

## I. On the Existing "Constitution" of the European Union

- A. As we discussed last week, every treaty organization may be said to have a constitution.
- i. That is to say, the treaties that create treaty organizations normally specify how the treaty organization's ruling body will be selected, the domain in which it is entitled to make policy decisions, and a decision rule for making decisions.
  - ii. These are the three major characteristics of a formal constitutional arrangement.
  - iii. On the other hand, as noted last week, the policy making power of a treaty organization is often very limited.
  - iv. Thus, an organization can have a constitution without having significant discretion or policy making authority.
- B. In this sense, the **EU has always had a "constitution"** because it has always been defined by formal documents that describe the manner in which members of its governmental bodies are chosen, what policy areas they are empowered to make policies in, and procedures for making collective decisions.
- i. These features have been revised many times during the history of the EU.
  - ii. For example, the scope of the EU's policy "making" ability have been expanding fairly rapidly through time.
  - iii. And, power has been shifting from the commission toward the European Parliament.
  - iv. The absolute veto power of the council has not changed somewhat less, but there is increasing use of decision rules requiring less than unanimous agreement.

## II. The present constitution of the EU can be interpreted along the lines of a national constitution, although formally the EU has substantially less policy making authority than a national government has.

- A. The European Parliament and the Council of member states closely resembles the structure of modern federal democracies in which the "legislature" consists of a directly elected chamber and an indirectly elected federal chamber.
- i. The *Consolidated Version of the Treaty Establishing the European Community* describes the architecture of the government of the EU.
  - ii. Articles 189-191 state that the representative European Parliament "shall be elected by direct universal suffrage."
  - iii. Articles 202-203 state that the Council "shall consist of a representative of each Member State at ministerial level, authorized to commit the government of that Member State."
  - iv. The legislative procedures specified in the EU's present constitution are complex, but it is clear that in many, perhaps most, policy areas both the Council and the Parliament have to agree about the policies adopted, although the balance of power currently favors the Council over the Parliament.<sup>1</sup>
- B. The commission is regarded as the cabinet or "the government" for the present purposes.
- i. The Commission clearly has significant autonomy, after its appointment, as is also true of the cabinets of many parliamentary systems, but ultimately it remains controlled by the Council and the member states.
  - ii. Its membership is selected jointly by the nations represented in the Council with consultation by the European Parliament (Article 214).
  - iii. The Council can determine the size of the Commission (Article 213) and commission salaries (Article 210).

<sup>1</sup> Article 252 of the *Consolidated Version of the Treaty Establishing the European Community* states that: "Where reference in this Treaty to this Article for the adoption of an act, the following procedure shall apply: (a) The Council, acting by qualified majority on a proposal from the Commission and after obtaining the opinion of the European Parliament, shall adopt a common position. (b) The Council's common position shall be communicated to the European Parliament. The Council and the Commission shall inform the European Parliament fully of the reasons which lead the Council to adopt its common position and also of the Commission's position. ... (c) The European Parliament may within the period of three months by an absolute majority of its component Members, propose Amendments to the Council's common position. The European Parliament may also by the same majority reject the Council's common position. ...If the European Parliament has rejected the Council's common position, unanimity shall be required for the Council to act on a second reading."

The commission may subsequently submit a revised proposal, which the council alone may consider. Amendments of this proposal by the Commission require unanimous agreement by the Council. (A. 252[e]).

- C. The representation of European people in both the Council and the Parliament can be regarded as somewhat “nondemocratic” because some voter's interests are given greater weight than others.
- i. For example, Germany is arguably being underrepresented and Luxembourg substantially over represented.
  - ii. This tends to be the case within all region-based forms of allocating representation insofar as the number of representatives (or votes by them) are constrained to be whole numbers.
  - iii. Moreover, it is clear that the **unequal representation within the EU is not a accidental consequence of bicameralism, but rather an effort to moderate political risks** that have generated this inequality.
  - iv. It is possible that a different method of voting or different number of representatives could reduce this inequality, while still reducing the risks of smaller countries, but the it seems clear that the present constitution and the proposed revision both attempt to minimize political risks from delegating policy making authority to the EU.
- D. Overall the basic architecture of the EU resembles that of Federal national governments, although much more restrictive decisions rules are used within the EU than within a national government.
- i. (These rules also reduce the risk of delegating authority to the EU.)

### III. Is the EU still a Treaty Organization?

- A. The limited authority and use of super majority and unanimity rules reflect the EU's origins as a treaty organization.
- B. The council is essentially an institution that represents the political interest of member state GOVERNMENTS (and member state ministers in the relevant fields of policy making).
1. Membership remains voluntary on the part of all members.
    - i. As sovereign nations each member can withdraw from the various treaty obligations at will, and there are no formal sanctions against doing so.
    - ii. (The new "constitution" makes the "right" of succession explicit, but it is clear that a nation can drop out of individual treaties (as with the monetary union) with little more cost than reduced international good will.)

- iii. It is, of course, possible that sanctions would be imposed on a member state that left the EU, but there are no clear statements to this effect, and the new constitution seems to imply that exit will be fairly painless, although perhaps delayed a bit.
2. Formally, most policies are implemented by national legislatures rather than by the EU.
  3. Formally, the member states approve all major policies by unanimous consent.
    - i. (Indeed, insofar as national legislatures review EU policies as they are implemented, it could be argued that all policies are adopted unanimously.)
- C. However, relatively few new policies make it through the formal unanimity process, so a good deal of what the EU has accomplished has occurred via "the back door" of coordinated regulatory decisions--which again are agreed to by the responsible ministries--but is subject to **much less** oversight by national governments as a whole..

### IV. Major EU Treaties

- a. Treaty establishing the *European Coal and Steel Community* (signed in Paris on 18 April 1951)
- b. Treaty establishing the *European Community* (signed in Rome on 25 March 1957)
- c. Treaty establishing a *Single Council and a Single Commission* of the European Communities (1967)
- d. *Single Europe Act* (1987)
- e. Treaty on European Union (signed in *Maastricht* on 7 February 1992)
- f. Treaty on European Union as amended by the *Amsterdam Treaty*, signed on 2 October 1997, entered into force on 1 May 1999,
- g. *Treaty of Nice* signed on 26 February 2001, entered into force on 1 February 2003.

### V. The Proposed "Constitution for Europe"

- A. For the most part, the existing institutional arrangements of the EU are preserved under the proposal for a "new" constitution for Europe.
- i. The Council, Commission, and Parliament are preserved, and remain in roughly the same system of decision making, with essentially the same division of power.
  - ii. Unanimous agreement is still required for major policy changes, but there is somewhat greater use of qualified majorities than before, and the rules for counting votes are revised.

- iii. The locus of EU authority is expanded in foreign policy.
- iv. A new formal right of succession is introduced. (In previous documents, the right of secession was implicit, e.g. a property of national sovereignty.)
- v. A very long list (of somewhat contradictory rights) has been incorporated into the constitution for the first time. (Similar language had been adopted before, but not by the unified treaties.)

B. In order for the EU to become a true nation state, the government would have to have the power to impose regulations over the objections of member states which would require powers of taxation and police authority.

- i. It is clear that the proposed "amendment" of the existing EU constitution fall short of that result.
- ii. This is not a revolutionary document, but a modification of a long series of treaties that attempts to gain the support of all the current and pending EU member states.
- iii. Remember, that treaty organizations have to advance the interests of all member states, more or less continuously to succeed.
- iv. Thus, it is unlikely that radical reforms were really feasible unless it was widely believed that the existing constitution was fundamentally flawed.
- v. (This does not seem to be the case, based on polls and causal observation.)

## **VI. Some of the main provisions of the "Draft Treaty Establishing a Constitution for Europe, submitted to the European Council Meeting in Thessaloniki."**

### 1. Article 1: Establishment of the Union

- i. Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competencies to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise in the Community way the competencies they confer on it.
- ii. The Union shall be open to all European States which respect its values and are committed to promoting them together.

### 2. Article 2: The Union's values

- i. The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity

and non-discrimination.

### 3. Article 3: The Union's objectives

- i. The Union's aim is to promote peace, its values and the well-being of its peoples.
- ii. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and a single market where competition is free and undistorted.
- iii. The Union shall work for the sustainable development of Europe based on balanced economic growth, a social market economy, highly competitive and aiming at full employment and social progress, and with a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
- iv. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of children's rights.
- v. It shall promote economic, social and territorial cohesion, and solidarity among Member States.
- vi. The Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.
- vii. In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and protection of human rights and in particular children's rights, as well as to strict observance and development of international law, including respect for the principles of the United Nations Charter.
- viii. These objectives shall be pursued by appropriate means, depending on the extent to which the relevant competencies are attributed to the Union in the Constitution.

### 4. Article 4: Fundamental freedoms and non-discrimination

- i. Free movement of persons, goods, services and capital, and freedom of establishment shall be guaranteed within and by the Union, in accordance with the provisions of the Constitution.
- ii. In the field of application of the Constitution, and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited.

### 5. Article 5: Relations between the Union and the Member States

- i. The Union shall respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including those for ensuring the territorial integrity of the State, and for maintaining law and order and safeguarding internal security.
  - ii. Following the principle of loyal cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution.
  - iii. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the objectives set out in the Constitution.
6. Article 6: Legal personality
- i. The Union shall have legal personality.

#### **VII. Article 18: The Union's institutions**

1. The Union shall be served by a single institutional framework which shall aim to:
  - i. – advance the objectives of the Union,  
– promote the values of the Union,  
– serve the interests of the Union, its citizens and its Member States,
  - ii. and ensure the consistency, effectiveness and continuity of the policies and actions which it undertakes in pursuit of its objectives.
2. This institutional framework comprises:  
  
The European Parliament,  
The European Council,  
The Council of Ministers,  
The European Commission,  
The Court of Justice.
3. Each Institution shall act within the limits of the powers conferred on it in the Constitution, and in conformity with the procedures and conditions set out in it. The Institutions shall practice full mutual cooperation.

#### **A. Article 19: The European Parliament**

1. The European Parliament shall, jointly with the Council of Ministers, enact legislation, and exercise the budgetary function, as well as functions of political control and

- consultation as laid down in the Constitution. It shall elect the President of the European Commission.
2. The European Parliament shall be elected by direct universal suffrage of European citizens in free and secret ballot for a term of five years. Its members shall not exceed seven hundred and thirty-six in number. Representation of European citizens shall be progressively proportional, with a minimum threshold of four members per Member State.
3. Sufficiently in advance of the European Parliamentary elections in 2009, and, as necessary thereafter for further elections, the European Council shall adopt by unanimity, on the basis of a proposal from the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles set out above.
4. The European Parliament shall elect its President and its officers from among its members.

#### **VIII. Article 20: The European Council**

1. The European Council shall provide the Union with the necessary impetus for its development, and shall define its general political directions and priorities. It does not exercise legislative functions.
2. The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The Union Minister for Foreign Affairs shall take part in its work.
3. The European Council shall meet quarterly, convened by its President. When the agenda so requires, its members may decide to be assisted by a minister and, in the case of the President of the Commission, a European Commissioner. When the situation so requires, the President shall convene a special meeting of the European Council.
4. Except where the Constitution provides otherwise, decisions of the European Council shall be taken by consensus.

#### **A. Article 21: The European Council Chair**

1. The European Council shall elect its President, by qualified majority, for a term of two and a half years, renewable once. In the event of an impediment or serious misconduct, the European Council can end his or her mandate according to the same procedure.
2. The President of the European Council:  
– shall chair it and drive forward its work,

- shall ensure its proper preparation and continuity in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council,
- shall endeavour to facilitate cohesion and consensus within the European Council,
- shall present a report to the European Parliament after each of its meetings.

3. The President of the European Council shall at his or her level and in that capacity ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the responsibilities of the Union Minister for Foreign Affairs.

4. The President of the European Council may not hold a national mandate.

#### B. Article 22: The **Council of Ministers**

1. The Council of Ministers shall, jointly with the European Parliament, enact legislation, exercise the budgetary function and carry out policy-making and coordinating functions, as laid down in the Constitution.
2. The Council of Ministers shall consist of a representative of each Member State at ministerial level for each of its formations. Only this representative may commit the Member State in question and cast its vote.
3. Except where the Constitution provides otherwise, decisions of the Council of Ministers shall be taken by qualified majority.

#### C. Article 23: **Formations of the Council of Ministers**

1. The Legislative and General Affairs Council shall ensure consistency in the work of the Council of Ministers.
  - a. When it acts in its General Affairs function, it shall, in liaison with the Commission, prepare, and ensure follow-up to, meetings of the European Council.
    - i. When it acts in its legislative function, the Council of Ministers shall consider and, jointly with the European Parliament, enact European laws and European framework laws, in accordance with the provisions of the Constitution. In this function, each Member State's representation shall include one or two representatives at ministerial level with relevant expertise, reflecting the business on the agenda of the Council of Ministers.
    - ii. 2. The Foreign Affairs Council shall, on the basis of strategic guidelines laid down by the European Council, flesh out the Union's external policies, and ensure that its actions are consistent. It shall be chaired by the Union Minister for Foreign Affairs.
2. The European Council shall adopt a European decision establishing further formations in which the Council of Ministers may meet.
3. The Presidency of Council of Ministers formations, other than that of Foreign Affairs, shall be held by Member State representatives within the Council of Ministers

on the basis of equal rotation for periods of at least a year. The European Council shall adopt a European decision establishing the rules of such rotation, taking into account European political and geographical balance and the diversity of Member States.

#### D. Article 24: **Qualified majority**

1. When the European Council or the Council of Ministers takes decisions by qualified majority, such a majority shall consist of the majority of Member States, representing at least three fifths of the population of the Union.
2. When the Constitution does not require the European Council or the Council of Ministers to act on the basis of a proposal of the Commission, or when the European Council or the Council of Ministers is not acting on the initiative of the Union Minister for Foreign Affairs, the required qualified majority shall consist of two thirds of the Member States, representing at least three fifths of the population of the Union.
3. The provisions of paragraphs 1 and 2 shall take effect on 1 November 2009, after the European Parliament elections have taken place, according to the provisions of Article 19.
4. Where the Constitution provides in Part III for European laws and framework laws to be adopted by the Council of Ministers according to a special legislative procedure, the European Council can adopt, on its own initiative and by unanimity, after a period of consideration of at least six months, a decision allowing for the adoption of such European laws or framework laws according to the ordinary legislative procedure. The European Council shall act after consulting the European Parliament and informing the national Parliaments.
5. Where the Constitution provides in Part III for the Council of Ministers to act unanimously in a given area, the European Council can adopt, on its own initiative and by unanimity, a European decision allowing the Council of Ministers to act by qualified majority in that area. Any initiative taken by the European Council under this subparagraph shall be sent to national Parliaments no less than four months before any decision is taken on it.
  - a. **Within the European Council, its President and the President of the Commission do not vote.**

#### IX. Article 25: **The European Commission**

1. The European Commission shall promote the general European interest and take appropriate initiatives to that end. It shall ensure the application of the Constitution,

and steps taken by the Institutions under the Constitution. It shall oversee the application of Union law under the control of the Court of Justice. It shall execute the budget and manage programs. It shall exercise coordinating, executive and management functions, as laid down in the Constitution. With the exception of the common foreign and security policy, and other cases provided for in the Constitution, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving inter institutional agreements.

2. Except where the Constitution provides otherwise, Union legislative acts can be adopted only on the basis of a Commission proposal. Other acts are adopted on the basis of a Commission proposal where the Constitution so provides.
3. The Commission shall consist of a College comprising its President, the Union Minister of Foreign Affairs/Vice-President, and thirteen European Commissioners selected on the basis of a system of equal rotation between the Member States. This system shall be established by a European decision adopted by the European Council on the basis of the following principles:
  - a. (a) Member States shall be treated on a strictly equal footing as regards determination of the sequence of, and the time spent by, their nationals as Members of the College; consequently, the difference between the total number of terms of office held by nationals of any given pair of Member States may never be more than one;
  - b. (b) subject to point (a), each successive College shall be so composed as to reflect satisfactorily the demographic and geographical range of all the Member States of the Union.
  - c. The Commission President shall appoint non-voting Commissioners, chosen according to the same criteria as apply for Members of the College and coming from all other Member States.
  - d. These arrangements shall take effect on 1 November 2009.
4. (4) In carrying out its responsibilities, the Commission shall be completely independent. In the discharge of their duties, the European Commissioners and Commissioners shall neither seek nor take instructions from any government or other body.
5. (5.) The Commission, as a College, shall be responsible to the European Parliament. The Commission President shall be responsible to the European Parliament for the activities of the Commissioners. Under the procedures set out in Article III-243, the European Parliament may pass a censure motion on the Commission. If such a motion is passed, the European Commissioners and Commissioners must all resign.

The Commission shall continue to handle everyday business until a new College is nominated.

A. Article 26: **Le Président** de la Commission européenne

- a. Taking into account the elections to the European Parliament and after appropriate consultations, the European Council, deciding by qualified majority, shall put to the European Parliament its proposed candidate for the Presidency of the Commission. This candidate shall be elected by the European Parliament by a majority of its members. If this candidate does not receive the required majority support, the European Council shall within one month propose a new candidate to the European Parliament, following the same procedure.
- b. Each Member State determined by the system of rotation shall establish a list of three persons, in which both genders shall be represented, whom it considers qualified to be a European Commissioner. By choosing one person from each of the proposed lists, the President-elect shall select the thirteen European Commissioners for their competence, European commitment, and guaranteed independence. The President and the persons so nominated for membership of the College, including the future Union Minister for Foreign Affairs, as well as the persons nominated as non-voting Commissioners, shall be submitted collectively to a vote of approval by the European Parliament. The Commission's term of office shall be five years.
- c. President of the Commission shall:
  - lay down guidelines within which the Commission is to work;
  - decide its internal organisation, ensuring that it acts consistently, efficiently and on a collegiate basis;
  - appoint Vice-Presidents from among the members of the College.
- d. ***A European Commissioner or Commissioner shall resign if the President so requests.***

B. Article 27: Le ministre des Affaires étrangères de l'Union

- a. The European Council, acting by qualified majority, with the agreement of the President of the Commission, shall appoint the **Union Minister for Foreign Affairs**. He or she shall conduct the Union's common foreign and security policy. The European Council may end his or her tenure by the same procedure.
- b. The Union Minister for Foreign Affairs shall contribute by his or her proposals to the development of the common foreign policy, which he or she shall carry out as mandated by the Council of Ministers. The same shall apply to the common security and defense policy.

- c. The Union Minister for Foreign Affairs shall be one of the Vice-Presidents of the Commission. He or she shall be responsible there for handling external relations and for coordinating other aspects of the Union's external action. In exercising these responsibilities within the Commission, and only for these responsibilities, the Union Minister for Foreign Affairs shall be bound by Commission procedures.

**X. Article 28: La Cour de justice**

1. The Court of Justice shall include the European Court of Justice, the High Court and specialized courts. It shall ensure respect for the law in the interpretation and application of the Constitution.
  - a. Member States shall provide rights of appeal sufficient to ensure effective legal protection in the field of Union law.
  - b. The European Court of Justice shall consist of one judge from each Member State, and shall be assisted by Advocates-General.
  - c. The High Court shall include at least one judge per Member State: the number shall be fixed by the Statute of the Court of Justice.
2. The judges and the Advocates-General of the European Court of Justice and the judges of the High Court, chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles III-260 and III-261, shall be appointed by common accord of the governments of the Member States for a term of six years, renewable.
3. The Court of Justice shall:
  - a. – rule on actions brought by a Member State, an Institution or a natural or legal person in accordance with the provisions of Part III;
  - b. – give preliminary rulings, at the request of Member State courts, on the interpretation of Union law or the validity of acts adopted by the Institutions;
  - c. – rule on the other cases provided for in the Constitution.