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Reform, Process, and Architecture

It was a long road from Nice to Lisbon. The ratification of the Lisbon Treaty was the culmination of attempts at Treaty reform in the EU, which began after the Nice Treaty and lasted for nearly a decade.[1] An understanding of the reform process is therefore essential in order to understand the Lisbon Treaty, more especially because there is much commonality between it and the Constitutional Treaty.

The discussion begins in 2001, the period between the Nice Treaty and the Laeken Declaration. Political developments in this period were crucial for the emergence of the Convention on the Future of Europe. The focus then shifts to the Convention, and identifies in temporal perspective five factors that shaped the Convention process, and enabled Giscard d'Estaing to present a Constitutional Treaty to the intergovernmental conference (IGC).

The story continues with the IGC that led to agreement on the Constitutional Treaty in June 2004, the subsequent demise of this Treaty after the negative referenda in France and the Netherlands, and the re-starting of the Treaty negotiations in 2007, culminating in signature of the Lisbon Treaty in December 2007 and its subsequent ratification.

The penultimate section of the chapter outlines the architecture of the Lisbon Treaty, an understanding of which is essential for subsequent discussion. The chapter concludes with reflections on the process of Treaty reform, and the lessons that can be learned from the 'long walk to Lisbon'.

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1. From Nice to Laeken: The Shaping of the Reform Agenda

We should never forget that the 'beginning started at the end'. The road to Laeken began with the Declaration on the Future of the Union appended to the Nice Treaty.[2] It is important to remember at the outset what the Declaration 'declared'.

[1] P Craig, 'Constitutional Process and Reform in the EU: Nice, Laeken, the Convention and the IGC' (2004) 10 EPL 653.

[2] Treaty of Nice, Declaration 23 [2001] OJ C80/1.

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It began with an air of congratulation at what had been achieved in the Nice Treaty.[3] The Declaration then called for a 'deeper and wider debate' about the future of the EU, which would 'encourage wide-ranging discussion with all interested parties'.[4] It set a timetable for this process to be continued through initiatives to be set out in a Declaration made at the Laeken European Council in December 2001. The Laeken Declaration should address, *inter alia*, the delimitation of competences, the status of the Charter of Fundamental Rights, simplification of the Treaties, and the role of national Parliaments in the European architecture.[5] It would then be for the IGC in 2004 to make the necessary Treaty changes 'after these preparatory steps'.[6]

It would nonetheless be mistaken to believe that the content of the Laeken Declaration, and the establishment of the Convention on the Future of Europe, were somehow pre-ordained after Nice. The calendar year 2001 between Nice and Laeken saw the emergence of consensus among the major institutional players about two crucial issues.

The first concerned the content of the reform agenda. It came to be accepted that the four issues left over from the Nice Treaty were not discrete. It came to be recognized that competences, and the status of the Charter, resonated with other issues concerning the institutional balance of power within the EU, and also with the vertical distribution of authority between the EU and the Member States. It became clear that the ideal of simplification of the Treaties could not realistically be accomplished without considering substantive modification in the existing Treaty provisions. The very fact that the Nice Declaration stated that future reform should address *inter alia* the four issues adumbrated above lent further weight to the expansion of the topics for discussion that resulted in the Laeken Declaration.

There was also growing consensus on the second issue, the reform process. If a broad range of issues was to be discussed, if the next round of Treaty reform was not simply to be a further episode in tinkering with the Treaties, then the idea that the result, whatsoever it might be, should be legitimated by input from a broader 'constituency' than hitherto assumed greater force. There was an element of 'traditional reform fatigue', leading to the desire for new institutional mechanisms that could consider matters central to the future of the EU.

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(a) The Council and the European Council

The debate on the 'Future of Europe' was formally opened on 7 March 2001, by the Prime Ministers of Sweden and Belgium, who held the Council Presidency for the first and second half of 2001, and by the President of the Commission

[3] ibid paras 1–2. [4] ibid para 3. [5] ibid para 5. [6] ibid para 7.

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and the President of the European Parliament. The 'futurum' website was inaugurated.[7]

The Goteborg European Council in June 2001 was an important step on the road to Laeken, and its approach was influenced by a paper prepared by the Secretary-General.[8] The paper contributed to the growing realization that the four issues identified in the Nice Declaration could not be considered in isolation and that debate about the future of Europe would necessarily address fundamental issues of institutional competence. This was acknowledged by the Goteborg European Council, which made reference to the Secretary-General's Report, and recognized that modernization of Community institutions would be central to future reforms.[9]

The deliberations of the Goteborg European Council concerning the reform process were shaped by a paper prepared by the Swedish Presidency of the Council.[10] It canvassed a number of options as to how the debate about the future of Europe should be taken forward, such as classic IGC mode, and the establishment of a small group of 'wise men'. It also raised the possibility of 'creating a broad and open preparatory forum',[11] drawing on the process used for the Charter of Fundamental Rights. The Goteborg European Council was relatively brief about the specifics of the reform process, but the Presidency paper put the Convention model firmly on the agenda and the European Council noted that the debate about the future of Europe 'involving all parts of society' should be actively pursued.[12]

The themes apparent in the first half of 2001 concerning both the content of the reform agenda and the reform process were developed by Belgium, which occupied the Presidency in the second half of 2001. This is readily apparent from the Press Release issued by the Belgian Presidency on 9 September 2001, at the conclusion of an informal meeting of foreign ministers. The reform agenda was conceptualized in terms of a broad analysis of the strengths and weaknesses of the European model, and this was coupled with specific attachment to the Convention model for the reform process, which was regarded as a democratic, transparent, and credible mechanism for future reform.

This growing consensus about the approach to content and process was affirmed by later meetings of the General Affairs Council (GAC).[13] Thus the GAC 'favoured an approach consisting of enlarging on the themes and objectives listed in the Nice Declaration, in the form of questions, with the

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[7] <http://europa.eu/institutional_reform/index_en.htm>.
[8] Preparing the Council for Enlargement, POLGEN 12, 9518/01, Brussels 7 June 2001.
[9] Goteborg European Council, 15–16 June 2001, [16]–[18].
[10] Report on the Debate on the Future of the European Union, POLGEN 14, 9520/01, Brussels 8 June 2001.
[11] ibid [56].
[12] Goteborg European Council (n 9) [15].
[13] 2372nd Council Meeting, General Affairs, 12330/01, Brussels 8–9 October 2001.

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dual aim of making the Union meet its citizens' expectations more successfully while functioning more effectively'.[14] The GAC also confirmed the broad convergence of views in favour of the Convention model, detailing matters such as the number and type of participants, the establishment of a Praesidium, and support from a Secretariat.[15]

The GAC meetings paved the way for the Laeken European Council.[16] In terms of the reform agenda, the Laeken Declaration gave the formal imprimatur of the European Council for the broadening of the issues left open post-Nice. These issues may always have been the tip of the iceberg. The Laeken Declaration nonetheless made this explicit. The four issues post-Nice became the 'headings' within which a plethora of other questions were posed, which raised virtually every issue of importance for the future of Europe. In terms of the reform process, the Laeken Declaration formally embraced the Convention model with a composition designed to enhance the legitimacy of the results that it produced, whatsoever those might be.

(b) The Commission

The willingness of the European Council and the Council to expand the reform agenda and to adopt the Convention model for the reform process was clearly crucial. It should, however, also be recognized that the other main institutional actors were pressing in the same direction.

This is apparent from one of the Commission's early contributions, six weeks after the inauguration of the future of Europe debate. The Commission made clear its belief that the four questions identified in the Nice Declaration were not the only ones to be considered when reflecting on the future of the Union. The debate should address

> the transparency and democratic legitimacy of the Union and its institutions and cover . . . all the questions that arise concerning the process of European integration, whether they relate to its final objectives, its institutional structures or its policies.[17]

While the Commission was more circumspect about the precise format for the reform process, it indicated its interest 'in a formula based on the agreement which led to the drafting of the Charter of Fundamental Rights'.[18]

The same themes are evident in Commission speeches between April and December 2001. Romano Prodi called for the Laeken Declaration to establish

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[14] ibid 18.
[15] ibid 18. See also, 2386th Council Meeting, General Affairs, Brussels 19–20 November 2001, 11.
[16] Laeken European Council, 14–15 December 2001.
[17] Commission Communication, On Certain Arrangements for the Debate about the Future of the European Union, 25 April 2001, 4.
[18] ibid 3.

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'an ambitious and comprehensive agenda'.[19] This would be discussed in the only way acceptable to citizens, in a Convention,[20] more especially so given that the Nice European Council had shown that the common European interest could not emerge from the regular IGC process.[21] Traditional State diplomacy could not, said Prodi, 'launch a full European constitutional process in a way which will seem credible in the eyes of the people'.[22] Individual Commissioners pressed in the same direction. Antonio Vitorino argued that the subject matter of the reform debate must be wide-ranging and that the Convention model should be employed.[23] These sentiments were echoed by Michel Barnier. He argued that the four topics identified in the Nice Declaration could not be considered in isolation since they necessarily resonated with broader issues concerning the purpose and legitimacy of the EU as a whole, which should be addressed via the Convention model.[24]

The Commission reiterated these views on the eve of the Laeken Summit. The Laeken Declaration should broaden the scope of the questions posed in the Nice Declaration since it was, for example, not possible to discuss competences without considering what the Member States of the Union wished to do together,[25] albeit without thereby calling into question 50 years of European integration.[26] The broadened agenda should be legitimated through the broadest possible consensus, which meant that the reforms should be deliberated using the Convention model.[27]

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(c) The European Parliament

The European Parliament pressed strenuously in the same direction as the other major institutional actors. This is apparent in its Resolution concerning the Future of the European Union in May 2001.[28] It expressed regret at the narrow compass of the Nice Treaty, and noted that a Union of 27 Member States required more thoroughgoing reform in order to guarantee democracy,

[19] On the Road to Laeken, Speech by Romano Prodi to the European Parliament, Speech/01/326, 4 July 2001, 4.

[20] ibid 3.

[21] Speech to the European Parliament's Committee on Constitutional Affairs, Romano Prodi, Speech/01/343, 10 July 2001, 3.

[22] Building the Community and the New Challenges Facing the Union, Romano Prodi, University of Pisa, Speech/01/458, 12 October 2001, 4.

[23] The Convention as a Model for European Constitutionalisation, Humboldt University, Berlin, 14 June 2001.

[24] Why Europe Matters, 17 October 2001; Speech to the European Parliament's Committee on Constitutional Affairs, 19 November 2001.

[25] Communication from the Commission on the Future of European Union, Renewing the Community Method, COM(2001) 727 final, 4.

[26] ibid 5.

[27] ibid 3–4, 8.

[28] The Treaty of Nice and the Future of the European Union, A5–0168/2001.

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effectiveness, transparency, and governability.[29] The medium through which such reform should be pursued should be radically different from the IGC model, which the European Parliament argued had outlived its usefulness as a method for Treaty reform. The Convention model should be employed, thereby enabling a wider participation of affected interests.[30] Consensus between the European Parliament and national Parliaments in favour of the Convention model was secured by July 2001.[31]

The European Parliament's aspirations were reiterated forcefully in the Report of the Committee on Constitutional Affairs for the Laeken European Council.[32] The Report reaffirmed the need to proceed beyond the strict confines of the issues identified in the Nice Declaration, and elaborated the particular topics that should be discussed in the reform process,[33] most of which found their way into the Laeken Declaration. The Report also pressed for adoption of the Convention model and set out in detail how it might operate.[34]

2. The Convention on the Future of Europe: From Talking Shop to Draft Constitutional Treaty

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The content of the Lisbon Treaty is, as will be seen, very similar to that of the Constitutional Treaty. It is therefore important to understand the way in which the Constitutional Treaty emerged, and the forces that shaped its content. It is only by doing so that one can understand the Lisbon Treaty itself.

The Laeken European Council duly instituted the Convention on the Future of Europe, which began work in March 2002.[35] It was chaired by Valery Giscard d'Estaing, with two Vice-Chairmen, Giuliano Amato and Jean-Luc Dehaene. There was one representative from each of the 15 Member States, 30 members of national Parliaments, two from each Member State, 16 Members of the European Parliament (MEPs) and two Commission representatives. There were also representatives from the accession candidate countries, who could take part in the proceedings without, however, being able to prevent any consensus that might emerge among the Member States. The members of the Convention could be replaced by alternate members if they were not present. Observer status was accorded to the European Ombudsman and to members of

[29] ibid [1]–[2].
[30] ibid [5]–[7].
[31] Second Meeting with National Parliaments on Future of Europe Secures Consensus in favour of a Convention to Prepare for Treaty Reform, 16 July 2001.
[32] Report on the Laeken European Council and the Future of the European Union, A5-0368/2001.
[33] ibid [2]–[4].
[34] ibid [6]–[21].
[35] Laeken European Council, 14–15 December 2001, Annex 1, 24. The seminal work on the Convention on the Future of Europe is, P Norman, *The Accidental Constitution, The Making of Europe's Constitutional Treaty* (EuroComment, 2nd edn, 2005).

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the Economic and Social Committee, the European social partners, and the Committee of Regions. The Presidents of the Court of Justice and of the Court of Auditors could be invited by the Praesidium to address the Convention.

The Praesidium of the Convention was composed of the Convention Chairman and Vice-Chairmen and nine members drawn from the Convention, these being the representatives of all the governments holding the Council Presidency during the Convention, two national parliament representatives, two European Parliament representatives, and two Commission representatives.

It is important to recognize at the outset that the Convention was given a relatively short period to complete its work. It was instructed to finish its deliberations within a year, and to present its conclusions to the European Council meeting in the summer of 2003. It is equally important to understand that the Convention decided at an early stage to proceed via consensus, rather than formal voting, which thereby gave the Praesidium considerable power to determine whether the requisite consensus had been reached.[36]

The Convention used a three-stage methodology. There was the listening stage from March till June 2002, when the main emphasis was on general statements concerning the missions of the Union. This was followed by the examination stage, in which Working Groups considered particular topics. This exercise occupied the latter half of 2002. There was then the proposal stage, in which the Convention discussed draft articles of the Constitution, normally on the basis of proposals from the Working Groups.

This was the formal architecture of the Convention deliberations. It tells us little about the real issues that shaped the framing of the Constitutional Treaty. The analysis that follows identifies the key factors that enabled the Convention to produce the Constitutional Treaty.

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(a) Spring 2002: a viable way forward through Working Groups

The organization of working groups was central to the attainment of the Convention goals.[37] The time limit within which the Convention had to consider the issues assigned to it by the Laeken Declaration was very tight. This was even more so once it became clear that the Convention wished to produce a 'complete Treaty'. Working groups were therefore a necessary step if the tasks were to be completed within the designated time. The possibility of establishing such groups was expressly envisaged in Article 15 of the Convention's Working Methods, and the decision to establish such groups was made in May 2002.[38] This made good sense. The groups facilitated detailed discussion of the kind that could not take place in plenary, and they enabled more Convention members to be engaged than would otherwise have been possible.[39]

[36] Norman (n 35) 37–38. [37] ibid ch 5.
[38] CONV 52/02, Working Groups, Brussels 17 May 2002. [39] ibid [1].

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Six groups were initially established. It was clear that there would have to be groups concerned with rights and competences, and these were duly established as groups two and five respectively. The establishment of separate groups dealing with subsidiarity and the role of national Parliaments was somewhat less obvious, but these became groups one and four. The remaining two groups dealt with classic legal and economic issues respectively, the legal personality of the Union being assigned to group three, and the implications of a single currency for closer economic cooperation being assigned to group six. Each working group was set a deadline to fit in with the schedule of plenary meetings in autumn 2002. Four further working groups on external action, defence, simplification of instruments, and the area of freedom, security, and justice were established in early autumn 2002. A working group on social Europe was created towards the end of 2002, making 11 in all.

However, working groups were consciously not used for certain issues, the most important example being the inter-institutional distribution of power. This was left for discussion in plenary sessions, in large part because of its centrality and the controversial nature of the relevant issues.

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(b) Autumn 2002: the defining 'convention moment'—the decision to press for a Constitutional Treaty

The decision to press for a Constitutional Treaty was perhaps *the* defining Convention moment. It is tempting to think that the Convention on the Future of Europe was created in order to produce a draft Constitutional Treaty. This is to read a sense of historical inevitability into events with the benefit of hindsight. The reality was far less pre-ordained.

Talk of a constitutional text featured only at the very end of the Laeken Declaration in the context of Treaty simplification. The language of the Declaration was cautious to say the least: 'the question ultimately arises as to whether this simplification and reorganization might not lead in the long run to the adoption of a constitutional text in the Union'.[40] It is true that in the opening ceremony Giscard mentioned the possibility of a Constitutional Treaty emerging from the Convention,[41] and it can be accepted that some Convention members might always have hoped that this would be attained.[42] Many Member States, however, felt that the Convention might be nothing more than a high-level talking shop, which produced recommendations.[43] There was therefore nothing inevitable about the Convention producing a coherent constitutional document. This was not a foregone conclusion.

[40] Laeken European Council, 14–15 December 2001.
[41] Norman (n 35) 39. [42] ibid 44.
[43] Norman (n 35) 34–35; P Norman, 'From the Convention to the IGC (Institutions)' (Federal Trust, September 2003) 2.

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The reality was that the Convention developed its own institutional momentum and vision. The idea took hold that the Convention should produce a coherent document, and that this should take the form of a Constitutional Treaty.[44] Thus the Praesidium rejected a proposal in July 2002 that the Convention should ask the Commission to prepare a draft Constitutional Treaty, since this would imply that the Convention had shirked its own responsibilities.[45] The defining 'Convention moment' when the idea that a Constitutional Treaty should be drafted by the Convention took hold was September 2002.[46]

A paper from the Secretariat, entitled *Simplification of the Treaty and Drawing up of a Constitutional Treaty*, was central to this process.[47] The Secretariat discussed options for making the Treaties more accessible, such as Treaty simplification, codification, and merger, and pointed to difficulties or limitations with such options. It then raised the possibility of drawing up a Basic Treaty, which addressed matters such as the values of the Union, citizenship, institutions, decision-making procedures, competences and the like. It thus laid the initial foundations for what was to become Part I of the Constitutional Treaty.[48]

Matters then moved rapidly. There was a plenary session on 12–13 September 2002, two days after the Report from the Secretariat.[49] The Chairman of the Convention, Giscard d'Estaing, drew together the impending reports from the working groups, with the Secretariat paper, which was to provide the foundation for the new Treaty architecture. This made it possible for the Convention to 'reflect on the form of the end product, ie the draft Constitutional Treaty for Europe'. The plenary session at the beginning of October 2002 carried forward these initiatives.[50] The debate revealed broad consensus for the idea that there should be a single legal personality, which would supplant the legal personalities of existing bodies. This would then 'pave the way for merger of the treaties into a single text', which would consist of two parts, 'the first, fundamental part, containing provisions of a constitutional nature, and the second mainly policies'.[51]

It was not fortuitous that the membership of the Convention altered in the late autumn of 2002, shortly after the Convention's aspirations to produce a concrete document became apparent.[52] The foreign ministers of Germany and France joined the Convention. The Member States began to realize that this

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[44] There was considerable uncertainty as to whether the Convention should seek to produce a Constitution or a Constitutional Treaty, Norman (n 35) 63–64.

[45] Norman (n 35) 54.

[46] ibid 54–55.

[47] CONV 250/02, Simplification of the Treaties and Drawing up of a Constitutional Treaty, Brussels 10 September 2002.

[48] ibid 11–15.

[49] CONV 284/02, Summary Report on the Plenary Session—Brussels 12 and 13 September 2002, Brussels 17 September 2002.

[50] CONV 331/02, Summary Report on the Plenary Session—Brussels 3 and 4 October 2002, Brussels 11 October 2002.

[51] ibid 2, 4. [52] Norman (n 35) 129–133.

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Convention might produce a constitutional document for the EU. It was better then to be on the inside, shaping whatever might emerge, rather than merely making comments from the sidelines.

(c) Autumn 2002: sketching the constitutional architecture through the Preliminary Draft Constitutional Treaty

Giscard d'Estaing was true to his word, and the Preliminary Draft Constitutional Treaty was presented to the second plenary session in October 2002.[53] Its publication[54] was an astute political move, notwithstanding the fact that there was much that was unclear or ambiguous.

The Draft represented an exercise in 'outline constitutional architecture'. It was premised on the idea of a single Treaty with three parts, the first containing the constitutional principles, the second dealing with Union policies, and the third with general provisions concerning ratification and the like. It identified the different 'rooms' within each part. The extent to which these 'rooms' had content varied considerably. The 'room' dealing with the EU institutional balance of power was largely empty, simply listing Articles that would deal with the powers of the principal EU institutions, while saying nothing as to what those powers actually were. The 'rooms' that dealt with topics such as competence and rights had some 'furniture'.

The publication of the Preliminary Draft Constitutional Treaty was astute nonetheless. It was important 'internally', sending a message to Convention members that progress was being made towards something concrete and providing a framework for the conclusions of the working groups. It was equally important 'externally' for the relationship between the Convention and key State players. The document lent credence to the idea that a Constitutional Treaty would emerge from the Convention, a matter which was not pre-ordained ahead of time. Its publication served to acclimatize State players to the fact that something real might emerge from the Convention, while allowing time for their comments to be considered. As Norman states, 'publication of the skeleton gave a palpable boost to the Convention's proceedings and structured the subsequent discussions'.[55]

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(d) Winter and spring 2003: internal and external discourse about institutions

The year 2002 ended relatively smoothly. The working groups continued their deliberations with varying degrees of success and consensus, presenting their

[53] CONV 378/02, Summary Report of the Plenary Session—Brussels 28 and 29 October 2002, Brussels 31 October 2002.

[54] CONV 369/02, Preliminary Draft Constitutional Treaty, Brussels 28 October 2002.

[55] Norman (n 35) 59.

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conclusions for discussion within plenary sessions from autumn 2002 onwards. When sufficient consensus emerged from plenary sessions the Secretariat began work in earnest on drafting articles concerning the topic, such as competence or rights, thereby fleshing out the relevant Article identified in the Draft Constitutional Treaty. The Convention then discussed these draft articles and amendments were tabled.

The beginning of 2003 arrived and there had as yet been no formal discussion about institutions. The contentious nature of the issues surrounding the inter-institutional division of power was evident in the process employed at the Convention. The Convention's general three-stage methodology, the listening phase, the examination stage through working groups, followed by the proposal stage, did not apply to institutions. There was no working group. It was felt that the issues were too contentious to be dealt with other than in plenary session. This is reflected in the fact that the title on Institutions was empty in the Preliminary Draft Constitution. It was a 'room' without content.

The key to understanding the deliberations about institutions is to recognize that they were shaped by discourse within and outside the Convention, and that the Praesidium exercised greater power over these proposals than any other matter on the reform agenda.

The formal, internal Convention discussions began in earnest in January 2003.[56] The Praesidium presented a reflection paper on the Functioning of the Institutions,[57] which served as the basis for discussion in the plenary session at the end of January 2003. It is important to appreciate the range of difficult institutional issues that were on the table. These included, *inter alia*, the method of choosing the Commission President, the composition of the Commission, the Council formations, the functions of the European Council, whether there should be a longer-term President of the European Council as opposed to the rotation system, the composition of the European Parliament, and its role within the legislative process. The diversity of views on these matters was readily apparent from discussions within the plenary session at the end of January 2003.[58] There was a reasonable degree of consensus on some matters, such as the co-equal status of the European Parliament within the legislative process. It was equally clear that there were serious divisions of opinion concerning the locus of executive power, more especially the respective roles of the Commission and the European Council.[59] The division of opinion was between the larger and the smaller States, with the Commission lining up with the latter group.

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[56] CONV 473/02, Summary Report on the Plenary Session—Brussels 20 December 2002, Brussels 23 December 2002.

[57] CONV 477/03, The Functioning of the Institutions, Brussels 10 January 2003.

[58] CONV 508/03, Summary Report on the Plenary Session—Brussels 20 and 21 January 2003, Brussels 27 January 2003.

[59] P Craig, 'The Constitutional Treaty: Legislative and Executive Power in the Emerging Constitutional Order' (EUI Working Paper No 7, 2004).

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The external discourse on these issues had a marked impact on the internal Convention deliberations. As Grevi notes, the key phrase in shaping the formal Convention agenda for 2002 may have been 'everything but institutions', but the key phrase for the debate in other circles was 'nothing but power'.[60] The institutional division of power was like Banquo's ghost, ever present, lurking in the background. The very fact that the institutional issues so clearly concerned the locus of power within the EU meant that Heads of State, national Parliaments, and interest groups all contributed to this debate. This was especially so in relation to the location of executive power within the EU, as exemplified by the debate about the future shape of the European Council. The larger Member States, in the form of Spain, the UK, and France, made it clear that they supported the idea of a longer-term, strengthened Presidency of the European Council. This became known as the 'ABC' view, expressed by Aznar, Blair, and Chirac.[61] In January of 2003, just when the Convention was beginning to deliberate about institutions, Germany was brought on board. This was made clear in a Franco-German paper, in which Germany accepted the idea of a long-term Presidency of the European Council, with the *quid pro quo* being that France accepted that the Commission President should be elected.[62] The importance attached to the future shape of executive power was also apparent in what Grevi has termed a non-paper leaked by the UK Government in January 2003 concerning the European Council.[63] The UK paper favoured very extensive powers for the President of the European Council, with fundamental implications for the way in which the EU would operate.[64] The vision for the EU contained in the 'ABC view' and the Franco-German paper provoked a fierce reaction from small Member States and accession States.[65]

We can now return to the internal Convention deliberations and the power wielded by the Praesidium. The views of the larger Member States necessarily impacted on the internal Convention discourse. This was all the more so given the change in the membership of the Convention in the late autumn of 2002. The most significant change in this respect was what Norman has termed the

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[60] G Grevi, 'The Europe We Need: An Integrated Presidency for a United Europe' (European Policy Centre, December 2002) 5.

[61] Norman (n 35) 110–112.

[62] ibid 143–148.

[63] G Grevi, 'Options for Government of the Union' (Federal Trust, March 2003) 6; Norman (n 35) 112.

[64] This paper envisioned the President of the European Council preparing and controlling its agenda; developing jointly with the Commission President the multi-annual strategic agenda; being head of the Council Secretariat that would become 'his administration'; chairing the General Affairs and External Relations Council; chairing teams of chairs of sectoral Council formations; approving agendas for sectoral Councils; chairing trialogue meetings with the Commission and the EP; and attendance at Commission meetings as an observer when the President of the European Council so decides; 'ownership' of major summits with great powers; coordination and supervision on aspects of crisis management and defence.

[65] Norman (n 35) 148–150.

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invasion of the foreign ministers:[66] Joschka Fischer and Dominique de Villepin both joined the Convention, as did foreign ministers from some other Member States. They were powerful figures and made numerous contributions to the institutional deliberations. The Franco-German paper, set against the background of the 'ABC' view, shaped developments inside the Convention concerning the disposition of executive power. It set the tone of subsequent debate about the Presidency of the Union. It had a marked impact on Giscard d'Estaing's thinking. He may well have inclined to this view in any event. The Franco-German paper, when combined with the opinions of the UK and Spain, nonetheless shaped his thinking. He was not about to produce a Draft Constitution for the IGC that contained key provisions about the institutional disposition of power that were opposed by the larger Member States, and therefore doomed to failure.

The manner of announcement of the constitutional provisions on the Presidency of the European Council was nonetheless dramatic. The proposals were leaked to the press on 22 April 2003, just as he was unveiling them to the Praesidium, with the consequence that Praesidium members were 'flabbergasted and furious'.[67] The proposals 'provoked shock and awe in about equal measure, particularly among the integrationist Convention members from the European Parliament and some of the smaller Member States'.[68] It is safe to say that they were not welcomed by the Commission either. The 'shock and awe' provoked by the Giscard proposals was explicable because they not only provided for an extended Presidency of the European Council, which was to be the highest authority of the Union, but also accorded the European Council a range of other powers, and its own bureaucratic support mechanism. It is true that the most developed form of these proposals did not survive long within the Convention. Substantial parts hit the 'cutting room floor', but the result as expressed in the Draft Constitution nonetheless embodied the central idea of an extended Presidency for the European Council and enhancement of its power.

The Praesidium submitted its proposals to the Convention in April 2003.[69] Full discussion of the draft articles concerning institutions only occurred in the plenary session on 15–16 May 2003,[70] and this revealed serious differences of view on central issues. The Praesidium realized that it needed more time for reflection and therefore did not make any amendments to these articles in its initial global draft of 28 May 2003.[71] There was no second reading in plenary

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[66] Norman (n 43) 2; Norman (n 35) 129–133.
[67] Norman (n 35) 189.
[68] Norman (n 43) 3.
[69] CONV 691/03, Institutions, Brussels 23 April 2003; CONV, Summary Report of the Plenary Session—Brussels 24 and 25 April 2003, Brussels 30 April 2003.
[70] CONV 748/03, Summary Report of the Plenary Session—Brussels 15 and 16 May 2003, Brussels 27 May 2003. See also, CONV 709/03, Summary Sheet of Proposals for Amendments relating to the Union's Institutions, Brussels 9 May 2003.
[71] CONV 783/03, Summary Report on the Plenary Session—Brussels 30 and 31 May 2003, Brussels 16 June 2003.

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about these articles. The Praesidium opted instead for consultations with the four constituent groups, governments, MEPs, national MPs, and the Commission, which took place on 4 June 2003.[72] Formal text of the revised articles on the institutions only became available on 10 June,[73] a mere three days before the concluding session on 13 June.[74] It is clear moreover, as will be seen below, that the Praesidium, and the Secretariat, exercised considerable power in deciding on the ultimate content of these provisions of the Constitution and which amendments should be adopted.

The Convention process in relation to institutions can obviously be criticized. It should, however, be placed in perspective. This may not serve to justify the process in this respect, but it does help us to understand what occurred. It was not self-evident that the Convention would seek to draft a Constitution. Many of the Member States felt that it might be nothing more than a high-level talking shop, which produced recommendations.[75] It nonetheless quickly became evident that the Convention had more far-reaching aspirations to produce a formal constitutional document. The decision to postpone discussion of institutions is readily explicable. It was clear that this topic would be divisive. If it had been placed on the agenda in the latter part of 2002, then it would have overshadowed the work on other issues. It might have undermined the entire constitution-making process.

The contrast with what occurred is instructive. The Convention, via working groups, concentrated on important issues, such as the Charter of Rights, competences, legal personality and the like. There were differences of opinion on these matters, but they were less marked than those on institutions. Progress on these matters allowed the Praesidium to publish the Preliminary Draft Constitution in the autumn of 2002. This may well have been a skeletal document. It did, however, reinforce the sense that the Convention really was going to produce a constitutional document, and allowed key national players to absorb the idea.

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(e) Spring and summer 2003: centralization of initiative to the Praesidium and the Secretariat in the closing stages

The closing stages of the Convention[76] saw the increasing centralization of initiative to the Praesidium and the Secretariat.

The European Council refused to extend the time for the Convention deliberations. The President of the Convention informed the members in April

[72] CONV 770/03, Part I, Title IV (Institutions)—Revised Text, Brussels 2 June 2003; CONV 771/03, Consultations with the Component Groups, Brussels 2 June 2003.

[73] CONV 797/03, Revised Text of Part One, Brussels 10 June 2003.

[74] CONV 814/03, Summary Report of the Plenary Session—Brussels 11 and 13 June 2003, Brussels 19 June 2003.

[75] Norman (n 43) 2.

[76] Norman (n 35) chs 15–17.

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that the European Council required the Convention to present its conclusions to the European Council meeting in Greece on 20 June. Giscard d'Estaing recognized that this was a firm deadline to which the Convention had to work.[77] He acknowledged also that the tight time frame required flexibility in the Convention's working methods.[78]

The tight time scale increased the centralization of initiative to the Praesidium and the Secretariat. They already had the principal responsibility for drafting the detailed articles of the Constitutional Treaty. Their power in this respect was strengthened because the working groups were largely disbanded once they had presented their final reports, although it was possible to reconvene such groups if this was required. The centralization of initiative was enhanced by the very limited time scale within which amendments to the draft Articles could be made. This was normally a week, a short time by any standards given the complexity and controversial nature of some of the Articles. It fell, moreover, to the Praesidium to decide which amendments should be taken seriously. A plethora of amendments were tabled to all draft Articles, and it was not uncommon for there to be 50 or more. It was the Praesidium, and in some instances a small number within the Praesidium, that 'grouped' the amendments, decided which 'groups' had most support, and which should be taken up.

The tightness of the timetable, with the consequential centralization of power and scant time for deliberation about amendments, was of course less than satisfactory. It certainly did not conform to some 'ideal-type' vision of the final stages of drafting a Constitution or Constitutional Treaty. The Convention, however, did not exist within an ideal-type world. It conducted its task against the real world conditions laid down by the European Council. Once the deadline was set the Praesidium had little choice but to take a more pro-active role. If it had not done so the Constitutional Treaty would not have been presented to the European Council in June 2003, and might not even have been ready by autumn 2003.

We should be similarly realistic about the Praesidium's role in relation to the prioritization of amendments. The absence of the strict deadline would, to be sure, have allowed greater time for deliberation about the amendments. It would still have been necessary for someone to be pro-active in deciding which of the amendments should be pursued. This could not have been readily accomplished by any simple voting method, even assuming that voting had been chosen as the method for resolving such matters. The number and range of amendments precluded this solution. Whether a member might vote for or against amendment X concerning topic A would depend on the alternatives, and there would

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[77] CONV 696/03, Summary Report of the Plenary Session 24 and 25 April, Brussels 30 April 2003.

[78] CONV 721/03, Letter from the Chairman to Members of the Convention Concerning the Convention's Working Methods During its Final Stages, Brussels 8 May 2003.

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often be many placed on the table. Moreover, preferences for or against amendment X on topic A might commonly be affected by the outcome in relation to amendment Y on topic B, which was related to, but distinct from, topic A.

3. The Inter-Governmental Conference: Deliberation, Discord, and Decision

(a) The IGC deliberations: an Italian autumn

Giscard d'Estaing duly delivered the Draft Constitutional Treaty to the European Council in June 2003.[79] However, the IGC deliberations did not begin in earnest until the autumn under the Italian Presidency. The outcome is well known. The Member States failed to agree on the Constitutional Treaty in the December meeting of the European Council.

The early view, embodied in the Laeken Declaration, was that the Convention deliberations would be no more than the 'starting point for the discussions in the Intergovernmental Conference, which will take the ultimate decisions'.[80] This was in line with the view that the Member States hold the reins of power in grand constitutional moments. It was nonetheless unclear when the IGC initially convened whether it would seek to reopen the Convention's text. There were some Member States who favoured acceptance of the text as it stood, mindful of the dangers of opening Pandora's Box. However, they made it clear that if the text were reopened then there were issues that they would place on the table for reconsideration. Other Member States were less reticent, and pressed for reconsideration of certain provisions. The latter view won the day, and the IGC proceeded to 'pick its way' through the Constitution, albeit not in any very systematic manner.

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The IGC discussed a plethora of particular issues during this period, including detailed aspects of areas such as economic policy, criminal law, defence, and the Common Foreign and Security Policy (CFSP).[81] It was not surprising, however, that the IGC deliberations were dominated by institutional issues. No attempt will be made to evaluate the complex issues surrounding the desirability or otherwise of the changes proposed by the IGC to the institutional provisions. These issues will be considered in subsequent chapters.[82] The objective is rather to give a brief flavour of the institutional issues that occupied the IGC in this

[79] CONV 820/03, Draft Treaty Establishing a Constitution for Europe, Brussels 20 June 2003; CONV 850/03, Draft Treaty Establishing a Constitution for Europe, Brussels 18 July 2003; this is the final version of the Convention's work, submitted in July 2003, in which some changes were made from the version submitted in June 2003.

[80] Laeken European Council, 14–15 December 2001, 5.

[81] CIG 52/1/03, PRESID 10, IGC 2003-Naples Ministerial Conclave: Presidency Proposal, Brussels 25 November 2003.

[82] Chs 2, 3.

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autumnal period. The changes were important because many were retained in the final version of the Constitutional Treaty and in the Lisbon Treaty.

The IGC considered the internal organization of the Commission. The Draft Constitution embodied a two-tier system for Commissioners, 15 of whom could vote, while the remainder could not.[83] This was a compromise between those who favoured a smaller, tighter Commission, and those who advocated the continued presence of one Commissioner from each Member State. This compromise was however deeply problematic. The Commission expressed opposition in the strongest possible terms, describing the relevant provisions of the Draft Constitution as 'complicated, muddled and inoperable'.[84] The Italian Presidency addressed the issue,[85] although it seemed that the IGC would persist with the divide between voting and non-voting Commissioners, while attempting to clarify the responsibilities of the latter group.[86]

The organization of the Council received considerable attention. The Draft Constitution proposed a combined Legislative and General Affairs Council (LGAC). When the LGAC acted in its legislative capacity each Member State's representation was to be composed of one or two representatives at ministerial level with relevant expertise, which would reflect the business on the Council's agenda.[87] This did not prove acceptable to the IGC.[88] The majority of the Member States favoured according legislative power to each of the Council formations, rather than having one dedicated Legislative Council, and this view was incorporated in a revised version placed before the IGC by the Italian Presidency.[89]

The IGC also proposed more general changes to the regime of Council formations.[90] The combined LGAC was discarded. There was to be a General Affairs Council, GAC, with the task of ensuring consistency in the work of the different Council formations. The GAC would, as in the Draft Constitution, prepare and ensure the follow-up to meetings of the European Council in liaison with both the President of the European Council as well as the Commission.[91] The provisions concerning the Foreign Affairs Council, FAC, remained the same.[92] The European Council would still make the decision concerning the

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[83] CONV 850/03 (n 79) Art I-25(3).

[84] A Constitution for the Union, Opinion of the Commission, pursuant to Art 48 of the Treaty on European Union, on the Conference of representatives of the Member States' governments convened to revise the Treaties, COM(2003) 548 final, [2].

[85] CIG 6/03, Preparation of the IGC Ministerial Meeting on 14 October 2003: Questionnaires, Brussels 7 October 2003.

[86] IGC 2003-Naples Ministerial Conclave (n 81) 4–5.

[87] CONV 850/03 (n 79) Art I-23(1).

[88] CIG 9/03, PRESID 1, Questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers, Brussels 15 October 2003.

[89] CIG 39/03, PRESID 5, Council Presidency and Council Formations, Brussels 24 October 2003.

[90] ibid. [91] IGC revised Art I-23(2). [92] IGC revised Art I-23(3).

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list of other Council formations.[93] A consequence of discarding the LGAC was that each of the Council formations would deliberate and vote on legislation within its respective area. The method of choosing the Presidency of the Council formations was altered.[94] They were to be held by Member State representatives in the Council on the basis of equal rotation, in accordance with a Protocol devised by the IGC. The Protocol embodied in essence a 'team system' for the Presidency of Council formations, other than the GAC and FAC. This meant that the Presidency of those other Council formations would be held collectively by pre-established groups of three or four States, for a period that was still being negotiated, but which would be somewhere between one and two years.

There was also discussion about voting within the Council, the definition of qualified majority voting (QMV), and the areas to which QMV, as opposed to unanimity, should apply.[95] Some States were happy with the Convention draft, others wished to be more adventurous, yet others wished to be more cautious, at least with respect to the retention of unanimity for voting in certain areas. The Italian Presidency was reluctant to reopen the Convention definition of QMV, which can be readily understood given the Byzantine nature of previous discussions on the matter. It did, however, accept that further reflection on the matter was necessary and that it might have to be placed on the table of the European Council meeting.[96]

(b) The Brussels European Council December 2003: the 'winter of our discontent'

As autumn turned to winter the Italian Presidency sought to prepare the ground for the Brussels European Council meeting in December 2003. It pursued a double-edged strategy, as is clear from documentation submitted to the European Council. It submitted one document in the form of revised texts on issues that the Presidency felt were sufficiently resolved by the IGC deliberations to be able to be put forward as concrete proposals.[97] It also submitted a much shorter document concerning sensitive issues that were intended to be the focus of the discussion at the December meeting.[98] These were the existence or not of some reference to Europe's Christian roots in the Preamble; the composition of the Commission; the rules on QMV; and the minimum threshold of seats in the European Parliament.

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[93] IGC revised Art I-23(4).
[94] IGC revised Art I-23(6).
[95] CIG 38/03, PRESID 4, IGC—Qualified Majority Voting, Brussels 24 October 2003.
[96] CIG 52/1/03, PRESID 10, IGC 2003—Naples Ministerial Conclave (n 81) 4.
[97] CIG 60/03, ADD 1, PRESID 14, IGC 2003—Intergovernmental Conference (12–13 December): Addendum 1 to the Presidency Proposal, Brussels 9 December 2003.
[98] CIG 60/03, ADD 1, PRESID 14, IGC 2003—Intergovernmental Conference (12–13 December): Addendum 2, Brussels 11 December 2003.

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Commentators and participants initially expected the Brussels European Council to be a 'three shirter'. There is an amusing article waiting to be written about 'sartorial metaphors within European discourse', more especially so given the talk of 'hats' within the Convention in the context of the Presidency of the EU. Suffice it to say that the 'three shirter' signified an expectation that the European Council would extend beyond the normal two-day period, thereby necessitating the extra supply of fresh clothing. It was thought that there would be lengthy discussions, quite possibly extending throughout the nights, as the *dramatis personae* hammered out some form of consensus on the issues that still divided them. That had been the case in the past, most recently with the IGC that produced the Nice Treaty.

Matters turned out very differently. As the date for the meeting approached, concerns were expressed that a deal might not be brokered. MEPs who were former Convention members drew up a list of ten critical points that they expected to see in the final Constitution. It was the issue of vote-weighting in the Council, with its implications for QMV, which proved most difficult. This saw France and Germany pitted against Spain and Poland, with the former pair insisting that the number of votes wielded by the latter two States should be reduced. Agreement could not be reached on this topic, the European Council broke up early, and the participants went home with some clean clothes.

The 'assignment of blame' for failure to agree on the Constitution began quickly. Fingers were pointed at Spain and Poland for being intransigent; similar accusations were levelled at France and Germany, and Berlusconi was criticized for not doing enough to resolve the problem. The 'payback' for failure to agree on the voting issue was equally rapid. On 16 December the leaders of France, Germany, UK, Sweden, Austria, and the Netherlands signed an open letter calling for EU spending to be capped from 2007 onwards. This would have significant consequences for Spain and Poland who would be principal beneficiaries of EU funding and hence suffer from any cap on spending. It is difficult to regard the timing of this letter as unrelated to the failure at Brussels.

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(c) The Brussels European Council June 2004: the Irish secure agreement

The Presidency passed to Ireland for the first six months of 2004, with the Dutch set to follow for the second half of 2004. The Irish conducted bilateral negotiations with the relevant players. However, it was the tragedy of the bombing in Madrid which proved to be the turning point. This led to a change of government in Spain. The incoming government quickly made it clear that it wished to see the IGC process revived and that it was willing to re-enter discussion about voting rights within the Council.

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It should not be thought, however, that agreement on the Constitutional Treaty was inevitable thereafter. It remained unclear until the last moment whether the voting rights issue could be resolved and whether other matters, such as Blair's red lines, could be accommodated. However, the Brussels European Council in June 2004 managed to secure agreement on the Constitutional Treaty.[99]

4. From Constitutional Treaty to Lisbon Treaty: Crisis, Reflection, and Ratification

(a) 2005: 'Ratification' and 'Reflection'

The final version of the Constitutional Treaty[100] had to be ratified in accordance with the constitutional requirements or choices of each Member State. Fifteen Member States ratified the Treaty. It was generally thought that problems with ratification would be most pronounced in the UK, but this was never tested because progress with ratification came to an abrupt halt when France and the Netherlands rejected the Constitutional Treaty in their referenda in 2005.[101] A number of Member States therefore postponed the ratification process. The European Council in 2005 decided that discretion was the better part of valour and that it was best for there to be a time for 'reflection', during which Member States were encouraged to engage in debate about the EU with their own citizens.

The negative referenda in France and the Netherlands, coupled with the period of reflection, not surprisingly generated discourse as to whether it was wise for the EU ever to have embarked on this ambitious constitutional project. This was reflected in the jibe 'if it ain't broke, why fix it?' On this view grand constitutional schemes of the kind embodied in the Constitutional Treaty were unnecessary, because the EU could function perfectly well on the basis of the Nice Treaty, and dangerous, because the very construction of such a constitutional document would bring to the fore contentious issues concerning matters such as the range of EU competences, the supremacy of EU law over national law, and the inter-institutional division of power, which were best resolved through less formal mechanisms, as opposed to hard-edged constitutional provisions that invited high-profile constitutional controversy.

There is force in this view. It should nonetheless be recognized that the four issues left over from the Nice Treaty were not discrete. They raised, both directly

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[99] Council of the European Union, Brussels European Council, Presidency Conclusions 10679/04, ADD 1, CONCL 2, Brussels 18 June 2004.

[100] Treaty Establishing a Constitution for Europe [2004] OJ C316/1; J Ziller, *La nouvelle Constitution europeéne* (La decouverte, 2005); J-C Piris, *The Constitution for Europe: A Legal Analysis* (Cambridge University Press, 2006); O de Schutter and P Nihoul, *Une Constitution pour l'Europe: reflexions sur les transformations du droit de l'Union europeéne* (Larcier, 2004).

[101] R Dehousse, 'The Unmaking of a Constitution: Lessons from the European Referenda' (2006) 13 *Constellations* 151.

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and indirectly, broader issues concerning the nature of the EU, its powers, mode of decision-making, and relationship with the Member States and their parliaments. The dissatisfaction with piecemeal IGC Treaty reform, monopolized by the Member States, should moreover not be forgotten. If this traditional process had been adhered to in relation to the broadened reform agenda there would have been a raft of criticism about the 'legitimacy and representativeness deficit' inherent in the classic IGC model.

A related, but distinct, set of issues concerned the way in which the Convention operated. Thus some cast doubt on the participatory credentials of the Convention, pointing to the increasing centralization of initiative in the Praesidium, especially in the latter stages of the Convention, which left scant time for deliberation of amendments. This was problematic and did not conform to some 'ideal-type' vision of drafting a Constitution. However, the Convention did not exist within an ideal-type world. It conducted its task against the real world conditions laid down by the European Council. Once the European Council reaffirmed the deadline the Praesidium had little choice but to take a more pro-active role, since otherwise the Constitutional Treaty would not have been presented to the European Council in June 2003. The absence of the strict deadline would, moreover, still have required 'someone' to have been pro-active in deciding which amendments should be pursued.

There was also a vibrant discourse as to what should happen in the light of the negative referenda in France and the Netherlands.[102] Some argued that while the rejection of the Constitutional Treaty by the French and Dutch voters had little to do with its content, grand constitution making was neither necessary, nor desirable, since there was already a relatively stable constitutional settlement in place. The EU should rather get on with its normal business.[103] Others broadly agreed with this diagnosis of the French and Dutch referenda, but maintained that the EU needed some constituent document as it moved forward in the new millennium.[104] Yet others saw the rejection of the Treaty as evidence of a deeper malaise within the EU, which should not be ignored.[105]

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(b) January to June 2007: from reflection to action

In 2006 the European Council commissioned Germany, which held the Presidency of the European Council in the first half of 2007, to assess and report

[102] G de Búrca, 'The European Constitution Project after the Referenda' (2006) 13 *Constellations* 205.

[103] A Moravcsik, 'Europe without Illusions: A Category Error' (2005) 112 Prospect, available at <http://www.prospectmagazine.co.uk/landing_page.php>.

[104] A Duff, 'Plan B: How to Rescue the European Constitution', Notre Europe, Studies and Research No 52, 2006.

[105] L Siedentop, 'A Crisis of Legitimacy' (2005) 112 Prospect, available at <http://www.prospectmagazine.co.uk/landing_page.php>.

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on the current state of discussion concerning the Constitutional Treaty. This would then serve as the basis for measures to be taken by the French Presidency in the second half of 2008 at the latest. It was nonetheless unclear at the time how much progress Germany would be able to make in gaining acceptance of the Treaty, or some revised version thereof.

The German Presidency, however, was keen to move matters forward in 2007. The objective was to see whether an agreement could be brokered between the Member States that would pave the way for acceptance of some revised Treaty reform. To this end, the German Government engaged in well-organized and astute diplomacy, inquiring of each Member State which issues in the Constitutional Treaty it would require to be changed in order for that State to ratify any amended document. This enabled Germany to bring to the table in the June 2007 European Council a detailed mandate of the changes that should be made to the Constitutional Treaty, in order that a revised Treaty could successfully be concluded.

The German Presidency sought agreement in the European Council in June 2007[106] on the outlines for a revised version of the Constitutional Treaty, which led to the birth of the Reform Treaty. The European Council concluded that 'after two years of uncertainty over the Union's treaty reform process, the time has come to resolve the issue and for the Union to move on'.[107] It was agreed to convene an IGC,[108] which was to carry out its work in accord with the detailed mandate provided in Annex I of the conclusions of the European Council, and finish its deliberations by the end of 2007.[109] The IGC was to be conducted under the overall responsibility of the Heads of State or Government, assisted by members of the General Affairs and External Relations Council. A representative of the Commission was to participate in the Conference, and the European Parliament was to be closely 'associated with and involved in the work of the Conference with three representatives'.[110]

The amount of work done prior to the June 2007 meeting was readily apparent from the detailed mandate in Annex I drawn up for the IGC that was to take place in the second half of 2007. Annex I began with 'general observations' about the next stage of Treaty reform. The IGC was asked to draw up a Treaty to be called the Reform Treaty, which would amend the existing Treaties with a 'view to enhancing the efficiency and democratic legitimacy of the enlarged Union, as well as the coherence of its external action'.[111] The Reform Treaty was to contain two principal substantive clauses, which amended respectively the Treaty on the European Union TEU, and the EC Treaty, the latter of which would be renamed the Treaty on the Functioning of the European Union, TFEU. The Union should have a single legal personality and the word 'Community' throughout would be replaced by the word 'Union'.[112]

[106] Brussels European Council, 21–22 June 2007. [107] ibid [8].
[108] ibid [10]. [109] ibid [11]. [110] ibid [12].
[111] ibid Annex I, [1]. [112] ibid Annex I, [2].

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The 'general observations' within the Annex were also structured to excise the 'C' word, constitution, from the Reform Treaty. Thus the Reform Treaty would operate as an amendment to the existing treaties, rather than by way of repealing all existing treaties as envisaged by the Constitutional Treaty.[113] The TEU and TFEU that were to make up the Reform Treaty were not to have a constitutional character. This was said to be so for a number of reasons:[114] the term 'constitution' was not to be used; the 'Union Minister for Foreign Affairs' was to be called High Representative of the Union for Foreign Affairs and Security Policy; the terms 'law' and 'framework law' were to be abandoned, and the existing terminology of regulations, directives, and decisions was to be retained; there was to be no flag, anthem, or motto; and the clause in the Constitutional Treaty concerning the primacy of EU law was to be replaced by a declaration.

The European Council's reasoning was readily explicable in political terms: the imperative was to conclude this stage of Treaty reform, and insofar as the constitutional terminology of the Constitutional Treaty was felt to be a political obstacle then it was to be ditched. This can be acknowledged, but it should nonetheless be recognized that the arguments set out above as to why the Reform Treaty was not to have a constitutional character were weak to say the very least. Insofar as the Constitutional Treaty partook of the nature of a constitution, none of the changes identified by the European Council were significant. A constitutional document does not cease to be so because the words law or lawmaking are not used, nor because of the change in nomenclature of the Union Minister for Foreign Affairs, nor for any of the other reasons listed. There is, of course, room for genuine debate as to whether the Constitutional Treaty was truly a constitutional document,[115] but insofar as it was the reasons for differentiation provided by the European Council were unconvincing.

The remainder of the European Council's mandate for the 2007 IGC consisted of 16 pages of detailed provisions concerning modifications that were to be made to the TEU and the TFEU. They related to matters such as competences, the Common Foreign and Security Policy, the enhanced role of national parliaments, the Charter of Fundamental Rights and the area of freedom, security, and justice. This did not, however, mask the fact that the great majority of the changes introduced by the Constitutional Treaty looked set to remain within the Reform Treaty.

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(c) July to December 2007: the IGC and the Lisbon Treaty

Matters then moved rapidly. An IGC was convened in order to take forward the formulation of the Reform Treaty. Portugal held the Presidency of the Council

[113] ibid Annex I, [1]. [114] ibid Annex I, [3].

[115] S Griller, 'Is this a Constitution? Remarks on a Contested Concept' in S Griller and J Ziller (eds), *The Lisbon Treaty, EU Constitutionalism without a Constitutional Treaty?* (Springer, 2008) 21–56.

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in the second half of 2007 and was keen that the matter should be concluded during its Presidency, in part because the President of the Commission was from Portugal, and in part because Portugal could then attach its name to the amending Treaty.

The 2007 IGC was power politics with a vengeance. We had grown accustomed to the fact that even traditional IGCs would be relatively open, with discussion papers available on the internet and time for the 'people' to form some view as to the planned reforms. This sense was fuelled by the more inclusive process used in relation to the Charter of Fundamental Rights and the Constitutional Treaty. The Lisbon Treaty was, by way of contrast, forged by the Member States and Community institutions, and there was scant time afforded for further deliberation. Thus the detailed version of the Reform Treaty of October 2007 allowed only two weeks before the Member States were required to signal their consent, and scant time for any one else to digest its detailed provisions.

The justification for this accelerated process was apparent when one perused the content of the Lisbon Treaty, but it was, for obvious reasons, a justification that those engaged in the IGC could not too openly avow, this being that the Lisbon Treaty was indeed the same in most important respects as the Constitutional Treaty. The issues had been debated in detail in the Convention on the Future of Europe after a relatively open discourse, and were considered once again in the IGC in 2004. There was therefore little incentive or appetite for those engaged in the 2007 IGC to reopen Pandora's Box.[116] This argument could not, however, be pressed too explicitly by those taking part in the 2007 IGC, since they would be open to the criticism that they were largely repackaging provisions that had been rejected by voters in two prominent Member States,[117] more especially given that key Member States sought to press forward with ratification of the Lisbon Treaty without recourse to any (further) referendum.

The 2007 IGC produced a document that was signed by the Member States on 13 December 2007,[118] although the appellation was changed to the Lisbon Treaty in recognition of the place of signature. It required ratification by each Member State. The hope that this stage of Treaty reform could be hastily concluded was dashed, however, when Ireland rejected the Lisbon Treaty in a referendum. This obstacle was overcome by a second Irish referendum in October 2009, after concessions were made to overcome Irish objections expressed in the earlier referendum. The final hurdle proved to be the reluctance

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[116] G Tsebelis, 'Thinking about the Recent Past and Future of the EU' (2008) 46 JCMS 265.

[117] This was so regardless of the fact that the reasons for the 'no' vote in France and the Netherlands may have had relatively little to do with the new provisions contained in the Constitutional Treaty.

[118] Conference of the Representatives of the Governments of the Member States, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, CIG 14/07, Brussels 3 December 2007, [2007] OJ C306/1.

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of the Czech President to ratify the Lisbon Treaty, but he did so reluctantly after a constitutional challenge to the Treaty had been rejected by the Czech Constitutional Court.

5. Lisbon Treaty: Architecture and Structure

(a) Formal architecture

It is axiomatic that every Treaty has its own architecture, which serves to shape the ordering and placing of particular Treaty provisions, more especially when the amending Treaty makes significant institutional changes to the status quo ante. It would indeed be natural to denominate this in terms of 'constitutional architecture', but for the fact that the word 'Constitution' has been consciously excised from the Lisbon Treaty. It is nonetheless necessary to understand and evaluate the '(constitutional) architecture' of the Lisbon Treaty, since this is important in and of itself, and because it facilitates understanding of the more particular amendments that will be considered in later chapters.

So, let us be clear about the basics. The Lisbon Treaty amends the Treaty on European Union and the Treaty Establishing the European Community. The Lisbon Treaty itself has seven Articles, of which Articles 1 and 2 are the most important, plus numerous Protocols and Declarations. Article 1 contains the amendments to the Treaty on European Union, TEU, and contains some of the principles that govern the EU, as well as revised provisions concerning the Common Foreign and Security Policy and enhanced cooperation. Article 2 amends the EC Treaty, which is renamed the Treaty on the Functioning of the European Union. The EU is henceforth to be founded on the TEU and the TFEU, and the two Treaties have the same legal value.[119] The Union is to replace and succeed the EC.[120] The Lisbon Treaty contains an Annex with a Table of Equivalences for the revised Treaty as a whole. This provides the reader with the new numbering of Articles for the entire Treaty. A consolidated version of the Lisbon Treaty now contains the new numbering and references to the old provisions where appropriate.[121] These renumbered Treaty Articles will be used throughout the discussion of the Lisbon Treaty.

(b) Substantive architecture: general

The Constitutional Treaty had a pretty clear 'constitutional architecture', and this was so irrespective of what one felt about particular provisions thereof.

[119] Art 1 para 3 TEU.
[120] ibid.
[121] Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C115/1, [2010] OJ C83/1.

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Part I contained the important principles concerning the nature and operation of the EU legal order, even if reference to the substantive provisions of Part III of the Constitutional Treaty was necessary in order to understand the more detailed meaning of particular principles.

The Lisbon Treaty fares less well in this respect. The revised TEU functions to some extent as the repository of the constitutional principles for the EU. This is especially true in relation to Title I-Common Provisions, Title II-Democratic Principles, and Title III-Provisions on the Institutions. The Articles included within these Titles undoubtedly address matters of a constitutional nature, concerning, for example, the locus of legislative power within the EU and the establishment of the newly-expanded role of President of the European Council. There are nonetheless matters not included within the revised TEU, which had properly been in Part I of the Constitutional Treaty. Thus, for example, the rules concerning competence, aside from a brief mention in the TEU,[122] are to be found in the TFEU,[123] as are the provisions concerning the hierarchy of norms,[124] and the important principles relating to budgetary planning.[125]

This was perhaps inevitable, given the fate of the Constitutional Treaty and the political need to take forward the reforms in a manner that would be more in accord with the status quo. This explains the continued use of the basic divide between the TEU and the EC, albeit with the latter renamed as the TFEU. The framers of the Lisbon Treaty nonetheless also had to ensure that there was some difference to the 'naked eye' between what was contained in the revised TEU, and what had been included within Part I of the Constitutional Treaty. The drafters of the Lisbon Treaty were therefore caught in a dilemma: the natural desire to frame the revised TEU so as to embrace the EU's important constitutional principles had to be tempered by the political need to produce a document that did not simply replicate Part I of the Constitutional Treaty.

The Lisbon Treaty has, however, made improvements in the architecture of what will henceforth be the TFEU. It is divided into seven Parts. Part One, entitled Principles, contains two Titles, the first of which deals with Categories of Competence, the second of which covers Provisions having General Application. Part Two deals with Discrimination and Citizenship of the Union. Part Three, which covers Policies and Internal Actions of the Union, is the largest Part of the TFEU with 24 Titles.[126] The most noteworthy change in this respect is that the provisions on Police and Judicial Cooperation in Criminal Matters, the Third Pillar of the old TEU, have been moved into the new TFEU. They have been integrated with what was Title IV EC, dealing with Visas, Asylum etc, and is now

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[122] Arts 4, 5 TEU. [123] Arts 2–6 TFEU.
[124] Arts 288–292 TFEU.
[125] Art 312 TFEU.
[126] The Titles are as follows: I-Internal Market; II-Free Movement of Goods; III-Agriculture and Fisheries; IV-Free Movement of Persons, Services and Capital; Title V-Area of Freedom, Security and Justice; VI-Transport; VII-Common Rules on Competition, Taxation and Approximation of Laws;

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Title V of the TFEU, renamed the Area of Freedom, Security and Justice. Part Four of the TFEU covers, as before, Association of Overseas Countries and Territories. Part Five, by way of contrast, is new and deals with External Action by the Union, bringing together a range of subject matter with an external dimension.[127] Part Six of the TFEU is concerned with Institutional and Budgetary Provisions, while Part Seven covers General and Final Provisions.

(c) Substantive architecture: the pillar structure and the Common Foreign and Security Policy

The impact of the Lisbon Treaty on the Second and Third Pillar[128] will be considered in subsequent chapters.[129] The present focus is on the general approach in the Lisbon Treaty to matters that had hitherto been dealt with in the Second and Third Pillars.

The approach to the Common Foreign and Security Policy (CFSP) in the Lisbon Treaty largely replicates that in the Constitutional Treaty, subject to the change of nomenclature, discussed below, from Union Minister for Foreign Affairs to High Representative of the Union for Foreign Affairs and Security Policy. The distinctive nature of the rules relating to the CFSP means that in reality there is still a separate 'Pillar' for such matters. The rules relating to the CFSP remain distinct and executive authority continues to reside with the European Council and the Council. It is the European Council, acting unanimously on a proposal from the Council, which identifies the strategic interests and objectives of the CFSP.[130]

This is further emphasized by Article 24 TEU, which provides that: the CFSP is subject to specific rules and procedures; it is defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise; that the adoption of legislative acts is excluded;[131] and the CFSP is to be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties.

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VIII-Economic and Monetary Policy; IX-Employment; X-Social Policy; XI-The European Social Fund; XII-Education, Vocational Training, Youth and Sport; XIII-Culture; XIV-Public Health; XV-Consumer Protection; XVI-Trans-European Networks; XVII-Industry; XVIII-Economic, Social and Territorial Cohesion; XIX-Research and Technological Development and Space; XX-Environment; XXI-Energy; XXII-Tourism; XXIII-Civil Protection; XXIV-Administrative Cooperation.

[127] The principal issues covered by Part Five are: the common commercial policy, cooperation with third countries and humanitarian aid, restrictive measures, the making of international agreements, and the EU's relations with third countries and international organizations.

[128] A valuable detailed analysis can be found in S Peers, *Statewatch Analysis of the EU Reform Treaty*, available at <http://www.statewatch.org/>.

[129] Chs 9 and 10.

[130] Art 22 TEU.

[131] Art 352(4) TFEU, which is the amended Art 308 EC, specifically precludes the use of this provision in relation to the CFSP.

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Article 24 TEU also emphasizes the 'specific role' of the European Parliament and the Commission in this area as defined by the Treaties. The European Court of Justice (ECJ) continues to be largely excluded from the CFSP.[132] It does, however, have jurisdiction in relation to Article 40 TEU, which is designed to ensure that exercise of CFSP powers do not impinge on the general competences of the EU, and vice versa; the ECJ also has jurisdiction under Article 275 TFEU to review the legality of decisions imposing restrictive measures on natural or legal persons adopted by the Council under Chapter 2 of Title V TEU.

(d) Substantive architecture: the pillar structure and Police and Judicial Cooperation in Criminal Matters

The approach in the Lisbon Treaty to the CFSP can be contrasted with that in relation to the Third Pillar, which is moved from the TEU and merged with the provisions of what was Title IV EC, dealing with immigration, asylum and civil law. This forms a new Title V TFEU, the Area of Freedom, Security and Justice, which has five chapters dealing with: general provisions, policies on border checks, asylum, and immigration; judicial cooperation in civil matters; judicial cooperation in criminal matters; and police cooperation. The detailed provisions largely reflect those in the Constitutional Treaty, subject to some amendments mandated by the European Council in June 2007. The Lisbon Treaty has therefore largely followed the Constitutional Treaty in 'de-pillarizing' this aspect of EU law.

This development is to be welcomed, as is the fact that, subject to transitional provisions, the normal jurisdiction of the ECJ is generally applicable within this area. Thus the old Article 35 EU, which limited the ECJ's jurisdiction under the Third Pillar, is repealed by the Lisbon Treaty. The exception is Article 276 TFEU, which continues to preclude the ECJ from reviewing the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. Article 267 TFEU, the preliminary ruling procedure, is modified such that if the question raised by the national court relates to a person in custody, the ECJ must act with the minimum of delay.

Less welcome is the preservation of the various opt-outs and reservations to Justice and Home Affairs, which have been extended to cover the new Title V TFEU, and therefore embrace policing and criminal law.[133] This was part of the 'deal' negotiated by the UK in the 2007 negotiations concerning the Lisbon Treaty.

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[132] Art 24 TEU, Art 275 TFEU.
[133] S Peers, *Statewatch Analysis, EU Reform Treaty Analysis No 4: British and Irish Opt-Outs from EU Justice and Home Affairs (JHA) Law*, 26 October 2007, available at <http://www.statewatch.org/news/2007/aug/eu-reform-treaty-uk-ireland-opt-outs.pdf>.

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6. Reflections on Constitutional Reform

Norman has rightly emphasized that the negotiations that resulted in the Constitutional Treaty were in many ways 'a tale of the unexpected'.[134] He notes that the Constitutional Treaty handed to the Italian Presidency in July 2003 was 'in many ways an accidental Constitution',[135] in the sense that the Laeken Declaration envisaged a less ambitious final document. Norman is equally firm in his conclusion that there was nothing inevitable about other key stages within the Convention, such as the timing of the early draft Constitution in autumn 2002, the invasion of the foreign ministers, or the Franco-German paper on institutional reform that did so much to shape later discussion.[136] With this by way of background, we can consider some of the issues concerning content and process in this latest and most protracted round of Treaty reform.

(a) Content

In terms of content, some might argue that the reform agenda was too ambitious and that the focus should have been on the four 'discrete' issues set out in the Nice Declaration. We should be careful in this respect. The issues left open after Nice were not discrete, and if reform had concentrated solely on them there would have been a raft of criticism that it had failed to address deeper problems about the functioning of the EU. The negative referenda in France, the Netherlands, and Ireland spoke volumes about the need for the EU to engage with the people, and there were undoubtedly real concerns about aspects of the EU. The disenchantment and lack of engagement with the European project among certain sections of society is a serious concern and must be addressed. The reality is nonetheless that the rationales for the negative votes in these referenda, especially those in France and the Netherlands, had relatively little to do with the principal changes made by the Constitutional or Lisbon Treaties.

There is of course room for disagreement as to the resulting content of the Lisbon Treaty. Thus some have been critical about the further federalization which they believed to result from, for example, the further shift from unanimity to qualified majority in the Council. Others, by way of contrast, have been equally critical about what they saw as the increased intergovernmentalism in the Treaty, focusing on, for example, enhanced Member State influence in the provisions concerning the inter-institutional distribution of power, the creation of the long-term Presidency of the European Council and the like. There are also significant differences of view concerning particular provisions of the Lisbon Treaty. Thus some have applauded the distribution of competences, while others

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[134] Norman (n 35) 313. [135] ibid 313. [136] ibid 313–315.

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have been critical, arguing that the provisions were unclear and uncertain. There is a similar spectrum of views on matters such as the balance between the social and economic dimensions of the EU as reflected in the new Treaty. Such differences of view on these and other matters are inevitable and will be considered in detail in the subsequent chapters.

(b) Process

In terms of process, it might be tempting to think that the Convention process was defective, or that it had been oversold by way of comparison with traditional IGC techniques. We should be careful before subscribing to these conclusions.

The sentiments expressed by the key players between Nice and Laeken were genuine. There was disenchantment with the traditional IGC approach to EU reform, more especially after the experience with the discussions leading to the Nice Treaty. If this traditional process had been adhered to in relation to the broadened reform agenda there would have been criticism about the 'legitimacy and representativeness deficit' inherent in the classic IGC model. It has moreover been argued by Risse and Kleine that the Convention method fares better than the traditional IGC model in terms of input, throughput, and output legitimacy.[137]

It is true that the realization that the Convention might well produce a formal Constitutional Treaty led to some intergovernmentalization of the Convention process. This is exemplified by the way that certain Member States changed their representatives to the Convention, installing high profile players such as foreign ministers in place of their original members. It is apparent also in the way in which State actors intervened in a deliberate manner from outside the Convention in order to influence the proceedings therein.

These developments did not, however, make the Convention just another IGC in disguise. State actors were always part of the Convention. The fact that State players recognized that the Convention deliberations were more important than they initially believed, and therefore wished to have greater input, did not mean that they had a monopoly in the discursive process.

It is true also that the Convention process was overlaid by the traditional IGC model. This was however to be expected. It would have been possible in theory for the outcome of the Convention deliberations to be dispositive with no amending role for the IGC. The reality is that the Member States would not accept this, nor are they likely to do so in the foreseeable future. The process of EU reform is therefore likely to be a blend of the Convention model and the IGC.

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[137] T Risse and M Kleine, 'Assessing the Legitimacy of the EU's Treaty Revision Methods' (2007) 45 JCMS 69.

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There will doubtless also be continuing debate concerning the process that led to the Lisbon Treaty. For some, the decision to press ahead with the Treaty which replicated 90 per cent of what had been in the Constitutional Treaty was either illegitimate, or at the very least dangerous in ignoring the negative votes in referenda from two prominent Member States, more especially because there was scant opportunity to consider the Lisbon Treaty before signature or ratification. For others, the decision to press ahead with this Treaty was justified. They point to the fact that the changes introduced by the Lisbon Treaty played little part in the negative votes in France and the Netherlands, and that insofar as those votes were reflective of a deeper malaise with the EU, it was all the more important to put in place a decision-making structure that would better enable the EU to meet the challenges of the new millennium.

We shall return to these issues in the concluding chapter after considering the principal changes brought about by the Lisbon Treaty. The discussion begins by considering the impact of the Treaty on the inter-institutional distribution of power in the EU.

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