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Treaties and Trade-offs

From the Board

The referendums in France and the Netherlands on the European Constitutional Treaty have shown how much the population of these founding states have turned against the creation of their own political elites. A number of comments have been made on the failure of this Constitution to get the support of the people. I will pick out two. First, there is the text of the Constitution itself that 'is imperfect, wordy and not really a constitution at all'.[1] And secondly, there is the wider context of the Constitution; there doesn't seem to be a convincing trade-off that can persuade people to vote in its favour.

As for the imperfect text of the Constitutional Treaty, it is easy to find similar comments for each of the existing Treaties. As a matter of fact, the original Treaty of Rome itself has been described as a *texte touffu et cabalistique*.[2] Treaty texts are necessarily a compromise between national interests and therefore imperfect. The imperfectness, however, makes them fit to function as what the French call a *structure d'accueil*, a structure of reception for unforeseen situations. A Constitution comprises 'codes of norms which aspire to regulate the allocation of powers, functions and duties among the various agencies and officers of government, and to define the relationships between these and the public'.[3] If we accept that the reading of a constitutional text is a necessary condition, though not the only one, for the understanding of political reality,[4] then the critics are correct in accusing the Constitution of being too complicated and wordy.

If the Constitution is considered to be a 'new step on the road of European construction',[5] a subsequent Treaty in line, the missing trade-off puts it out of line. The ECSC-Treaty supposedly incorporated the trade-off between the availability of Germany's coal and steel for rehabilitation and the Rome Treaties' trade-off between German industry and French Agriculture. Since those beginning years, the deepening through trade-offs has gone hand in hand with widening. The Single European Act, with its internal market programme, convinced the Brits, Danes and Greek to accept institutional reform, and it

1. *The Financial Times* of April 16, 2005, Section Leader, p. 10 'Chirac does battle for the constitution: But can he save the EU from incalculable harm?'.
2. Villey, D., 'Le marché commun dans l'optique européenne', in: *Revue d'Economie politique* 1958, Tome LXVIII, at p. 28.
3. S.E. Finer e.a. *Comparing Constitutions*, Oxford University Press: 1995, at p. 1.
4. Idem, p. 5.
5. *See* the Messina Declaration of June 1955, published at the EU-history website of the University of Leiden, http://www.eu-history.leidenuniv.nl

accompanied the Mediterranean enlargement. Maastricht – where the French got the euro and the Germans their re-unification and the political union – just preceded the EFTA enlargement, and Amsterdam and Nice were to prepare the Union for its eastern enlargement. At present, neither further steps in European integration nor further enlargement are capable to convince.

How does Treaty text resulting from a trade-off function as *structure d'accueil*? Are the compromises included in the Treaty text always respected? The European Court of Justice recently offered a nice example when it ruled on an action for failure to fulfil obligations under Article 141 Euratom.[6]

At the time of its origins, the decisive reason for the Euratom Treaty probably was French insistence. The French had more interest in atomic energy cooperation than in an economic community; Euratom was used as a negotiation tool by the other five to save the customs union.[7] The question of to what extent nuclear energy for military purposes falls under Euratom was part of the discussions in the Assemblée nationale when the Guy Mollet government was trying to secure French parliamentary support for negotiating the Rome Treaties. At the time, it was clear that the French Parliament would never accept subordination of the French military nuclear programme to cooperation on nuclear energy for peaceful purposes and to Euratom.[8] The Euratom Treaty itself confirms in Articles 1 and 2 that the mission and the tasks entrusted to it are essentially civil and commercial. The Euratom Treaty gives Euratom the exclusive right to conclude contracts for the supply of fissile materials (art. 52). Euratom however has no right to check on the supply of fissile materials for military purposes (art. 84 EA).

The question of the application of the Euratom Treaty to military installations returned recently. Whether radioactive waste emanating from nuclear facilities used for military purposes fell under the obligation of Article 37 EA was the subject of the recent enforcement proceeding before the European Court of Justice. Article 37 obliges Member States to provide the Commission with information on the disposal of radioactive waste. The United Kingdom had refused to provide general data relating to a plan for the disposal of radioactive waste associated with the decommissioning of the Jason reactor at Royal Naval College, Greenwich. The United Kingdom, supported by France, was of the opinion that the Treaty itself covered only the civil uses of nuclear energy. Therefore, the United Kingdom did not feel obliged to communicate the requested information to the Commission.

The Commission, on the other hand, pointed to the fact that the Euratom Treaty does not explicitly exclude general military activities from its scope.

6. Case C-61/03, *Commission* v. *United Kingdom*, Judgment of the Court of 12 April 2005, nyr.
7. *See* J.K. de Vree and M. Jansen, *The Ordeal of Unity. Integration and disintegration in modern Europe*, Amsterdam, 1998, p. 224 and H.-J. Küsters, *Fondements de la Communauté Economique Européenne,* Luxembourg, 1990, p. 183 ff.
8. *Idem*.

The Commission's view was supported by Advocate General Geelhoed, who recognized that, at the time of conclusion of the Treaty, the potential application of Euratom to military matters was 'an issue of certain political sensitivity'.[9] He also referred to a record in the *travaux préparatoires* of the Treaty that:

> 'The general view of the Ministers was that it was more important to find a solution that did not definitely exclude military uses, while at the same time ensuring that such a solution could not endanger the safeguards that were recognised as being of primordial importance.'[10]

From this record, he arrived at the position that the contention that nuclear defence falls *per se* outside the scope of application of Euratom was not valid.

The Court of Justice however was not willing to imply issues that the negotiators left unresolved. The Court, on the basis of the absence of any derogating provisions specifically intended to safeguard the national defence interests of the Member States, stated as a fact that activities falling within the military sphere are outside the scope of Euratom.[11] Through this conclusion, the Court resolved an issue that the negotiators had left unresolved: in the end, the French parliament got what it wanted.

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9. Point 80 of his Opinion of 2 December 2004.
10. *Idem*, points 81 and 109.
11. *See* the last sentence of cons. 36.