Integrity and Efficiency in the European Union Constitutional Treaty*

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ABSTRACT

In the context of the public debate prior to its possible ratification, supporters of the European Union Constitutional Treaty (EUCT), among whom all of EU and member states officials, point out the many important institutional improvements the text potentially entails. While only partly accurate, these arguments appear mostly to be of secondary order in view of the basic requirements of political liberalism. In this paper, we try to demonstrate that, at this more fundamental level, both what we refer to as the “principle of integrity” and the “principle of efficiency” of collective action are clearly violated in the current (and definitive) state of the EUCT. This violation occurs because the text mixes non revisable public policy decision rules with non revisable public policy decided contents on the one hand, and, on the other hand, because the very rules chosen do not sufficiently allow for the possibility of collective decision in a more than ever numerous and heterogeneous European Union. In order to clarify those two points, we use a “constitutional political economy” theoretical framework. We finally develop some considerations about the possible co-existence of “integrity” and “efficiency”, as we define them, in the pseudo-federal regime that characterises the EU.

JEL Codes: B52, D70, N24, N44.
Keywords: European Union Constitutional Treaty, Institutions, Efficiency, Rules, Constitutional Political Economy, Federalism.

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1. Introduction: What Should a Constitution Do?

However tempted, one should not judge the European Union Constitutional Treaty (EUCT thereafter) by its cover. Of course, one can hardly help noticing, on the first page of the draft version presented to the public in June 2003, later amended before being signed by the 25 member states of the EU on October 29, 2004 in Rome, that the term “Treaty” was much less visible than the word “Constitution”. Much attention has indeed been (rightly) devoted to this “nature of the beast” issue by constitutional law scholars. But it seems that the question of the democratic quality of the EUCT, its adequacy to standard political liberalism requirements, has oddly been taken for granted. This time it is the expression “European Union” that appears to stand in the way of academic scrutiny, the common belief being (rightly again) that the very European project has been founded on political liberalism.

The aim of this paper is to revoke this peculiar kind of post hoc ergo propter hoc perspective on the EU and to truly examine, with some existing tools of political economy, if the EUCT truly follows from the post-war “founding fathers” democratic ideals. While the general and vague idea of a “European Constitution” is, at least for pro-Europeans federalists like us, naturally seducing, scholars (as well as citizens) have nevertheless to deal with the effective compromise that has resulted from the work of the European Convention and the printed text as it is in reality to evaluate its adequacy to existing democratic standards, what we will refer later on to as the “principle of integrity” and the “principle of efficiency” of collective action.

But we first feel obliged to present readers with preliminary clarifications on our assessment of the EUCT. In our view, it is simply not questionable that the text seems to mark a number of

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3 “Treaty establishing a Constitution for Europe” in EU official parlance.
4 Unless mentioned otherwise, the text referred to in this article is the English final version of the EUCT published in the EU Official Journal C 310 of December 16 2004.
5 In June 2004.
6 See Weiler (2002) for some scientific criteria in this debate.
7 The European Convention, also referred to as the “Convention on the future of Europe”, was convened by the Laeken Declaration of 15 December 2001 to make the EU “more democratic, more transparent and more efficient”. It held its sessions from February 28 2002 until July 10 2003 and was composed of 1 President and 2 vice-president (nominated), 15 representatives of the Heads of State or Government of the Member States (one from each Member State), 13 representatives of the Heads of State or Government of the candidate States (1 per candidate State), 30 representatives of the national parliaments of the Member States (two from each Member State), 26 representatives of the national parliaments of the candidate States (two from each candidate State), 16 members of the European Parliament, 2 representatives of the European Commission, for a total of 105 tenured members.
significant positive steps on the path of a much-needed democratization\textsuperscript{8} and institutional reform of the European Union, now comprising 25 members\textsuperscript{9}.

To begin with, the second part of the text, the so-called “Charter of Fundamental Rights” (the EU Bill of Rights), should not be treated lightly in this respect, especially by those who have been complaining for many years that the European project was exclusively about deregulating, liberalizing or privatizing. But neither should it be seen, as it is sometimes emphatically, as a constraint on Member states social legislation establishing new rights for workers. It has no such binding power, and the UK government made this point explicit in the text in the course of the June 2004 negotiation and final agreement\textsuperscript{10}.

The new enhanced role given in the text to the European Parliament (\textit{elected} by European citizens since 1979) should not, as well, be underestimated, notably with regard to its relations with the European Commission, the most powerful body of the EU together with the European Central Bank (ECB) and the Court of Justice of the European Communities (referred to in the text as the “Court of Justice of the European Union”), all members of which are \textit{not elected}.

Important institutional reforms of the executive branch\textsuperscript{11} have also been elaborated and proposed by the Convention’s delegates: in the new system, the Presidency of the European Council of the EU\textsuperscript{12} would be more stable and legitimate, an “Union Minister for Foreign affairs” would be nominated and the power of the Eurogroup would be strengthened. Here again however, one should keep in mind that such reforms do not go without possible disillusions and drawbacks\textsuperscript{13}. Whatever the limits, inherent to any constitutional process and outcome, one should thus acknowledge that the delegates have sincerely tried to improve the EU system in the context of an unprecedented arduous negotiation. Symbolically, the EUCT is a success.

\textsuperscript{8} For a general assessment of the state of deliberation and democracy in the EU, see Fitoussi and Laurent (2004).
\textsuperscript{9} Since May 1\textsuperscript{st} 2004.
\textsuperscript{10} One can refer on this point to Article II-111 of the EUCT : “1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution. 2. This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution.”
\textsuperscript{11} This denomination is almost abusive, since the EU system actually relies on a confusion of powers and a separation of legitimacy, see Laurent and Le Cacheux (2003).
\textsuperscript{12} Not to be confused with the Council of Ministers referred to in the text as the “Council” (Article I-19).
But what is fundamentally a Constitution? What should it do? What essential features should it be given to guarantee citizens the greatest possible freedom in the long run? The simple but powerful tools that political economists have forged over the last century are to be used in this very historic occasion—the submission of a new Constitution to popular approval\(^\text{14}\). Beside the affirmation of common values and shared goals (Preamble, part of Part I and Part II of the EUCT) any constitution must comprise provisions regarding the organization of powers and the decision-making process in the polity it governs (Part I of the EUCT). It also should entail approval and revision provisions (Part IV of the EUCT\(^\text{15}\)). A pseudo-federal Constitution must, in addition, clarify the attribution of competence between central and decentralised institutions and bodies (Part I, Article I-12 to I-18).

In a democratic regime, those provisions must reflect a trade-off between two partly contradictory requirements: first, the necessity to allow for, and even encourage, a process of individuals preferences aggregation, “individuals” being States or citizens in a pseudo-federal system of the type of the EU\(^\text{16}\). Such a process supposes the establishment and enforcement of rules that ideally prevent individuals from blocking the system at any time and give them strong incentives to opt for co-operative and mutually beneficial strategies, when they appear desirable for the political community formed by the inter-dependant members. Those rules should conversely deter participants to chose individual interests over common welfare, when their choices can have collectively harmful consequences. Such is in our view the “principle of efficiency”. But this imperative does not stand alone at the founding level of Constitutions. The related mission of any fundamental law is to protect minorities against the possible abuses from deciding majorities. This implies designing limits to collective action, for instance thresholds so high that veto power is always possible when vital outcomes are at stake. We propose to simply call this the “principle of integrity”.

\[^{13}\text{To mention just one, foreign affairs are still submitted in the EUCT to the unanimity rule so it is hard to imagine what exactly will the Council representative represent, see Laurent and Le Cacheux (2003).}\]
\[^{14}\text{This long-lasting and far-reaching branch of our discipline dates back to the founding fathers of economic theory, for long called “political economy”. The modern economic analysis of constitutions can be traced to Wicksell (1896) and has been given a new impetus with the work of Buchanan et Tullock (1962). Many contributions have enriched the field since then, see Breton, Salmon et Wintrobe, eds. (2000) for an overview and a European perspective.}\]
\[^{15}\text{See next section on this point.}\]
\[^{16}\text{For the sake of the argument, we will suppose here that EU member states choices reflect the already aggregated collective preferences of their citizens.}\]
It is well known that, for instance, the rule of unanimity allows every party to the political process to defend its interest but does only exceptionally allow for collective action—actually limited to Pareto-improving choices, provided they are perceived as such by individuals. Reciprocally, majority rules make punctual decisions much more easy, but expose minorities to majority’s arbitrary\textsuperscript{17}.

Consequently, the “democratically optimal” Constitution can be said to be the one that secures “efficiency in integrity”.

2. The Constitutional Political Economy\textsuperscript{18} of the EUCT: The Integrity Violation

Political integrity can be simply defined as the preservation of individuals preferences in the course of collective action. Those can be altered because of the existence of the “social interdependence costs” identified by Buchanan and Tullock (1962), that is the expected costs induced by the necessary interactions between rational individuals willing to minimise transaction costs by acting together. The elementary dynamic of those costs are represented on Figure 1: the greater the number of individuals needed to take action in the political process, the lesser the value of expected integrity cost faced by a given individual. When N=0, the individual faces an asymptotic expected cost of compromising with another one whom he might need to co-operate with. When N=2, this cost is lesser because the individual has already accepted to mix her preferences with those of another one. When N=100, the aggregated preferences have become truly collective so that the cost of integrating another individual in the process in order to take necessary action is very low.

The point of this representation is to show that integrity cost can be reduced if the political process becomes almost neutral in terms of individuals preferences. Another way of saying the same thing would be to note that the more anonymous the individual is in collective action, the less collective action is going to be costly for her. Most importantly, this scheme shows why rules and not choices should be the object of constitutional decision.

\textsuperscript{17} We also have to refer here to classical objections addressed to simple majority rules, such as the impossibility theorems formalised by Arrow (1951) and the related literature on the risk of cyclical majorities (see, among many contributions, DeMeyer and Plott, 1970).

\textsuperscript{18} The concept was coined by Brennan and Buchanan (1988).
Of course, there would be a much simpler way to make sure the integrity of any citizen would never be violated in the political process of collective action: it would be to decide unanimously that all choices should be taken unanimously and to write it down in the constitution. This kind of constitutional rule was indeed supported by Wicksell (1896) for budgetary matters, first because according to him such a decision-making process was possible (public finances finance public goods so everybody should agree on voting them), and second because it was desirable (citizens finance public finances through taxes and should have a voice in the process of budgetary decisions).

But, as noted by Buchanan (1987) and Phelps (1985), the simple unanimity rule of the kind advocated by Wicksell, because it makes the pursuit of individuals consents much too costly, is not suited to attain constitutional optimality defined here as the best possible trade-off between integrity and efficiency, or, to put it differently, the co-existence of the possibility of social choice and the right to oppose it. “The logical foundations of constitutional democracy” built by Buchanan and Tullock (1962) allow us to formalise it better and thus to evaluate the distance of the EUCT to this theoretical model.

Contrary to everyday political choices, which belong in the short democratic run, constitutional choices are inscribed in long run perspectives. For an individual (or a State in a federal or pseudo-federal system) to accept a rule in a democratic regime –rule that sometimes can produce a negative outcome for her– it has to be the more neutral possible and apply over a fairly long period of time, so that positive expected outcomes may balance possibly negative ones. It also has to be agreed on, in the first place, through a unanimous procedure (Buchanan, 1986).

But it is of crucial importance not to confuse in this process a decision-making rule and a decision, i.e. a specific outcome of a general public policy. If the model of Buchanan and Tullock (1962) allows to overcome the political deadlock of constant unanimity, that leans entirely on the side of integrity and condemns efficiency, it is by advocating a unanimous procedure of constitutional choice of decision-making rules and not choices. Then, and the analysis rejoins Rawls' model of formal democracy (Rawls, 1971), provided the application period of the rule is long enough, individuals find themselves placed behind a “veil of uncertainty” (and not of mere “ignorance”, see infra) at the moment of the constitutional choice.
The neutrality of this “original position” is the guarantee of their freedom in the course of an otherwise mutually beneficial political process. Each and every member of the political community (or their agents, that are in our case EU and member states officials present in the process as Convention’s delegates\(^{19}\)) chooses the rules of decision of the community considering the possibility of being, in terms of preferences, alternatively on either side (favourable or adverse, in the majority or the minority) of different outcomes if the rule is implemented. Of course, the consideration presiding to this choice greatly depends on the domain of collective action considered (an argument that supports a differentiation of rules across the different domains of collective action).

But here an element of complexity has to be added to the Buchanan and Tullock framework. Constitutional rules do not only concern the different ages of the present generation. They also rule the dynamic destiny of future generations. The Rawlsian “veil of ignorance” supposes that all members of the community are perfectly rational calculators that are able to devise all social occurrences (i.e. social fates) the future holds but do not know what will be the realized one and choose accordingly criteria of social justice. What lacks in both the Buchanan and Tullock and Rawls models is true uncertainty as defined by Knight (1921). In our view, what the constitutional rules have to deal with is not only complexity, but undetermination. The constitutional rules apply to a radically uncertain future, that no calculation can describe, save decipher.

This uncertainty, and the cautiousness it implies for constitution-drafters, is easily understandable when applied to economic matters, submitted to erratic fluctuations of largely mysterious business cycles\(^{20}\). As King (2004) puts it : “the core of the monetary policy problem is uncertainty about future social decisions resulting from the impossibility and undesirability of committing our successors to any given monetary policy strategy”. In order words it is undesirable and impossible to try “to foresee all the incidents in the life of a nation” (Tocqueville, 1835) in a constitutional text. The question of the possibility to revise constitutional rules when they have been adopted appears of decisive importance in this regard (see next section).

\(^{19}\) 100 out of 105 of whom were elected members of parliaments, national and European, and governments, so that the criticism based on the undemocratic nature of the very constitutional process that lead to the EUCT does not, in our view, hold (see note 7).
In the light of the “principle of integrity”, a first imperative appears: a constitution can not contain decisions but rules of decision of collective action. It can, if necessary, differentiate the rules from a domain of public action to another but it can not prescribe invariant choices for the minorities of the present and the majorities of the future in the form of decided contents of public policies.

Several key provisions of the Third Part of the EUCT as well as some of the many Protocols (36 in total) gathered in the decisive but somewhat detached from the public debate “Protocols and Annexes” part clearly violate, according to us, the “principle of integrity”. These sections of the EUCT do not define the functioning of the democratic process but the outcomes it must lead to in the form of a specific content or partial orientation they give to most economic public policies (namely monetary, exchange rate, fiscal, competition and industrial policies). We will focus here on monetary and fiscal policies, as defined by Article III-177 and III-184 and both the “Protocol on the Statute of the European System of Central Banks and of the European Central Bank” and the “Protocol on the excessive deficit procedure”.

It must be well understood that each public policy which content or orientation is defined in a constitution (all the more if it can be revised, see the following section) exits the democratic sphere –where alternate majorities make public policies content vary– if the text is adopted. What does the EUCT exactly say concerning fiscal and monetary policies?

—Article III-177

The activities of the Member States and the Union shall include [...] a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy, the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support general economic policies in the Union, in accordance with the principle of an open market economy with free competition. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a stable balance of payments.

20 We do not ignore of course the arguments developed on this subject by the “rules versus discretion” literature, that are discussed infra.
–Article III-184

1. Member States shall avoid excessive government deficits. [...] The reference values are specified in the Protocol on the excessive deficit procedure.

–Article 1 of the “Protocol on the excessive deficit procedure”.

The reference values referred to in Article III-184 [...] of the Constitution are:
(a) 3 % for the ratio of the planned or actual government deficit to gross domestic product at market prices;
(b) 60 % for the ratio of government debt to gross domestic product at market prices.

–Article III-185

1. The primary objective of the European System of Central Banks shall be to maintain price stability.

Because the EUCT mixes rules or instruments (the euro is defined at Article I-8, the ECB and the European System of Central Banks at Article I-30) with choices or predefined contents (text cited above), it perverts the significance of the original unanimity choice (unanimity required of all EU member states nations, after a parliamentary or referendum majority vote). Agreeing unanimously on predetermined choices annihilate the principle of integrity this procedure is supposed to secure. The argument according to which the federal or pseudo-federal regime of the EU imposes that one should know who does what in this Third Part is not acceptable in our view. “Who does what?” is a very different question from “What is done?”. In this respect, the criticism that accuses the text of neo-liberal orientation is, according to us, misplaced: the text is anti-liberal considered through “the principle of integrity”.

This important theoretical point must be clarified. There is no doubt that the EUCT has been strongly influenced by the new classical macroeconomics literature. And there is no doubt that this literature relies on the “rules rather than discretion” model developed by Kydland and Prescott (1977), that seems to favour the application of seemingly neutral rules over the erratic exercise of economic policy by possibly irresponsible governments. Our view is that there is a strong contradiction between the requirements of “constitutional political economy” and the “economic constitutionalism” formalised by Kydland and Prescott. In economic theory terms,

21 Article III-184 together with the “Protocol on the excessive deficit procedure” are the essence, although not the totality, of the “Stability and Growth Pact” present in the Amsterdam Treaty (1997).
22 Governments have already accepted the EUCT in on October 29 2004 in Rome.
inscribing a new classical macroeconomic framework (an absolutely independent central bank like the ECB, sovereign over monetary and exchange rate policies, and a relatively independent administrative authority like the European Commission in charge of implementing the Stability and Growth Pact) in a constitution means choosing for present and future citizens the form of the Phillips curve (i.e. the trade-off between inflation and unemployment). In brief, there is a considerable difference between the specific rules that are designed to produce constantly similar outcomes and the general rules designed to allow for all possible outcomes to occur\(^{23}\). The first ones limit individuals freedom. The second ones authorise it.

By the same token, the lack of social provisions (the lack of “Social Europe”) in the text is not a legitimate motive to reject or even criticise it. How can one criticize the absence of majority among current elected member states governments or parliament representatives on this issue? Nevertheless, one can criticize the fact that text does not leave this issue sufficiently open if future majorities decide to implement tax and social integration\(^{24}\). A constitutional text can not impose upon future generations the choices of the present one, or even, in the case of the EUCT, those of the past generations since the Third Part is largely a compilation of parts of the Treaty of Rome (1957), but mostly of the Maastricht (1992) and Amsterdam (1997) Treaty, that were all drafted before the single currency and, for the last two, destined to achieve it.

An odd but true observation, is that the very founders of the “constitutional political economy” analysis have soften their initial argument when applying it to the EUCT. Buchanan (2003) seems more concerned with the efficiency-enhancing nature of the “competitive federalism” supposed to “protect citizens” from “efficiency-reducing policies” than with the specific provisions of the EUCT. Brennan and Hamlin (2004), otherwise authors of a passionate defence of the coherence of the “constitutional economics” research program\(^{25}\), insist on their part that the first virtue of the EUCT would be the “institutionalization of peace”. The fact that these authors may find themselves more in agreement with the content of the neo-liberal economic policies implemented in the EU since its birth (the “economic constitution” of the EU\(^{26}\)) is not a theoretically sufficient motive in our view to overlook the fact that their inscription in the EUCT is in formal

\(^{23}\) Although this distinction, sharply established in Buchanan and Tullock (1962), is somewhat blurred in Brennan and Buchanan (1986) that explicitly support the kind of rules advocated by Kydland and Prescott (1977).

\(^{24}\) Notably by strictly maintaining the present unanimity rule on tax and social matters.

\(^{25}\) See Brennan and Hamlin (1998).

\(^{26}\) For a detailed account of the many flaws of this economic constitution, see Fitoussi (2002).
contradiction with their own work, developed when the Keynesian theory ruled the academic and political world.

To conclude this section and sum up its argument, a reference can be made to the work of Elster, and in particular to the evolution of his understanding of constitution as a collective pre-commitment device. As it well the known, the first Elster (1979) strongly advocates the existence of institutional instruments designed to constrain the collective will, extrapolated from the necessity of individuals to bound their potentially “self-defeating” rationality. But the second Elster (2000) acknowledges a “no-bridge” problem from private constitution to public constitution. The necessity to prevent oneself from doing something is acceptable because it is the “individual later” that is self-constrained by ‘the individual now’. A public constitution is of completely different order: “individuals now” bind “other individuals now” and their “descendants later”. Since, as Elster (2000) puts it, “No group has an inherent claim to represent the general interest. Society has neither an ego nor an id”, constitution must contain general rules. They also must allow for their revision.

3. The Necessary Revision of (contingent) Rules

This argument is again contradictory with the “constitutional economics” literature. Kydland and Prescott (1977), pointing the “time inconsistency” of public policy, insist on the fact that there should be « institutional arrangements which make it a difficult and time-consuming process to change the policy rules in all but emergency situation ». But what if the rules chosen appear to be ill-suited or simply inferior to another rule or set of rules? This is why the constitution must entails revision provisions.

This aspect is subtle in the EUCT and takes two different forms. On the one hand, Part IV of the EUCT strictly maintains unanimity of member States for any revision of the text. It is quite clear that in an European Union of 25 heterogeneous member states, this provision means that the text will not be revisable at all for a very long time, if any. Of course, this revision procedure is not different from those existing in all Treaty, but the EUCT defined itself as a Constitution and its provisions will be applied as such by member states if it is ratified. A Constitution must be

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27 This notion consists of considering the economic policy as a game of strategic interactions between a public authority, which continually seeks to optimise the result of its action in terms of welfare, and rational agents, who thwart its plans after their announcement, as they are fully aware of their lack of credibility.

28 One of the features, according to Weiler (2002), that distinguishes a Treaty from a Constitution.
flexible enough to adapt to unknown future generations preferences in the context of an unpredictable future.

On the other hand, proponents of the EUCT point out that the text contains a new device, aiming at revising it “internally” in the form of the “Flexibility clause” defined by Article I-18:

1. If action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.

In other words, this mechanism only allows, with important limitations, to extend the domains within which decisions are taken on the base of the majority, and not unanimity, rule (see next section for a discussion of the quality of the majority rule finally chosen in the EUCT).

Future evolutions are simply not foreseeable at the time of a constitutional drafting. This is why the longest-lasting constitutions are the shortest, i.e. those with the most general and less detailed provisions. If constitutions are detailed, then at least should they be revisable. To put it once again into King (2004) phrasing, the reason why we should revise rules of decision is quite simple: « it is that we are unwilling to commit now never to learn from future experience ».

Having applied the « principle of integrity » to the EUCT we found that, because the text mixes non revisable public policy decision rules with non revisable public policy decided contents, this first principle of political liberalism has been violated. But what about the quality, in terms of the efficiency of collective action, of the true rules chosen in the EUCT?

4. The Efficiency Violation: “Large” vs. “Small” in the EU-25

After emphasizing the principle of integrity and its implications in terms of contents of the constitutional provisions and of revision procedures, the next question is: what should exactly be the decision-making rule? How to minimize the decision-making costs for policies that are deemed mutually beneficial, given that decision costs increase with the number of parties

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29 The same article states that: “Measures based on this Article shall not entail harmonisation of Member States’ laws or regulations in cases where the Constitution excludes such harmonisation.”
involved, both because of increased heterogeneity of preferences and because of bargaining and other transactions costs? (Chart 2)

To fully understand the nature and consequences of the majority rule adopted in the EUCT, one must recall the dramatic evolution of the number of small and big countries in the EU (see Chart 3 and Table 1): started in the 1950s with only six countries, three of which were “large” (over 50 million people) and three “small” (less than 15 million people), the European integration process has progressively included more and more countries, and an ever larger number of “small” states, especially after 1995, when the quasi-equilibrium between “large” and “small” countries was clearly broken; the current—and near-future—situation in this respect is one in which the EU comprises four “large” members— including a “very large” one, namely Germany—, two “almost large”, or “medium-size” members—Poland and Spain—and 19 “small” —and in some instances “very small”—members.

As noted in Alesina and Spolare (2003), the emergence since 1945 of a large number of economically highly integrated and “small” countries is a global phenomenon, corresponding to a simultaneous economic integration and political des-integration. The specificity of the EU “small” states is that they are the result of the two former evolutions in a politically integrated pseudo-federal regime.

Because they were aware of the increased difficulty of making collective decisions in a Union that was to become more numerous and more heterogeneous, the national governments of the EU15 countries had decided to reform the decision-making rules of the Council before enlarging the EU. Indeed, this reform was the major, if not only, objective of the Intergovernmental conference (IGC) convened in 2000 to draft what was to become the Nice Treaty. However, after fierce bargaining and a last-minute compromise offered by the French government in order to avoid a complete failure of the Nice Summit in December 2000, the voting weights and majority thresholds eventually agreed upon are far from solving the efficiency problem: the weighting scheme and the triple threshold for qualified majority (72% of the votes in the Council, representing at least 50% of the member states and at least 62% of the EU population) are not only highly complex and hardly transparent; they also make it fairly easy for countries to form a
blocking minority coalition, so that the decision-making process is most likely not to be efficient.\(^{30}\)

Adopted precipitously without any simulation of how it would actually function, this qualified majority rule immediately appeared to be too complex, inefficient and probably inconsistent in a Union of 25 or more members (Baldwin and Widgrén, 2004a). The Convention that was convened soon after the adoption of the Nice Treaty therefore proposed a simpler and more efficient rule: the double majority threshold, with 50% of the member states representing at least 60% of the EU population. But these lower thresholds gave more power—especially veto power—to “large” member states, thus relatively weakening the blocking powers of coalitions of “small” member states, and especially that of the two “medium-size” countries—Poland and Spain—that had benefited most from the compromise reached in Nice (Laurent and Le Cacheux, 2004a). In addition, the efficiency gain compared to the Nice decision rules, although real, was actually not enormous (Baldwin and Widgrén, 2004b).

Following the failure of the Brussels summit in December 2003—mostly due to the opposition of the Polish and Spanish governments to what was clearly a loss of influence of these countries compared to what they had gained in Nice—, a new round of negotiations, this time within the Intergovernmental conference, led to the adoption of higher thresholds for the double majority rule in the Council\(^ {31}\). The majority rule adopted in the EUCT is the following:

**Article I-25**

1. A qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union. A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.

2. By way of derogation from paragraph 1, when the Council does not act on a proposal from the Commission or from the Union Minister for Foreign Affairs, the qualified majority shall be defined as at least 72% of the members of the Council, representing Member States comprising at least 65% of the population of the Union.

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\(^{30}\) On the probabilities of reaching decisions on collective issues with the qualified majority rules in the Nice Treaty, see Bobay, 2001.

\(^{31}\) As is well known, qualified majority rules are an essential ingredients of constitutional compromises in federations, as illustrated by the history of the US federal constitution, and the famous “Grand Compromise” it ended up with. But in the case of the EU, matters are made more complex by the confusion between executive and legislative powers, and by the existence of three different bodies where member countries seek representation (the Commission, the Council, and the Parliament). See Laurent and Le Cacheux, 2004b.
3. Paragraphs 1 and 2 shall apply to the European Council when it is acting by a qualified majority.

Whereas the double majority rule that had been proposed by the Convention –50% of the member states representing at least 60% of the EU population—could be regarded as both simple and relatively more efficient than the qualified majority rules of the Nice Treaty, the thresholds finally adopted are but a small progress in terms of efficiency over the Nice rules: according to the calculations made by Baldwin and Widgrén (2004b), the probability of reaching collective decisions would rise from about 5% under Nice rules to a little less than 10% under the new rules with the 25 present member states, and even slightly more with 27 or 28 (including Turkey, in this case). With the already signed accession of Bulgaria and Romania, the double majority thresholds amount to 15 states and at least 310 millions EU citizens; and if Turkey were to join, the thresholds would be 15 states and at least 360 millions EU citizens.

An additional condition, adopted at the end of the IGC negotiations in Brussels, states that a blocking minority has to be include at least four states, a condition that turns out to be binding only for “large” countries, but not for “small” ones. In order to illustrate the properties of this particular double majority rule, and especially the numerous possibilities of forming blocking coalitions, we may give a few examples: a coalition of the six founding countries (Germany, Benelux, France and Italy), or even one that would not include France or Italy, could oppose any decision in the Council; the same could be achieved by a coalition of the 12 new members in the enlarged Union at 27, or indeed any coalition representing at least 170 millions citizens; and in a situation like that prevailing in the Spring of 2003, Italy, Poland, Spain and the UK could have opposed any common decision on Iraq.

In matters of economic policy, these rules are thus likely to allow the continuation of non-cooperative strategies by national governments, with even more detrimental consequences in terms of lack of common policies in the context of an enlarged EU, while the larger number of members and the greater heterogeneity would have required more efficient rules for cooperative solutions to emerge. And it may be recalled to unanimity is still the rule for tax policies and for the decisions concerning the EU budget and its medium-term financial framework: such a decision-making procedure may be regarded as responsible for the “petty accounting logic” that

32 See also the calculations performed by Bobay, 2004, who reaches similar conclusions with regard to the efficiency of the decisions rules eventually included in the EUCT.
is prevailing in EU budget negotiations, and hence for the inability of the EU Council to reach reasonable decisions on the financing of even commonly agreed upon common policies, let alone openly redistributive regional or structural policies.

One way out of such probable deadlocks on most matters of common interest, especially likely because of the different incentives bearing on the national governments of “large” and of “small” countries, it would have been desirable, for efficiency purposes, to facilitate the emergence of “pioneering groups”, “avant-gardes”, or “reinforced cooperations”, i.e. sub-groups of member states willing to cooperate on such issues as tax harmonisation, social policies, etc.; but instead, the EUCT makes the formation of such sub-groups more difficult, by submitting it to the approval of the others.

5. Political Liberalism and Pseudo-Federalism: Is there an “optimal degree of constitutional flexibility” in the EU?

In the previous sections of this paper, we have tried to show that the EUCT exhibits a clear violation of both the “principle of integrity” and the “principle of efficiency”. But we have used the “constitutional political economy” framework partially. In the remainder of this paper, we will try to articulate both principles in order to propose a general view of what we have defined as “the optimal Constitution” and then apply it to the EU.

After many other authors, Alesina and Spolare (2003) formalise the “issue of size” in public economics as resulting from a trade-off between the efficiency of the provision of public goods and the heterogeneity of preferences. In the framework that we have chosen, this trade-off means a trade-off between efficiency and integrity: the bigger the size of the EU, the better the provision of public goods but the greater the divergence on what to provide, so the greater the necessity to implement general rules instead of specific ones. In this perspective, there is an optimal size of the EU: one that minimize efficiency and integrity costs. As Buchanan and Tullock (1962) put it: “the fully rational individual, at the time of constitutional choice, will try to choose that decision-making rule which will minimize the present value of the expected costs that he must suffer. He will do so by minimizing the sum of the expected external costs and expected decision-making costs, as we have defined these separate components.” Chart 4 shows how such an addition is made: the rule chosen, that allows for K/N individuals to agree, minimises the integrity and efficiency costs.
Yet, there is in our view a broader way of interpreting the optimality of a given Constitution. This is done by introducing the notion of “optimal degree of constitutional flexibility”. Let us first detail the trade-off between costs and benefits of Constitutions drawing on the “principle of integrity” and “efficiency”. The major cost of a Constitution (i.e. the rules it entails) is its lack of flexibility in the face of unforeseen shocks. Because of the rigidity of some or all of its rules, a Constitution could prevent political authorities to take necessary efficient action. On the other hand, the major benefit of a Constitution is the stability of the political contract enclosed in it: A Constitution reduces the costs of re-negotiating endlessly the political and social contract, seeking consents in the polity like Diogenes an honest man.

In this very simple formalisation, the “optimal Constitution” appears to be the one with the (more) “optimal degree of constitutional flexibility”: high enough to adapt to unpredicted or unpredictable events without too much net losses of welfare, low enough to avoid the costs induced by the perpetual re-negotiation of the political contract.

Trying to measure the distance between the EUCT and this model might be a useless task: it is very possible that no such optimality exists in the EU given its nature and that we are only left with second, third, or fourth best, which are unsatisfactory but possible. This could explain, at the same time, why we are so displeased with the EUCT, but why this sentiment is sterile. However accurate these hypotheses are, we believe they are unfounded: there is an “optimal degree of constitutional flexibility” that can reconcile political liberalism and the pseudo-federal nature of the EU. It can be attained through “differentiated constitutionalism”.

What this notions means is relatively simple: given the number and heterogeneity of the EU members in terms of collective preferences and economic incentives, there can not be a single constitution in the EU (save one with non-revisable public policy contents and sub-optimal decision-making rules) but several European Constitutions.

The first of these Constitutions would be the true “European Constitution”: it would entail Part II and the “values and goals” of Part I, and would only be revisable unanimously. It could be submitted to the signature and ratification of all States willing to comply with the Rule of Law and democracy, as they are defined in Europe.
The second one would be the “EU Constitution”: submitted to the EU-25 member states, it would entail the decision-making rules of Part I, provided they are corrected to take into account the criteria of size and the relevant “neutralised” (in terms of “integrity” violation, see above) contents of Part III (Single Market, budgetary rules,...). This Constitution would be revisable through qualified majority.

Finally, the third Constitution would be the “Euro area Constitution”: submitted only to the ratification of Euro area members, it would be revisable through qualified majority and include neutral definitions of monetary, exchange rate and budgetary policy. This Constitution should in addition determine the decision-making rules for “European public goods” (social protection and integration,...) to be produced between the closest and most integrated members of the EU, namely the Euro area members.

«The theory of clubs» as defined in Buchanan (1965), as a “theory of optimal exclusion” (and inclusion) will certainly be very useful for this differentiated, democratic and efficient EU to emerge.
References


Chart 1
The “Principle of Integrity”
Chart 2
The Rise of the “Small(s)” in the EU

Note: A “Small” EU Member state is defined as one with a population inferior to the fourth of the population of the biggest state. A “Medium” state is defined as one with a population inferior to half of the population of the biggest state. “Large” states are those remaining.
<table>
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<tr>
<th>Country</th>
<th>Population*</th>
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</tr>
<tr>
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<td>Cyprus</td>
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<tr>
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<td>Slovenia</td>
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<td>5.2</td>
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<td><strong>Germany</strong></td>
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</table>

Note: A “Small” state is defined as one with a population inferior to the fourth of the population of the biggest state. A “Medium” state is defined as one with a population inferior to half of the population of the biggest state. “Large” states are those remaining.

Source: Eurostat.

Chart 3
The “Principle of Efficiency”

Source: adapted from Buchanan and Tullock (1962).

Chart 4
The “Optimal Degree of Constitutional Flexibility”

Source: adapted from Buchanan and Tullock (1962).