, like the full integration of the Charter of Fundamental Rights into the Constitution,⁶⁹ a

⁶⁸ See Ingolf Pernice, Elements and Structure of the European Constitution, 2nd ECLN-Conference, www.whi-berlin.de/pernice-structures.htm at 5.

⁶⁹ For proposals in this regard: Pernice, *supra* note 28 at 31 – 36.

more systematic and transparent attribution of powers to the Union,⁷⁰ the merger of the three pillars and the attribution of a legal personality to the Union, the concrete terms of the institutional settlement are far from being in sight.⁷¹ With the view to achieving the fundamental objectives of the reform: transparency, democratic accountability, efficiency and identity, it is submitted that the Convention as well as the IGC 2003 - among other changes - will have to

- Give the Union a face by vesting the President of the Commission with the representative and executive powers of a President of the Union;
- Provide for a democratic election of the President of the Union by the European Parliament, and thus giving the electorate a real political choice;
- Separate the legislative functions of the Council from its executive functions and provide for public meetings of the legislative Council;
- Provide for the double majority as the general mode of decision-making at the Council, and the co-decision of the European Parliament as a general rule;
- Vest the European Parliament with full budgetary powers and the Union with the power of taxation, with a view to making it financially accountable;
- Limit the Commission to twelve Members, including the President, with eleven Commissioners nominated by the President and the College confirmed by the Parliament and appointed by the Heads of State and Government.

Such a reform will change the Union substantially, as it will be by the mere fact of enlargement anyway. To achieve this, great courage is needed, based on realism and the acceptance that national sovereignty is a concept of the nineteenth century which was never able to serve peace and well-being of humanity. The Members of the Convention feel that there is, indeed, a "constitutional moment", as J.H.H. Weiler recently put it,⁷² or at least a constitutional momentum: They feel that they may play a historic role - many of the governments have actually sent their responsible ministers to the Convention - and after having invested more than a year of their lifetime, they should be very reluctant to miss the opportunity to "make history". The success will, finally, depend on how far they will find the support of the citizens of the Union who, yet, need to be convinced that the new Constitution is worth to take the ownership of, as the Constitution of the Union of its citizens.

⁷⁰ See Ingolf Pernice, Eine neue Kompetenzordnung für die Europäische Union, WHI-Paper 15/02, www.whi-berlin.de/pernice-kompetenzordnung.htm; Uwe Leonardy, „Kompetenzabgrenzung: Zentrales Verfassungsprojekt für die Europäische Union“, in: Cullen/Zervakis (eds.), *Der Post-Nizza-Prozess: Auf dem Weg zu einer Europäischen Verfassung?* (Nomos 2001); Rudolf Streinz, Die Abgrenzung der Kompetenzen zwischen der Europäischen Union und den Mitgliedstaaten unter besonderer Berücksichtigung der Regionen, (2001) Bayerische Verwaltungsblätter 481 – 488; Armin von Bogdandy/Jürgen Bast, Die vertikale Kompetenzordnung der Europäischen Union – Rechtsdogmatischer Bestand und verfassungspolitische Reformperspektiven, 28 Europäische Grundrechte Zeitschrift (2001), 441 – 458.

⁷¹ Draft Articles on institutions are announced by the Presidium for the week after Easter 2003.

⁷² Joseph H. H. Weiler, A Constitution for Europe? Some Hard Choices, in: *JCMS* 40 (2002), 563 at 578.