

# Introduction

## The EU Institutions between Enlargement and the Constitution



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The year 2004 has been one of special importance for the European institutions. In addition to the election of a new Parliament and appointment of a new Commission, the institutions have been faced with the challenges posed by the accession of ten new Member States on 1 May, and have begun to look forward to the changes which may be introduced by the Treaty establishing a Constitution for Europe which was signed on 29 October. This special issue of *Eipascope* therefore looks at the EU institutions 'between enlargement and the Constitution'. The introductory article highlights the different dimensions of institutional change which are involved and the different kinds of question which are posed regarding the institutional development of the Union. The five contributions then look at the Council, the European Parliament, the European Commission and the Court of Justice, as well as the institutional dimensions of external action. They ask whether the preparations for enlargement have been sufficient and what the impact of enlargement may now prove to be, as well as looking at what the newly-signed Constitution may mean for the institutions' practical work and political role in the future.

Much has happened in 2004 to draw attention to the European institutions, and to make people ask questions about both their political roles in the evolving European system and their practical abilities to manage European business in the future.

On 1 May ten new Member States joined the Union. How will the Council manage business with 25 delegations around the table? Will a College of 25 Commissioners be able to function efficiently? Will the Court be able to manage an enlarged workload? Will the increase in the numbers both of members and of political parties represented affect the political coherence of the Parliament? How will all the institutions manage the near-doubling of the number of official languages from 11 to 20 – with even more to come in the next few years?

In June a new Parliament was elected. These first elections in the enlarged Union proved to be rather disappointing. Far from contributing to an increase in overall electoral participation, the response of most of the new Member States ensured continuation of the trend by which average turnout across the Community/Union has fallen with each successive elections. Yet by the autumn the talk was more of the Parliament's 'coming of age', as the President-designate of the new Commission was forced on 27 October to withdraw his proposed team in the face of opposition to several candidates. Does this mark a major change in the roles of the Parliament and the Commission? Is this the beginning of a new stage in European public debate?

This situation somewhat clouded the atmosphere in Rome on 29 October when the 25 governments met to sign the Treaty establishing a Constitution for Europe which had finally been agreed in June. Is this essentially

an ordering exercise aimed at bringing greater consistency, efficiency and transparency into a system which had become unmanageably – and even undemocratically – complex? Or, with its proposals for a 'Minister for Foreign Affairs' and 'European Laws', does this mark a qualitative transformation of the Union in the direction of a more state-like political system? And, in all events, what will the changes mean for the practical work of the institutions and their interaction with European citizens?

Even as the Constitutional Treaty was signed, however, it did not seem certain that Europe will in fact ever find out what it means, given the significant possibility of rejection in at least one of the referendums which are scheduled to take place in the two-year period which has been allowed for ratification. Some parts, however, may come into effect anyway. Indeed, one of the most important changes proposed – the creation of a common External Action Service – began to be prepared as soon as the Treaty was signed, while the European Defence Agency foreseen in the Constitution was already established in 2004.

### Different Dimensions of Institutional Change

With so much going on, it may be hard to see clearly what is happening in the broader perspective of the longer-term development of European integration. What kind of political system is emerging? What kinds of issue remain to be addressed if that system and its institutions are to have the necessary effectiveness and legitimacy to manage the Union in the face of the ever more complex realities posed by an ever wider Europe.

It may be helpful to step back briefly and to 'un-

bundle' the situation. The ways in which the European institutions have changed since the creation of the Communities can be seen in the light of four concepts and processes:

- political design,
- institutional reform,
- governance, and
- capacity-building.

These concepts overlap and are not mutually exclusive. Somewhat different issues and questions are highlighted, however, in each of these complementary perspectives on the institutional development of the Union.

### **Political design**

The first dimension is one of political negotiation over different institutional arrangements inasmuch as these are seen to embody different preferences as to the political nature (or 'finalité politique') of the 'European project'.

All Member States agreed at Laeken in 2001 that it was now appropriate to define a set of basic principles and rules which could explicitly be presented to citizens as the 'Constitution' of the Union. However, there may not be a common understanding of the political meaning of a 'constitutional' treaty for Europe. In this sense, the Convention and the IGC are only the latest episode in a permanent political debate which unfolds between two poles, over what formal model of political organization is desired for Europe – usually in terms of alternative forms of unions between states.

At one end, where the fact of a 'Constitution' is given maximum political significance, there are *federalist* designs for some kind of 'United States of Europe'. In its simplest form, this is a bicameral parliamentary system. The legislative branch at European level is made up of a territorially-based Council and a directly-elected Parliament; the Commission serves as the executive; and the Court is the independent judiciary. This is the model of a 'European Political Community' which was briefly considered in the early 1950s; more or less reiterated in the European Parliament's Draft Treaty on European Union in 1984; and explicitly proposed more recently by, for example, the Belgian Prime Minister in 2001.

At the other end, there are constitutional designs of a more *confederal* nature. The basic elements include a more limited and instrumental approach to the pooling of sovereignty, and the attribution of a leading role to the Council and European Council. This design has most clearly been expressed in French, starting with General de Gaulle's 'Europe des Patries', moving through Jacques Chirac's 'Europe unie des États', and perhaps best captured in the more recent formula of a 'Fédération des États-Nations'. Tony Blair's formulation in Warsaw in 2000 – 'a Europe of free, independent, sovereign nations who choose to pool that sovereignty in pursuit of their own interests and the common good' – in fact seems to make the same point.

Does the Constitution fundamentally change the political nature of the institutions? Article I-6 does, for

the first time, state in primary law the simple federal fact that 'The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.' Article I-20 does suggest that Union laws are passed by two legislative 'chambers' and carried out by an executive accountable to them:

*The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Constitution. It shall elect the President of the Commission.*

And the Court of Justice takes on many formal characteristics of a Constitutional Court of the Union.

Yet things are not quite so simple. When it comes to decision-making, there are multiple exceptions to the use of codecision. Member States retain the right of veto in several key areas.<sup>1</sup> Unanimity is still required for modification of the Constitution. And the vague political definition given in the very first article seems to acknowledge the prudence of leaving the Union as an 'unidentified political object':

*Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise on a Community basis the competences they confer on it.<sup>2</sup>*

The key question in this perspective is whether there is a minimum level of political and public consensus with regard to the political meaning of the institutions to ensure stability of the integration process. So, will this formula prove to be sufficient? Or will it unravel as the ratification process witnesses pressures and campaigns both from those disappointed by the terms of the 'constitutional' settlement, and from those who see it as going too far in the direction of a genuinely closer political union.

### **Institutional reform**

'Institutional Reform' is the term used in recent decades to refer to the adaptation of the institutions' competences, composition and functioning in response to perceived 'deficits', often associated with enlargement. The possible responses to these problems may be shaped by ideological preferences regarding political design, but the starting point is generally the existence of functional challenges.

These partly relate to the *efficiency* of decision-making, the 'ease' with which binding decisions can be reached. Problems in this respect are seen to be exacerbated as successive enlargements increase the number and diversity of Member States, while new areas in which the Union pursues common goals are characterized by ever greater complexity and sensitivity.

Integrationists tend to urge a greater pooling of sovereignty through majority voting and/or the delegation of powers to autonomous institutions. More 'Euro-hesitant' actors tend to question whether, if there are such deep differences, it is in fact appropriate to make the adoption of generally-binding decisions easier, even against national preferences; at most one should seek other forms of cooperation which are not so binding or uniform in their impact.

Efficiency concerns are evidently not the same as – and can even enter into tension with – concerns over institutional *legitimacy*, meaning a general acceptance of the basic 'rightfulness' of the authorities which generate norms, on the part of those who are bound by them. Quite different specific elements may be involved when it comes to the European institutions. And here again, ideological preferences naturally shape how the problems and their possible solutions are perceived. In the perspective of 'institutional reform', as opposed to 'governance', there are two key concepts.

The first is 'fairness' in relation to the representation and relative power of participating countries in the common institutions. Citizens will be less inclined to accept rules adopted by bodies in which they feel that they or their governments (or any other form of recognized representative association) are not represented according to principles which are seen to be appropriate and just. This point has been sharpest and most painful with regard to the weighting of votes in the Council. The system which applied in EU 15 came, among other things, to be seen as 'unfair' by Germany and The Netherlands, whose much greater demographic weight vis-à-vis France and Belgium respectively was not reflected in the parity of Council votes. The voting arrangements reached at Nice were not seen as fully 'fair' either, Spain and Poland having 27 votes compared to Germany's 29 despite having only half the population. Hence, the renewed arguments in the following Intergovernmental Conference which held up final agreement of the Constitutional Treaty until June 2004. To a lesser extent it has been an issue for the Parliament. There was a whiff of discrimination at Nice against 'new' Member States, two of which were not initially allocated the same number of seats as 'old' Member States with almost identical populations (and one still has not), thus visibly violating the basic principle of equal representation of citizens at each level of population size.<sup>3</sup>

A second is 'accountability', usually understood as the need for the European institutions, which adopt binding rules and spend public money, to be answerable to citizens through elected bodies. If a decision is taken at European level, especially if majority voting is involved, then there has to be an elected European body capable of directly channelling citizens' concerns and exercising political control on their behalf. This has been the main functional logic behind the successive increases in the powers of the European Parliament – the traditional approach to dealing with the 'democratic deficit'. It is interesting, however, that Article I-46 of the Constitution explicitly mentions not only the direct

election of Parliament, but also the democratic accountability of the governments meeting in the Council to their citizens and national parliaments. Moreover, national parliaments are given other roles in the Constitution, notably with regard to controlling respect for the principles of subsidiarity.

Both the efficiency and the legitimacy concerns of 'institutional reform' refer predominantly to official structures and relationships. On the one hand, the key question is whether the institutions can adapt their internal structures and working methods, in the context of enlargement, to produce the results needed to make Union action possible, whether this means Commission proposals, Council decisions, Parliament positions or Court judgements. On the other, the issue is whether formal criteria of legitimacy are seen to be satisfied. Do the European Parliament and the national parliaments (and, within the national systems, regional authorities) consider that they are given sufficient institutional powers to give input and scrutinize output? What is often missing from such pictures, however, is the relationship between the institutions and citizens, and the whole question of the participation of actors of civil society.

### **Governance**

A third dimension, indeed, which is associated with the concept of 'governance', reflects precisely the understanding that the functioning (and the quality) of a system cannot only be seen in terms of the formal structures of authority but also needs to take into account the interaction between these and the actors of civil society. The issues at stake here do not concern the kind of formal political model which is created, and they go beyond the question of efficiency and formal accountability. They relate to the democratic quality of the whole system of actors and relationships involved.

In the EU context, the term has a more specific connotation, namely the discussions which started in and around parts of the European Commission in the mid-1990s, based, among other things, on the belief that institutional reform was not going to be sufficient to overcome the lack of public support which was so evident in the wake of the Maastricht ratification problems. Indeed, this point is still clearly made at the start of the resulting White Paper on Governance in 2001 when it states that, despite the successes of European integration and its formal democratic basis – the 'double democratic mandate' of directly-elected European Parliament and Council representing the elected governments of the Member States – 'many Europeans feel alienated from the Union's work.'<sup>4</sup> The evolution of the institutions therefore needs to be seen in the broader perspective of 'principles of good governance', identified in the White Paper as openness, participation, accountability, effectiveness and coherence.

More provocatively, the October 2000 Work Programme for the White Paper even suggested (somewhat to the annoyance of the European Parliament) that participation in fact constitutes a second source of

legitimacy for the Union:

*'democracy in Europe is based on two twin pillars – the accountability of executives to European and national legislative bodies and the effective involvement of citizens in devising and implementing decisions that affect them'.<sup>5</sup>*

Interestingly, the Constitution seems to echo this to some extent. The chapter on 'The Democratic Life of the Union' is not limited to the article on representative democracy. This is followed first by an article dedicated to 'The principle of participatory democracy'. This makes explicit reference to the importance of the Commission's consultations with 'parties concerned' and of dialogue between all institutions with 'representative associations and civil society', as well as introducing the possibility for one million citizens to ask the Commission to submit a legislative proposal. The chapter then includes an article on 'The social partners and autonomous social dialogue'.

From a 'governance' perspective on institutional development, then, key questions concern the relationship between the European institutions and European citizens and social actors. In addition to accountability, direct or indirect, the main issues include the ways in which citizens and social actors may come to participate actively in the integration process and to support the institutions as actors within the multi-level European system.

### **Capacity-Building**

A fourth dimension of change concerns the resources and internal management of the institutions, and their consequent ability to handle the growing demands which are placed upon them in practical terms.

This is not only a question of decision-making procedures in any of the institutions, but of their general capacity to manage European business efficiently. These challenges are not new or only due to enlargement. However, the successive expansions of Union membership inevitably exacerbate the problems. The unprecedented scale of the 2004 enlargement means that this dimension is all the more important this time.

It should also be added that these challenges do not apply only to the European institutions. In the EU system, implementation of policies depends fundamentally on the Member States, and the record in recent years among 'old' Member States has been far from satisfactory. The new Member States have been subject to a high degree of pressure – and have received a great deal of support – to ensure that they will be able to implement Community rules. However, the European institutions, particularly the Commission, have a fundamental role to play. In this sense, the 'capacity' challenge is double – to ensure adequate resources and management capacity within the institution itself, and also to oversee and support implementation capacities within the Member States.

## **The European Institutions in 2004**

This special issue of *Eipascope* looks at the European institutions in 2004, 'between enlargement and the Constitution'. That is, in the light of the analytical perspectives outlined above, the contributions ask whether the preparations for enlargement have been sufficient and what the impact of enlargement may now prove to be, as well as looking at what the newly-signed Constitution may mean for their practical work and political role.

### **The Council**

Most public attention in the last few years concerning the Council has concentrated on two sensitive issues of institutional reform.

The first is *qualified-majority voting* (QMV). On the one hand, the debate has concerned the scope of application. In an ever bigger Union, how far can Member States expect to retain the right of veto if the EU is to avoid paralysis in key areas for the future? On the other, how should one revise the system for determining a qualified majority so as to ensure efficiency, fairness and comprehensibility? The Nice Summit agreed on a new system, which came into force on 1 November 2004. This provides for a re-weighting of votes (ranging from 29 for each of the largest four countries down to three for Malta) and three criteria for adoption of decisions. A qualified majority needs at least 232 votes out of the total of 321. The votes must be cast by a numerical majority of Member States. And any Member State may request verification that a winning coalition of votes represents at least 62% of the EU population.

The European Convention proposed replacing these arrangements by a system of dual majority. Weighted votes would disappear. A qualified majority would require a simple majority of states representing 60% of the population. The Constitution in the end has adopted a somewhat modified system of dual majority. The basic principle is that a qualified majority requires 55% of the Member States and 65% of the total population, with the additional condition that a blocking minority must consist of at least four Member States. Yet further conditions are to apply until at least 2014.

The second has been the *Presidency* of the Council. The traditional system of six-monthly rotation has been defended by some as a symbol of the equality of states, criticized by others as a source of discontinuity. At the same time, there has been discussion of the adequacy of the 'troika' arrangements for external representation of the Union which have existed since the entry into force of the Amsterdam Treaty. In the end, the Constitution provides for three different arrangements. There is to be a President of the European Council, elected for two and one-half years, renewable once. External relations will come under a Union Minister for Foreign Affairs, who will be nominated for five years, and chair a Foreign Affairs Council as well as serve as Vice-President for External Relations in the Commission. The remaining presidency functions will continue to be carried out by

a rotating six-monthly presidency, within a sequence based on pre-determined groups of three countries. These groups may establish special forms of coordination between themselves.

Important as both these issues are, however, the Council's main concern in the immediate future is how to manage the practical problems which enlargement has brought to a head, in terms of structures, resources and working methods.

The article by **Nicole Bayer** in this issue thus focuses on these fundamental but less widely-discussed dimensions of Council business, and offers a preliminary assessment of the adequacy of the solutions which have been proposed so far.

### ***The European Parliament***

The European Parliament is the institution which seems, at least in formal terms, to have been most strengthened by developments in 2004. The Constitutional Treaty continues the trend by which the Parliament has received stronger powers in every successive reform. The Parliament's role in decision-making is again strengthened, with codecision to become the norm for legislative acts.

*'European laws and framework laws shall be adopted, on the basis of proposals from the Commission, jointly by the European Parliament and the Council under the ordinary legislative procedure... If the two institutions cannot reach agreement on an act, it shall not be adopted.'*<sup>6</sup>

The Constitution also provides for a change in the way in which the Commission's accountability to Parliament is conceptualized. The Treaty currently provides for the Parliament to give its approval first to the person who is nominated by the Council, and subsequently to the Commission 'as a body'. In the European Convention, there was much discussion about proposals to link the Commission – or at least its President, who gives that institution 'political guidance' – more explicitly to the majority in Parliament. Some argued that the President should be elected from among candidates proposed by the Political Groups either by Parliament itself, or perhaps by Europe-wide election. The Constitution finally included the following compromise:

*'Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members.'*<sup>7</sup>

The Parliament's growing powers – as well as an apparent increase in the party-political dimensions of the debates – were dramatically demonstrated at the end of October when, in the face of opposition within the Parliament to several nominees, the President-designate of the Commission, José Manuel Barroso, was led to ask

for a postponement of the Parliament's scheduled vote of approval and consequently to modify his proposed College of Commissioners.

In this context, the question naturally arises as to the possible impacts of enlargement on the European Parliament at this time of mounting political responsibilities. The article by **Edward Best** and **Francis Jacobs** in this issue thus discusses three aspects of this question: the possible impact on Parliament's *efficiency*, in terms of its internal structures and working methods; on its *coherence*, in the sense of its Groups' ability, together with European political parties, to be seen to present clear policy choices at European level; and on its *legitimacy*, in terms of its public support.

### ***The European Commission***

The European Commission, for its part, faces enormous responsibilities in the enlarged Union, for which it needs sufficient resources, support and credibility.

Debates have tended to focus on the size and composition of the Commission. Should every Member State be entitled to have a national in the College of Commissioners? One side has argued that there should be fewer Commissioners than there are Member States. This, it is argued, would make the Commission more efficient as well as more 'independent', and on both grounds make it better able to fulfil its European mission. The other side responds that the problems of efficiency are exaggerated, since it is not so difficult to organize 25 or 30 people; that independence need not be compromised by the presence of nationals from all Member States, while that presence can help ensure that the Commission is felt to fulfil its mission of guaranteeing balanced attention to the interests of all parties, big or small; and that legitimacy is better served for everyone by maintaining a national link. The Constitution proposes a compromise. The first Commission to be appointed after entry into force of the Constitution will consist of one Commissioner per Member State. The next Commission – supposedly that taking office in 2014 – will have only two-thirds the number of Member States. It remains to be seen whether this intention will eventually be carried out.

Public attention has also concentrated on the efficiency and the sound financial management of the Commission. The Commission has indeed been engaged in a process of internal reform since the 1990s, much sharpened by the fall of the Santer Commission and the subsequent initiatives taken by the Prodi Commission.

**Thomas Christiansen** and **Mark Gray** therefore discuss the background to these reforms and evaluate the results achieved by 2004. They consider some of the main practical implications posed by enlargement for the Commission. They also look at the institution's position in the evolving political system, and the tensions created by the Commission's increasing reliance on the European Parliament, on the one hand, and the importance of its maintaining strong links with national governments, on the other. They conclude by looking at the challenges facing the Barroso Commission.

### *La Cour de justice européenne*

In preparation for enlargement, the Treaty of Nice introduced a number of changes concerning the internal organisation of the Court of Justice, as well as the distribution of competences between the Court of Justice and the Court of First Instance.

The Constitutional Treaty foresees even broader changes in the structure of the Court, and gives it some formal characteristics of a Constitutional Court of the Union.

The article by **Véronique Bertoli-Chappelart** and **Stéphane Arnaud** asks whether the changes proposed at Nice will be sufficient to deal with the challenges of enlargement for Court business, and looks at some of the remaining questions which have to be answered with regard to the real meaning of its new 'constitutional' roles.

### *The Institutional Dimensions of External Action*

One of the most prominent issues underlying the ongoing institutional debates has been the feeling that European Union has failed to live up to its potential as an international actor – and that it has indeed notably failed on many occasions even to act as a single actor. It is a continuing hope that institutional changes can help not only to talk with a single voice but to bring about a real convergence of interests. The proposals of the Constitutional Treaty are important in this respect. The Union is to have legal personality, thus ending (at least formally) the division between Community competences and intergovernmental pillars. A Union Minister for Foreign Affairs will replace the current 'troika' for external representation of the Union, made up of the country holding the rotating Presidency of the Council (perhaps accompanied by the incoming Presidency), the High Representative for the Common Foreign and Security and Policy, and the External Relations Commissioner. As noted above, the proposals

for a common External Action Service are not only one of the most potentially significant changes included in the Constitution but are already beginning to be set in motion. The design of this service will have major implications for the Council and the Commission. There are also important political concerns, notably with regard to the role of the European Parliament. The final article, by **Simon Duke**, therefore looks at the evolving role of the institutions with regard to external relations.

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### NOTES

- <sup>1</sup> Unanimity applies in most of the Common Foreign and Security Policy; police cooperation and judicial cooperation in criminal matters; certain kinds of international agreements; key financial decisions (determination of own resources, multi-annual financial framework, basic provisions on structural funds and cohesion fund), certain aspects of taxation and social security and a considerable variety of other specific issues.
- <sup>2</sup> Treaty establishing a Constitution for Europe (TCE) Article I-1. CIG 87/04 of 6 August 2004, emphasis added.
- <sup>3</sup> The principle of 'degressive proportionality' which is explicitly mentioned in the Constitution, means that smaller populations are relatively over-represented compared to larger populations. At each level of population, however, there should be the same 'rate' of representation.
- <sup>4</sup> Commission of the European Communities, 'European Governance: A White Paper', COM (2001) 428, Brussels, 25 July 2001. p.7.
- <sup>5</sup> Commission of the European Communities, 'White Paper on European Governance: "Enhancing democracy in the European Union". Work Programme', SEC (2000) 1547/7, Brussels, 11 October 2000. p.4.
- <sup>6</sup> TCE Art. I -34 (1).
- <sup>7</sup> TCE Art. I - 27 (1), emphasis added. □