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For the Constitution of the European Union

Convergences, Divergences, Possible Paths (and a Few Proposals)

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GUIDE TO THE READING

The present document is not meant as an addition to the projects for the European Constitution submitted thus far to the Convention. It is meant rather to offer a reasoned assessment of the proposals advanced, highlighting sufficiently consolidated points of convergence as well as the problem knots that still remain to be undone on the basic lines of the reform of European Treaties. For each problem we have tried to emphasise advantages and inconveniences of the main solutions proposed.

On some points, unexplored so far, the text offers further proposals that intend to enhance the current debate in the political world and in the European scientific community at a stage when the discussion is still open and all further deepening may help build up a Constitution for the citizens of Europe.

PART I
Missions and objectives of the Union

SUMMARY: 1. Missions of the Union. 2. Granting a single legal personality to the Union. 3. The Charter of Fundamental Rights and the modalities to insert it in the Constitution. 4. The constitutionalisation of principles regarding fiscal issues.

1 - Missions of the Union

We Europeans are united by deep relations, because ours is the memory of various national, cultural and religious identities joined in a common identity by the mutual respect boosted by a sense of freedom and justice. We have grown up side by side among harsh conflicts, exchanges of various natures and mutual learning. During the last century the European people saw the outbreak of two world wars from which they arose aware that only peace and the respect for human dignity could have assured a future. This is the basis, the strength and the hope of that great and original construction that the European Union is today.

We Europeans are united by deep relations …

After two World Wars a Union based on common values:

The Union contributed decisively to the upkeep of peace in the continent, to the development of civilisation and democracy, to the economic wealth in a space that was first common and then unique. For each of these values it now has to face ambitious **missions** that the extension from fifteen to twenty-five Member States will have to make more distant and yet more achievable.

For the Union of the XXI century the mission of **peace** can and must develop to the point of accepting the challenge of a European contribution to international stability and security. For the universal importance of the values on which it is based, for its economic and commercial weight, for the political role it is being acknowledged, the Union will have to act as a world **stability and security factor** and will have to offer an effective support to the **management** of the difficult **globalisation** processes under way.

…peace

The spreading of civil values can and must be another crucial mission of the Union: it must be developed by safeguarding and promoting human rights and liberties and by an institutional system apt to eliminate the citizens' suspicion of a bureaucratic and centralising Europe, apt to guarantee transparency, certainties and responsibilities regarding the competences of the Union and its Member States as well as of the single powers of the Union.

…human rights and democracy

The target of a **sustainable economic growth** forms the features of an equally essential mission. It can and must be articulated in the aims of a productive growth, of full employment, of a high social protection within a competitive market social economy, innovative and dynamic. The Union must thus propose to guarantee equality between men and women and the growth of opportunities for the young in accessing the employment market, a

… sustainable economic growth

high degree of environmental protection, the respect for the rights of future generations. In these conditions jointly with the solidarity among people, Member States, European cities and regions will be able to actually strengthen the economic and social cohesion throughout Europe.

2 - Granting the Union a legal personality

To be able to carry out the Union's missions, a preliminary demand to be satisfied is the attribution of a **legal personality** to the Union. The fact that the Union is at present lacking such a status determines hardly understandable differences. Therefore, while European negotiations are being concluded by the Community (and signed, on behalf of Europe, exclusively by the Commission and by the Presidency in charge), the agreements that involve the competences of Member States are concluded by the Community and by its Member States (and signed by the respective competent authorities).

A single legal personality to the Union: its positive effects

The present situation – as assessed by the European Convention Working Group – is "found to be ambiguous in a number of ways and likely to undermine affirmation of the Union's identity at international level and legal certainty, both of which are essential in international relations with third States and international organisations".

Granting a single legal personality, in establishing a certainty factor, implies **overcoming the Union's current "pillar" structure.** This obviously does not exclude the possibility of preserving, for specific subjects or sectors, different decisional procedures. It would moreover have a strategic function both for reasons of coherence and internal cohesion and to guarantee the Union a visible identity in international organisations and in the eyes of Third States.

Overcoming the present "pillar" structure

Granting a single legal personality to the Union **will not however jeopardise the distribution of external competences with Member States**, and thus a "mixed agreement" that regards Member States as well, will remain such even if concluded by the Union rather than by the Community. To this end too we believe it necessary to explicit the following in the text of the Constitution: that not only does the Union respect the identity, the juridical system and the organisation of Member States, but acknowledges their legal personality of international law; that the Union replaces by right the Community in all its juridical relations; that the final agreements with the Community are binding except otherwise stated by Third States.

The legal personality of Member States remain in place

… and the Union replaces by right the Community

3 - The Charter of Fundamental Rights and the modalities for inserting it in the Constitution

Another preliminary condition to allow the Union to carry out its missions and, at the same time, define its constitutional profile, is the definition of the **fundamental rights of citizens,**

which seems an essential tool.

The Nice Charter of Fundamental Rights

No one doubts that the Charter proclaimed by the Nice Intergovernmental Conference must acknowledge such rights. What was instead debated inside and outside the Convention was the way the Chart could be inserted in the text of the Constitution.

In this respect, **four different solutions** were advanced:

- the mere reference to the Charter in the Preamble;
- the insertion of the Charter among the sources (European Convention for the Protection of Human Rights and Fundamental Freedoms and common constitutional traditions) guaranteeing the fundamental rights in the Union on the basis of the present formulation of article 6 TEU;
- the insertion of the Charter in a Protocol annexed to the Treaty;
- the textual incorporation of the Charter in the Constitution.

There were two conflicting political positions over the choice. Whereas in the continent it was and is quite natural to assign dispositions regarding fundamental rights the same value as that regarding the organisational part of the Constitution, in the United Kingdom it is feared that European judges would thus be invested with a power of interpretation apt to erode the competences of Member States to the advantage of the Union.

The conflict was greatly reduced following the adoption of proposals to amend articles 51 and 52 of the Chart contained in the conclusions of the II Working Group at the Convention, chaired by Antonio Vitorino. **In adapting the "horizontal clauses" of the Charter to the approval of the new Constitution,** the amendments of the Working Group make it clear, among other things, that the Charter "does not extend the scope of application of Union law beyond the powers of the Union…or modify powers and tasks defined by the other Chapters of the Constitutional Treaty". This should produce a double effect: on the one hand, reassure the British and, on the other hand, open the way (considering that we are talking of "*other* chapters") for the insertion of the Charter in the constitutional text or as an annex to the text itself.

In a second group of amendments, proposed by the II Working Group, the fundamental rights acknowledged by the Charter, to be interpreted in harmony with the constitutional traditions common to the Member States, are differentiated from the dispositions of the Charter containing principles that may be invoked before the judges only as regards the interpretation and the control of legality of legislative and administrative acts enforcing such principles. Though the aim of the provision is similar to the previous one, the effects are different and appear more debatable. The distinction between rights and principles recalls the distinction between the classical rights of freedom and social rights. This however is not the case of the Charter, which

indeed refers to the principle of **non-divisibility of the rights** acknowledged, nor could there be sufficient juridical bases in the intentions of the people who drafted it, as may be understood by the explicatory notes to the works of the I Convention. Moreover, nowadays all rigid distinctions between rights of freedom and social rights and, above all, the thesis of a purely programmatic efficacy of constitutional laws have long been abandoned in the constitutional experiences of the majority of the States of the Union.

The incorporation of the Charter into the Constitution as preferable solution

The conclusions of the II Working Group on the rest may easily be shared, for they prove that the insertion of the Charter of Fundamental Rights in the constitutional text or in an annexed Protocol is a solution that may be actually followed as it respects the specificity of national laws.

In addition, the choice of **incorporating the text of the Charter in the text of the Constitution**, besides being the only one apt to guarantee dispositions on rights the same importance as those regarding the organisational part, appears to meet more than other choices, the need for democracy and transparency as it allows European citizens to see rights expressly sanctioned in the Constitution of the Union.

Furthermore, the objection according to which the direct incorporation of the fifty-four articles of the Chart would excessively encumber the text, could be overcome by **merging** the articles without modifying the language and this would reduce the number to a half.

4 – The constitutionalisation of principles regarding fiscal issues.

Do principles regarding fiscal issues need to be inserted in the Constitution?

It could be useful to reflect on the opportunity of **inserting some principles on fiscal issues in the Constitution**.

In fact, it is difficult to totally ignore the fiscal aspect, which has already been the object of a consistent jurisprudence by the Court of Justice. In several pronunciations the Court has considered national fiscal systems to examine the coherence with the freedom guaranteed by the Union and, at the same time, has desumed from such systems some principles of fiscal justice which "penetrate" into European law.

The provision of the principle of consent, joined to the representative principle

The Convention will thus have to assess the opportunity to insert in the text of the European Constitution **a set of essential rules** apt to constitute parameters for active and passive subjects of the fiscal power considering the experiences matured in the various member countries of the Union. In the light of this the "principle of consent" could be established joined to the "representative principle" which all fiscal withdrawals must follow.

As regards the power to impose taxation, it should be expressly connected with the "**individual paying capacity**" and should in all cases respect the principle of "**equality**" as well as that of a "**free and dignified existence**" both of the taxpayers

and of their family, of "**solidarity**", of "**certainty of law**" and of "**sustainability**".

PART II
Union competences

SUMMARY: 1. The importance of a clear definition of competences. 2. Principles and method for defining the distribution of powers between the Union and Member States. 3. Establishing in a single provision all types of competences of the Union. 4. A new category of competence of the Union: shared competence. 5. Complementary competences of the Union and co-ordination of economic policies with social policies. 6. An effective monitoring of subsidiariry. 7. The preservation of implied powers of the Union. The specular possibility of re-expansion of Member State powers.

1 – The importance of a clear definition of competences.

The political debate and reflections regarding the European integration process have long focused on the issue of the delimitation of the distribution of powers between the Union and Member States. Criticism coming from various parts regarding the **current system of distribution of powers** defined in the European Treaties is well known. It is in fact characterised by a **complex intertwining of objectives**, **material and functional competences** as well as by the existence of **four Treaties** and **two different entities**, the Union and the Community, by the proliferation of legislative tools of different and sometimes dubious juridical significance as well as by the lack of a true and proper hierarchy of laws. Hence the recurring criticism of the lack of clarity of the current distribution of powers with the ensuing absence of definite responsibilities on the art of those who should intervene.

The lack of clarity of the present competence partition

In fact, the European integration process, more than a precise distribution of powers between the European and national level, has so far privileged a **fluid identification of powers and competences** attributed to the Union, ensuing from the contemporary acknowledgement of action powers of the Union and of initiative of the single competent European institution.

The need for a rationalised framework for Union competences….

At the heart of the need for a clearer definition of the competences of the Union, seen in almost all reflections carried out in recent years on the matter, two different aspirations may be identified.

Firstly, the one that sees in rationalising the distribution of powers a tool apt to obtain a clearer attribution of **decisional and political responsibilities** and thus a strengthening of the **democratic consensus** of citizens towards the Union and the activity of its institutions. This outlook has sometimes remained in the background, but it must strongly be supported and taken to

…to strengthen the democratic consensus of citizens towards the Union…..

the limelight in the debate on the European Constitution, also in consideration of a further significant acquisition, which it allows to reach. A clear definition of the competences of the Union should in fact be useful also and mostly to establish once and for all that there are subjects - such as, for example, social policies - where there are principles that must hold good for all European citizens.

…and to establish the existence of common principles in certain subject matters

The other outlook, is the one aiming at a radical change in the powers of the Union and at partly re-attributing Member States and territorial sub-state bodies some of the powers so far exercised by the Community or by the Union. In these analyses favouring the "re-nationalisation" of certain European competences there is a tendency of the Union to intervene both in material ambits where it should not have competences of sort (thus overpassing the competence ambits of Member States) and in those sectors for which such an intervention is seen as inappropriate. Similarly, for the criticism addressed to the tendency of the Union to intervene by excessively detailed actions or vice-versa, to avoid adopting an adequate regulation.

The outlook of the "re-nationalisation" of certain competences

Both the above outlooks appear to consider **actual problems**, but the vast consent generally reached in the current debate on the need to **define and clear the perimeter of competences so far attributed to the Union** seems the best answer to both.

All this justifies the need to provide for significant adjustments. Adjustments that are all the more **necessary, also in the light of the new missions assigned to the Union.**

A new framework of competences connected with the new missions assigned to the Union...

The demand for **more Europe** in the future is generally shared by all, but there is also a need for **less Europe** where its interventions shadow or limit the responsibility that should be of the State, regional or local.

An answer should be given, for example, to the demand for **greater cohesion, unity in foreign policy and security** in the fight against criminality; issues in respect of which citizens expect a stronger role on the part of the Europe. It is also necessary, however, to find valid solutions to **limit the intrusive potential** that the Union has so far displayed in many fields and enhance the possibility for Member States and Regions to adapt interventions defined by the Union to the respective diversities.

…for a stronger and more united Europe, but also less intrusive

Contextually to the definition of the distribution of powers, we must better define the **fundamental responsibilities of the Union** (that is the entirety of its missions) and identify the tools apt to strengthen **the control of the limits of the competences assigned to the Union.**

2 – Principles and method for defining the distribution of powers between the Union and Member States.

The principles for defining the distribution of powers

In view of the above considerations it is not surprising that among the issues raised by the Laeken Declaration the matter of

distribution of powers between the Union and Member States appears of the utmost importance.

To reach a solution to these problems, in the work of the European Convention it has been achieved a solid agreement on how to draft the constitutional text based on the following **principles** that cannot in any way be disregarded:

The principles thus far commonly agreed

a) **supremacy of European law on national law**, already sanctioned by the jurisprudence of the Court of Justice but **in the light of a more stable and clear distribution of powers with Member States**. This means, for example, that in complementary competence matters (that are competence of Member States and where the Union may intervene only with support measures) a Union law would not legitimately prevail over the internal law of Member States. Likewise, in shared competence matters (for which the Constitution should attribute to the Union the only competence to dictate principles), a Union law aiming at dictating detailed dispositions would consequently be illegitimate;

b) **clear and transparent limitation of competences attributed to the Union,** such as to facilitate European citizens' immediate understanding of what the Union does and is responsible for;

c) **restatement and re-definition of the subsidiarity principle** and identification of the **modalities for verifying and controlling** that it is respected according to criteria and procedures apt to prevent all pervasive tendency of the Union as regards Member States and, at the same time, apt to guarantee that the Union will intervene where necessary and useful for European citizens;

d) **explicit insertion of a residual clause in favour of Member States,** aiming at guaranteeing that in any case competences not attributed to the Union be assigned to Member States and that outside the competences assigned to the Union, it may not intervene with binding tools of a legislative nature, but only **soft law tools**;

e) **preservation of the implied powers of the Union,** though with the provision for a greater role for National Parliaments in safeguard of the subsidiarity and proportionality principle and thus of a law such as the present article 308 TEC that allows an acceptable degree of **flexibility** in the competences of the Union as regards contingent or unforeseeable demands when the European Constitution is approved.

Other two issues of particular importance should be added, in our opinion, to the ones highlighted above, which turned up in

almost all the projects submitted.

The first, already proposed by the European Parliament, consists in the unification within a single constitutional framework and under the European method of the three present pillars and of all the legislative competences of the Union. This is an essential issue considering that **the unification of the three present pillars** in a single institutional and juridical framework would give rise to certain beneficial effects by simplifying the European system not only in the eyes of citizens, but also as regards the actions of European institutions, which for years have had to endure complications arisen from this baroque constitutional architecture (suffice it to think of the uncertainty on the juridical bases often denounced or, yet, of the need for two tools or different international agreements to give rise to initiatives concerning the same sector).

The unification of the three pillars

The second consists in the **distinction**, within the subjects included in the traditional **concurrent competence**, between competences that must remain the concern of the concurrent partition, as provided for in the European Treaties, and subjects where it is preferable that the **Union only establishes the fundamental principles of the subject.**

The distinction between "concurrent" and "shared" competences

The latter innovation appears particularly important for it can allow an **enhancement of the different regulation demands** of Member States and can also open up the path to the enhancement, according to their own constitutional rules, of the role of territorial governments having legislative powers.

There is a proposal, advanced especially by the European Commission, to indicate **policies** rather than **competences** attributed to the Union, articulating such policies by thematic homogeneous areas and specifying for each area and policy group specific goals and the tools the Union can use, reaching a distribution of tasks between Union and Member States in a functional manner.

Defining competences or policies?

Such an outlook deserves to be **borne in mind in defining** and listing the various kinds of **competences** of the Union and of the subjects ascribable to the different categories of competences, rather than as an alternative to the above mentioned guideline. In fact, it is better that a juridical text of a constitutional kind should specify not only objectives and missions to be pursued but also define and explain powers and competences that may be exercised and relative subject matters. The drafting of a constitutional text necessarily means **abandoning the "functionalistic method"** – typical of an integration process limited to some specific factors, such as the European integration process so far – and compels to **fully accept the "constitutional method".** With this in mind it is quite natural that the competences be genetically hinged onto the missions of the European Union. However, it is **not** appropriate to punctually specify what are the objectives that the Union must pursue in carrying out the single competences attributed to it.

The "constitutional" method: defining powers and competences

By adopting this technique, moreover, the new constitutional text could even reach the goal of simplifying and making the attribution of competences already assigned to the European Union more clear.

The achievement of this goal would be greatly favoured by the contemporary and more thoughtful definition of the role and the missions to be assigned to the Union and consequently by the vastness of its powers and the terms for exercising them.

3 – Establishing in a single provision all types of competences of the Union.

On the basis of the principles and problems mentioned above it would be convenient to **reconsider all the present competences** attributed to the Union within the present three pillars in order to define a **unitary framework regarding the distribution of Union competences**. As already known, at present there are two categories of dispositions in the European Treaties that discipline the distribution of powers: on the one side, vast and general dispositions as by article 5 TEC, ratifying the principle of enumerated competences and the principles of subsidiarity and proportionality; on the other side, very specific and detailed dispositions disseminated everywhere both in the institutive Treaty establishing the European Community and the Treaty on European Union, which act as juridical bases for the actions of the European institutions.

A unitary framework for Union competences…

Furthermore, the re-comprehension in a single juridical framework of the subjects that at present fall into the second and third pillar, though maintaining different procedures, to achieve a greater clarity in defining the distribution of powers, should be advisable for the positive effects the "communitisation" would mean, that is the **strengthening of the democratic legitimacy** and the guarantee of a **parliamentary and jurisdictional control** over the actions carried out in those sectors of the Union.

…and its effects

A real clarification of the system of distribution of powers would be achievable if the single disposition apt to conjugate the two different above-mentioned styles were introduced in the constitutional text.

A single rule conferring competences to the Union…

In identifying the character and type of the single competences assigned in this context to the Union, the definition of the new situation should be inspired by the criterion of the **different degree of European interest** that, subject after subject, should preside the competence partition between the Union and Member States.

In applying this idea, after an article on "general principles" re-confirming the choice sanctioned by article 5 TEC, stating that the Union may act only within the assigned competences and objectives, always respecting the principles of subsidiarity and proportionality, it would be advisable to explicitly concentrate **in a single rule the indication of all the different categories of**

…defining categories, essence and subject matters for Union competences

competences of the Union and the provisions describing, for each of them, the essence, defining its legislative effects and specifying the material fields of application by explicitly leading back to the various intervention powers acknowledged by the Union to the single category of competence.

The categories of Union competences:

In this sense the rule should first specify that five different categories of competences are attributed to the Union: **exclusive, concurrent, shared, complementary and of co-ordination.** Moreover, it should establish, in the wake of the jurisprudence of the Court of Justice, that as regards matters of exclusive competence it is the task of the Union to regulate the entire subject; in those subject matters Member States may act only on the basis of an explicit authorisation. It should likewise specify that in concurrent competences the States are entitled to the entire competence as long as and insofar the Union does not intervene. As for the "new " shared competences it should specify that the Union, as will be better explained below, only has to establish the fundamental principles of the subject that are binding for the States. Lastly, it should contain the general residual clause in favour of the competence of Member States on all matters not explicitly assigned to the Union.

exclusive competences

Among subjects of **exclusive competence,** besides the ones already provided for by the Treaties in force - common trade policy, market and interstate competition, protection and exploitation of marine biological resources, monetary policy - most of the projects submitted deem that also those policies regarding external economic relations, foreign policy, European security and defence, Union citizenship, statute of Union officials, Union statistics, and conclusion of association Treaties should also be included as these subjects also need to be ruled by a uniform discipline throughout Member States.

It might thus be necessary to provide for an explicit competence of the Union regarding "**its own tributes**". This would be a particularly important innovation for it implies acknowledging the fact that the Union too must have resources determined on the basis of the democratic principle and, thus, of the method of consent expressed by its citizens through the exercise of the legislative power attributed to the institutions of the Union itself. Taxation in the Union has so far been the monopoly of the States, but the costs of the Union have determined an increase of public expense and, thus, of the overall fiscal pressure on the European citizens. The attribution of this competence to the Union is coherent with the principle of fiscal responsibility, according to which the demand for greater resources be faced by attributing fiscal powers to the subject carrying out the expense policy.

concurrent competences

Among subjects of **concurrent competence** those regarding agriculture and fishing, structural and cohesion funds, interstate competition, environment, transportation and trans-European rails, consumer protection, prevention and repression

of illegal activities harmful to the financial interests of the Union, promotion of equal opportunities between men and women, should be maintained. Moreover, communication should be included among these matters. In fact communication is increasingly important in Europe, less and less it can be restricted within national boundaries, and it is important that the Union should be able to dictate binding rules for all Member States.

4 – A new kind of competence for the Union: the shared competence.

We propose that the same constitutional rule explicitly provides for a new category of Union competence, that we will call "shared competence". In this category should fall certain subjects that are now part of the concurrent competence, partly contained in the third pillar (judiciary and police co-operation) and in part the object of specific harmonisation interventions, thus becoming **"shared" subjects.** As regards these subjects, the Union should only have the power to dictate fundamental principles that are binding for the States by exercising a competence similar to the concurrent one provided for by the Italian Constitution. It would be a question of defining and acknowledging the existence of powers already exercised by the Union, for instance - among others - in matters of settlement freedom, (article 44 TEC), mutual recognition of diplomas, certificates and other titles (article 47 TEC), liberalisation of a specific service (article 52 TEC), where even nowadays the Union has to limit itself and adopt a "*framework legislation*".

The new "shared" competence….

The proposal to define this kind of competence as "shared competence" derives from the fact that it necessarily implies both activating the legislative power of the Union (for the definition of principles) and the legislative power of Member States, for the remaining part of the legislation. In sum this competence, thus identified, allows to assign the Union the right to dictate, as regards the listed matters, only framework principles, leaving the States (and possibly the regions with legislative powers) free to adopt laws that better correspond to national and local specificity, according to modalities and spaces of legislative autonomy that the traditional concurrent competence cannot guarantee.

…and the positive affects of its introduction

Moreover, this kind of competence would also have the effect of allowing an **effective enhancement of the jurisdictional control on the compliance with the principle of subsidiarity**, as the Court could verify that the Union's intervention does not go beyond the establishment of common principles of each subject's discipline.

Thus in all subject matters included in this category, the activation of its powers by the Union does not exclude – and indeed, conversely, contemplates – the continuous exercise of the legislative powers by Member States, but subjects these powers to the respect of the supremacy principle of European law over

national law limited within the provision of the framework principles. The following subjects could be appropriately included in this shared competence: the discipline of the area of liberty, security and justice, the one regarding research and development (both to be expanded and connected to high quality training), the one regarding development co-operation, the ones regarding energy, industry, social and employment policies.

Lastly, among matters of shared competence, the **"harmonisation and co-ordination of the fiscal regulation of Member States"** could be usefully inserted. Firstly, this would allow avoiding or at least correcting the phenomenon of "double taxation" and would give elasticity and continuity to the application in all Member States of common principles as regards taxation. In this way the Union would have a competence in principles not connected with material procedural and theological limits as now provided for by article 93 TEC.

5 – Complementary competences of the Union and the co-ordination of economic policies with social policies.

The same European constitutional provision should, also, specify the subjects, remaining in the competence of Member States, where the Union could adopt co-ordination actions in support of national legislative disciplines, bearing in mind the constitutional principle that, in all other sectors not included in the exclusive, concurrent or shared competences, the legislative competence regards Member States according to their own legal systems. Among the subjects where the Union should have the faculty of exercising this **complementary competence** we may indicate those regarding education, training, youth, culture, health, civil and environmental protection, tourism and sports. It appears likewise important to insert, among these subjects, the administrative innovation. After Lisbon, in fact, we can register an increasing interest of the Union for the quality of regulation, the efficiency, efficacy and modernisation of public administrations, which are becoming ever-growing development factors.

complementary competences

Lastly, it should be made clear that the Union must be able to have powers of co-ordination of the economic and financial policies, imposed by the introduction of the single currency and by the stability Pact as well as the co-ordination of the above with the social policies.

co-ordination of economic and financial policies and their co-ordination with social policies

In other words, it is a matter of **joining the Europe of Maastricht and the Europe of Lisbon** with the aim of developing a European knowledge-based economy, capable of achieving high standards of growth and capable of sustainable economic growth with more and better jobs and greater social cohesion..

For this specific co-ordination aim, the European Constitution should define the objectives and the corresponding common criteria and orientations regarding economic, financial

and social stability as well as the common standards, criteria and orientations that bind the States as regards their policies concerning employment, education, training, environmental sustainability, infrastructural endowment and other fields already examined in the recent European summits.

6 – An effective monitoring of subsidiarity.

In order to guarantee the greatest involvement of European institutions as well as the safeguard of the role and interest of the States, it is appropriate to establish that in all the legislative sector the Union should be able to adopt the necessary dispositions only following the Council's (Council for legislative affairs) unanimous decision with the approval of the European Parliament as a fully entitled co-decision maker.

The compulsory involvement of National Parliaments can be obtained through the participation of their members in the works of the Council for Legislative Affairs, within each National delegation (see, part III, section *b)*, par. 2). On this point there seems to be a generalised consent towards the introduction of an ***ex ante*** **political control by the National Parliaments regarding the respect of the principle of subsidiarity** to which, according to proposals advanced - **an *ex post* control of a jurisdictional kind** could be added (by the Court of Justice on request of the National Parliaments or the Committee of the Regions).

An* ex ante *political control by the National Parliaments…

As regards the political control, the consent reached regards the introduction of an "early-warning" mechanism that, without reaching a true and proper right of veto, would allow national Parliaments to express themselves at the beginning of the procedure on the conformity or non-conformity of the legislative proposals of the European Commission on the principle of subsidiarity, compelling it to adequately reconsider and motivate it.

…through an "early-warning" mechanism

The involvement of the National Parliaments could also be provided for by a strengthened and reformed COSAC (Conference of Community Affairs Bodies of the Parliaments of the European Community).

7 – The preservation of the implied powers of the Union. The specular possibility or re-expansion of Member States powers.

Lastly, the new Constitutional text should have to face clearly the issue of the **Union's implied powers.** On this point there are two orientations: the first aims at suppressing this kind of power and, thus, article 308 TEC, considered at the origin of the Union's tendency to expand its actions in an uncontrolled manner; the second aims at maintaining these powers, considered an advantage in the pursuance of the Union's missions. Moreover,

The need of flexibility in the distribution of powers

suppressing these powers could mean creating a certain stiffness in conflict with the developing character of the Union whereas maintaining the present situation could hardly be acceptable.

An intermediate solution between those advanced so far …

It could thus be advisable to choose **an intermediate solution** providing for forms of implied powers that may be exercised both by the Union as regards the States and by the States as regards the Union.

In order to guarantee the necessary flexibility in the partition of competences and, above all, to allow the Union to intervene when the general interests requires it and its intervention is absolutely necessary to pursue its goals and missions, it is advisable to **preserve the principle, already acknowledged, of implied powers** (article 308 TEC), providing that the Union adopt the necessary dispositions, but strengthening the role of the **European Parliament** in the procedure. In order to guarantee both the widest involvement of European institutions and safeguard the role and interests of Member States it should be, therefore, appropriate to establish the unanimous decision of the Council and the approval of the European Parliament.

a) the preservation of the implied powers of the Union…

It would also be advisable that the new constitutional text expressly acknowledged, for the first time, the **possibility of re-expanding the powers of Member States,** thus setting up the mechanism provided for by article 308 TEC even in the opposite direction. As the need for flexibility in the competence partition between the Union and Member States, the correct application of the principle of subsidiarity and a careful assessment of the interests at stake, may justify the fact that the competence of the Union be separately exercised by the single Member States or by some of them, it is wise to provide for the Union, by its own deliberation, **on the Commission's proposal or of at least one third of Member States**, to establish that a competence may better be carried out by the States or by some of them. Obviously in this case too a strengthened procedure should be provided for with the Council's unanimous vote, with the vote of the European Parliament and with a previous mandatory consultation of National Parliaments.

…b) with the specular possibility of re-expansion of Member States powers

PART III
Union institutions

SUMMARY:

A) – The reasons and goals of a reform of European institutions

1 - The limits of the incremental method

Supranational and inter-state components: a balance to be preserved…

The architects of the European institutional system have always taken care **to balance the two components expressing the double original legitimacy of the Union, the supranational and the inter-state one.** The principle of the institutional balance has thus guaranteed that **the integration be achieved not by compression but by the creative contribution of national identities** and their mutual enrichment. If this heritage is not to be jeopardised, the institutional balance principle must be preserved. However, to preserve this it must be made to function and accept the challenges that are at stake for us and for the future generations of European citizens. This is the basis on which the following European institutions need to be reformed.

The need for a global institutional reform does not only stem from the choice of proceeding to a general revision of European Treaties. It also rises, more specifically, from a mutual reflection on the experience of reform processes started with the approval of the European Union's institutional Treaty. Once established the general aim of creating “an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen”, the Union was given ambitious tasks such as the creation of a single currency within an already unified market in terms of goods, people, services and capitals, the adoption of a mutual policy on matters of security and defence, the co-operation as regards social policies, employment, asylum, immigration, police, justice and foreign policy.

This was the turning point in the integration process. However, the tools, procedures and institutional system were not sufficiently adequate for the general goal and the far more

ambitious tasks. Indeed, procedures were multiplied on the basis of the new tasks and with a detailed dose of prerogatives for each institution. This further encumbered the relative apparatuses, and by opposing one to the other, weakened and dulled their functioning, created new hindrances in the decisional circuits and increased the distance the citizens sensed from an enterprise that proposed to near them to the Union's decisions.

…tackling the problems affecting the functioning of European institutions thus far emerged

The fact is that the drafters of the Treaty still believed in the virtues of the incremental method that had traditionally characterised the innovation processes of the institutions, which was not abandoned even in the light of the strong expectations of simplification, transparency and efficiency that preceded the approval of the Amsterdam and Nice Treaties.

This gave rise to that sense of "estrangement of many Europeans" due to the Union's "too bureaucratic" actions mentioned in the Commission White Paper and the Laeken Declaration on the Future of Europe. It was referred to as a sentiment that cohabits with the expectations of the citizens themselves for a Europe more present at world level and more deeply committed in carrying out targeted missions, which demand a greater efficiency of institutions. On both occasions the need to adequately and duly reform the present institutional architecture was firmly acknowledged. Conversely, a Union of at least twenty-five Member States would be paralysed in its decision making or reduced to an inter-governmental organisation.

…also in view of the enlargement of the Union

This is why the Laeken Declaration suggested "**a different approach** from fifty years ago, when six countries first took the lead". The new approach should be based on a global institutional reform pursuing the goals of a Union "more democratic, more transparent and more efficient".

The request for a "different approach" expresses **the need to overcome the incremental method,** convinced as we are that the desired degree and forms of flexibility can no longer be referred to the method used in the reform process, but to the kind of balance between stability and change that could arise from a constitutional design aimed at totally revising European institutions.

A different approach from fifty years ago: the need to overcome the incremental method …

On the other hand, the often stated general adhesion to the institutional balance principle excludes the hypothesis of an Olympic design of Constituents outlining institutions, functions and structures for the first time. It is not a matter of bringing to life new institutions, but of seeing that the output of the existing ones can guarantee a "more democratic, more transparent and more efficient Union".

… for a more democratic, more transparent and more efficient Union

2 - The need to divide power into legislative and executive

In this respect the Convention paid special attention to the fact that, in the current European institutional system, **the principle of separation of powers is guaranteed only as**

regards the judiciary power and not as regards relations between legislative and executive power. This produces, among others, the following consequences:

The current absence of a division of legislative and executive functions …

- Firstly, parliamentary control over the work of the executive has structuring difficulties as it is affected by a marked correspondence between powers and functions also as regards aspects formally nearer to the fiduciary aspect;

- Secondly, in decisional processes who does what is often rather vague: this is not only a problem of conflicts of competences but also a problem of the responsibilities of one institution towards another and of all the institutions as regards citizens;

… and its effects

- Thirdly, the absence of correspondence between powers and functions affects the functioning rules of the single institutions that characterise the deliberations of the legislative organs, as is the case of the works of the Council on legislative matters, for which the publicity rule is not valid, nor sometimes is the majority rule: the sectorial Ministers in Brussels, covered by the dullness that features the works of the Council, succeed in producing rules that would not be approved by national Parliaments;

- Fourthly, the absence of a clear distinction between tasks attributed to each power affects the classification of the Union's acts that, not based on the difference between legislative acts and executive ones, cannot provide for the prevalence of the former over the latter: this of course negatively influences transparency, the quality of regulations, the efficiency of the apparatuses of the Union and Member States required to apply the acts of the Union and on the citizens trust of European institutions.

The **confusion of functions between legislative and executive power** does not allow the correspondence of power with the responsibility for exercising power and this is at the base of the **democracy gap** of European institutions, the **transparency gap** in their decision-making procedures and the **delivery gap in their activities**.

The democracy, transparency and delivery gaps

Thus the reform of institutions is also of the utmost importance to conform the relation between legislative and executive power to the principle of separation of powers. The incremental method would again prove inadequate. This is another reason for a global reform.

In this respect, if it were only a matter of copying the States' constitutional organisation model the balance between the supra-governmental and inter-state components, considered vital for the Union's future development, would be jeopardised. However, to enforce Montesquieu's principle, **it is in no way necessary to follow the institutional patterns already experimented by the States.** It is necessary and sufficient to conform the internal structure and the functions of the institutions that exercise the legislative and the executive powers in the present system of the Union to guarantee a different connection and a different dynamics. In these terms **the principle of the separation of**

It is not necessary to follow the institutional patterns already experimented by Member States

powers becomes compatible with that of the institutional balance and their combination may give rise to unexpected results in terms of democracy, transparency and efficiency.

The Convention is now convinced that only strong institutions, focused on carrying out well defined functions, can interact in a virtuous dynamics and that, on this basis, it becomes necessary to conform the intentions of the institutions to the principle of separation of powers and, at the same time, it becomes possible to orient the institutional balance towards co-operation and mutual confidence.

3 - The goals of the reform

The generally shared target of **the simultaneous strengthening of the single institutions** requires, in turn, a re-articulation of their structure as regards the functions carried out, the re-establishment of their fundamental missions and the attribution of further competences.

Strengthening the Union, strengthening the single institutions, distinguishing missions and functions

In particular, the following:

- restoring to the **European Council** its function as a driving force in defining the general political guidelines of the Union;
- investing the **European Parliament**, the representative House of the European peoples, with the power to deliberate on all European legislation and exercise control over the action of the Executive;
- distinguish the legislative activity of the **Council**, assigned to a seat acting as second House representative of Member States (creating an *ad hoc* "Council for Legislative Affairs"), from activities of an executive kind, concentrated in a reduced number of compositions of the Council itself;
- defining and reinforcing the role of the **Commission** as guarantor of the implementation of primary legislation, as institution with exclusive power of proposal and implementation of legislation;
- giving the **Court of Justice** further powers to resolve disputes between the Union and Member States, and to guarantee the principle of subsidiarity;
- enhancing the connection of **National Parliaments** with European institutions, in particular to protect the principle of subsidiarity.

In view of these essential innovations:

The new separation of powers

- the European Parliament and the Council for legislative affairs exercise the **legislative power** jointly;
- the **executive power** is exercised, on the political impulse of the European Council, by the Commission and by the sectorial Council of Ministers;
- the **judiciary power** is exercised by the Court of Justice and by the Court of First Instance.

Within the so-called "triangle" formed by the European

Parliament, the Council and the Commission, the implications would be the following:

- the **European Parliament** would have the right to express the **democratic legitimacy** of the Union, once it were co-endowed with the deliberating power over all the European legislation, the co-decision procedure generalised, with due exceptions, (and this could be called "legislative procedure"), the prevalence of such a legislation over executive acts established and the powers of the European Parliament designed by the President of the Commission and of control over the activity of the Commission more clearly defined;

- the **Council** would equally have the right to express the **inter-state legitimacy** of the Union, once summoned, in its different compositions, to exercise the functions, respectively, of propulsion and definition of the general orientation of the Union (European Council), of legislative co-decision maker (Council for legislative affairs), of carrying out the legislation in well defined matters (corresponding to the sole sectorial Councils designed to remain);

- the **Commission** would in turn better interpret **Europe's common interest** once its monopoly over the legislative initiative were confirmed and once made responsible for the executive before a European Council focused on the exercise of the effective power to boost the general orientations of the Union and a European Parliament capable of controlling the work of the Commission itself.

B) The reform of the single institutions and their relations

1 - The European Parliament

Structural Profiles

A uniform electoral procedure for the European Parliament

Uniformity of the electoral systems – the principle of an adequate representation of the respective people joined to the need of further nearing citizens to the European institutions (article 1 TEU), should lead to the acknowledgement in the constitutional text of the sole electoral procedure uniformity principle (without referring to the alternative hypothesis of "common principles for all Member States": article 190 TEU), so that all specification of the principle itself could be inserted in a Protocol on the basis of the Council's decision of 25 June and 23 September, 2002.

Number of members of Parliament – We may wonder whether the existing principle according to which the number of representatives elected by each Member State should guarantee an adequate representation of their respective people (article 190 TEC) is met by the present system that leads to an oversized

representation of minor States as compared to the bigger ones. Alternatively, we could think of referring to the system according to which the people of each Member State is represented by at least four members of the European Parliament and by a number of components defined proportionally on the basis of the population. We could moreover consider the fact that the concurrent idea of an equal representation of each State would already find its full acknowledgement in the second House once the latter is structured according to the following structures.

Statute and general terms for members of Parliament to exercise their functions – The characterisation itself of the European Parliament as a House representative of the European peoples suggests providing for a discipline by law of the statute and general terms for members of Parliament to exercise their functions. Instead, similarly to the provisions of the Constitution of Member States, the Constitution could provide for **the prohibition of constraints of mandate** for members of the European Parliament, also in view of the fact that European political parties have already been acknowledged and will actually become stronger.

Modalities of internal functioning

There is no reason to differ from the indication already contained in the EC Treaty as regarding the modalities of internal functioning. In integrating them, it would be advisable to introduce in the new Constitutional text measures guaranteeing the greatest possible expansion of **public debates.**

Assuring the greatest possible application of public debates

In particular, it would be advisable to establish the principle according to which the sessions of the European Parliament should be public and the internal regulation published on the Official Gazette of the European Union.

A useful integration could consist in providing that the special plenary sessions of the Assembly, when requested by the majority of members of Parliament, take place also through the **political groups**, so to insert them in the Constitution in harmony with the recent acknowledgement of the European political parties.

Emphasizing the role of political in the European parliament

Functional profiles

Attributing the European Parliament, together with the Council for Legislative Affairs, the power to deliberate on the entire legislation of the Union seems the best solution. **The present co-decision procedure, which could take the name of "legislative procedure", would have general application**, except for specific mandatory exceptions.

Making procedures more democratic: giving general application to the co-decision procedure, as legislative procedure…

This outcome is the result of a gradual maturation of beliefs that, on the one hand, reflects the need to satisfy the democratisation of procedures regarding the general and fundamental choices of the Union, and on the other hand, is an essential condition to establish the principle of separation of powers in the relations among the political institutions of the

Union as well.

Once established, the solution should lead to assign the two branches of the legislative power also the **power to approve budgets and international treaties drawn up by the Union.** This would not correspond to what is generally provided for by the Constitutions of democratic countries, but would end a tendency progressively established in the following reforms of European treaties.

… and assigning to the legislative power the approval of budgets and international treaties drawn up by the Union

The functions of the European Parliament that are different from the legislative ones would be exclusive responsibility of this body, as House representative of the peoples of the Union. On the basis of existing Treaties, **the policy-setting power and parliamentary control** of the European Parliament over the Commission is exercised by the joint participation in the procedure designing the President, and subsequently the Commission, and the power to vote a confidence motion as regards the Commission itself: these basic indications should be confirmed by the Constitution, unless the European Parliament played a more significant role in designing the President and the members of the Commission. (see, below paragraph 4).

As for the **inspection function** of the European Parliament, the existing discipline could be usefully integrated in two directions. The object of the requests could include every issue of general interest for the Union, instead of the sole hypotheses of "alleged contraventions or maladministration in the implementation of Community law". Moreover, we should expressly provide for the inspection function of the European Parliament to be extended to the sectorial Councils to make them responsible and give transparency to their work. This could not be achieved within the Union (considering that the fiduciary relation with the European Parliament itself can but regard the sole Commission), not within the national ambit (considering that the responsibility before national Parliaments may only regard the single Minister of the Member State member of the Council, and not the Council of Ministers as a collegial organ).

The **power of the European Parliament to control the implementation of the laws**, which is the responsibility of the Union, should be the object of a separate provision by the European Constitution, so that the picture of parliamentary duties could be completed in compliance with the principle of separation of powers.

2 - The Council for Legislative Affairs

Reasons for the Reform

Nowadays, the responsibility for enacting legislation in the European Union mainly belongs to the Council, in its General Affairs formation and in its too many sectorial compositions. The multiple composition in which the Council meets are at the origin

of the great production of micro-sectorial laws that go well beyond the needs imposed by the creation of the single market and causes a widespread annoyance among European citizens.

A Council for Legislative Affairs as legislative body…

The solution for this situation would be to establish, within the present Council of Ministers, a **Council for Legislative Affairs** as the second House representative of the States, separated from the Council of Ministers, responsible for political-administrative functions.

Composition

…composed by a Minister for each State as a permanent member with general and transversal range of competences …

The Council for Legislative Affairs should be formed by a **Minister indicated by each State as permanent member** designed on the basis of his general and transversal competences, willing to devote himself to them with continuity.

Permanent members could be accompanied, according to the items on the agenda, by **sectorial Ministers**, or by a representative of the executives of the local authorities of each Member State, if this is the competent government as regards a given issue, as well as by no more than three **National members of Parliament.** This last provision would allow National Parliaments to participate in the preparatory decision-making process of European legislation.

… accompanied by a national delegation

Presidency

Two possible alternatives may be identified:

Hypotheses for the Presidency of the Council for Legislative Affairs

- **election among the components:** the solution would be symmetric as regards the provisions for the European Parliament;

- **six-monthly rotation mechanism**: the solution, similar to the one adopted for the *Bundesrat*, would allow to preserve the six-monthly rotation mechanism for an institutionally important figure (second only to the president of the European Council), and thus, in the very chore of the European institutional architecture, render the position of equality among the States forming the Union visible. This could be one of the measures designed to preserve a tight connection between the institutions of the Union with the single States, thus making up for the possible elimination of the rotation system as regards the presidency of the European Council.

Voting modalities

From weighted vote to double majority

The double existence of the Council for Legislative Affairs as second House and as representative of Member States should be respected as regards voting modalities. The simplest and most coherent choice would be to provide for the deliberations of this body to be adopted by qualified majority, calculated by the **double majority** of Member States and of the population of the Union, instead of the deliberation system decided in Nice, considered by most complex and intricate.

Public meetings for the Council for Legislative Affairs

Lastly, being a true and proper House, it would be advisable to provide for **the meetings** of the Council for Legislative

Affairs to **be always public.**

The effects of the introduction of the Council for Legislative Affairs on the legislative production of the European Union.

The introduction of the Council for Legislative Affairs could be a decisive step towards a separation of powers and could give a sole interlocutor for the European Parliament in carrying out the legislative function. Moreover, it would provide an **important contribution to the improvement of the quality of regulation of the Council itself**, as it would be issued by the same body and not by several different compositions.

The Council for Legislative Affairs contributes to the improvement of the quality of EU regulation

Moreover, in this manner we could correct the political asymmetry according to which each autonomous council formation gathers all the Ministers of Member States of a given sector, granting the power to issue laws without guaranteeing a confrontation with the Ministers concerned and the collegiality typical of national Governments. The foreseen establishment of the Council for Legislative Affairs should also guarantee the resolution of possible conflicts between sectorial Ministers within each National delegation. This is clear if we bear in mind the direct link between the Minister of each Member State delegated to take part in it and the respective Prime Minister (who is the State representative at the European Council).

3 - The European Council

Reasons for the reform

The function of the European Council, as an institution that "shall bring together the Heads of State or Government of the Member States and the President of the Commission", is to "provide the Union with the necessary impetus for its development " and to define "the general political guidelines"(article 4 TEU). These attributions are clearly defined and presuppose that the European Council focus only on them to carry them out in the most efficient manner. Conversely, experience registered a strong tendency of the European Council to accumulate problems, even very small ones, that often had nothing to do with its attributions and that risked transforming a **political impulse institution** such as the European Council into a court of appeal for the solution of issues yet unsolved at administrative level. The reasons for such dispersion may be identified in administrative malfunctioning concerning the preliminary stages of the work of the Council and the following execution of its decisions as well as in the misunderstanding of the principle according to which there is a correspondence between the powers and the function of each institution, and lastly in the multifarious inconveniences caused by the six-monthly rotation system of the Presidency, made even more serious by the passage from a Union of fifteen to a Union of

Emphasizing the role of the European Council

twenty-five Member States

The solution to the administrative malfunctioning, according to the treaties partly already drafted, do not consider the other causes of the Council's malfunctioning, which would require to modify the treaties. But what would the consequences be on the role and thus on the structuring of the European Council?

The issue of the Presidency: hypotheses advanced

Hypotheses for the Presidency of the European Council

Once the partition of functions among the institutions of the "triangle' comply with the principle of separation of powers, the function of the European Council would be to dictate the Union's general orientations and it would be reasonable to maintain that the problems of the six-monthly rotation of the Presidency could be reduced to the point of not justifying any afterthoughts.

Conversely, we are entitled to think that a clearer partition of functions between the institutions of the "triangle" may not solve the problem of the six-monthly rotation, including the strong international exposure of the President of a body summoned to define the Union's "general political guidelines".

In this respect several opinions and several solutions may be legitimate. Following are the pros and cons of the most widespread solutions. This analysis is followed by a reconstruction proposal advanced by Astrid.

a) Preservation of the six-monthly rotation

Pros

- absolute guarantee of equality among Member States as regards access to the Presidency;

- enhancement of the good functioning of the present mechanism where, according to certain interpretations, the Presidencies, in turn, proved able to expand great innovative energy, especially in recent times (with however only fifteen Member States).

Cons

- The President in charge would be a pure President of a collegial body devoid of any external protection capacity;

- in a Union of twenty-five Member States it would be very complicated to "start from scrap" every six months;

- if maintenance of the six-monthly rotation were accompanied by a stronger legitimacy of the Commission reached through a parliamentary investiture of its President, he would in fact be the President of the Union and the institutional balance would not be guaranteed.

b) "Internal" President chosen by the European Council among one of its members for five years (or for two years and a half renewable once)

Pros

- this solution could be a balanced mediation between the rotation system and "external' full time presidency, and would

allow to overcome the problem of discontinuity of the six-monthly presidencies allowing, however, the Heads of Member States (especially the smaller ones) to feel the president of the Council as "one of them";

- a similar solution could also be valid for the bureaucratic structures in support of the President and could eliminate the dangers of conflict among the structures mentioned in sub *b)*, as with this solution we could maintain the present system according to which the staff of the Presidency is formed by Member State officials;

Cons

- it seems difficult to hypothesise that heads of Member States (especially the bigger ones) may seriously face for a long time span both the tasks of president of the national and of the European government.

c) An annual presidential *Team* formed by heads of State and government of four Member States.

Pros

- the partition of the presidency among four Member States (which would occupy the presidency and two deputy presidencies of the European Council, besides the presidency of a Council of Ministers in a politically crucial sector) would form an almost perfect balance between big and small Member States. In particular, in a twenty-five member Union, a 'big" State and three "small" ones would alternate every six years.

Cons

- this pattern could reproduce the risks feared in sub *a)* with reference to the six-monthly rotation or give rise to other dangers such as conflicts that could arise among the Member States forming the team as regards policy making within the European Council and the Cabinet.

d) Unification of the post of the President of the European Council and the post of the President of the Commission.

Pros

- Simplicity of the system. A sole Presidency of the Union granted to the President of the Commission not only substantially as *a)*, but also formally;

- Coincidence between democratic legitimacy and inter-state legitimacy.

Cons

- At present the unification of the two nominations goes beyond the political-institutional balance that appears achievable nowadays in the European Union.

e) Full time President chosen by the European Council for five years (or for two and a half years renewable once)

Pros

- The choice of a President chosen for the period

corresponding to the legislation and not covering other institutional charges (possibly nominated by the European Council and chosen among people who have occupied the office of head of State or government of a Member State, of President of the Commission or of the European Parliament), would correspond to the hypothesis of a presidency apt to elevate Europe's "political role" inside and outside the Union;

Cons

- There is still a widespread diffidence regarding a full time president of the Council for a continuous period, mostly due to the lack of a precise definition of his role and limits;
- The distinction between the political impulse function of the warranty and initiative function of the President of the Commission could be confused with a hierarchic submission of the latter as regards the former;
- A full time President could create a lack of balance in other aspects, including the need for an *ad hoc* administrative apparatus, liable to compete with the apparatus of the Commission.

The issue of the Presidency: a possible intermediate proposal

Aware that each of the above hypotheses offers interesting aspects, in our opinion it is evident that they reflect at least **three fundamental aspirations or objectives**:

The proposal of Astrid on the Presidency of the European Council

a) giving continuity to the activity of the European Council and raising the "political" level of the Union's action;

b) preserving for the single Member States a strong role in the European institutions and an actual connection with their territory;

The three objectives to pursue

c) guaranteeing that the strengthening of the European Council does not alter the role and the functions of the Commission.

The above aspirations are only in apparent conflict and we may **try to formulate a hypothesis safeguarding them all,** by highlighting the positive profiles of each solution and reducing the inconveniences.

The attempt to do this must in no way jeopardise the general functioning of the institutional framework creating too complicated mechanisms (as the *teams* of countries without the unitary guidance of the European Council could prove) that risk breaking down in a twenty-five Member State system.

In formulating the following proposal, a possible evolution in time of this proposal has been hypothesised too.

a) Give continuity to the action of the European Council with a full time President having a long mandate

***a) a* full time President with a long mandate…**

As for the need to give continuity to the work of the European Council, almost all the above hypotheses show some

kind of weak point.

In fact, by extending the Union, all the malfunctioning of the rotation system (already highlighted) appears inevitably destined to increase whereas the benefits cannot but decrease.

…to give continuity to the action of the European Council…

Moreover, as already highlighted, a part time President within the Council itself (that is one preserving the charge of Prime Minister in his own country), would hardly have the time to visit each of the twenty-five Member States, even if he had a mandate longer than the present six months, as at the same time he would have to devote himself to his national commitments.

However, the creation of a "Minister for Foreign Affairs of the Union" alone, deemed advisable by everyone, may not be enough to guarantee the necessary external "political weight" of the Union in the more crucial issues where international relations are decided by Heads of State summits.

It seems therefore difficult to give up the benefits implied in the full time President with a long mandate solution (for instance two years and a half, renewable once). The possible unbalance effects of the latter however would need attention.

***b) a presidency* bureau…**

b) preserve the strong role of the States by a presidency *bureau* of members, chosen on a six-month rotation basis, in the European Council and other complementary measures

However, preserving a strong role for the individual Member States within the European institutions and an actual connection with their own territory is a necessity which the President alone cannot satisfy.

An "external" President of the European Council having a long mandate must not necessarily become the European President. In fact, it must be explicitly stated that such a President would be the **chairman of the European Council**, to whose action he would give coherence in time.

…to preserve a strong role of the States

In this respect we could establish, inside the European Council, a presidency *bureau* composed, for **a six-month rotation** period, by some Prime Ministers (4 or 6), chosen on the basis of an implicit representation principle of groups of Countries "homogeneous" geographically and for size and interests (for instance, Countries with a high population and smaller Countries, new entries and Countries among the present 15 members).

The idea of siding the future President of the European Council with a presidency bureau does not seem a hypothesis of mere mediation among the different needs for continuity of orientation and of respect for the peculiarities of the single countries. Conversely, it appears to satisfy the Council's demands for functionality: in a formation extended to 25 countries the singling out of certain Prime Ministers, in turn, that can stand out in the Council, with the relative President, as bearers of the different interests at stake, may favour the establishment of a political consent around a unitary position.

Moreover, the strengthening of the European Council's

continuity by a full time president sided by a presidency bureau does in no way exclude further complementary hypotheses apt to guarantee in all cases a strong connection, territorial as well, of Union institutions with the single Member States. (see below, as regards the Council of Ministers).

Lastly, it might be reconsidered the idea of holding one of the two six-monthly meetings of the European Council in the capital of a Member State, or an informal meeting of the Heads of State and Government.

c) clearly define the competences of the President of the European Council to guarantee the role and functions of the European Commission

c) a President of the European Council with clearly defined competences, limited to the European Council responsibilities…

In examining the relation of the possible future President of the European Council with the European Commission and with its President, the feared conflicts ensuing from this "diarchy" would be greatly reduced if the responsibilities of each were clearly partitioned. It should be clearly stated that the President of the European Council is responsible only for the whole "activities of the Council," including foreign policy, and that he cannot encroach on the typical activities and functions of the Commission and its President, neither with the (exclusive) power of proposal and the power of implementation of European legislation, nor with the guarantee of the respect of the Treaties.

…so not to encroach on the typical Commission's activities and functions

Moreover, the distinct legitimacy of the President of the Commission would establish a more balanced relation between the two than in the cases of the diarchy President-Prime Minister typical of certain European models. By the rest, it would in no way exclude a creative co-operation, for their term of office and full time commitment would grant a strong "European" feature to both.

A possible development of the proposal in time

A possible development in the future: towards a single Presidency

The advanced solution does not exclude the hypothesis of a unification of the post of the President of the Commission and of the post of the President of the European Council, the latter always assisted by the above mentioned presidency *bureau*.

As mentioned, this does not correspond to the present stage of the institutional balance. This however does not mean that the balance cannot have some kind of development. As already experienced (the Euro experience for instance) the temporal dimension may reduce conflicts and allow new balances to form.

Thanks to the dynamics triggered by the new constitutional design, we could already consider the possibility – **after two legislatures of the European Parliament** – of unifying the Presidency of the European Council and of the Commission on a single person.

4 - The European Commission

Structural Profiles

Strengthening the role and the independence of the Commission

Firstly we should confirm the Commission's characteristic of **independent institution,** and try to solve the possible dilemmas with concurrent demands: the efficiency of the college and the need for connection with the other institutions.

As for the **number of commissioners,** stated the subjective requisites of independence designed to characterise members of this organ both as regards selection criteria and ways of carrying out the charge, we may wonder on their number. According to the Nice Treaty, the first Commission to follow the adhesion of the twenty-seventh Member State will include a lower number of Commissioners than that of Member States, chosen according to a rotation principle among the States themselves. As the new Constitution will entry into force before this event, we may wonder whether it would not be better to anticipate the provision of the Nice Treaty at that time or, on the contrary, whether to maintain the rule of equal representativeness of Member States for the future as well.

The composition of the Commission: the hypotheses advanced

The hypotheses are the following:

a) a number of Commissioners equal to that of Member States

Pros

- This is a simpler solution, thus more transparent;
- The need for efficiency could be met as regards the internal organisation of the Commission (see below).

Cons

- The Commission would however be too plethoric;
- The need for an internal hierarchy belies the mentioned simplicity.

b) a number of Commissioners inferior to that of Member States

Pros

- greater government efficiency;
- the principle of equal representativeness of Member States must b e satisfied within inter-governmental institutions, but not within the supranational ones and, less than ever, in the Commission, which must carry out government tasks.

Cons

- the need for the Commission to be and to appear constantly independent from all Member States could be guaranteed only by the equal representativeness principle.

A Commission non plethoric

The **preferable solution** seems to be that of **a Commission with a reduced number of members** even before the provisions of the Nice Treaty: actually, even a 25 member Commission seems

plethoric as regards the number of essential missions on which it must focus and the demands for a good functioning of the College.

The reasons for the decision of having one member for each Country could be, in any case, adequately satisfied by a **fair rotation mechanism** according to representativeness criteria of groups of "homogeneous" Countries as regards composition and interests.

Functional profiles

The Commission: responsible for the implementation of Union law …

To extend the principle of independence to the functioning of the organisation it would be advisable to sanction the principle according to which **the Commission has the general responsibility for the implementation of Union law**. Thus, the qualification of the Commission as institution summoned to **interpret the common interest of the Union** would be satisfied.

…and for interpreting the common interest of the Union

Hence, certain indications regarding the **specific powers** of the Commission confirming the ones provided for by the existing Treaties: the **exclusive power of proposal**; the submission to the European Parliament of the budget and the correlative power to execute the **budget** law; the adoption of **executive acts** and the administrative execution of the laws, in the subjects where the Union is responsible; and finally, in the areas where Member States are responsible for execution, the promotion – even with meetings of the competent authorities at national level – and **co-ordination** of the implementation of laws both by the central governments and, if requested by the respective legal systems, by the local governments.

The powers of the Commission

A specific innovation could invest the powers of the Commission in the multilateral surveillance procedure regarding the respect of the Union's broad guidelines by Member States economic policies. Article 99, par. 4, TEC provides that once ascertained that such policies are not coherent with the schedules orientations or risk jeopardising the correct functioning of the Economic and Monetary Union, the Council may adopt the necessary recommendations for the Member State concerned, acting by a qualified majority on a recommendation from the Commission. For a tighter surveillance over the formation of an excessive deficit, it would be advisable to provide (not in the "first part" of the Constitution, but in the second one) that, instead of a simple recommendation, the Commission should formulate a proposal that could only be overcome unanimously by the Council.

Ways to choose the President

As for the ways to choose the President of the Commission, the **joint participation** of the European Council and the European Parliament to the procedure for choosing both the institutions expressing the double legitimacy of the Union should stand in all cases. If the independence marked the birth of the Commission and formed its historical benchmark and still appears

of vital importance for the safeguard of the institutional balance, the relation of the Commission with Parliament became increasingly necessary as the latter exited the dark area where it was relegated to take on the characteristics of the institution expressing the direct democratic legitimacy of the Union.

Commission-European Parliament: a relation increasingly necessary

Nevertheless, adapting the Commission's independence to the need for a tighter connection with Parliament may give rise to different solutions, still at issue:

- confirmation of the present sequence – the European Council designs the President, then "elected" by the European Parliament. The difference with the present system, according to which the "nomination" of the President is "approved" by the European Parliament (article 214 TEC), would not merely be a matter of terms, and the present sequence would be respected.

- election by the European Parliament and subsequent approval by the European Council – This would be a more conspicuous innovation which would strengthen the connection with the European Parliament to the point of making the Commission a government politically responsible for its acts to a Parliament. How can we avoid the risk of voiding the independence of the Commission, which justified specific mechanisms of the system such as the monopoly of the legislative initiative? The parliamentary majority required for the election of the regular holder of this office is an important discriminating factor: we could provide for him to be elected by the European Parliament by a majority of members higher that the one provided for parliamentary system Governments.

The other stages of the procedure for the formation of the Commission

There seems to be a general consent as regards the discipline of the other stages: the **designation of the Commissioners** attributed to the European Council by a mutual agreement among members on the President of the Commission's proposal (except for the Minister for Foreign Affairs, unanimously designed by the European Council and the deputy president by right of the Commission, who would hold a plurality of offices with the functional addition of the responsibility for the CSFP sector within the general responsibility given to the Commission); and **the vote of confidence of the European Parliament** on the Commission thus established.

A vote of confidence of the European Parliament on the Commission

Modalities of internal functioning

It would be advisable to confirm the attribution of general organisational powers to the President, including the competence partition among commissioners and the modalities of individually ending the office of commissioner for voluntary resignation or on the President's request previously approved by the College.

If it were later deemed that the rule providing for one citizen

for each Member State should not be cancelled following new adhesions, the problem of the efficiency of an ever growing college would inevitably arise. In this case:

- A first hypothesis could consist in attributing the direction of a sector of the Commission's activity to half of its members, whereas the remaining half would carry out delegate functions or be delegated by the Commissioner in charge of the sector to direct single sub-sectors;
- Alternatively, the differentiation between the two levels of the Commission could end by attributing the right of vote in the college to the sole members of the higher level.

5 - The Council

The number of sectorial Councils

Simplifying the compositions of the Council

The attribution of general executive powers to the Commission must be subject to the sole exceptions established by the Constitution, where it assigns some executive functions to the Council. Only in these cases is the maintenance of certain sectors justified.

Moreover, excluding the re-ordering of the executive functions, the present structuring of the Council is the cause of many disorders due to the excessive number of compositions in which it, in turn, meets. The problem has long been known. Indeed the Seville European Council has decided to reduce the number to nine.

Once decided the general re-ordering of the executive functions, it is necessary to identify within the European Constitution the **residual compositions of the Council having executive tasks.** On this point we must first justify the non sectorial Councils with a general or at least a markedly transversal competence and, secondly, the Councils corresponding to functions that recently entered the system of the Union, which cannot yet be subject to "communitisation": functions, therefore, that require a steady connection among governments of Member States as well as between the Union and the administrations of Member States.

The preservation of sectorial Councils only for transversal functions ….

…and for the functions not yet subject to "communitisation"

The **General Affairs Council** (given its role in ensuring the coordination of the activities of the Council and the coherence of the dossiers among them and with the Union's objectives) falls into this **first category** together with the **Foreign Affairs Council,** very different from the former, due to the multiple implications in the management of this sector, considering the strengthening of foreign policy of the Union and the introduction of the Union's Foreign Affairs Minister. The **second category** could include, except otherwise assessed, the **two Councils** that include the Minister of Justice, the Ministers of the Interior and of Civil Protection and the financial Ministers.

Only 4 sectorial Councils:

- General Affairs Council

- Foreign Affairs Council

- Justice, Home Affairs and Civil Protection Council

- Ecofin Council

In the new institutional system, the functions carried out by

the other Councils do not need the establishment of a special body. They fall within the general responsibility of the Commission, which can and must hold **meetings with the Ministers of Member States,** each time it deems necessary with reference to the single sectors. The assignment would make the system flexible enough to guarantee the appropriate connection among national government levels and at the same time state the fact that such links must be promoted by the Commission, and not by an inter-governmental body.

The functions of the other sectorial Councils fall within the general responsibility of the Commission…

…that can hold meetings with the Ministers of Member States

The issue of "comitology"

On the basis of the above indications we could face the issue of the excessive number of Committees (about four hundred) that in the present system have multiplied also as executive projections of sector Councils. In the absence of appropriate provisions, the reduction of the number of Councils may not go parallel with that of the committees, which could survive under the umbrella of a crosswise competence Council such as the General Affairs Council.

The suppression and the merging of Committees as a consequence of the reduction of sectorial Councils

To avoid such a risk it would be advisable to provide for the suppression of the Committees (with the exception of the COREPER, being this an absolutely necessary structure) and **contextually assign the Commission** (summoned to guarantee connection among government levels) **the task of joining the functions of the Committees that still have a justification** following the reduction of sectorial Councils. Such an innovation should find appropriate place in the second part of the Constitution.

Presidency of sectorial Councils

Various proposals have been put forward, some of which connected to the proposals regarding the Presidency of the European Council. Among these, the assignment of the presidencies of the Councils (except the Foreign Affairs Council) on a six-month rotation basis to a single Member State or the assignment of a President or a Deputy President of a sectorial Council of Ministers to each Member State.

Presidency of sectorial Councils

If a presidency *bureau* of the Council were set up, other analogous ***bureaux***, composed on a rotation basis by the same Member States, might be set up, even in the sectorial Councils, to support the rotating President on duty. Another option could be the assignment of the presidency (individual) of the sectorial Councils to each of the Member States represented in the European Council *bureau*, so to assure a link with the whole Councils' activities.

Finally, there is the proposal, put forward some months ago with the explicit aim of holding back, to the benefit of the Commission, the potential excessiveness of a full time President of the European Council with a long mandate, that is assigning the presidency of the sectorial Councils to the **members of the**

Commission. In this perspective, which could connect the various parts of the Union's Executive from both the structural and functional sides, the President of the Commission could undertake the presidency of the General Affairs Council, the Foreign Affairs Minister the one of the Foreign Affairs Council and the members of the Commission competent per subject would be the presidents of the rest of the Councils explicitly mentioned in the Constitutional text. Moreover, it seems realistically unlikely that the Governments of the Member States approve such a institutional design.

6 – The Court of Justice and the Court of First Instance

The judicial power and its role

From the warranty instance of the law aiming at maintaining the institutional balance to the interpretation of European law, the jurisdiction of the Community has become a crucial factor not only for the institutional development of the Union and the European integration process, but also for the safeguard of the rights of the single States, the discipline of which is associated with the principles on the right to the defence and equal trial sanctioned by the European Charter of Fundamental Rights.

Not only has the Court guaranteed the respect of the law regarding the interpretation and application of the Treaty, thus contributing to its full confirmation in national legal systems, but it has also developed certain principles on which to base the European legal system and has carried out a steady dialogue with national jurisdictions on the basis of judicial subsidiarity and loyal co-operation, giving rise to complex reticular structures apt to involve the constitutional and supreme courts as well as all the judges of Member States and which form a peculiarity of the experience and of the European "jurisdictional federalism" model.

In turn, the Court of First Instance, originally introduced as a deflation tool of the Court, has succeeded in giving rise to a jurisprudence that has guaranteed the rights of those concerned in areas of great importance – such as competition and State aids – and has become the "laboratory" to verify new organisational and procedural solutions (sections, formation of colleges, selection of the occasions in which the general attorneys are involved).

The effective safeguard assured by the judges of the European Union has gradually lead to a widespread use of European instances, especially as regards the basic institution of a dialogue among National Courts and European judges, represented by the requests of preliminary rulings. However, this has contributed to a gradual engulfment of roles among the different levels of jurisdiction and to an ever more precarious balance between effectiveness of the safeguard and the respect of procedural and organisational requisites.

The present situation originates from the situation that ruled the jurisdictional activity of the Community. In fact, up to the Treaty of Nice, the discipline of the judicial power was rather inorganic, contained as it was in acts of various nature (treaties, protocols, procedure regulations) and sometimes having an uncertain juridical character (notes of the Court, instructions for lawyers, communications of the Commission).

The inconsistencies before Nice

The final system showed strong peculiarities in giving the Court of Justice tasks that, in national systems, are generally partitioned among constitutional and supreme ordinary and administrative Courts. Similarly a Court of First Instance was created, that was hardly accessible for the natural and legal persons because of the limiting provisions on matters of capacity to act.

Thus, the system needs re-examining on some of its essential points.

The positive innovations in the functions and the organisation introduced by the Treaty of Nice …

The revisions provided for by the Treaty of Nice solved most of these issues and inconsistencies. The functions of the Court of Justice were rationalised, in the full respect for its status of judicial body with composite aims; the competences of the Court of First Instance were expanded to include, under certain terms, the judgement on the interpretation of the acts of the Union by the procedure of judicial remission.

The modifications also concerned organisational profiles, in view of the current extension: both bodies are now formed to guarantee the presence of at least one judge for each Member State; new jurisdictional chambers have been established for particular subjects with the aim of experimenting a system now becoming articulated over more degrees of judgement; the sources of the organisation of the two bodies (statute) and of the relative procedure (procedure regulation) have been re-ordered.

However, even after the important innovations introduced by the Treaty of Nice, there are still important areas of the jurisdiction discipline on which it would be advisable to intervene when the Constitution is adopted.

…and the remaining innovations to insert in the Constitutions

With this in mind, the most consistent innovations should invest the **system of access to the European jurisdiction**. The Treaty of Nice, in fact, has only partly operated the extension of access modalities to the European Courts, and this both as regards individual people, legally acknowledged as subjects (indeed as European citizens) constantly involved in the direct and indirect action of the Union and concerning the actions of local and regional authorities, to safeguard the sphere of their own competences as regards the respect for the interference of others.

A broader access to European jurisdiction…

It should thus be **extended the right of natural and legal persons to bring direct action** against decisions or acts of the Union having a clear and direct effect on them, prejudicial to their rights or imposing obligations.

Similarly, in view of the **implications of the principle of subsidiarity**, and of the possible provision for a jurisdictional

type of control (not only political) over its application, dispositions will have to be dictated committing Member States to acknowledge **regional and local authorities,** as identified in the respective national constitutional provisions, the right to bring direct action to the Court of Justice, against acts of the Union adopted in violation of the norms concerning the competence partition and the principle of subsidiarity.

Apart from the Committee of the Regions (see below), a general acknowledgement of such power might cause a proliferation of appeals apt to void the effectiveness of the jurisdictional safeguard. As far as this is concerned, we could think of a **national filter** – as proposed by the European Parliament – **or a preliminary examination by the judge in charge himself.** The first solution appears more convenient because it involves a remission of each Member State's choices and would thus better respect the principle of autonomous determination of each of them as regards their own internal organisation.

…with a national filter

7 – The Committee of the Regions

The functions of the **Committee of the Regions**, to be confirmed in its present structuring, require innovative choices in compliance with the global institutional re-ordering. According to the EC Treaty, the Committee is heard by the Commission and by the Council only when provided for by the Treaty and may be heard each time these institutions and the European Parliament deem it necessary; moreover, the Commission and the Council may not take into account the opinion of the Committee of the Regions when the term scheduled for their presentation has expired. The change in the EC Treaty, besides considering the new partition of the legislative and executive functions, should enhance the Committee's participation in the decisional procedures concerning the fundamental political choices of the Union, on the basis that their democratisation requires the involvement of the organism representing the local communities of Member States.

More precisely, it would be advisable to provide for the mandatory consultation of the Committee in the decision-making process of Union laws in those cases and manners established by the rules of procedure of the two Houses, the obligation of the latter to motivate the choice of disagreeing with such an opinion and the faculty of the Commission to consult the Committee when forming executive acts.

A mandatory consultation of the Committee of the Regions in the decision-making process of Union laws

At the same time it would be equally necessary to assign the Committee the **right to bring direct action** against the acts of the Union deemed invasive of the competences of regional and local authorities. With the aim of correctly enhancing its role, the Committee of the Regions could be assigned the task of preparing an annual Report on the state of the regional and local

The attribution of a right to bring direct action against acts of the Union deemed invasive of the competences of regional and local authorities

communities of the Union, to be sent to the other institutions and be published on the Official Gazette of the European Union.

8 - The other institutions

The other institutions disciplined by the EC Treaty (Central European Bank, European Investment Bank, Accounting Office, Economic and Social Committee) mainly give rise to problems of adaptation to the above mentioned institutional design, excepted in certain cases where there is a need for their strengthening. It would be a matter of selecting the EC Treaty dispositions dedicated to these institutions to be inserted in the "constitutional part", and refer implementing and detail dispositions to the second part of the constitutional text.

The consolidation of provisions regarding the European Central Bank…

As for the **Central Bank**, it would be advisable to consolidate the principles stemming from the set of rules, sometimes very detailed, provided for by the EC Treaty: the organisation and composition of the bodies, the European system of central banks, the fundamental independence principle of the Central European Bank and of the national central banks, the system of relations with the other institutions, the functions.

…and the European Investment Bank

The same thing should be done as regards the **European Investment Bank** for which it is advisable to indicate and up-date tasks and activities, especially a tighter relation between the bank's mission and Union policies, with particular attention to regional and industrial policies, research and technological development, and that of trans-European networks.

The Court of Auditors

The discipline of the **Court of Auditors,** besides being reduced to the essential (with indications of composition and nomination criteria, as well as of functions), would require an adaptation to the new role of the European Parliament, of which the Court is structurally an auxiliary body. The provision according to which the European Parliament should supply not only its own view regarding the nomination of the members of the Court of Auditors (article 247 TEC), but its consent too should correspond to the above premise.

The Economic and Social Committee

As for the **Economic and Social Committee**, the problem of the representativeness of its composition has been pointed out. Considering that the Nice Treaty, though overcoming the traditional notion of "category", has only slightly modified the composition criteria of the Committee defined by article 257 of the EC Treaty, these do not sufficiently reflect the changes taken place recently in production and services (it speaks of "producers, farmers, carriers, workers, dealers, craftsmen, professional occupations, consumers and the general interest"). It would thus be advisable to up-date the composition criteria, which would legitimise an enhanced joint participation of the Committee in the Union's decisional procedures, shaped on the scheme proposed by the Committee of the Regions.

PART IV
The Acts of the Union

SUMMARY: 1.Reasons for the reform. 2. Goals of the reform. 3. The new classification of the Acts of the Union. 4. The legislative procedure. 5. The budget

1 - Reasons for the reform

The scarce response of the provisions of the Treaties as regards normative acts to the current relations among the acts themselves and even to their present typology, makes the system of the Union hardly understandable and thus increases the **democratic deficit**.

The rarefaction of the differences between the sources of law of the Union

There are many reasons to explain this gap, among which a long lasting indulgence in the jurisprudence of the Court of Justice in justifying the rarefaction, in practice, of the differences between the effects of regulations and those of directives and a certain off-handedness of the Commission and of the offices (only partly justified by the need for flexibility) in creating new kinds of acts subordinate to directives and regulations.

The lack of an explicit boundary between secondary normative acts and administrative acts

Moreover, the **structural confusion between legislative and executive power** could not but influence the kind of acts, without considering that the system lacks an explicit boundary between secondary normative acts and administrative acts.

The above accounts for the failure of certain Member States' decision, and first of all of Italy, to introduce the principle of hierarchy of sources of law, as well as that of the re-organisation of the Union's acts promised in a Declaration annexed to the Maastricht Treaty. The proliferation of acts and the consequent dullness of the system also derive from structural elements that only an opportunity such as the approval of a constitutional text may modify.

2 - The goals of the reform

Simplifying instruments and procedures of the Union

For satisfying the need to **simplify instruments and procedures** long circulating in the current culture of the Union's institutions, the indications stemmed from the Convention are based on the necessity of **re-examination of the type of acts**:

The goals of the reform

- conform to the contextual introduction of the principle of the separation of powers;
- apt to guarantee at the same time the hierarchic superiority of the acts adopted by the legislative power over those of the executive;
- apt to typify executive acts so as to determine the prevalence over administrative acts;
- apt to democratise and make decision-making procedures of all the Union's acts transparent;

- not jeopardising, at the same time, the need for flexibility of the system.

3 - The new classification of Union acts

The new classification of the Union primary sources: "European Union law" and "European Union framework law"

It is the widespread opinion that as regards **primary sources**, that is those subject only to the Constitutional source, it is necessary and sufficient to replace the existing definition of "regulation" and "directive" with "**European Union law**" and "**European Union framework law**" respectively. This is necessary to make it clearly understood that these and only these are the acts adopted by the legislative power (formed as already said by the European Parliament and the Council for Legislative Affairs). It is, however, also sufficient, and may thus remain unvaried, because the definition of the effects that the present system links to rule and directive respectively corresponds to the definition of the effects that the European Constitution, when re-ordering the competence partition of the Union and of Member States, connects to law and framework law.

The acts of the Executive: "decisions" and "regulations"

As for the **acts of the Executive**, innovations should be greater even as regards typifying. In addition to decisions, **a new typology of "regulations"** has been proposed, divided into merely **executive** regulations and **delegated regulations**, as acts adopted by the executive power on the basis of a delegating law setting objectives, content and scope for the exercise of delegate power.

The introduction of "delegated regulations" …

…and its advantages

This would be a tool that, without violating the new partition of functions between powers, would allow the legislator of the Union, if he deemed it necessary, to pay attention only to principles and leave the regulation of details to the executive and thus guarantee flexibility to the system. At this point the ways of **control of the modalities of the exercise of delegate power** by the legislator need to be considered. Firstly, the legislative power has the faculty to legislate at any time on the subject object of the delegation (*call-back*), which is however inherent in a power delegated only as regards the exercise on given terms and not as regards the entitlement. Moreover, the enforcement of the delegate regulation could be subject to the condition that the legislative power will not formulate a contrary advice within a given period of time from its adoption, or to make up for a control instance, though differently formulated, we could provide for the dispositions of the delegate act to cease being effective on expiry of a given term, provided this term is not prolonged (*sunset clause*).

The possible ways of control of the modalities of the exercise of delegate power by the legislator

The non-normative acts: recommendations and opinions

Lastly, the present EC Treaty dispositions would be confirmed for the part regarding **recommendations** and **opinions** among the **non-binding acts** and thus non-normative acts, though specifying that their adoption must respect the previously mentioned acts.

To complete the discipline of the acts, bearing in mind the

principles on the quality of the legislation contained in the Protocol on principles of subsidiarity and proportionality annexed to the Amsterdam Treaty, the obligation of motivating all the acts of the Union could be sanctioned. This could also apply to the obligation to refer, in the introduction to the text on each principle, to the proposals or the mandatory advice requested by the Constitution. Moreover, it should be stated that the drafting of legislative acts be inspired by the **principles of quality of regulation**, leaving to a law the definition of the respective instruments (consultation, regulatory impact assessment, alternatives to regulation).

The obligation of motivating all the acts of the Union

The quality of regulation

4 - The legislative procedure

Once established the general rule according to which all proposals for a legislative act (promoted on the Commission's initiative) are examined by the European Parliament and by the Council for Legislative Affairs in view of the approval of an identical text, the legislative procedure would be far more simple than the present complex typologies of procedures for approving legislative acts.

A simple legislative procedure

As there is no longer need to guarantee the weight of the single institutions, even by the provision of various modalities of joint participation to the act and of differentiated majorities, the legislative procedure would in fact be **mostly disciplined by the rules of procedure of the two Houses**. The subjects to be disciplined **by the Constitution** should correspondingly be reduced and should concern, in particular, the **number of readings** necessary for the approval of a legislative text and the **modalities to solve** possible **conflicts** between the two Houses on the contents of the text being examined.

The definition in Constitution of the number of readings and the modalities to solve possible conflicts between the two Houses

The solution provided for by the present system, consisting in Conciliation Committee, may be maintained, provided it is conformed to the new principle established by the two Houses. It would be a matter of providing, with the aim of proposing a common text regarding controversial laws, that the Presidents of the two Houses summon a Conciliation Committee formed by delegations of the European Parliament and the Committee for Legislative Affairs having an equal number of votes, independently from the number of their members, (a necessary statement considering the different number of members of the two Houses). If within a given term (possibly three weeks) the Committee succeeds in approving a common plan, the two Houses should be given a further term (possibly another three weeks) to approve such a plan. If, conversely, the Committee does not reach an agreement within the given term, the act should be considered as not adopted.

Once adopted and subsequently signed by the Presidents of the two Houses, legislative acts should be published on the Official Gazette of the European Union and be enforced

according to provisions dictated by Treaties in force

Independently from the discipline regarding the two Houses' legislative act formation procedures, it would be advisable to introduce directly **in the Constitution some dispositions on the simplification of acts** and the participation of advisory bodies in their creation.

Introducing in the Constitution dispositions on the simplification of acts…

On the first issue, with the aim of preventing a proliferation of act typologies, it would be advisable to establish a general line according to which, once the Commission proposes the two Houses a legislative act, the latter must abstain from adopting resolutions, recommendations and every other action not provided for by the Constitution. The latter could usefully delegate a Union law with the task of defining the mechanisms and the seat to improve the quality of the legislation by **simplifying** and **codifying** it.

On the second one, the decision-making procedure of the Union's most important political choices should be as near as possible to citizens, compatibly with the demands for functionality of the legislative product. In this respect and in view of satisfying these demands, it would be advisable to delegate to a Union law the identification of ways for the **Committee of the Regions, the Economic and Social Committee, associations and organisations representing important social sectors to participate in the legislative procedure.**

…and on the participation of consultative bodies

5 - The budget

As already highlighted in the Conclusions of the IX Working Group on Simplification of the Convention, the dispositions in force on the budget should be inserted in the first part of the Constitution only as regards the **basic principles** and the **essential elements regarding the budgetary procedure**. As to the principles, the Constitution should **state that the budget must be unitary, universal and annual. Furthermore**, it should require the balance between income and expenditure as well as the obligation to cover expenses. The budgetary procedure provided for by the EC Treaty requires further important innovations.

The constitutional principles regarding the budget

The budget authority should be distributed between the European Parliament and the Council: the latter should have the last word regarding resources and ceilings of financial outlooks, whereas the European Parliament should have the last word on expenditure.

The need for innovation also regards the distinction between obligatory and non obligatory expenses, which in practice has proved the cause of complication in the budget procedure: it would be a matter of applying a single procedure for both kinds of expenses.

It would moreover be advisable to insert in the Constitution the Financial Planning Document, provided for by the 1989 Inter-

Institutional Agreements, establishing that at the beginning of each legislature the Commission must submit the European Parliament and the Council the Financial Planning Document (FPD) subsequently adopted by the Council following the approval of the European Parliament. This Document, due to establish the global amount of the Union's resources during the legislature as well as the annual amount of expenses articulated according to sector, should be binding for the budget of each financial year. In this respect it would be advisable to further specify that the Commission, before submitting proposals for acts or adopting acts that may weigh on the budget, should guarantee that covering of scheduled expenses remains within the limits set by the FPD as regards the current financial year.

PART V
Relations between the Union and the States

SUMMARY: 1. Relations between the Union and Member States 2. Relations between the Union and third States

1 - Relations between the Union and Member States

Relations between the Union and Member States **should be based on a principle of complementarity.** Member States must pursue the objectives defined by the Constitution; they must abstain from any measure that may jeopardise their attainment and, in defining national policies, they must bear in mind the policies of the Union and aim at increasing their efficacy. Forms of opting out should thus be excluded and the non-participation of a Member State in a strengthened co-operation should only be temporary and limited to when the conditions are mature for the State to join the other States.

Relations between the Union and Member States to be based on a principle of complementarity

Attributing a juridical legal personality to the Union means a **revision of admission procedures** for new Member States. This will be the object of a Treaty between the Union and the State requesting admission that, before ratification by the Union, will be subject to the approval of all Member States in compliance with the respective constitutional laws.

The revision of admission procedures for new Member States

As for the safeguard of **fundamental rights** on which the Union is based, a suspension procedure of the right to vote will be enforced against the State that violates such rights.

In the new constitutional system, it is advisable to evaluate the opportunity of taking a further step towards the safeguard of the Union's values by providing for an **expulsion procedure** in extreme cases to be deliberated unanimously. A strengthened majority could approve the necessary institutional adaptations and the measures that may follow.

The provision of an expulsion procedure

The discipline of relations between the Union and Member States should, moreover, provide for the discipline of **withdrawal**. The generalisation of the majority deliberation principle needs to be balanced by such an institution.

The explicit provision of a withdrawal…

The question of whether to globally acknowledge the right to withdraw or whether to limit it to the sole revisions of the Treaties remains. There seem to be good grounds, in terms of accountability and continuity of a country's European commitment, to limit the right to withdraw to the second hypothesis.

…but only in case of revisions of the Treaties

Once the intention to withdraw from the Union is communicated, a period of time should be given in which the Council decides by strengthened majority the institutional adaptations and further measures required following the Member State's withdrawal.

2 - Relations between the Union and third States

The preservation of the existing framework…

The rules regulating relations between the Union and third States do not require substantial changes as regards the existing situation. The basic principle is that the Union, to pursue its objectives, may, on matters inherent with competences, conclude agreements with third States or with international organisations. The opportunity of requesting the Court of Justice's opinion on the compatibility of an agreement with the dispositions of the Constitution will have to be maintained. If the Court expresses a negative opinion the provision according to which the agreement will have to be enforced only after revision of the Constitution will have to be confirmed.

The rule on rights and obligations deriving from conventions concluded before the enforcement of the Constitution will equally have to be inserted. Such rights and obligations remain valid together with the need to resort to any means to eliminate inconsistencies.

…but establishing who can negotiate in the Union's name

Bearing in mind the attribution of juridical personality to the Union, the laws regarding the **conclusion of agreements** will necessarily have to be innovative. In particular, it should be made clear **who can negotiate in the Union's name**, that according to the cases and competences prevailingly involved could in turn be the **Commission** or the **Council**. The articles on the conclusion of the agreement will be inserted in the second part of the Constitution.

The provision of associations with other States or international organisations…

In the first part of the Constitution there will have to be a norm on the conclusion of agreements with one or more States or international organisations establishing an association characterised by mutual rights and obligations, by common actions and particular procedures.

…and the definition of special relationships between the Union and its neighbouring States

Particular attention should be paid to define a possible network of special relationships between the Union and its **neighbouring States.**

In particular, tighter forms of association could be defined with the above countries. Similar forms of association could be provided for with **States that have exited the Union**, as better specified below, in the following part.

PART VI
General and final provisions

SUMMARY: 1. The principle of unanimity regarding the revision of European Treaties. 2. Hypotheses to modify article 48 TUE. 3. The proposal: unanimity and express unilateral withdrawal. 4. The constitutional referendum. 5. How to amend the European Constitution in the future.

1 – The principle of unanimity in the revision of European Treaties

The principle of unanimity: an unmodifiable limit for the revision of the Treaties

Article 48 TEU imposes the **unanimity rule** in designing the revision procedure for European Treaties: "amendments will be enforced after ratification by all Member States". It is quite clear that this **procedure** is **rigid** because it considers the contribution of the willingness of all contracting parties as the flawless element needed to enforce amendments, and thus for the production of effects. Furthermore, as regards European law there is no possibility of derogation, as European practice and jurisprudence confirm. Thus, the modification at issue must find the consent of all partners by means of ratification. The effects are produced by the last of these that achieves the term provided for by article 48 TEU. In this way the new Treaty comes to being in continuity with the previous one and forms its legitimate modification. New laws for the new contracting parties or for the original ones, that is for everyone, or even specific derogation and differentiated and special regimes could easily be introduced. However, such innovations would produce effects only after ratification according to the unanimity principle as provided for by article 48, and only for the future, within the legitimately modified treaty.

If there were no consent of all the contracting parties, the enforcement would have no effect for anyone within European legality. With this in mind, the new treaty would simply not exist according to article 48.

2 – Hypotheses to modify article 48 TUE

Proposed reforms of the unanimity rule in case of non ratification of Treaty revisions by a Member State

From this perspective, no **particular modalities** of the formation procedure seem relevant. Several proposals aim at guaranteeing a minimum platform of consents to the new pact regime, (see, for instance E. Brok's contribution, *The Constitution of the European Union*, *Conv. 324/04*; and that of the European People's Party and European Democrats, *Discussion Paper*, 10/11/02, in particular article x+6), but these proposals does not

seem relevant, as already said, since such modalities would not be introduced in compliance with article 48 TEU, and according to the terms of that same article would not be in force among the contracting parties. (The "*Progetto di Trattato che istituisce l'Unione Europea*, - Project of Treaty establishing the European Union" – drafted by A. Spinelli is not far from the previous proposals, according to which article 82 replaced the unanimity principles with the double majority rule and that is: half plus one of Member States whose populations represent two thirds of the total population of the Community).

Neither is another proposal legally convincing (F. Lamoureux *et alii* (edited by), *Studi Fattibilità. Contributo ad un progetto preliminare di Costituzione dell'Unione Europea*, - Feasibility Studies. Contribution to a preliminary project for the Constitution of the European Union – see, in particular, article 101), which, though with a different perspective from the previous ones, derogates from the unanimity rule and envisages a complex approval procedure defined by the authors themselves "an extreme breach of article 48".

Nor would the assessment of differentiated regimes, referred to those contracting parties unable to give their consent to the modifications, be in any way different: and this because that very consent is the sole condition needed to introduce any kind of modification of the treaties as pictured nowadays.

3 – The proposal: unanimity and express unilateral withdrawal

It is thus necessary to **re-create the unanimity principle** even when there is no ratification by one or more States. The correct solution seems to be in the **unilateral withdrawal** of the non ratifying contracting parties. The withdrawal allows the original pact regime to remain intact between the ratifying parties and provides that within that regime the non-ratification that would prevent the enforcement of modifications on the basis of article 48 TUE may not take place. In fact, it is quite clear that by withdrawing the non ratifying parties become third parties as regards the treaty and thus their refusal would in no way affect the unanimity principle. It is likewise clear that the ratifying parties would have no problems whatever from the non-ratifying parties' lack of consent.

The unilateral withdrawal of the non ratifying contracting parties as the only solution legally admissible

It is advisable that the will to withdraw is expressed by an appropriate clause, inserted in each national bill for the ratification of the Constitutional Treaty and to be separately approved. It seems correct to believe that the withdrawal will have to take place before the last ratification date expires. In fact, following this date, the non-ratification would negatively accomplish the provisions of article 48 TUE. The withdrawal act could usefully be connected with special terms in favour of the non-ratifying parties, such as for example a **privileged**

association regime.

4 – The constitutional referendum

The possible provision for a **referendum vote** should be assessed within the above mentioned conceptual project. The referendum has, in fact, nothing to do with article 48 EUT, nor could the modifications at issue introduce it as a necessary element for the ratification formation procedure.

The possible call for a referendum may be understood as a solicitation and the choice of how to carry it out and its effects would be left to the internal system of the States. A state could easily consider the referendum a necessary tool and condition the ratification by a positive result, but this would influence procedures as regards the internal regulation just by assessing whether the ratification is produced or not. The consequences of the possible conflict of the people's will and the will to ratify would be closed up within the internal political-institutional system.

Obviously, the political-institutional meaning of providing for a poll and its impact on the birth of the new Europe is quite a different matter that will not be faced on this occasion.

5 – How to amend the European Constitution in the future

The revision of the European Constitution in the future: two hypotheses

Lastly, the **possibility of amending the European Constitution in the future** is a different matter. In this case, conversely from the initial approval, the new constitutional text could design a quicker revision procedure, not necessarily in obeisance to the unanimity principle, as the procedure would be valid for the future and approved in compliance to article 48 TUE.

Astrid suggests **two hypotheses** that differ mainly in assigning the European Parliament a different role: in one case, this is, together with other subjects, that of proposing the revision project approved by 4/5 votes in favour at the inter-governmental Conference, and in the other case, it gains the fatherhood of the emendatory act that it shares with the European Council.

Both, however, are coherent with the principle of state participation in the revision – the participation will not necessarily have to coincide with the totality of consents – and with the involvement of European institutions in the different stages of the revision.