

The Draft Treaty Establishing a Constitution for Europe – Institutional Aspects of Monetary Union

On June 18, 2004, the Intergovernmental Conference (IGC), constituted by the European Heads of State or Government, reached an agreement on the Treaty establishing a Constitution for Europe which provides a new, consistent legal architecture for the EU. The legal and institutional framework for the European System of Central Banks (ESCB), the European Central Bank (ECB) as well as for the single monetary policy is defined in both the constitutional provisions of Part I and the policy areas of Part III of the Constitutional Treaty. The Statute of the ESCB/ECB is attached to the Treaty as a protocol.

The constitutional provisions (Part I) not only define price stability as one of the EU's general objectives, but also confirm the *sui generis* nature of the ECB as enshrined in the Treaty on European Union. The Constitutional Treaty integrates the concept of "Eurosystème" and incorporates into primary legislation that the euro be defined as currency unit and symbol of the Union.

In the field of monetary union (Part III), a number of new provisions, which only apply to the euro area Member States, have been created. The procedure for amending the provisions on Economic and Monetary Union (EMU) have been simplified; however, this simplified amendment procedure does not apply to the constitutional provisions. Under certain circumstances, monetary policy decisions may be taken by super-qualified majority.

In principle, the Constitutional Treaty does not entail any change in substance in the field of monetary union and the amendments are largely of a technical nature. Thus, the framework conditions for monetary union as embodied in the Treaty on European Union have been reaffirmed.

Isabella Lindner,
Paul Schmidt

1 Introduction

The IGC started its proceedings on October 4, 2003, and at the European Council meeting in Brussels on June 18, 2004, reached an agreement on the Treaty establishing a Constitution for Europe.¹ The final draft will be submitted to the Member States for ratification, and the Constitutional Treaty shall – from the present point of view – enter into force on November 1, 2006.

In accordance with Article 48 of the Treaty on European Union, the European Central Bank (ECB) contributed to the IGC on institutional changes in the monetary area. The Governing Council of the ECB established a Task Force on the EU Draft Constitution which discussed the possible implications for institutional changes on the ESCB/Eurosystème and the ECB and developed the strategic

positioning of the Governing Council of the ECB. On September 19, 2003, prior to the IGC, the Governing Council of the ECB adopted an official opinion on the relevant aspects of the new Constitutional Treaty. Subsequently, the President of the ECB, Jean-Claude Trichet, communicated further monetary policy positions of the ECB Governing Council (ECB, 2003c; ECB, 2004a) to the respective Council presidencies.

This article describes the aspects of the Constitutional Treaty that are relevant to the ESCB/Eurosystème and aims to analyze the implications of the amendments to the Treaty, taking into account as much as possible the conclusions of the Working Party of IGC Legal Experts, which revised the Constitutional Treaty at the technical level, and the results of the ECB Task Force discussions.²

¹ In the following, the Treaty establishing a Constitution for Europe will be referred to as Constitutional Treaty.

² At the editorial close, the most recent material available to the authors was a consolidated version of the draft Constitution (CIG 87/04; CIG 87/04 add1 and add2) already containing a continuous numbering of Treaty articles.

Refereed by
Thomas Wagner,
Legal Division.

2 General Remarks

2.1 The Architecture of the Constitutional Treaty

The draft Constitution establishes a consistent constitutional architecture replacing the three-pillar structure of the set of existing treaties. Following a preamble, the Constitutional Treaty is divided into four main parts and a number of protocols, including the protocol on the Statute of the ESCB and the ECB, as follows:

- Part I “Constitutional Provisions,”
- Part II “The Charter of Fundamental Rights of the Union,”
- Part III “The Policies and Functioning of the Union,”
- Part IV “General and Final Provisions.”

Part I, Part III and the relevant protocols contain the legal and institutional underpinnings of the ESCB/Eurosystem, the ECB and the single monetary policy.

In this context, the question emerged whether the constitutional provisions of Part I are supreme over Part II, Part III and Part IV. So far, the European Court of Justice has considered all parts of the Treaty on European Union equal. However, the provisions in Part I of the Constitutional Treaty, which, *inter alia*, specify the institutional framework, prevail over the provisions of the other parts in so far as their amendment requires convening an IGC. By contrast, “Internal Policies and Action” (Part III, Title III) and thus also the provisions on monetary union are subject to a simplified amendment procedure. However, the ESCB/Eurosystem takes it for granted that

the various parts and titles as well as the protocols of the Constitutional Treaty are basically considered equal.

In conclusion, the Constitutional Treaty encompasses two amendment procedures for the provisions on monetary union:

- Regular amendment procedure: If the amendments are comprehensive, the President of the European Council shall call a Convention³ which examines the proposal and adopts by consensus a recommendation to the IGC. The amendments enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements (Art. IV-443).⁴
- Simplified amendment procedure: “Internal Policies and Action” (Part III, Title III) and thus also the provisions on monetary union can be amended by a simplified amendment procedure. The European Council may adopt a European decision amending all or part of the above mentioned provision, acting by unanimity after consultation of the European Parliament and the Commission and, in the monetary area, the ECB. Such a European decision does not come into force until it has been approved by the Member States in accordance with their respective constitutional requirements. The application of this procedure implies that some provisions of the Constitutional Treaty may be amended without calling a Convention or an IGC (Art. IV-445).

³ *The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene the Convention should this not be justified by the extent of the proposed amendments (Art. IV-443 (2)).*

⁴ *If, two years after the signature of the treaty amending the Treaty establishing the Constitution, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council (Art. IV-443 (4)).*

2.2 Monetary Policy Decision-Making by Qualified and “Super-Qualified” Majority

Current practice already requires a qualified majority in the Council for a large part of monetary policy decisions. The Constitutional Treaty does not provide for a significant extension of the scope of qualified majority voting. However, the Treaty stipulates that where Part III provides that the Council should act by unanimity, the European Council may adopt a European decision authorizing the Council (e.g. the Ecofin Council) to act by qualified majority⁵ (Art. IV-444). Under certain circumstances, decisions in the field of monetary union can be taken by “super-qualified” majority. Decisions regarding the following areas relevant for monetary policy now require either a qualified or a super-qualified majority:

- So far, the Council has been able to amend the ESCB/ECB Statute on a recommendation from the ECB and by qualified majority. An amendment proposed by the European Commission would have required unanimity in the Council. The Constitutional Treaty lays down that the Council decides on a proposal from the European Commission by qualified majority and on a recommendation from the ECB by super-qualified majority⁶ (Article III-187(3)). This strengthens the position of the European Commission vis-à-vis the ECB.

- The Council, on a proposal from the Commission and after consulting the ECB, may adopt appropriate measures to ensure a unified representation within the international financial institutions and conferences (Art. III-196(2)). Only members of the Council representing Member States whose currency is the euro are entitled to vote; decisions are made by qualified majority.
- The President, the Vice President and the other members of the Executive Board of the ECB are appointed by the European Council, acting by a qualified majority (Art. III-382 (2)).

The higher blocking minority threshold compared with the Treaty of Nice could make it more difficult to block majority decisions. The increase of both the super-qualified and the qualified majority thresholds might only slightly accelerate the decision-making process in the Council.

2.3 EU Legislative Acts

In exercising the competences conferred on it in the Constitutional Treaty, the EU will use European laws, European framework laws, European regulations, European decisions, recommendations and opinions (Article I-33). When authorized to do so (Art. I-35), the ECB will adopt European regulations and European decisions as well as recommendations and opinions (Art. III-190).

⁵ *If the Council acts upon a proposal of the European Commission or the European Foreign Affairs Minister, from November 1, 2009, this will require a qualified majority representing at least 55% of the Member States, i.e. at least 15 Member States and at least 65% of the Union’s population. At least four Member States, representing more than 35% of the Union’s population, are required to form a blocking minority.*

⁶ *If the Council acts upon a recommendation of the ECB in the field of EMU, from November 1, 2009, this will require a super-qualified majority representing at least 72% of the Member States comprising at least 65% of the Union’s population (Art. I-25(2), Conference, 2004).*

The ECB may adopt European regulations (formerly called regulations) for instance on the definition and implementation of the single monetary policy, on payment and settlement systems, on specific tasks relating to prudential supervision of credit institutions, on the capital and the capital subscription of the ECB or on the transfer of foreign reserve assets (see Article III-190.1(a)).

As European laws or framework laws are legislative acts, they have precedence over European regulations adopted by the ECB. This is mainly relevant for those areas which do not exclusively fall within the fields of competence of the ECB (e.g. payment systems).

3 Part I of the Constitutional Treaty: Constitutional Provisions

3.1 The Primary Objective of Price Stability

The Treaty on European Union defined the promotion of “non-inflationary growth” and “stable prices” as one of the objectives of the Union. The Constitutional Treaty now includes the concepts “balanced economic growth” and “price stability” (Art. I-3). Part I also explicitly states the primary objective of the European System of Central Banks to maintain price stability (Art. I-30). Another reference to price stability, which is the primary objective of the single monetary and exchange rate policy, can be found under Article III-177.

The application of the simplified amendment procedure for Part III made it even more important that price stability has been integrated in the objectives laid down in Part I of

the Constitutional Treaty. This implies that price stability is not only an operational objective of the ESCB/Euro-system but an objective that is binding for both the Union and its Member States.

3.2 Monetary Policy – An Exclusive Competence of the Union

Article I-12 stipulates the division of responsibilities between the Union and the Member States, according to which the Union has exclusive competence in the field of monetary policy for the Member States whose currency is the euro (Article I-13(c)). While the Union may legislate and adopt legally binding acts, the Member States may do so themselves only if so empowered by the Union or for the implementation of Union acts (Article I-12 (1)).

The Constitutional Treaty does not provide a definition of the concept “monetary policy”. The ESCB/Euro-system has adopted a broad interpretation of the concept monetary policy, referring to Article III-185, which describes the basic tasks to be carried out through the ESCB.

Primary legislation now stipulates that the currency of the Union is the euro, which is also listed under the symbols of the Union (Article I-8).

3.3 The ECB as an Institution Sui Generis

The Constitutional Treaty lists the ECB, together with the Court of Auditors and the advisory bodies⁷ as “the other Union institutions and advisory bodies” (Article I-30). However, when the institutional structure of the ESCB had been defined by the Treaty on European Union, the ECB had deliberately not been classified

⁷ *Committee of the Regions and the European Economic and Social Committee.*

as an institution of the Community. As the draft Constitution does not list the ECB among the political institutions, such as the Council, the European Commission or the European Parliament, the ESCB/Eurosystem presumes that the ECB is an institution *sui generis* and that the new institutional classification of the ECB does not imply any substantial change.

Article I-30 defines the concept “ESCB” and, for the first time, also the concept “Eurosystem”. The Governing Council of the ECB has used the term Eurosystem in its external communication since 1998. The Eurosystem comprises the ECB and the national central banks (NCBs) of the Member States which have adopted the euro.

The ESCB is governed by the decision-making bodies of the ECB (the Governing Council and the Executive Board) and pursues the primary objective of maintaining price stability. Without prejudice to this objective, it supports the general economic policies of the Union to contribute to the realization of the Union’s objectives. All other tasks of the ESCB are defined in Part III of the Constitutional Treaty and in the ESCB/ECB Statute. The Constitutional Treaty also states that the ECB has legal personality. The ECB has the exclusive right to authorize the issuance of banknotes.

While the Treaty on European Union emphasizes the independence of both the NCBs and the ECB⁸, Article I-30 of the Constitutional Treaty only refers to the independence of the ECB. In exercising its functions and in administrating its funds the

ECB is independent. The Community institutions, bodies and other agencies as well as the governments of the Member States respect this principle of independence. Only Part III (Article III-188) – which can be revised by a simplified amendment procedure – stipulates the independence of the NCBs.⁹

3.4 Transparency

The Constitutional Treaty provides the public with broader access to documents. The Treaty on European Union regulates public access to the documents of the European Parliament,¹⁰ the Council, the European Commission; the ECB stipulates its own transparency rules. The principle of transparency of the Constitutional Treaty (Article I-50 (3)) now also applies to the ECB when carrying out its administrative tasks (Article III-399 (1)). Restricting transparency to administrative tasks shall protect the ECB against public access which could negatively affect its core functions.¹¹

4 Part III of the Constitutional Treaty: The Policies and Func- tioning of the Union – Monetary Policy

The specific provisions on monetary union are incorporated in Part III, Title III, Chapter II of the Constitutional Treaty; they are subdivided into “Economic and Monetary Policy”, “Institutional Provisions”, “Provisions Specific to Member States Whose Currency is the Euro” and “Transitional Provisions”. The sections on monetary policy and the ESCB/Euro-

⁸ Article 108 Treaty on European Union.

⁹ See section 2.2.

¹⁰ Article 255 Treaty on European Union.

¹¹ See ECB, 2004.

system have been reorganized, i.e. the transitional provisions no longer include the provisions that referred to the European Monetary Institute (EMI), the second stage of EMU and the beginning of the third stage of EMU. The specific provisions for the euro area countries are summarized under a separate section. All other provisions are broadly in line with the Treaty on European Union. In principle, no changes in substance have been made to provisions regarding monetary union; adaptations have been largely of a technical nature.

4.1 Monetary Policy

The section on “monetary policy” describes the objectives and tasks of the ESCB and stipulates the ESCB’s primary objective of maintaining price stability¹² (Article III-185). Contrary to the Treaty on European Union, the definition of the ESCB and the reference to the legal personality of the ECB have been omitted because they are explicitly stipulated under Article I-30. In exercising their powers and carrying out the tasks and duties conferred upon them by the Constitutional Treaty, the ECB and NCBs are subject to the principle of freedom from any instruction (“Independence”, Article III-188).

4.2 Institutional Provisions

The section “Institutional Provisions” describes the coordination tasks and the composition of the Economic and Financial Committee. The provisions regarding the Monetary Committee (with advisory status), which was replaced by the Economic and

Financial Committee at the beginning of the third stage of EMU in 1999, have been canceled.

Title VI, “The Functioning of the Union”, contains the general institutional provisions on the Governing Council and the Executive Board of the ECB as well as on the participation of the President of the Council of Ministers in Governing Council meetings, the participation of the ECB President in Ecofin Council meetings and the relations between the ECB and the European Parliament (Article III-382, Article III-383).

4.3 Provisions Specific to Member States Whose Currency is the Euro

The “Provisions Specific to Member States Whose Currency is the Euro” are summarized under a separate section in a clear and structured manner. These provisions include the measures related to the surveillance and coordination of Member States’ budgetary discipline, the economic policy guidelines as well as the external representation of the euro. Only Member States of the euro area, which regularly hold Eurogroup meetings, are entitled to vote on these measures (Article III-194).

Arrangements for meetings between ministers of Member States of the euro area are laid down in the Protocol on the Eurogroup (Article III-195). The Eurogroup will continue to meet informally; to improve its working methods, it will elect a president for a term of two and a half years.

¹² The Draft Treaty establishing a Constitution for Europe lists the articles that do not apply to countries with a derogation (Article III-197 (2) (c)). It lists the objectives and tasks of the ESCB and thus also the objective of price stability (Article III-185 (1-3, 5)). According to the ESCB/ECB Statute (Article 43.1 of the Statute), however, the objectives and tasks of the ESCB (Article 2 of the Statute) apply to the Member States with a derogation.

The Eurogroup, acting by a qualified majority¹³ on a proposal from the European Commission and after consulting the ECB, takes decisions on the external representation of the euro (Article III-196). These decisions are taken to establish common positions and ensure unified representation of the euro within the international financial institutions and conferences.

Furthermore, it is the exclusive responsibility of the Eurogroup to conclude agreements on an exchange rate system for the euro or general orientations for the exchange rate policy vis-à-vis non-euro area currencies. The same holds for decisions on the euro central rates within the exchange rate mechanism (ERM II) and agreements on exchange-rate matters with countries or international organizations (Article III-326 in combination with Article III-197).

4.4 Transitional Provisions

The section “Transitional Provisions” contains regulations for Member States with a derogation, i.e. non-euro area countries. The provisions on EMU that do not apply to Member States with a derogation include for example the objectives and tasks of the ESCB/Eurosystem, the legal acts of the ECB or the appointment of members of the Executive Board of the ECB (Article III-197).

The “Transitional Provisions” also stipulate institutional regulations on the General Council as the third decision-making body of the ECB, the definition of the convergence criteria¹⁴ as well as the provisions on the abrogation of derogations after the convergence assessment. In accordance with the latter provision, the Council decides by qualified majority, after consulting the European Parliament, after discussion in the European Council and on a proposal from the European Commission. What is new is that this decision is to be based on a recommendation from the euro area Member States, acting by qualified majority.

The euro area Member States and the Member State concerned may decide by a simple majority, after obtaining the consent of the European Parliament, to irrevocably fix the exchange rate at which the euro is to replace the currency of the Member State concerned and to lay down other measures necessary for the introduction of the euro (Article III-198).

Where a sudden crisis in the balance of payments occurs, a Member State with a derogation may be granted macro financial assistance or take protective measures, such as the temporary introduction of capital controls (Article III-201, Article III-202).

¹³ In cases in which only a limited number of Council members has the right to vote (i.e. increased collaboration or euro area), the projected percentages will be inserted (and changed) in such a way that they will only apply to those Council members who have the right to vote and only to the population of the Member States they represent.

¹⁴ In order to ensure continuity in assessing the exchange rate criterion, the Constitutional Treaty still contains a reference to the no longer existing EMS.

5 Statute of the ESCB and the ECB

The ESCB/ECB Statute is attached to the draft Constitution as a protocol and was technically adapted by the Working Party of IGC Legal Experts (Conference, 2003a).¹⁵

- In line with Article I-30, Article 1 of the Statute contains the concept “Eurosystem”.
- Regulations were renamed European Regulations, Decisions were renamed European Decisions (Article 35), Community was replaced by Union, “ECU” was replaced by “Euro” and “EC Treaty” or “Treaty on European Union” were replaced by “Constitution”.
- Certain provisions on the establishment of the ECB and the ESCB (Article 1.1, Article 14.1) as well as the transition to the third stage of monetary union (Article 32.3, Article 50, and Article 51), the EMI protocol as well as the reference to the seat of the ECB (Article 37) have been omitted in the protocol.

6 Conclusions

Representing a new and consistent legal architecture, the Constitutional Treaty, is intended to enhance and streamline decision-making in the EU-25, both at the European and the international level.

However, the efficiency of the decision-making process of the Council, and thus of the Ecofin Council, may not be improved substantially by the Constitutional Treaty. The increase

of the blocking minority threshold compared to the Treaty of Nice could make it more difficult to block majority decisions; the higher super-qualified and qualified majority threshold is expected to accelerate the decision-making process only slightly. It remains to be seen to what extent the European Council will make use of the newly created possibility of widening the scope for majority decisions in the Council in cases where the Treaty provides for unanimity.

Up to now, a considerable number of decisions in the field of monetary union has been taken by qualified majority. The Constitutional Treaty slightly strengthens the European Commission’s position to influence monetary union: Proposals from the Commission to amend the ESCB/ECB Statute require a qualified majority in the Council whereas recommendations from the ECB require a super-qualified majority.

The introduction of the simplified amendment procedure which covers provisions of Part III of the Constitutional Treaty is likely to have a very fundamental impact on future developments in monetary union. The constitutional provisions of Part I of the Constitutional Treaty, which affect monetary union only to a small extent, continue to be subject to the standard procedure. This implies that changes in substance are less likely to occur.

The Constitutional Treaty takes into account the institutional developments in the area of monetary union

¹⁵ Irrespective of the draft Constitution, the ECB Governing Council was prepared for the forthcoming enlargement in the euro area and the voting modalities were adapted according to a Council decision (European Council, 2003) (Article 10.2 of the Statute). If there are more than 15 national central bank governors, the voting rights of the members of the Council of the ECB will be limited to 21, which means that 6 permanent members of the Executive Board of the ECB retain permanent voting rights and the 15 voting rights of the NCB governors will rotate. All members of the Governing Council who temporarily do not exercise a voting right will continue to attend meetings and will be able to participate actively in the discussions.

since the introduction of the euro. Thus, the Constitutional Treaty integrates the concept “Eurosystem” and incorporates the definition of the euro as the currency unit and one of the symbols of the Union. The Eurogroup continues to meet informally; but the Constitutional Treaty formally recognizes in a protocol its existence. Furthermore, the Constitutional Treaty defines a number of new provisions which only apply to the euro area Member States; it also defines areas of responsibility in which only euro area Member States have the right to vote. All in all, these amendments contribute to a better understanding of the institutional structure and workings of monetary union.

The Constitutional Treaty does not entail any changes in substance in the field of monetary union compared to the current legislation; most amendments were of a technical nature only. It stipulates that one of the objectives of the Union is to maintain price stability and confirms the sui generis nature of the ECB as enshrined in the Treaty on European Union. The tasks, mandate, status and legal and institutional framework of the ECB and of the ESCB remain widely unchanged. The framework conditions for monetary union as embodied in the Treaty on European Union have been reaffirmed. Thus, as regards monetary policy, the EU-25 is well prepared for the enlargement of the euro area.

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