

THE EU CONSTITUTION: ITS IMPACT ON ECONOMIC AND MONETARY UNION AND ECONOMIC GOVERNANCE

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ABSTRACT

Il contributo analizza l'impatto della Costituzione europea sul funzionamento dell'Unione economica e monetaria e sul governo dell'economia. Conformemente alla dichiarazione di Laeken, la Costituzione sancisce la separazione delle competenze tra l'Unione e gli Stati membri. Tuttavia lo studio sostiene che, a motivo della sua specificità, il coordinamento delle politiche di bilancio ed economiche è una competenza UE sui generis. La Costituzione non apporta modifiche fondamentali all'attuale governance economica della UE. Il ruolo della Commissione è in qualche modo rafforzato nel settore delle politiche di Multilateral Surveillance Procedure e Excessive Deficit Procedure; nel Consiglio sono introdotte nuove regole di votazione ma il loro impatto è limitato ed il ruolo del Parlamento rimane, nell'insieme, invariato. La situazione è piuttosto diversa per quanto concerne la governance dell'area dell'euro, la cui autonomia è notevolmente accresciuta. La Costituzione dà facoltà agli Stati membri dell'area di adottare misure specifiche per le politiche di bilancio ed economiche della stessa area. Viene anche notevolmente incrementato il numero dei casi in cui nel Consiglio votano esclusivamente gli Stati membri dell'area dell'euro, mentre il ruolo dell'Eurogruppo è ufficialmente riconosciuto nella Costituzione. Tuttavia, ciò non implica la creazione di uno specifico Consiglio Ecofin per l'area dell'euro. Infine, ulteriori modifiche vengono apportate nei campi della rappresentanza esterna della UEM, delle misure che governano l'utilizzo dell'euro e l'entrata nella UEM, delle procedure semplificate di revisione, ecc. La Costituzione non corregge l'esistente squilibrio tra i due pilastri della UEM, quello economico e quello monetario, ma apre la porta a una migliorata governance economica all'interno dell'area dell'euro. I Ministri finanziari dell'area dell'euro raccoglieranno la sfida?

INTRODUCTION

Enhancing economic policy coordination was one of the items put on the agenda of the Convention by the European Council of 14-15 December 2001.¹ Many economic and political observers have indeed criticised the asymmetry between the economic and the monetary parts of Economic and Monetary Union (EMU). National governments remain responsible for the conduct of economic and budgetary policies, while monetary policy has been transferred to the European level. Loose and mostly non-binding coordinating mechanisms are in place in the economic field, while a centralised decision-making process has been established within the Eurosystem in charge of the monetary policy of the euro area.

A Working Group on Economic Governance, chaired by Klaus Hänsch, was established within the Convention to discuss this issue. Members of the Convention proved to be deeply divided, resulting in only limited progress on this issue, although some doors were nevertheless opened. The final result reached by the Intergovernmental Conference (IGC) is very similar to the conclusions of the Convention's proposals.

The Constitution not only reorganises the provisions of the European Union (EU) Treaty: it also brings some changes. In this paper, we analyse these from different points of view: the Union's objectives and symbols (Chapter 1); the respective competencies of the Member States and the Union in the economic field, and more particularly the specific position of the competence to coordinate economic policies among the competencies of the Union (Chapter 2); economic governance within the Union (Chapter 3); and economic governance within the euro area (Chapter 4). Finally, we will examine some other relevant changes in the field of external representation, measures governing the use of the euro, entry into EMU, withdrawal from the Union, and the revision procedures (Chapter 5).

This contribution does not cover amendments to the institutional position of the European System of Central Banks (ESCB) and the European Central Bank (ECB), which are addressed in Professor Jean-Victor Louis' contribution to this volume.

I THE OBJECTIVES AND SYMBOLS OF THE UNION

The objectives of the Union were reviewed first by the Convention and then by the IGC, resulting in the introduction of a specific title in the Treaty regarding the Union's symbols.

¹ See the "Laeken Declaration on the future of the European Union", annexed to the Presidency conclusions.

I.1 THE UNION'S OBJECTIVES

The Maastricht Treaty referred to “the establishment of economic and monetary union, ultimately including a single currency”, as a means of realising the Union’s objective “to promote economic and social progress and a high level of employment and to achieve balance and sustainable development”.² Since EMU is now a tangible reality, references to its establishment have disappeared from the Union’s objectives. However, Part I of the Constitution mentions some of EMU’s core elements. One of these is price stability, which should be regarded as a cornerstone of EMU.

Besides the existing reference to balanced economic growth, the Constitution mentions price stability as among the objectives of the EU. Price stability was introduced into the Constitution at a late stage in the IGC negotiations, following lengthy discussions and constant and repeated advocacy by the Eurosystem.³ The Eurosystem’s arguments in favour of such an explicit reference can be summarised in three main points.⁴ First, non-inflationary growth is mentioned as one of the Community’s objectives⁵ in the Treaty establishing the European Community (“the Treaty”). Second, “Price stability is not only the European System of Central Banks’ primary objective but also forms part of the heart of monetary union for all European citizens; in this sense ‘stable prices’ clearly benefit society [...]”. Third, the introduction of a simplified procedure to amend Part III of the Constitution, which includes the EMU provisions (see section 5.7), rendered this reference necessary in order to strengthen the commitment towards price stability.

Hence, Article I-3 (3), first indent, of the Constitution reads: “The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.” However, this wording is not entirely free of ambiguity. Is price stability referred to as a goal, or as a means to achieve the sustainable development of Europe alongside balanced economic growth, a competitive social market economy, etc.? This is a hard question to answer and may be the subject of considerable debate.

To maintain price stability is the primary objective of the Eurosystem. In this regard, it should be noted that mentioning price stability among the Union’s objectives does not change, widen or restrict the primary objective of the Eurosystem’s monetary policy. In fact, the question had been put forward by

2 Article 2 of the EU Treaty.

3 “The European Constitution and the ECB”, ECB Monthly Bulletin, August 2004, pp. 51-64 (57-59).

4 The Eurosystem’s point of view was notably expressed in a letter sent by ECB President Jean-Claude Trichet to the President of the Council of the European Union, dated 16 April 2004. The letter is available on the ECB’s website.

5 Article 2 of the Treaty refers to “sustainable and non-inflationary growth”. Stable prices, together with sound public finances and monetary conditions as well as a sustainable balance of payments, are also considered in Article 4 (3) of the Treaty to be guiding principles for the Community and the Member States. These guiding principles are no longer to be found in the Constitution.

some Convention members. However, it was considered that “maintaining price stability is the best contribution monetary policy can make with regard to the achievement of other economic goals”.⁶

As an objective of the Union, price stability should also constitute a guiding principle for all EU institutions when they act in the economic field and play a key role in the definition of Member States’ economic policies and their coordination through the Broad Economic Policy Guidelines and through budgetary discipline.

1.2 THE SYMBOLS OF THE UNION

The euro, as the currency of the Union⁷, is one of the key symbols of the EU, together with the flag, the anthem, the motto (“united in diversity”) and Europe Day. With this provision, the Constitution corrects a peculiarity of the Treaty: the Maastricht Treaty wording referring to the ECU (European Currency Unit) as the single currency was never changed, and the legal status of the euro was instead derived from a Council regulation.⁸

The Constitution presents the euro as the currency of the Union. However, in other instances, the Constitution refers to “the Member States whose currency is the euro”.⁹ So, whose currency is the euro? Is it the currency of the Union, or the currency of its Member States? It could be the former, given that Article I-7 of the Constitution gives legal personality to the Union. However, as not all Member States have joined the euro area yet and given the place where the euro is referred to as the currency of the Union, we regard this reference to the euro as the “currency of the Union” as being primarily symbolic. Legally, the euro remains the currency of those Member States which have adopted the euro, as stated in the substantive provisions of the Constitution. Therefore, this “new and explicit” status as the currency of the Union should not change the nature of the euro, nor have any impact on the functioning of EMU.

In the long run, however, it might have some influence on the current neutrality policy of the EU institutions with regard to the international role of the euro. Indeed, as a symbol of the Union or a token of its identity, the euro might also acquire a political dimension, as indeed was the case with the old legacy currencies (e.g. the Deutsche Mark), which were symbols of national identity to which citizens were bound and that they aimed to protect or to promote.

6 ECB Monthly Bulletin, *op. cit.* in footnote 3, p. 58. For further considerations in this respect, the reader is invited to consult the contribution of Professor Jean-Victor Louis in this volume.

7 Article I-8, 4th indent, of the Constitution.

8 Council Regulation (EC) No 974/98, 3 May 1998, on the introduction of the euro (OJ L 139, 11.5.1998, p. 1). The name “euro” was decided by the European Council of 15 and 16 December 1995 in Madrid.

9 Articles I-13 (1) (c), I-15 (1), I-30 (1), III-194, III-195, III-196 (3), III-197 (2) and (4) and III-198 (2) and (3) of the Constitution.

2 THE COORDINATION OF ECONOMIC POLICIES: A SPECIAL CASE IN THE CATEGORIES OF THE UNION'S COMPETENCE

One of the main objectives of the Convention on the Future of Europe – as described in Declaration 23 annexed to the Treaty of Nice – was to establish “a more precise delimitation of powers between the European Union and the Member States”.¹⁰ The subsequent Declaration of Laeken repeated the need to “clarify, simplify and adjust the division of competence between the Union and the Member States in the light of the new challenges facing the Union”.¹¹

Given this clear mandate, the Convention and the IGC have undertaken to clarify the allocation of powers between the Union and its Member States on the basis of the principle of conferral as well as on the definition of categories of the Union's competence. The principle of conferral belongs to the fundamental principles on which the entire European integration process rests. In accordance with this principle, the Union must act within the limits of the competences conferred upon it by the Constitution in order to achieve the objectives set out in the Constitution.¹² Conversely, competences that are not conferred upon the Union by the Constitution thus remain with the individual Member States.¹³

On this basis, Article I-12 of the Constitution enumerates three main categories of competences which are entrusted to the Union and further detailed in Part III of the Constitution: exclusive competence¹⁴, which includes the monetary policy¹⁵ of the Member States whose currency is the euro; shared competence¹⁶; and finally, the “competence to carry out actions to support, coordinate or supplement the actions of the Member States”.¹⁷ In addition to these three categories, Article I-12 (3) states that “the Member States shall coordinate their economic and employment policies within arrangements as determined by Part III, which the Union shall have competence to provide”.

What is the nature of this competence of the “coordination of economic and employment policies”? To which category of competence does it belong? This issue is a complex one, and is examined below.

10 Declaration on the future of the Union, No 23, annexed to the Treaty of Nice, signed on 26 February 2001 (OJ C 080, 10.3.2001), signed on 26 February 2001, p. 85.

11 European Council of Laeken, 14 and 15 December 2001, Declaration annexed to the conclusions of the summit.

12 Article I-11 (1) of the Constitution.

13 Article I-11 (2) of the Constitution.

14 Article I-12 (1). For an exhaustive list of the exclusive competences, see Article I-13 (1) of the Constitution.

15 As Jean-Victor Louis mentions in his paper in this volume, some authors suggest a broad interpretation of this concept. The wording of the ECB Opinion of 19 September 2003 addressed to the IGC, which has been invoked in this debate in favour of a broad interpretation, was especially carefully chosen to avoid entering into this debate on the scope of the exclusive competencies. The ECB Opinion clearly refers to the wording of the provisions of Part III related to monetary policy. This results in our view that the Eurosystem's exclusive competence covers the conduct of monetary policy and of foreign exchange operations as well as the holding and management of the official foreign reserves of the Member States. Competences are, on the other hand, in our view shared in the field of payment systems, where the Eurosystem's task is “to promote the smooth operation of payment systems”, as well as in the field of financial stability, where the Eurosystem's task is “to contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system”. See also the view expressed by the ECB in H. K. Scheller, *The ECB, History, Role and Functions* (Frankfurt: ECB, 2004), p. 142.

16 Article I-12 (2) of the Constitution.

17 Article I-12 (5) of the Constitution.

The provisions of Article I-12 (3) must be read in conjunction with Article I-15 (1), which further describes the type of competence that the EU can exercise in the field of economic policy. Article I-15 (1), first indent, reads as follows: “The Member States shall coordinate their economic policies within the Union. To this end, the Council of Ministers shall adopt measures, in particular broad guidelines for these policies”. The wording closely reflects Article 99 (1) of the Treaty. It can be argued that it follows from the wording of Article I-15 (1) that the coordination of economic policy does not belong to “exclusive” or “shared” competences¹⁸, but solely consists of a coordinating role on the part of the EU. Moreover, Article I-15 (1) leaves no doubt as to the economic competence of the Member States. Hence, the coordination of economic policies should pertain to the third main competence of supporting, coordinating or complementary action.

However, Article I-14 (1) of the Constitution seems to invalidate this hypothesis by clearly stating that “the Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles I-13 and I-17”, i.e. exclusive competence and areas of supporting, coordinating or complementary action respectively. In addition, it can be derived from the wording of the second paragraph of Article I-14 that the list of “*principal areas*” of shared competence it contains is not exhaustive. Since the coordination of economic policies is not mentioned as an exclusive competence or among the areas of supporting, coordinating or complementary action, one could conclude that it belongs to the category of shared competence.¹⁹ During the work of the Convention, some members of the Working Group on Economic Governance considered that “in order to ensure economic growth, full employment and social cohesion, this should extend to bringing macro-economic policy within the shared competence of the Union and the Member States”. However, in its final Report to the Convention plenary, the Working Group recommended that “the current structure whereby exclusive competence for monetary policy within the Eurozone lies with the Community, exercised by the ECB under powers conferred upon it by the existing Treaty, and competence for economic policy with the Member States, should be maintained”.²⁰

We argue that the coordination of economic policies, given its specificity, forms a distinct category of the Union’s competence. This interpretation is supported by five key arguments.

First, a specific provision deals with the coordination of economic policies, not only in Article I-12, which lists the different categories of competence, but also in the following Articles that describe each of them. Indeed, Articles I-13 to I-17 repeat the same logical order as Article I-12: Article I-13 first deals with exclusive competence; Article I-14 then describes the areas of shared competence; next come the provisions of Article I-15 on the coordination of

¹⁸ These are listed in Articles I-13 and I-14 respectively.

¹⁹ See K. Lenaerts, “The Structure of the Union According to the Draft Constitution for Europe”, in J. W. de Zwaan et al. (eds), *The European Union: An Ongoing Process of Integration*, Liber Amicorum A. E. Kellermann (The Hague: T.M.C. Asser Institute, 2004), pp. 3-22 (20).

²⁰ Final Report of the Working Group on Economic Governance, CONV 357/02, 21 October 2002, p. 2.

economic policies; and finally Article I-17 deals with areas of supporting, coordinating or complementary action. Sources argue that this represents a deliberate choice by the Convention to underline the specific nature of the Union's competence in the coordination of economic policies.²¹

Second, when the Union shares a competence with the Member States, it may legislate and adopt legally binding acts in that area.²² In the coordination of economic policies, on the other hand, the Council adopts Broad Economic Policy Guidelines. The Broad Economic Policy Guidelines are adopted under the form of a Recommendation, which is not legally binding, unlike other instruments such as European laws or framework laws. Furthermore, Article I-12 (2) specifies that "the Member States shall exercise their competence to the extent that the Union has not exercised, or has ceased to exercise, its competence". Since the Union cannot adopt legally binding acts and the individual Member States retain their basic competence in economic policy, this cannot be a shared competence.²³

Third, Article I-15 does not merely entrust the EU with a competence, but notably provides that "the Member States shall coordinate their economic policies within the Union". Different wordings were used in the various drafts produced by the Convention. Initially, the emphasis was exclusively put on the Union's competence; a reference was then progressively reintroduced regarding the Member States' competence (compare Article I-11 (3) with Article I-14 (1), 2nd sentence of the "Draft Treaty establishing Constitution for Europe", submitted to the European Council on 20 June 2003). The IGC completed the shift of emphasis in favour of the Member States' competence.²⁴ As pointed out by P. J. G. Kapteyn, "care is taken to avoid anything that could be explained as conferring on the Union itself a competence to co-ordinate the economic and employment policies of the Member States. Obviously Member States were prepared to go to great length to protect themselves against encroachment of their powers in these fields".²⁵ The Union resembles a forum where coordination takes place but without the ability to play its own role. In this sense, the concept of coordination seems to be limited to the strict application of the rules foreseen in Articles III-179 and III-184.

Fourth, the power of the Council to adopt sanctions against individual Member States in the framework of the Excessive Deficit Procedure makes the

21 In his commentary on the Convention's work, "Vers une Constitution européenne", Etienne de Poncins clearly affirms that the competence remains within the realm of the Member States, which thus leaves absolutely no room for a shared competence between the Union and its Member States. He adds that the Union only coordinates the policies of the Member States, and that it is because of the importance of this coordination that the Convention deemed it necessary to mention it in a separate Article (see E. de Poncins, *Vers une Constitution européenne. Texte commenté du projet de traité constitutionnel établi par la Convention européenne* (Paris: Editions 10/18, 2003), p. 108).

22 Article I-12 of the Constitution.

23 Peter Norman writes that the coordination of economic policies was given its own article because of its political importance and because it did not involve legislation (see P. Norman, *The Accidental Constitution: The Story of the European Convention* (Brussels: EuroComment, 2003), p. 197).

24 See D. N. Triantafyllou, *La Constitution de l'Union européenne selon le Traité de Rome de 2004. Les choix clés de la Convention et de la Conférence intergouvernementale* (Brussels: Bruylant, 2005), p. 47.

25 P. J. G. Kapteyn, "EMU and Central Bank: Chances Missed", *European Constitutional Law Review*, I-2005, p. 125.

coordination of economic policies a specific competence. Not even in the areas of exclusive competence may the Council exercise such power. The only other instance where the Council has similar power is the suspension of voting rights in the case of a breach by a Member State of the values of the Union.

Fifth, the coordination of economic policies does not belong to the third category of competence either. In the areas of supporting, coordinating or complementary action, the Union may adopt legally binding acts when it chooses to act, although its actions do not supersede the competence of the Member States. By contrast, in the coordination of economic policies the Union does not have the power to adopt legally binding acts, nor the choice to exercise its competence.

Therefore, we consider that the coordination of economic policies neither belongs to the area of shared competence nor to the areas of supporting, coordinating or complementary action, but is instead a specific competence.²⁶ By confirming that the competence for economic policy remains national and by conferring to the Union only a very limited competence regarding the coordination of economic policies, the Constitution does clarify the allocation of power between the Union and its Member States.²⁷ However, it does not touch upon the existing imbalance between the two pillars of EMU, i.e. economic union and monetary union.²⁸ Except for some changes and improvements (see Chapters 3 and 4), one may argue that the structural weakness of EMU in terms of economic and budgetary policy remains fundamentally unchanged. This lack of political will towards further integration explains the difficulties encountered for instance in the implementation of the Stability and Growth Pact (SGP) or in the external representation of EMU. As we have seen, such structural weaknesses also have an impact on the instruments used (i.e. non-legally binding acts). This also considerably limits the possibility for the euro area to move towards an economic government even if Article I-15 (1), second indent, provides that “specific provisions shall apply to those Member States whose currency is the euro” (see section 4.1).

3 THE ECONOMIC GOVERNANCE OF THE EU

One basic feature of the Maastricht Treaty (and thereafter the EU Treaty) is that the provisions which relate to the coordination of economic policies apply to the whole Union. Except in very limited cases, the same rules apply to both euro area and non-euro area Member States. While maintaining this basic feature, the Convention and later the IGC discussed some changes with the aim of improving the economic governance of the EU.

²⁶ See Triantafyllou, *op. cit.*, pp. 47-49.

²⁷ The German Chancellor Gerhard Schröder published a scathing open letter in this respect: “The pact will work better if intervention by European institutions in the budgetary sovereignty of national parliaments is only permitted under very limited conditions. [...] In addition, more respect should be given to EU members’ primary competence over economic and fiscal policy [...]”, *Financial Times*, 17 January 2005.

²⁸ Kapteyn, *op. cit.*: “The asymmetry of the ways economic and monetary policy objectives are pursued under the EC Treaty has been retained in the Constitution” (p. 124).

3.1 THE ROLE OF THE COMMISSION

The Commission's role is somewhat strengthened both in the multilateral surveillance procedure of Article III-179 and in the Excessive Deficit Procedure of Article III-184.

First, in both procedures, the Commission's role as "guardian of the Treaty" or as "independent referee"²⁹ will be strengthened, as it will be able to address an early warning directly to the Member State concerned. For the moment, this possibility is reserved to the Council and limited to the preventive arm of the SGP.³⁰ Under Article III-179, the Commission will have the possibility to issue an early warning to a Member State when it has established that its economic policies are either not consistent with the Broad Economic Policy Guidelines, or risk jeopardising the proper functioning of Economic and Monetary Union. This will cover the case of a significant budgetary deviation, thereby avoiding the repetition of the January 2002 episode, when the Council decided not to issue an early warning to Germany and Portugal, contrary to the Commission's recommendation. When issuing its warning, the Commission will alert a Member State at an early stage, thereby allowing that Member State to take the necessary measures with the view to avoiding an excessive deficit situation. Under Article III-184, when the Commission considers that an excessive deficit in a Member State exists or may occur, it will now have "to address an opinion" to the Member State concerned. This opinion could also be considered as a warning, providing a Member State with the opportunity to take supplementary measures and show goodwill, which would thus weigh favourably on the Council's decision as to whether an excessive deficit actually exists. However, because this opinion will be issued just before the Council decision, it can also be regarded mainly as being merely informative (no notification procedure currently exists when the Commission considers a Member State to be in an excessive deficit situation).

Second, in the Excessive Deficit Procedure, Council decisions on the existence of an excessive deficit in a Member State will be based on a Commission proposal instead of a recommendation. Again, the right of initiative of the Commission will be reinforced, since the Council needs unanimity to deviate from a Commission proposal as opposed to qualified majority in the case of a recommendation. However, this represents the only case where the Constitution extends the use of Commission proposals as opposed to recommendations. The Commission had advocated for a more general use of proposals in the EMU chapter, particularly regarding the adoption of the Broad Economic Policy Guidelines and associated surveillance measures.

3.2 THE NEW VOTING RULES IN THE COUNCIL

To cope with an enlarged Union, the decision-making process within the Council had to be revised. Besides the new double majority rule, two other amendments

²⁹ European Commission, "EU Economic Review 2004", p. 261.

³⁰ In the event that the Council identifies that the budgetary position of a Member State has significantly diverged from its medium-term objective or the adjustment path towards it (see Council Regulation (EC) No 1466/97, Articles 6.2 and 10.2).

were introduced which are specific to EMU. The first and most important of these amendments consists in increasing the number of cases where only the euro area Member States take decisions (given its importance, this issue will be dealt with in a separate chapter). The second amendment consists in extending the list of cases where the Council can act without the vote of the Member State in question.

3.2.1 THE EXCLUSION OF THE MEMBER STATE IN QUESTION FROM THE VOTE

In the exercise of multilateral surveillance, the Council may address the necessary recommendation to a Member State when it has established that the economic policies of this Member State are not consistent with the Broad Economic Policy Guidelines or that they risk jeopardising the proper functioning of EMU. It shall act without taking into account the vote of the Member State concerned³¹, whereas “under the present rules, this Member State is judge and defendant at the same time”.³² It can be argued that “the change of practice introduced by the Constitution will help to strengthen the impartiality of multilateral surveillance. In doing so the Constitution moreover removes the existing bias in favour of large Member States, since under the current arrangements the latter can constitute a blocking minority more easily than the smaller countries because of their larger voting weight”.³³

In the Excessive Deficit Procedure, the same exclusion of the vote applies when the Council decides whether an excessive deficit exists.³⁴ Strangely enough, such a vote exclusion has not yet been applied to that decision, although it has already been applied to the other measures taken by the Council in the context of the Excessive Deficit Procedure.³⁵ The Constitution fills this gap.

As a result, the Constitution ensures that each time the economic or budgetary policy of a Member State is discussed, this Member State cannot take part in the vote. This constitutes an important achievement. As we shall see below, the exclusion mechanism also facilitates the decision-making process, “since the voting threshold will be lowered and will thus be easier to reach”.³⁶

The exclusion of a Member State from the vote is not specific to decisions related to economic policies. It also applies when suspending certain rights of the Member States that seriously breach or risk breaching the values of the Union, or if the Member State voluntarily withdraws from the Union.³⁷ However, this exclusion mechanism is not always exercised in EMU-related decisions concerning a particular Member State. For instance, a Member State with a derogation can take part in votes concerning decisions granting mutual assistance or authorising protective measures in case of difficulties or a crisis in its balance of payments.³⁸ To provide another example, a Member State with a derogation

31 Article III-179 (4), second indent, of the Constitution.

32 European Commission, “EU Economy Review 2004”, p. 261.

33 *Ibid.*, pp. 261-62.

34 See Article III-184 (6) of the Constitution.

35 See Article 104 (13) of the EC Treaty.

36 European Commission, “EU Economy Review 2004”, p. 262.

37 Articles I-59 and I-60 of the Constitution respectively.

38 See Articles III-201 and III-202 of the Constitution.

can participate in the decision to lift its derogation, as well as in the decision that irrevocably fixes the rate at which the euro is to be substituted for its currency.³⁹

3.2.2 THE NEW DOUBLE MAJORITY RULE

The voting modalities in the Council certainly constitute one of the longest debated institutional issues during the Convention and the IGC. The horse-trading concerning weighted voting in the negotiations of the Nice Treaty led to substantial criticism. Pressure was thus high on the members of the Convention and the IGC to come up with a more democratic and simple system. As a result, they proposed a system of double majority voting.

A. The final regime (after 1 November 2009)

Article I-25 (1) of the Constitution introduces the double majority voting system. A qualified majority shall require a minimum of 55% of the Member States, or a minimum of 15 of them, whichever is the greater, and together they must represent at least 65% of the EU population. A blocking minority requires more than 35% of the EU population and at least four Member States. However, according to Article I-25 (2), when the Council does not act on the basis of a Commission proposal, a qualified majority requires 72% of Member States, representing at least 65% of the EU's population.

Does this higher threshold of 72% of the Member States and 65% of the population apply within the context of economic policy?

The answer is yes in the following instances:

- The adoption of the Broad Economic Policy Guidelines (Article III-179 (2));
- The adoption by the Council, acting on the basis of an ECB recommendation, of complementary legislation defining the limits and conditions of certain powers of the ECB⁴⁰ (Articles III-187 (4) and III-190 (3));
- Mutual assistance and protective measures in case of difficulties or a crisis in the balance of payments in a Member State with a derogation (Articles 201 and 202 (3));
- Appointment of the members of the Executive Board of the ECB by the European Council on a recommendation from the Council (Article III-382(2)).

Conversely, the higher threshold does not apply when the Constitution establishes specific voting rules, either because the Member State concerned cannot take part in the vote, or because only euro area Member States may participate in the vote. This concerns:

- The multilateral surveillance procedure (Article III-179 (4));
- The Excessive Deficit Procedure (Article III-184 (6 and 7));
- Measures specific to the euro area (Articles III-194 (2) and III-197 (2 and 4));

³⁹ See Article III-198 (2 and 3) of the Constitution.

⁴⁰ However, the lower voting threshold will apply when the Council is acting on a proposal from the Commission. This therefore creates an uneven level playing-field between Commission proposals (which are easier to adopt) and ECB recommendations (which need a higher majority in the Council). This situation could have been corrected by applying the special voting rules in both cases.

- The external representation of the euro area (Article III-196 (3));
- The recommendation of the euro area Member States for the abrogation of a derogation (Article III-198 (2)).

In the latter cases, a qualified majority shall require 55% of the Member States representing at least 65% of the population of the Member States participating in the vote. A blocking minority shall include more than 35% of the population of the Member States participating in the vote, plus one other Member State.

By not applying the higher threshold in these cases, as normally required when the Council does not act on the basis of a Commission proposal, it can be argued that the Constitution mitigates to a certain extent the consequences of the limited role of the Commission in these areas.

B. The transitional period (until 1 November 2009)

The new voting rules, including the specific ones, will enter into force on 1 November 2009. Until then, Protocol No 34 on the transitional provisions relating to the institutions and bodies of the Union determines, among other aspects, the applicable voting rules within the Council. In actual fact, the Protocol merely upholds the current weighted voting rules. According to Article 2 (2) of the said Protocol, Acts of the European Council and of the Council requiring a qualified majority shall be adopted if there are at least 232 votes in favour out of a total of 321, and if they represent a majority of the Member States, when decisions are taken on the basis of a Commission's proposal. Otherwise, 232 votes and two-thirds of the Member States will be needed.⁴¹

C. Comparison between the weighted voting and double majority regimes

This section seeks to assess the impact of the two regimes on the decision-making process by comparing their main characteristics.

- The weighted voting rules are applicable until 31 October 2009:
In the EU25, a qualified majority requires 232 votes out of a total of 321 (i.e. 72%). Thus, 90 votes are required to constitute a blocking minority (i.e. the combined votes of at least three large Member States (29 votes each), plus one other Member State). In other words, four Member States are sufficient to block any decision.⁴²
- The double majority regime is applicable as from 1 November 2009⁴³:
In the EU25, a qualified majority shall require at least 55% or 72% of the Member States, representing at least 65% of the population of the Union. A blocking minority thus requires more than 35% of the population and at least

⁴¹ A member of the Council may request a check to ensure that the Member States comprising the qualified majority represent at least 62% of the total population of the Union. If that proves not to be the case, the act shall not be adopted (Article 2 (2), last indent, of the Protocol).

⁴² In some circumstances, three Member States are sufficient to block a decision. For instance, if either the United Kingdom or Poland (both with 29 votes) is excluded from a vote in one of the cases described above, the total number of votes will be reduced from 321 to 292. Therefore, only 210 votes are needed to attain a qualified majority. A blocking minority then requires at least 83 votes, i.e. the cumulated voting rights of three "big" Member States, which would comprise 87 votes combined.

⁴³ If at least three-quarters of the blocking minority (in terms of population or number of Member States) indicate their opposition to the Council adopting an act by a qualified majority, the Council shall discuss the issue and do everything in its power to reach a satisfactory solution to address the concerns raised by the minority.

four Member States (or more than 35% of the population of the Member States participating in the vote, plus one Member State in those cases where a Member State has been excluded from the vote, as explained above).

To conclude, the overall balance remains more or less the same under the double majority rule as under the present weighted voting regime as far as the EU25 is concerned. The impact of this reform on future decision-making processes in the euro area is commented on below (see section 4.3).

3.3 THE ROLE OF THE EUROPEAN PARLIAMENT

The Constitution brings only limited changes to the role of the European Parliament.

In the context of the Broad Economic Policy Guidelines, the Constitution holds that detailed rules for the multilateral surveillance procedure may be laid down in a European law (i.e. via the co-decision procedure), whereas they are to be adopted through the so-called cooperation procedure in the current Treaty.⁴⁴ The role of the European Parliament is hereby strengthened or, more precisely, will be strengthened if and when new rules are adopted for the multilateral surveillance procedure.⁴⁵

With regard to fiscal discipline, the Council may, in accordance with the cooperation procedure, adopt legal acts specifying the definitions for the application of the prohibitions relating to overdraft facilities with central banks (monetary financing prohibition), privileged access to financial institutions, and the so-called no-bailout rule.⁴⁶ On this basis, the Council has adopted two regulations.⁴⁷ However, these are not considered of a legislative nature, but rather of an implementing nature. Therefore, in accordance with the new hierarchy of norms introduced in the Constitution, Article III-183 (2) has opted for regulations or decisions (i.e. non-legislative and implementing acts) for the adoption of which the European Parliament does not play any role. By way of compensation, Article III-183 (2) states that the European Parliament will however be consulted. If this seems to constitute a downgrading of the European Parliament's role, it should be noted that the existing regulations are not expected to be amended in the foreseeable future.

Finally, there are two other amendments that increase the powers of the European Parliament. In Article III-187 (3), which lays down a specific amendment procedure for some provisions of the Statute of the European System of Central Banks and the European Central Bank ("the Statute"), the Constitution moves from a Council decision to a European law. Moreover, in Article III-191, which

44 Article 252 of the Treaty.

45 The agreement reached by the European Council on 22-23 March 2005 on the reform of the SGP will entail an adaptation of the rules for multilateral surveillance.

46 These prohibitions are laid down in Articles 101, 102 and 103 of the Treaty.

47 Council Regulation (EC) 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty, (OJ L 332, 31.12.1993, p. 1); Council Regulation (EC) 3604/93 of 13 December 1993 specifying definitions for the application of the prohibition of privileged access referred to in Article 104a of the Treaty (OJ L 332, 31.12.1993, p. 4).

allows the enactment of necessary measures for the use of the euro, the Constitution also opts for legislative acts instead of mere measures adopted by the Council.⁴⁸

3.4 THE STABILITY AND GROWTH PACT

The exclusion from the vote of the Member State concerned, together with the exclusion of the votes of those Member States with a derogation in case the budgetary position of a euro area Member State is discussed (see section 4.2), represent the only changes brought to the Excessive Deficit Procedure. On the substance, the Constitution leaves the current rules – the so-called corrective arm of the SGP – unchanged.

However, a “Declaration on Article III-184” is attached to the Constitution. This Declaration simultaneously:

- reaffirms the commitment to the provisions concerning the SGP as the framework for the coordination of budgetary policies in the Member States; underlines the importance of sound budgetary policy throughout the economic cycle; and confirms that a rule-based system is the best guarantee for commitments to be enforced and for all Member States to be treated equally;
- considers that the orientations of budgetary decisions should reflect the right priorities towards economic reforms, innovation, competitiveness and strengthening of private investment and consumption in periods of weak economic growth;
- states that the Member States will take all necessary measures to raise the growth potential of their economies.

It concludes however that “this Declaration does not prejudice the future debate on the Stability and Growth Pact”, a rather cautious conclusion. Thereafter, the European Council reached an agreement to reform the SGP on 22-23 March 2005 and invited the Commission to bring forward rapidly proposals to amend the Council Regulations.

4 THE ECONOMIC GOVERNANCE OF THE EURO AREA

As we have seen, the provisions relating to the coordination of economic policies apply, as a rule, to the whole Union. However, when the authors of the Maastricht Treaty drafted the provisions of EMU, they anticipated that not all EU Member States would adopt the single currency at the same time. Hence, they laid down transitional provisions according to which the Member States with a derogation would not be able to participate in votes to adopt certain measures or decisions to be taken by the Council in the field of EMU. Later, with the adoption of the euro, the ministers of economy and finance of the euro area Member States decided to gather informally to exchange views on their respective economic situations. This resulted in the creation of the so-called Euro Group.

⁴⁸ For more details in this regard, see sections 5.5 and 5.2 respectively.

In view of EU enlargement, it has become increasingly evident that the transitional period could be prolonged for many years and that the euro area Member States could not and would not indefinitely delay any further coordination of their economic policies. The ministers of the euro area have persistently requested more autonomy both in the Convention and later during the IGC.⁴⁹ The authors of the Constitution had to find a way to enable enhanced economic coordination among the euro area Member States without overly widening the gap between them and the Member States with a derogation.

The Constitution contains a number of provisions designed to achieve this delicate balance. Formally, it includes a new heading on “provisions specific to Member States whose currency is the euro”⁵⁰, and recognises the existence of the Euro Group through the inclusion of a special protocol. On the substance, it extends the number of cases where only the euro area Member States vote in the Council, and introduces a new provision which enables the euro area Member States to adopt specific measures in order to enhance their economic coordination.

4.1 MEASURES SPECIFIC TO THE EURO AREA MEMBER STATES

As mentioned above, Article III-194 of the Constitution introduces a new provision which enables the euro area Member States to adopt measures specific to them with regard to budgetary discipline and the Broad Economic Policy Guidelines.

4.1.1 IMPACT ON BUDGETARY PROVISIONS

Concerning budgetary discipline, Article III-194 (1) enables the euro area Member States to adopt measures “to strengthen the coordination and surveillance of their budgetary discipline”. Article III-194 (1) also stipulates that these measures are to be enacted “in accordance with the relevant procedure from among those referred to in Article III-179 and III-184, with the exception of the procedure set out in Article III-184(13)”. What then is the exact scope of this provision?

Article III-184 sets out the so-called Excessive Deficit Procedure, and refers in paragraph 13 to the Protocol on the Excessive Deficit Procedure, which contains further provisions relating to the implementation of this procedure. In addition, it states that a European law shall lay down the appropriate measures to replace the Protocol, and that the Council may also adopt European regulations or decisions laying down detailed rules and definitions for the application of the Protocol.

If, in accordance with Article III-194 (1), we except the procedures laid down in Article III-184 (13), the euro area may not:

⁴⁹ See de Pincins, *op. cit.*, pp. 300 and 310.

⁵⁰ This new heading comprises three Articles: Article III-194 on the measures specific to the euro area, Article III-195 on the Euro Group and, lastly, Article III-196 on the external representation of the euro area. All are commented on below.

- Adopt a European law replacing the Protocol and laying down further provisions applicable to the euro area Member States to implement the Excessive Deficit Procedure;
- Enact for the euro area Member States any European regulations or decisions laying down detailed rules and definitions for the application of the Protocol or of the above-mentioned European law.

In our view, because of the exclusion of Article III-184 (13), Article III-194 does not allow the euro area Member States to adopt any measures specific to the euro area that implement the Excessive Deficit Procedure or complement the European laws, regulations or decisions applicable to the whole Union in this field. This means that the content of the so-called corrective arm of the SGP should remain the same for both the euro area and the non-euro area Member States. Some euro area Member States were perhaps afraid by the possible consequences of a new (stricter) Excessive Deficit Procedure for the euro area. Another explanation could be that because of the serious consequences that the Excessive Deficit Procedure entails, non-euro area Member States should also agree to changes that would be applicable to them when they finally join the euro area.⁵¹

Instead, through Article III-194, the Constitution now offers a clear legal basis for a possible preventive arm of the SGP that is specific to the euro area.⁵² A European law based on Article III-179 (6) and III-194 could for instance define additional rules relating to the medium-term budgetary objective, the adjustment path to achieve it, and the content of the stability programmes applicable to the euro area Member States. The euro area could also develop new instruments, e.g. new statistics, qualitative data and other indicators.

4.1.2 THE BROAD ECONOMIC POLICY GUIDELINES

With regard to the economic policy guidelines, Article III-194 (1) allows the euro area Member States “to set out economic policy guidelines for them”. Two questions immediately arise: How can this provision be combined with the adoption of the Broad Economic Policy Guidelines for the whole EU? And does the new provision also allow the euro area to adopt individual Broad Economic Policy Guidelines for its Member States?

As far as the first question is concerned, Article III-194 (1) states that the Broad Economic Policy Guidelines specific to the euro area Member States ought to be “compatible with those adopted for the whole of the Union and are kept under surveillance”. Consistency is thus ensured. Furthermore, we expect that from

51 Jean-Victor Louis suggests another interpretation, according to which the authors’ intention was to forbid the euro area Member States to replace the Protocol by provisions specific to the euro area, while allowing them to adopt complementary or additional rules to Regulation 1467/97 on speeding up and clarifying the implementation of the Excessive Deficit Procedure (OJ L 209, 2.8.1997, pp. 6-11), in order to give effect to the reference made in Article III-194 to Article III-184. (see J. V. Louis, “The Stability and Growth Pact: Experiences and Future Aspects”, preliminary draft, Colloquium organised by ECSA Austria, Vienna, 10-11 March 2005). This means however that the wording of Article III-194 should be read as follows: “with the exception of the procedure set out in Article III-184(13) *alinea 1 and 2*”.

52 The procedure referred to should be the procedure laid down in Article III-179 (6), which enables the Council to adopt detailed rules for multilateral surveillance.

a political point of view, the Broad Economic Policy Guidelines of the euro area and its individual Member States will continue to form an integral part of the whole EU Broad Economic Policy Guidelines exercise.

With regard to the second question, it is worth recalling that, under Article 99 (2) of the present Treaty, the Council (i.e. the 25 Member States) adopts general Broad Economic Policy Guidelines for both the EU and the euro area, as well as individual Broad Economic Policy Guidelines for each Member State. In other words, the same legal basis is used for the adoption of the different parts of the Broad Economic Policy Guidelines. In the Constitution, the legal basis for the adoption of the Broad Economic Policy Guidelines is laid down in Article III-179 (2). However, the Constitution also provides in Article III-197 (2) (a) that the Member States with a derogation do not vote on the “adoption of the parts of the broad economic policy guidelines which concerns the euro area generally”. In other words, only the euro area Member States take part in the vote for the adoption of the *general* Broad Economic Policy Guidelines for the euro area. However, Article III-197 (2) (a) cannot serve as a legal basis for the adoption of the individual Broad Economic Policy Guidelines for the euro area Member States.⁵³ Therefore, it would seem logical to consider the provision of Article III-194 as the legal basis which allows the euro area Member States to adopt individual Broad Economic Policy Guidelines for each of them, without the Member States with a derogation participating in the vote.

As a result, where the adoption of the Broad Economic Policy Guidelines currently rests on a single legal basis (Article 99 (2) of the Treaty), the Constitution introduces a complex construction whereby the different parts of the Guidelines rest on three distinct legal bases:

- The general EU Broad Economic Policy Guidelines and the individual Broad Economic Policy Guidelines of the Member States with a derogation will be adopted by the Council with the vote of all Member States, on the basis of Article III-179 (2);
- The general euro area Broad Economic Policy Guidelines will be adopted by the Council without the vote of the Member States with a derogation, in accordance with Article III-197 (2) (a);
- The individual Broad Economic Policy Guidelines of the euro area Member States will be adopted by the Council with the vote of just the euro area Member States, on the basis of Article III-194.

The increase in the number of legal bases certainly creates complexity but can also be regarded as a necessary step to enhance the autonomy of the euro area. By doing so, the Constitution gives the euro area the possibility to set out its general and individual Broad Economic Policy Guidelines. However, these Guidelines will retain the status of a recommendation. As a consequence, their structural weakness (i.e. their non-binding nature) will remain not only for the EU but also for the euro area.

⁵³ Article III-197 (2) (a) refers to the “adoption of the parts of the broad economic policy guidelines which concern the euro area generally”.

4.2 CASES WHERE ONLY THE EURO AREA MEMBER STATES VOTE IN THE COUNCIL

As indicated above, the current Treaty contains some transitional provisions according to which a list of Articles do not apply to the Member States with a derogation. Article 122 (3) of the Treaty includes in this list the following provisions:

- Coercive means of remedying excessive deficits;
- Objectives and tasks of the ESCB;
- Issuance of the euro;
- Acts of the ECB;
- Monetary agreements and measures related to exchange rate policy as well as the external representation of the euro;
- Appointment of the members of the Executive Board of the ECB.

In addition, Article 122 (5) of the Treaty suspends the voting rights of the Member States with a derogation for the Council decisions referred to in these instances.

The Constitution extends the list of provisions which do not apply to Member States with a derogation and for which their vote is suspended. Article III-197 (2) and (4) adds new instances where only euro area Member States can decide, namely:

- Adoption of the parts of the Broad Economic Policy Guidelines concerning the euro area as a whole;
- Recommendations made to the euro area Member States in the framework of the multilateral surveillance procedure, including on stability programmes and early warnings;
- All measures relating to excessive deficits concerning euro area Member States.

For the sake of completeness, it should be mentioned that in both Article 123 of the Treaty and Article III-191 of the Constitution, the measures governing the use of the euro are adopted by the Council with just the votes of euro area Member States.⁵⁴ Furthermore, the same rule applies when the Council adopts the measures set out in the new heading on “provisions specific to Member States whose currency is the euro”.

By comparison with the current situation, the autonomy of the euro area is increased, since it will be able to take all decisions concerning its members, without the Member States with a derogation participating in the vote, in the framework of:

- The coordination of their economic policies, through the adoption of the euro area general and individual Broad Economic Policy Guidelines⁵⁵;
- The multilateral surveillance procedure of their national measures implementing the Broad Economic Policy Guidelines and of their individual stability programme;

⁵⁴ This provision is commented on below.

⁵⁵ With regard to the adoption of the individual Broad Economic Policy Guidelines of the euro area Member States, please refer to the above considerations on Article III-194.

- The Excessive Deficit Procedure (i.e. when the Council decides that an excessive deficit exists, addresses recommendations to the Member State concerned, gives notice to that Member State and when it adopts coercive means of remedying such an excessive deficit).

4.3 VOTING MODALITIES WHEN ONLY THE EURO AREA MEMBER STATES VOTE IN THE COUNCIL – TOWARDS A NEW EURO AREA ECOFIN COUNCIL CONFIGURATION?

In a Communication to the Convention⁵⁶, the Commission proposed to set up a formal decision-making body for the euro area. This body would be composed of euro area Member States only, and would act as the euro area ECOFIN Council. In other words, the proposal added a new Council configuration, restricted to euro area Member States, alongside the existing EU Council of Ministers of Economic Affairs and Finance (ECOFIN) Council. The new euro area ECOFIN Council configuration would take all decisions related to the euro area and its Member States. However, in its final report to the Convention plenary, the Working Group on Economic Governance was split over whether “decisions related exclusively to the Eurozone should be taken by the ECOFIN Council, bringing together the participating Member States only”.⁵⁷

The Convention and the IGC were confronted with a dilemma. On the one hand, they recognised the need for enhanced coordination within the euro area and therefore the need to increase the autonomy of the euro area. This has even become all the more necessary now that the euro area currently constitutes a minority of EU Member States (12 out of 25), whereas before the 2004 enlargement it constituted the majority (12 out of 15). On the other hand, bearing in mind that all EU Member States will in principle adopt the single currency, the authors of the Constitution did not want the euro area to become a sort of closed club. Therefore, they chose not to create a euro area ECOFIN Council. Instead, they decided that decisions will be taken by the ECOFIN Council in its full composition, but the voting rights of the non-euro area Member States shall be suspended when the Council adopts measures specific to the euro area or to its individual Member States.⁵⁸

As we have seen above, the voting modalities in the Council when only the euro area Member States take part in the vote can therefore be summarised as follows.

The voting modalities in the Council will differ before and as from 1 November 2009. For our calculations below, we will work on the basis of a euro area composed of 12 Member States.

Until 31 October 2009, the Council will decide on the basis of weighted voting. In a euro area composed of 12 Member States, a qualified majority requires 138

⁵⁶ Communication of the Commission, COM (2002) 247 final, 22 May 2002, p. 10.

⁵⁷ Final Report, op. cit., p. 8.

⁵⁸ This is illustrated in the transitional provisions contained in Article III-197 (2) and (4) or in Article III-194, which provides that the *Council* will act, but that “only members of the Council representing Member States whose currency is the euro shall take part in the vote”.

votes out of a total of 191 (i.e. 72%⁵⁹). Thus, 54 votes are necessary to constitute a blocking minority. In other words, just two large Member States are sufficient to block a decision.⁶⁰

From 1 November 2009 onwards, however, the double majority regime will apply. In a euro area comprising 12 Member States, a qualified majority shall require at least 55% of the participating Member States, representing together at least 65% of the population of those Member States. A blocking minority must include Member States representing more than 35% of the population of the participating Member States, plus one other Member State. Taking into account the respective share of the Member States in the population of the euro area, we come to the conclusion that at least three Member States will be needed to block a decision.⁶¹ This new regime should therefore facilitate the decision-making process as it will be slightly harder to block a decision (i.e. requiring three Member States instead of two).

Decisions relating to the euro area and its Member States are taken by the Council without the Member States with a derogation participating in the vote, but not in their absence. Hence, those Member States can take part in the deliberations, which does not facilitate enhanced coordination among euro area Member States.⁶² The authors of the Constitution were well aware of the fact that enhanced coordination among euro area Member States needed an appropriate forum in which not all Council members are present. Therefore, they decided to formalise the role of the Euro Group, which was originally set up as an informal body where euro area Member States could openly discuss questions of common interest but were not able to take formal decisions.

4.4 MAKING THE EURO GROUP AN OFFICIAL ENTITY

Article III-195 of the Constitution declares that the “arrangements for meetings between ministers of those Member States whose currency is the euro are laid down by the Protocol on the Euro Group”.

Protocol No 12 on the Euro Group is rather brief. It contains two Articles which lay down rules of a procedural nature. According to Article 1, the ministers of the euro area will be able to meet informally to discuss questions related to the specific responsibilities they share with regard to the single currency. The Commission shall take part in the meetings, and the ECB shall be invited. The meetings will be prepared by the representatives of the ministers of finance and

⁵⁹ See Article 2 (4) of Protocol No 34.

⁶⁰ Or 72% of the votes of the other Member States when the Member State concerned does not take part in the vote, for instance when the Council decides on the existence of an excessive deficit. In such a case, the threshold to form a blocking minority will also be different.

⁶¹ Or, again, of the other Member States when the Member State concerned does not take part in the vote. However, according to our calculations, the threshold to form a blocking minority (at least 35% of the population of the Member States participating in the vote plus one member) remains the same, i.e. at least three Member States are needed.

⁶² In this respect, a parallel can be drawn with the conditions relating to the functioning of the enhanced cooperation (see Article III-416 et seq. of the Constitution). For an analysis of the working conditions of the enhanced cooperation, see D. Servais, P. Vigneron and R. Ruggeri, “Le Traité de Nice. Son impact sur l’Union économique et monétaire”, *Euredia*, 4 (2000), pp. 477-509.

the Commission.⁶³ Article 2 adds that the ministers shall elect their president for two and a half years.

On the substance, the Recitals of the Protocol contain some interesting considerations. The High Contracting Parties declare their desire to promote growth in the EU and, to that end, to develop an ever-closer coordination of economic policies (which includes both the Broad Economic Policy Guidelines and fiscal discipline) within the euro area. They also affirm that they are “conscious of the need to lay down special provisions for enhanced dialogue between the Member States whose currency is the euro, pending the euro becoming the currency of all Member States of the Union”. The objectives of the Euro Group are thus clearly stated: close coordination and enhanced dialogue. In addition, the Recitals also make it clear that the Euro Group is of a temporary nature and will only exist until all Member States have adopted the euro.

What is the exact nature of the Euro Group? Article III-195 refers to arrangements and meetings among ministers. In addition, the first Article of the Protocol expressly stresses the informal nature of the Euro Group, which may only *discuss* issues of common interest but does not take decisions, except to elect its president.

In conclusion, the Protocol gives a legal basis to an existing body, which has become the place where the euro area Member States can discuss issues that are then (only) formally decided upon in the Council. As an increased number of decisions will be decided with the votes of just the euro area Member States, the role of the Euro Group should continue to increase. Moreover, the two and a half year presidency introduced by the Constitution is a novelty. These elements will certainly help assert the identity, the role and the economic governance of the euro area, although much will depend on the personality of the president and on the willingness of the euro area Member States to explore the ways that the Constitution offers them.

5 OTHER RELEVANT ASPECTS OF EMU

In Chapters 3 and 4, we examined the economic governance of the Union and the euro area, in particular regarding the budgetary rules and the coordination of economic policies. We also mentioned the new voting rules within the Council, when deciding in a Union or a euro area format. These rules also apply to other provisions which were discussed in the IGC, some of which were regarded as particularly sensitive by the Member States. In this last chapter we will comment on the external representation, the measures governing the use of the euro, entry into EMU, withdrawal from the Union and the revision procedures.

⁶³ This is the role of the Euro Group Working group, which is a special configuration of the Economic and Financial Committee (EFC).

5.1 COMMON POSITIONS AND UNIFIED REPRESENTATION WITHIN INTERNATIONAL FINANCIAL INSTITUTIONS

The provisions of the Treaty with regard to the position of the Community and its external representation for issues relevant to EMU have never been implemented. Instead, in 1998, the European Council of Vienna agreed on an informal arrangement with regard to the external representation of the Community in International Monetary Fund (IMF) and G7 meetings, and urged the institutions to come up with common positions on issues which are of particular importance to EMU.⁶⁴ This agreement has not been fully applied.⁶⁵ Lastly, the Treaty of Nice modified the voting requirement in the Council to decide on the external representation of EMU from unanimity to qualified majority voting.⁶⁶ However, the Council has not yet adopted such a decision. Therefore, it is no wonder that, in its final report to the Convention plenary, the Working Group on Economic Governance called for improved euro area representation in international organisations. Unfortunately, the group could not agree on the means to achieve this goal. While some group members favoured better coordination, others considered that the President of the Euro Group should have a stronger role. Finally, some members held the view that the Commission should represent the euro area, as it represents the EU in trade policy.⁶⁷

Under the current Article 111 (4) of the Treaty, the Council shall decide on the position of the Community at international level with regard to issues of particular relevance to EMU and on its representation. The Council acts by a qualified majority, on a proposal from the Commission and after consulting the ECB. When adopting its decision, the Council shall comply with the allocation of powers between economic policy and monetary policy, i.e. pay due respect to the powers of the ECB in monetary matters. According to Article 122 (3) to (5), the voting rights of the Member States with a derogation shall be suspended, among others, for the decision referred to in Article 111 (4). In other words, Council decisions relating to the position of the Community and its representation at the international level with respect to EMU are adopted by the euro area Member States.

Article III-196 (1) of the Constitution deals with the “euro’s place in the international monetary system” and “common positions on matters of particular interest for the EMU within the competent financial institutions and conferences”. The second paragraph of Article III-196 provides that the Council “may adopt appropriate measures to ensure unified representation within the international financial institutions and conferences”. These provisions clearly refer to the definition of the euro area’s position and representation in the IMF and G7/G8 meetings. The responsibility to establish common positions and to adopt measures ensuring a unified representation belongs to the Council, acting on a proposal from the Commission and after consulting the ECB. The third

64 Conclusions of the Presidency, European Council of Vienna, 11 and 12 December 1998, points 14 and 15.

65 European Commission, “EU Economy Review 2004”, p. 263.

66 See Servais, Vigneron and Ruggeri, *op. cit.*, pp. 481-83.

67 Final Report of the Working Group on Economic Governance, *op. cit.*, p. 8.

paragraph expressly states that decisions taken under the first or the second paragraph will be adopted by those Member States whose currency is the euro, and according to a qualified majority.

It should also be noted that neither Article 111 (4) nor Article III-196 involves the European Parliament in the decision-making process.

In conclusion, be it on the substance or on the procedure, the two provisions are very similar.⁶⁸ However, a few differences should be noted:

- First, whereas the Council “shall adopt” a decision establishing common positions under the first paragraph of Article III-196, the second paragraph merely provides that the Council “may adopt” appropriate measures to ensure unified representation. When the Council has an obligation to act in the first case, it does not have such an obligation in the second. Article 111 (4) does not make such a distinction. In both cases, the latter provides that the Council “shall decide” and is therefore under an obligation to do so.
- Second, unlike Article 111 (4), Article III-196 does not refer to the allocation of powers between the Council and the ECB with regard to economic and monetary matters. Moreover, Article III-196 (1) seems to give the Council a mandate “to secure the euro’s place in the international monetary system”, possibly adding to the confusion. However, the duty to consult the ECB is maintained in Article III-196 (1) and (2). Conflicts of competence should therefore be avoided. In any case, the Council has to respect the exclusive competence of the Eurosystem in the field of monetary policy.
- Third, another difference is to be found in the form of representation of the euro area. Whereas Article 111 (4) does not specify how this representation should be organised, Article III-196 (2) expressly refers to a “unified” representation. Despite this new wording, a change in the present situation seems unlikely as the Member States are still reluctant to abandon their seat to a Union representative.⁶⁹

5.2 MEASURES GOVERNING THE USE OF THE EURO

Article 123 (4), third sentence of the Treaty has often been compared to Article 308 (ex 235): a sort of implied powers clause for the euro area.⁷⁰ It allows the Council, acting by a qualified majority⁷¹ of the Member States without a

68 This also holds true for the other provisions of Article 111 which are taken over in Article III-326 of the Constitution.

69 One could argue that the legal personality given to the Union under Article I-7 of the Constitution could allow it to become a member of international organisations and make it easier for the EU to speak with one voice in these fora. However, membership of international organisations and conferences usually pertains to the realm of Member States. Other constraints also have to be taken into account. First, the asymmetry of competence between the Member States and the ECB with regard to economic and monetary matters is unchanged. Second, not all EU Member States have adopted the euro as their single currency. Thus, the representation of the Union would still be divided between the euro area and the other EU Member States. Third, it might be difficult for third parties to accept these internal EU arrangements.

70 However, Article 123 (4) of the Treaty does not apply to Member States with a derogation. Thus the Council has to adopt a special legal act based on Article 308 of the Treaty each time it deems it necessary to extend the effects of the measures adopted on the basis of Article 123 (4) to the Member States with a derogation.

71 Until the Treaty of Nice, the unanimity of the Member States without a derogation was required. In this respect and more generally concerning the changes brought by the Treaty of Nice to the functioning of EMU, see Servais, Vigneron and Ruggeri, *op. cit.*, p. 483.

derogation, on a proposal from the Commission and after consulting the ECB, to “take the other measures necessary for the rapid introduction of the ECU as the single currency of those Member States”.

Article III-191 of the Constitution introduces some changes in this provision.⁷² On the substance, the scope of the provision has been widened. It allows measures to be taken that are necessary for the use of the euro in a broad sense rather than just those measures necessary for its rapid introduction, as this was considered too narrow a drafting. For instance, the Council Regulation on the fight against counterfeiting was adopted on the basis of Article 123 (4).⁷³ No one would argue that measures to protect the single currency are unnecessary, but equally no one would say that they are linked to its rapid introduction either. The letter of Article III-191 will thus better match its spirit and the reality. On the procedure, Article III-191 expressly refers to European laws or framework laws (which are legislative acts, based on a Commission proposal and adopted according to the so-called co-decision procedure, whereby the Council and the European Parliament are on an equal footing). Under the current procedure, the European Parliament, though not mandatorily involved, is usually consulted.⁷⁴ Although many measures have already been adopted, there might still be room for using the new provision, which clearly reinforces the role of the European Parliament. The new wording also provides that the measures to be adopted may not prejudice the powers of the ECB and, as is now the case, that the latter has to be consulted. As one of the merits of consulting the ECB is precisely to avoid any interference with its powers, we do not think that the provision of Article III-191 adds anything new in this respect. Finally, as mentioned above, Article III-191 is listed in Article III-197 (2) as one of the cases where only the euro area Member States can take part in the vote.⁷⁵

5.3 ENTRY INTO THE MONETARY UNION

To join the Monetary Union, a Member State must fulfil the convergence criteria. The question of who should decide on whether these criteria have been fulfilled gave rise to long discussions while the Maastricht Treaty was being negotiated. The main conclusion was that one should avoid establishing a “club” whereby the euro area Member States would co-opt new members. Therefore, according to the Treaty, if the necessary conditions are met⁷⁶, the Council, acting by a qualified majority on a proposal from the Commission, shall abrogate the derogation of the Member State concerned.⁷⁷ Then the Council shall, acting this

72 Article III-191 reads: “Without prejudice to the powers of the European Central Bank, European laws or framework laws shall lay down the measures necessary for use of the euro as the single currency. Such laws or framework laws shall be adopted after consultation of the European Central Bank”.

73 Council Regulation (EC) No 1338/2001 of 28 June 2001, which lays down measures necessary for the protection of the euro against counterfeiting, OJ L 181, 4.7.2001, p. 6.

74 For instance, the European Parliament has been consulted on Council Regulation 974/98 on the introduction of the euro, or on Council Regulation 1338/2001, which lays down measures necessary to protect the euro against counterfeiting.

75 This is also the case under Article 123 (4) of the Treaty.

76 The fulfilment of the criteria is first discussed in the Council meeting in the composition of Heads of State or Government, on the basis of reports from the Commission and the ECB and after consulting the European Parliament.

77 Article 122 (2) of the Treaty.

time “with the unanimity of the euro area Member States and the Member State concerned”, upon a proposal from the Commission and after consulting the ECB, adopt the conversion rate at which the euro shall be substituted for the currency of the Member State concerned, and then take the other measures necessary for the introduction of the euro in that Member State.⁷⁸

The Constitution introduces an additional step in this procedure. According to Article III-198 (2), second indent, besides the above-mentioned elements, the Council shall act only after “having received a recommendation of a qualified majority of those among its members representing Member States whose currency is the euro”. It is further specified that “these members shall act within six months of the Council receiving the Commission’s proposal”. On the other hand, with regard to the fixing of the conversion rate, the procedure remains unchanged.

This additional step aimed to give euro area Member States greater say on the entry of new Member States into the euro area. Since the 2004 enlargement, the majority of EU Member States are not members of the euro area. Hence, the euro area Member States feared that the majority would be able to force through the entry of a Member State which does not fulfil the criteria by making the entry of another Member State that fulfils the criteria conditional upon the entry of the one that does not. If there is definitely merit in increasing the role of the euro area in the process, one may wonder whether adding a new step in an already long and complex procedure was the best way of achieving this objective. Besides, from a legal perspective, a “euro area recommendation” does not offer the euro area Member States watertight protection: without such a recommendation the Council may not act, but it does remain free to choose not to follow it. To achieve the pursued objective, another solution could have been to require that the final Council decision be taken by a qualified majority of the euro area Member States as well as of the whole EU.

5.4 WITHDRAWAL FROM THE UNION

Voluntary withdrawal from the Union is quite a novelty.⁷⁹ Indeed, the European integration process has often been considered as irreversible – or at the least, the adoption of the euro is, as Jean-Victor Louis recalls in his contribution to this volume.

Although the new provision does not explicitly deal with the possible withdrawal of a euro area Member State from the EU, it goes without saying that the ECB should be formally consulted in such a case for matters falling within its field of competence. Nor does it deal with the case of a euro area Member State that wants to recover its monetary sovereignty while still remaining a member of the EU.

⁷⁸ Article 123 (5) of the Treaty.

⁷⁹ See Article I-60 of the Constitution.

5.5 SIMPLIFIED REVISION PROCEDURES

The Convention and later the IGC aimed at making future amendments to the Constitution and to the annexed protocols easier by introducing simplified amendment procedures besides the ordinary revision procedure.

However, such flexibility is not completely new. Back in 1992, a specific procedure was introduced in the EMU Chapter of the Treaty. Article 107 (5) of the Treaty allows parts of the Statute to be revised according to a simplified procedure⁸⁰, under which the Council may act “either by qualified majority on a recommendation from the ECB and after consulting the Commission or unanimously on a proposal from the Commission and after consulting the ECB. In either case, the assent of the European Parliament shall be required”. This provision is however only applicable to some provisions of a very technical nature. The Constitution takes over this specific procedure in Article III-187 (3), and moves it to the legislative procedure. The Statute may therefore be amended by a European law, which means that the European Parliament will co-decide with the Council. It should be noted that the ECB’s right of initiative is nevertheless preserved.⁸¹

The Constitution introduces two further simplified revision procedures. As a result, EMU provisions can be subject to four different revision procedures:

- a) The above-mentioned specific procedure, which is applicable to the revision of some parts of the Statute.
- b) A simplified revision procedure with regard to Part III of the Constitution, which may allow to move from unanimity to qualified majority voting in the Council, as well as from a special legislative procedure to an ordinary legislative procedure (i.e. the so-called co-decision procedure).⁸² This procedure could apply to two EMU provisions:
 - In Article III-184 (13), where the Council may adopt a European law acting unanimously on a Commission proposal and after consulting the European Parliament to adopt measures relating to the implementation of the Excessive Deficit Procedure.
 - In Article III-185 (6), where the Council may, acting unanimously and after consulting the European Parliament and the ECB, adopt a European law conferring specific tasks upon the ECB regarding the prudential supervision of credit institutions and other financial institutions.⁸³

Such changes require a European Decision adopted by unanimity by the European Council after obtaining the consent of the European Parliament, and in the absence of any opposition notified by a national Parliament.

⁸⁰ Article 107 (5) of the Treaty and Article 41 of the Statute.

⁸¹ In this case, however, the qualified majority requirement will be higher than in the case of a Commission proposal (see section 3.2 on the new double majority rule).

⁸² For more details concerning this procedure, see Article IV-444 of the Constitution.

⁸³ It is worth noting that a move from unanimity to qualified majority in the Council was proposed in Nice and during the last IGC. However, the Member States could not reach agreement on this proposal.

c) A simplified revision procedure, which opens the door for revising all or part of the provisions of Title III of Part III on the internal policies and action of the Union (including Chapter II on economic and monetary policy).⁸⁴ The Member States, as well as the European Parliament and the Commission, all have a right of initiative to submit a proposal for revision to the European Council. After consulting the European Parliament, the Commission and the ECB in case of institutional changes in the monetary area, the European Council shall decide by unanimity. This decision, which may not increase the competences of the Union, shall then be ratified by all the Member States before it comes into force.⁸⁵

Such a revision procedure could have a significant impact on the EMU provisions as it allows all provisions of Chapter II to be amended. This includes the procedure for coordinating economic policies, the fiscal rules (i.e. the Excessive Deficit Procedure), and the tasks and organisation of the ESCB and the ECB. It even allows the specific procedure applicable to the revision of some parts of the Statute to be amended. As an illustration, Professor Jean-Victor Louis recalls in his contribution a failed attempt to extend the list of provisions contained in Article III-187 (3) to Articles 10 to 12 of the Statute (this attempt aimed at modifying the composition, the functioning and the respective responsibilities of the Governing Council and the Executive Board), and mentions the strong opposition of the Eurosystem in this respect.⁸⁶ Now, the simplified revision procedure of Article IV-445 would precisely allow such an extension of the list of provisions referred to in Article III-187 (3). It should also be recalled that the Eurosystem advocated a reference to price stability in Part I of the Constitution in order to protect its primary objective from a hasty revision under the procedure of Article IV-445.⁸⁷

d) The ordinary revision procedure will apply to the amendments to Part I (and II) of the Constitution and to the annexed protocols. As regards EMU, it means in particular the objectives of the Union, the euro as a symbol of the Union, the categories of competence, the establishment of the ECB/ESCB/Eurosystem as well as the protocols regarding the Statute, the Excessive Deficit Procedure, the convergence criteria, the Euro Group and the specific position of the UK and Denmark. The procedure can be initiated by any Member State, the European Parliament or the Commission, but the ECB does not have such a right. The procedure includes the convening of a Convention, prior to the IGC, unless the

84 See Article IV-445 of the Constitution.

85 For more details, see Article IV-445 of the Constitution.

86 Under the present governance structure, monetary policy decisions are taken by the Governing Council of the ECB, which is composed of the governors of the national central banks (NCBs) of the euro area and the six members of the Executive Board of the ECB. For the sake of efficiency, some observers consider that monetary policy decisions should instead be taken by a restricted Monetary Policy Committee. Based on our participation in the Maastricht Treaty negotiations, we would like to note that this suggestion would run against one of the basic principles of the Maastricht Treaty negotiations on EMU, i.e. that Member States abandon their monetary sovereignty under the condition that they will continue to participate in the monetary policy decision-making process. To reconcile this requirement with the need for independence of the monetary authority, it was decided that, on the one hand, the governors of the NCBs would participate in the Governing Council but would not receive or seek instructions and, on the other, that each member of the Governing Council would receive the same voting power except when acting in his/her capacity as a shareholder of the ECB (with a weighted vote according to the share of his/her respective NCB in the capital of the ECB). This compromise could explain why the concept of participation "in a personal capacity" is only implicit in the Treaty.

87 See section 1.1 of this paper.

European Council does not consider this to be justified by the extent of the proposed amendments.

CONCLUSION

In a very synthetic way, the impact of the Constitution on EMU can be summarised as follows:

- Looking at the substantive provisions that will apply when the Constitution enters into force, no real progress has been achieved towards enhanced coordination of economic policies: the structural weakness of the economic pillar of EMU remains, since, as a rule, it only relies on non-binding instruments (e.g. Broad Economic Policy Guidelines). Generally, the core provisions still do not make any distinction between euro area and non-euro area Member States. On the positive side, there are some minor achievements to note (including the reference to the euro and more leeway to adopt measures necessary for the use of the euro as the single currency).
- Progress has been made on economic governance: as an independent referee, the Commission may address an early warning to a Member State, especially in the case of a significant budgetary deviation; a Member State will no longer vote on decisions regarding its economic and budgetary policies; the autonomy of the euro area is increased, since in the field of economic and budgetary policies it will now be able to take all decisions regarding its members without the Member States with a derogation participating in the vote; and the euro area Member States will also have a greater say regarding entry into EMU, at least from a political point of view. However, the new voting rules will not facilitate the decision-making process, and indeed the large Member States will even see their position strengthened further.
- Some doors are still open: the Constitution allows the euro area Member States to strengthen multilateral surveillance in the euro area, including the preventive arm of the SGP. The revision procedures are more complex, but at the same time make it possible to change rules, including important ones, without convening an IGC.

This result can be explained by the need to maintain a delicate balance between conflicting desires:

- The authors of the Constitution had to find a way to reconcile, on the one hand, the request of the euro area Member States for enhanced economic coordination among themselves and for greater autonomy, with, on the other, the interests of non-euro area Member States, which were particularly opposed to any weakening of the role of the ECOFIN Council.
- The euro area Member States had to reconcile their aspiration for more symmetry between the economic and the monetary pillars of EMU and their concern about losing autonomy in the conduct of their economic and budgetary policies. As mentioned above, Member States were particularly keen to avoid anything that could be seen as conferring on the Union itself a competence to coordinate the economic policies of the Member States. This also explains why no progress has so far been reached in the field of external representation.

To sum up, the Constitution does not introduce any important changes with regard to the EMU provisions, nor does it create any new instruments. The real added value is that the Constitution opens the door for an improved economic and budgetary policy in the euro area, combined with reinforced multilateral surveillance. As the autonomy of the euro area is increased for all decisions that concern its members, euro area governance should in turn gain in consistency. The rest depends on political will.