

EU CONSTITUTION RECONSIDERED – CHALLENGES OF THE EU PERCEPTION

Introduction

Heads of states and governments of the EU member states met at the meeting of the European Council in Laeken, Belgium, on December 14-15, 2001. One of the issues on the top of the agenda appeared the establishment of the European Convention that would deal with the elaboration of the new document corresponding to the vision of the future Europe. The representatives of the EU member states declared, that in the situation when the European Union is introducing its single currency and its enlargement is becoming irreversible, also following the terrorist attack in the USA on September 11 that has brought a rude awakening, Europe stands at the crossroads⁹. The European Council spoke about the “dream of a strong, unified Europe” that is about to come true as “the unification of Europe is near”¹⁰. At the same time, a number of challenges and open questions were posed concerning the lack of close ties between the EU and its citizens, the role and perception of the EU in a fast-changing and globalized world, division and definition of competences between the EU and its member states, the nature of the EU institutions and instruments, level of democracy, transparency and efficiency of the EU, economic, social, environmental, migration and other issues, etc. European Council declared that the time has come for such open questions to be adequately responded and that simplification of existing four Treaties was necessary to achieve greater transparency and bring the EU closer to its citizens.

For these purposes, the European Council established a Convention comprising 15 representatives of the Heads of State or Government of the Member States, 30 members of national parliaments, 16 members of the European Parliament and two Commission representatives, tasked to debate on the future of Europe and elaborate a new simplified document. In June 2004, as a result of multi-year negotiations, the Convention came up with the draft text of the new document that was entitled the Treaty establishing a Constitution for Europe¹¹ (hereinafter the “CT”). After some amendments, the CT was signed in October 2004 by 25 member states of the EU. The European Parliament, by a large majority, endorsed and wholeheartedly supported the ratification of the CT¹² that should have been done individually, by all member states for the CT to enter into force.

Majority of the EU member states (15 countries) decided to pursue the ratification through national parliaments without holding a referendum on the acceptability of the CT by their national citizens. However, France, Denmark, Ireland, Luxembourg, Netherlands, Portugal, Spain, Czech Republic, Poland and the UK chose to set binding or non-binding referendums¹³ either because of the requirements of their national legislations or for some political considerations. After ratification of the CT by the national parliaments of Greece, Hungary, Italy, Lithuania and Slovenia and the ‘yes’ vote of Spain in the non-binding referendum in February 2005, the nationals of France and Netherlands said ‘no’ to the CT in May-June 2005. Although followed by the ‘yes’ vote of Luxembourg in July, the

⁹ Presidency Conclusions, European Council Meeting in Laeken, 14-15 December 2001.

¹⁰ Id., see in particular Annex I, Laeken Declaration on the Future of the European Union.

¹¹ Official Journal of the European Union, C series, No 310, 16 December 2004.

¹² Daily Notebook 12-01-2005 of the European Parliament, available at <http://www.europarl.europa.eu/sides/getDoc.do?jsessionid=058D022C18EB2A6749BEB7982B634646.node1?pubRef=-//EP//TEXT+PRESS+DN-20050112-1+0+DOC+XML+V0//EN&language=EN#SECTION1>

¹³ EU Constitution Newsletter, The Federal Trust for Education and Research, May 2005.

rest of the member states decided to cancel the planned referendums and ratification procedures, as they did not make sense anymore.

Following the failure of the CT, a new intergovernmental conference was set¹⁴ for writing a new Treaty that would simply incorporate the changes to the existing four ones. As a result, the new document – the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (hereinafter the “Lisbon Treaty” or “Treaty”)¹⁵ - was prepared and signed in Lisbon in December 2007, that entered into force on December 1, 2009.

Interestingly, before the signing of the Lisbon Treaty, the chairman of the former constitutional Convention, stated in the open letter on October 27, 2007 that the Treaty of Lisbon is the same as the rejected constitution; only the format has been changed to avoid referendums¹⁶. In fact, as it will be discussed below, all articles of the CT have equivalent articles in Lisbon Treaty containing more or less the same legal texts; merely the sequence, numbering and composition have been changed. Only several articles of the CT were directly removed: Article I-6 referring to the supremacy of the EU law, Article I-8 defining EU symbols, and Articles III-128, IV-437, IV-438, IV-439, which had a purely technical nature, specific to constitutional document (repeal of earlier treaties, succession and legal continuity, transitional provisions relating to certain institutions). However, at the same time the Lisbon Treaty introduced some important political and perceptual changes that appeared crucial in the discussions around the CT.

Consequently, this paper aims to examine whether in fact there are any substantial differences between the CT and Lisbon Treaty from the legal and political standpoint, determine the reasons for the failure of the first and success of the second, and argue that the challenges related to perceptions of the European Union by the member states and their nationals and lack of unity lie at the heart of the whole process.

Constitutional nature of the CT and Lisbon Treaty

First, before examining major differences between the CT and Lisbon Treaty, one should have a closer look at the nature of the both texts. Mere titles such as a Constitution or a Treaty may not necessarily define the legal context of these documents. For example, the fact that the founding document of the International Labour Organization (hereinafter the “ILO”) is a Constitution does not change the status of the ILO as of international organization and certainly, the mentioned document cannot be considered as a Constitution, in its classical meaning, but rather a charter or a statute. On the other hand, the European Court of Justice (hereinafter the “ECJ”) traced the constitutional nature of the EEC Treaty back in 1986 by saying that “the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”¹⁷, meaning at that time the Treaty establishing the European Economic Community (Treaty of Rome). Later, ECJ specified even more, that “the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law”¹⁸. Obviously, the purpose of the ECJ was to strengthen the legal importance of the Treaty and to show its constitutional nature, meaning rather a body of fundamental principles and rules. In contradiction, the European Council explicitly stated that Maastricht and Rome treaties “will not have a constitutional character”¹⁹.

In its classical meaning, as well as according to the state practice of the European countries mostly belonging to the constitutional law order, the Constitution is strongly associated to the existence of a state and is seen as an expression of the will of sovereign people to manifest itself as an independent political entity and to organize itself for the purpose of a state²⁰. Although in a much broader sense, Constitution may simply imply a body of fundamen-

¹⁴ European Parliament Resolution of 7 June 2007 on the roadmap for the Union’s Constitutional Process (2007/2087(INI), P6_TA(2007)0234.

¹⁵ Official Journal of the European Union, 2007/C 306/01.

¹⁶ *Traité européen* : “les outils sont exactement les mêmes, seul l’ordre a été changé dans la boîte à outils”, *Le Monde*, 26.10.2007.

¹⁷ *Les Verts vs. European Parliament*, Case 294/83, Judgement of 23 April 1986.

¹⁸ Opinion N1/91, ECR 1991-10, 14 December 1991.

¹⁹ European Union, Presidency Conclusions, 11177/1/07, Brussels, 21-22 June 2007.

²⁰ Wim Voermans and Henk Griffioen, *The European Constitution and the Relations between European and Member State Powers*, *Zeitschrift für Staats- und Europawissenschaften*, Vol. 5, No. 1, pp. 25-45, 2007.

tal principles or established precedents (for example in case of the unwritten constitution of the UK) according to which a state or organization is governed²¹. In the absence of a unique definition, the term Constitution is rather linked to the perception - how the people of certain countries may feel towards it.

Since the elaboration of the CT, the debates have been very active as to whether this document in fact is a Constitution. The discussions did not stop after the adoption of the Lisbon Treaty since the absolute majority of articles being part of the CT were incorporated in it that raised questions about the constitutional nature of a document formally called a Treaty. And vice versa – the CT has also been challenged to be a Treaty rather than a Constitution especially taking into consideration that its title is a Treaty establishing a Constitution for Europe.

Some authors argued that the CT looked very much as a treaty, even if it contained fundamental law for the EU and its title was rather preconditioned by the existence of the “European dream”, implying the ultimate unification of Europe, although the CT failed to meet all the requirements in this regard²². In contradiction, others conclude that the CT is a constitutional will of the EU member states and should be seen as such²³, as well as because it is a codification of the existing EC and EU law, the case law of the ECJ and builds on the constitutional traditions of the members states²⁴. Even more, as the Lisbon Treaty incorporated the principles of the CT and functions of the member states can no more be found at the EU level, and while EU unites not only states but also its citizens, the Treaty is in fact a Constitution²⁵.

Some explain that the Lisbon Treaty is not a constitution because:

- the intention of Lisbon Treaty drafters was obvious – it should not have been perceived as a constitution;
- the term constitution appears nowhere in Lisbon Treaty;
- Lisbon Treaty was designed to amend existing treaties, while the CT would have been a new document, standing alone;
- Lisbon Treaty was adopted through the procedure of ratifying an international agreement (in accordance with the national legislations of member states) while CT required referendums as it was designed to express the will of the citizens of Europe²⁶;
- the process of its creation was one typical of international treaties conducted through intergovernmental negotiations²⁷.

However, if we consider Lisbon Treaty from the standpoint that in order for the document to be a constitutional one, it should contain rules regulating the exercise of political power in a given political entity and that they must be seen as embodying fundamental basis of society within the polity, than Lisbon Treaty is definitely a constitutional type of document²⁸.

Obviously, the tension between constitutionalism and intergovernmentalism exists and some conclude that the lack of democracy in the EU and the decision making process rather come under the logic of intergovernmentalism although the ECJ played an important role in developing the constitutional law²⁹.

²¹ Shorter Oxford English Dictionary, 5th edition OUP, Oxford 2002 .

²² Pavlos Eleftheriadis, *Constitution or Treaty?*, The Federal Trust for Education and Research, London, UK, 2004

²³ Julianne Kokott and Alexandra Ruth, *The European Convention and its Draft Treaty Establishing a Constitution for Europe: Appropriate Answers to the Laeken Questions?*, 40 CMLRev, 2003.

²⁴ Voermans and Griffioen, *supra* note 12.

²⁵ Jens-Peter Bonde, *From EU Constitution to Lisbon Treaty*, Foundation for EU Democracy and the EU Democrats in cooperation with Group for Independence and Democracy in the European Parliament, ISBN: 87-87692-71-6, May 7, 2008.

²⁶ Philip Bremner, *The Lisbon Treaty: A Constitutional Document, Not a Constitution – a British Perspective*, Aberdeen Student Law Review, October 2008.

²⁷ Antonio D’Atena, *The European Constitution’s Prospects*, Book: Hermann-Josef Blanke, Stelio Mangiameli, *The European Union after Lisbon, Constitutional Basis, Economic Order and External Action*, ISBN: 978-3-642-19506-8, 2012.

²⁸ *Id.*

²⁹ Migel Poiarés Maduro, *How Constitutional Can the European Union Be?*, The tension between intergovernmentalism and constitutionalism in the European Union, New York University Jean Monnet Working Paper No. 5/04, March, 21 2010.

This way there is no scholarly consensus on the nature of the CT and some even consider that it has a hybrid treaty-constitution nature³⁰. Ultimately the debate is not only a legal but a political one³¹ as well that may largely depend on the political visions and desires of those involved. Some conclude that those who want to turn the EU into a federal state would like to see a Constitution and those who oppose a federal state – oppose a Constitution³². Hereby, the debate remains between those embracing a federalist approach by promoting a political vision of European unity and functionalist's views opting for transnational cooperation based on immediate functional needs³³.

Legal differences between the CT and Lisbon Treaty

Although containing a vast number of equivalent provisions, it is noteworthy to identify some important legal differences that exist between the draft text of the CT and Lisbon Treaty.

– Primacy of the EU law:

CT contained an article directly saying that: “The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States.”³⁴

The authors of the Lisbon Treaty decided to remove such a bold statement and instead incorporate some justification to why the Community law has in fact a primary character. As a result, a non-binding declaration concerning primacy was attached to the Treaty, which made a reference to the judgment of the ECJ and portrayed the supremacy of the EU law only through the prism of “the settled case law” that is a cornerstone principle of community law and thus should be obeyed³⁵.

– Common space:

Both the CT and the Lisbon Treaty aim to “offer its citizens an area of freedom, security and justice without internal frontiers”³⁶. However, in comparison to the CT, the Lisbon Treaty is not so unconditional and introduced a reservation that the absence of internal frontiers “in which the free movement of persons is ensured” is acceptable only “in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.” Hereby, the member states chose to maintain the possibility for the control of their external borders. This is especially noteworthy with respect to the immigration crisis that the EU experiences nowadays due to the thousands of asylum seekers from Syria. Lisbon Treaty allows member states to restrict the free movement of persons for the mentioned reasons, while the CT did not include such possibility, obviously because, as in other cases, it aimed to create a higher degree of union.

In the same Article, the drafters of the Lisbon Treaty chose to specifically emphasize that “the Union shall establish an economic and monetary union whose currency is the euro.”³⁷ Though the CT aimed to create the same economic ties and also introduced euro, this was not incorporated in the part of the EU's objectives.

– Competences:

Both the CT and Lisbon Treaty deal with the competences and relations between the EU and the member states. Although on substantial basis both documents say the same, the drafters of the Lisbon Treaty considered it necessary to emphasize that “competences not conferred upon the Union in the Treaties remain with the Member States” and that in fact “national security remains the sole responsibility of each Member State”³⁸.

³⁰ Laurent Pech, *The Fabulous Destiny of the EC Treaty: From Treaty to Constitution to Treaty Again?*, Irish Journal of European Law, Vol. 15, No. 49, 2008.

³¹ Jean-Claude Piris, *Does the European Union have a Constitution? Does it need one?*, Harvard Jean Monnet Working Paper 5/00, Harvard Law School, Cambridge, MA 02138 USA.

³² Kimmo Kiljunen, *The European Constitution in the Making*, Center for European Policy Studies, Brussels, 2004

³³ Grainne de Burca, *Reflections on the EU's Path from the Constitutional Treaty to the Lisbon Treaty*, Fordham Law Research Paper, 2008.

³⁴ Article I-6.

³⁵ Lisbon Treaty, Declaration 17.

³⁶ Lisbon Treaty, Article 3[2]; CT, Article 1-3.

³⁷ Article 3 [2].

³⁸ Article 4 [3a].

– Charter of Fundamental Rights:

The draft of the CT made a Charter of Fundamental Rights of the European Union of 7 December 2000, as an integral part of the document thus emphasizing the importance of the rights and freedoms contained within³⁹. Obviously, this appeared not to enjoy wide EU support as Lisbon Treaty removed the Charter from the body text although stated that “The Union recognizes the rights, freedoms and principles set out in the Charter ...which shall have the same legal value as the Treaties”⁴⁰. At the same time an explanatory non-binding declaration was considered necessary to attach to the Treaty, which clarified that “the Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties”⁴¹. This way the introduced changes appear to have a more technical, rather than substantial nature as the Charter, although not being part of the main document, maintained the same legal value/force as the Treaty itself and the ECJ continues to use it both in legislation and in judgments⁴².

– Additional citizenship:

In comparison to the CT, the Lisbon Treaty chose to explicitly state that “Every national of a member state shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.”⁴³ With such reference, on one hand the Treaty emphasized that the national citizenship of each member state is not something that the EU intends to eliminate, however at the same time the EU has its own citizens who are directly linked to it with certain rights and obligations.

– National parliaments:

Lisbon Treaty strengthened the emphasis on the role of the national parliaments through imposing the obligations to forward to them draft European legislative acts and notifications about the applications for accession to the EU, enabled the parliaments to take part in Treaty revision procedures, etc.⁴⁴ In addition to this, Lisbon Treaty introduced the right to veto for the national parliaments with regard to family law⁴⁵. In particular, the national parliaments gained the authority to oppose measures concerning family law with cross-border implications within six months after notification. In such case, the decision by the Council shall not be adopted. The obligation to notify national parliaments in this regard was never incorporated in the draft text of the CT.

– Financial institutions:

Lisbon Treaty chose to include the European Central Bank and the Court of Auditors in the part of EU’s institutions⁴⁶ that was not the case with respect to the CT.

– Social security:

A member of the Council can declare that the draft legislative act with regard to measures in the field of social security affects important aspects of its social security system and refer the issue to the European Council. In such case, the Lisbon Treaty enabled a possibility for the European Council to take no action⁴⁷ that could not be the case according to the CT.

– EU accession:

The draft text of the CT contained only the reference to the respect for the EU values that seemed sufficient for a candidate country to be eligible for accession⁴⁸. Authors of the Lisbon Treaty chose to make a special emphasis and reference to the so-called Copenhagen criteria that also needed to be taken into consideration. Although

³⁹ CT, Title II, Fundamental Rights and Citizenship of the Union.

⁴⁰ Lisbon Treaty, Article 6.

⁴¹ Lisbon Treaty, Declaration 1 concerning the Charter of Fundamental Rights of the European Union

⁴² Bonde, supra note 17.

⁴³ Article 9 [8].

⁴⁴ Article 12 [8c].

⁴⁵ Article 81 [65].

⁴⁶ Article 13 [9].

⁴⁷ Article 48[42].

⁴⁸ Article I-58.

not explicitly naming membership conditions laid down by the European Council in June 1993 in Copenhagen⁴⁹, the Treaty clearly stated that the conditions of eligibility agreed upon by the European Council are something that count⁵⁰.

– Simplified procedures:

In comparison to the CT, Lisbon Treaty envisaged simplified procedures for the establishment of a) European Public Prosecutor's Office from Eurojust⁵¹ and of b) police cooperation in relation to the prevention, detection and investigation of criminal offences⁵². The amendments introduced to the text of the Lisbon Treaty enabled that in case of the absence of unanimity of the Council, which defines the operational measures, the initiative and the will of at least nine member states will suffice for automatically granting the authorization to act.

– Energy area:

In comparison to the corresponding article of the CT, the Lisbon Treaty emphasized that if severe difficulties arise in the supply of certain products, the Council should decide the measures appropriate to the economic situation exclusively "in a spirit of solidarity between Member States" notably when this concerns the area of energy⁵³. It is perceived that this change was initiated by Poland, which feared the agreement between Germany and Russia on creating a gas supply by means of an underwater pipeline through Baltic Sea, avoiding Poland⁵⁴. The spirit of solidarity thus obligates Germany and other EU member states to take into consideration the interests of other actors.

– Climate change:

At the time of drafting the Lisbon Treaty, the problem of climate change gained more international importance and it was incorporated in the Treaty as one of the worldwide environmental problem that needs to be effectively combated⁵⁵. CT did not contain such specific reference.

– EU symbols:

With the aim to make the treaty look as technical and unemotional as possible and play down its significance⁵⁶, text of the Lisbon Treaty completely removed the reference to the symbols of the EU that were stipulated in details by the CT⁵⁷:

"The flag of the Union shall be a circle of twelve golden stars on a blue background.

The anthem of the Union shall be based on the "Ode to Joy" from the Ninth Symphony by Ludwig van Beethoven.

The motto of the Union shall be: "United in diversity".

The currency of the Union shall be the euro.

Europe day shall be celebrated on 9 May throughout the Union."

Instead, the adherence to the above-mentioned symbols was included as a declaration in the final act of the Treaty⁵⁸. Later the Constitutional Affairs Committee of the EU Parliament endorsed the use of these symbols for

⁴⁹ Presidency conclusions, Copenhagen European Council, 21-22 June 1993.

⁵⁰ Article 49 [49].

⁵¹ Article 86[69e].

⁵² Article 87[69f].

⁵³ Article 122 [100].

⁵⁴ Bonde, supra note 17.

⁵⁵ Article 191[174].

⁵⁶ Sebastian Kurpas, The Treaty of Lisbon – How much 'Constitution' is left? An Overview of the Main Changes, Center for European Policy Studies, No. 147, December 2007.

⁵⁷ Article I-8.

⁵⁸ Declaration 52 by the Kingdom of Belgium, the Republic of Bulgaria, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the Italian Republic, the Republic of Cyprus, the Republic of Lithuania, the Grand-Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Republic of Austria, the Portuguese Republic, Romania, the Republic of Slovenia and the Slovak Republic on the symbols of the European Union

all formal activities⁵⁹. This way, although not a part of the main treaty, EU symbols remained in practice, exactly as envisaged by the CT.

Issue of European Identity

Apart from some legal differences that exist between the draft text of the CT and Lisbon Treaty, the authors of the latter introduced major political and perceptual amendments, mainly in the preamble of the Lisbon Treaty, that affect the understanding of what type of document is in fact concluded, what is the vision for the future of Europe, how the new stage of European integration is seen and how this is linked with the understanding of the European identity.

First efforts to officialize the concept of “European identity” are found in the Document on the European Identity published by the Nine Foreign Ministers in 1973⁶⁰. The document defines the concept according to two criteria: common heritage, interests and obligations and common external policy, i.e. relations with the world. The first criterion serves as an instrument for measuring the unity of nine member countries and the European identity is understood as “the diversity of cultures within the framework of a common European civilization, the attachment to common values and principles, the increasing convergence of attitudes to life, the awareness of having specific interests in common and the determination to take part in the construction of a United Europe”. The values itself, are cherished through legal, political and moral order and determined to defend the principles of representative democracy, rule of law, social justice and the respect for human rights. Nine member states were determined to achieve the latter through establishing the system of political cooperation and taking a common action, “where possible and desirable”. This leads to a second criterion, which sees “acting as a single entity” in relations with the rest of the world as a determinant of the European identity. This way the member states believe that the security of each country will be guaranteed more effectively although emphasizing that unification is not directed against anyone or inspired by a desire of power. At the same time, the institutions and procedures chosen for the implementation of the common external policy “should enable the distinct character of the European identity to be respected”.

Maastricht Treaty incorporated the reference to the “European identity”, however solely through the prism of “common foreign and security policy ... which might in time lead to a common defence”.⁶¹ The latter is seen as the reinforcement of the European identity. “Assert its identity on the international scene” appeared as one of the objectives of the Union⁶², however at the same time the Treaty was emphasizing the respect towards the national identities of the Member States⁶³. Later, Amsterdam Treaty as well as Lisbon Treaty maintained the reference to the European identity in the same frame of common defence policy. At the same time, the Lisbon Treaty strengthened the respect for the “national identities inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government”⁶⁴.

Surprisingly, the draft of the Constitutional Treaty did not contain any mentioning of the term “European identity”. Instead, the preamble stated that “while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny”. This record deserves a particular attention since highlights two most important elements of a collective identity – common history and common future.

Preamble of the CT makes a reference to the common history of the EU member states by promoting the belief that “Europe, reunited after bitter experiences, intends to continue along the path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived”. Common history is an essential

⁵⁹ *EU Parliament set to use European flag, anthem*, 11 September 2008, 16:54 CET available at <http://web.archive.org/web/20080912123052/http://eubusiness.com/news-eu/1221140822.65>.

⁶⁰ Copenhagen, 14 December 1973; countries logically should have included Belgium, France, Italy, Luxembourg, Netherlands, West Germany, Denmark, UK and Ireland.

⁶¹ Treaty on European Union, Office for Official Publications of the European Communities, Luxembourg, 1992, preamble.

⁶² *Id.*, Article 2.

⁶³ *Id.*, Article 6.

⁶⁴ Lisbon Treaty, Article 3a.

element of collective identity that leads to the formation of the narrative of “where we are from”¹. The first draft of the CT even included Thucydides definition of democracy printed in ancient Greek² with the aim to illustrate the common legal and philosophical roots, on one side, and to emphasize, on the other, that the democratic values were part of European history long before the US enshrined them³.

Such reference to common history disappeared in the preamble of Lisbon Treaty substituted to merely “re-calling the historic importance of the ending of the division of the European continent and the need to create firm bases+ for the construction of the future Europe”. Here the main emphasis is made on simply overcoming the division points on European continent rather than portraying Europe as a single entity enduring bitter experiences somewhere in the past.

Through underlying the common history, the draft of the CT logically continues with the will and need of the peoples of Europe to pursue and build common future – “to forge a common destiny”. This way the CT sees the European Union as one community with one destiny achieved through overcoming former divisions. Obviously, this is not only a political or legal but also strongly a psychological element. By endorsing this attitude, the peoples of Europe realize much stronger unity than the one achieved through the cooperation and coordination of policies. “Common destiny” implies the existence of a single community driving through the common path since otherwise the destiny cannot become a shared one.

The Lisbon Treaty did not dare to maintain such a bold statement. Instead, the preamble makes a very weak reference to the “need to create firm bases for the construction of the future Europe” and “creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity”. As illustrated, in Lisbon Treaty future is not committed to be explicitly common and the close links of the union established is simply something that never have been before (i.e. a step forward taking into consideration the past bonds) rather than something that in fact is a really close one. The unity established under the Lisbon Treaty, if not legally (in so far as subsidiarity principle is analogous in the CT and Treaty), but at least formally, leaves a room for believing that the decisions taken by the member states may be distinct.

While pursuing the goal of achieving unity ever more closely, the draft of the CT at the same time tried to portray united Europe, as such, as “a special area of hope” for the Earth. Such record emphasized the exceptionality of Europe and the greatness of the peoples of Europe in comparison to the rest of the world. The Lisbon Treaty did not share such a daring postulate of the CT and chose to stay modest by implementing common foreign, security and defense policy “in order to promote peace, security and progress in Europe and in the world”. Obviously, one of the reasons to disregard the reference to exceptionality could also be a danger of creating an anti-American perception by competing with the ideals of American exceptionalism.

One of the most conceptual distinctions between the CT and Lisbon Treaty, apart from the title, that needs to be mentioned is that the first is concluded on behalf of “the will of the citizens and States of Europe to build a common future”⁴, while the second refers only to “high contracting parties”⁵. While at first sight it is absolutely an ordinary thing that, in general, Constitution always affirms the aspirations of peoples while Treaty is a document concluded between the parties and this fully reflects the principles of international law, however such distinction may lay at the foundation of why Treaty is more welcomed than Constitution. High contracting parties, whether united or not, at least maintain the perception of separate entities with their own communities, which decided to establish “an ever closer union” and attain common objectives. In comparison, the CT argues that the establishment of the EU reflects “the will of citizens and States of Europe” and aims to build common future. “Citizens and States of Europe” is a term already underlining the existence of one society “united ever more closely”, of a single entity hav-

¹ Armin von Bogdandy, *The European Constitution and European Identity: Potentials and Dangers of the IGC’s Treaty Establishing a Constitution for Europe*, Jean Monnet Working Paper 5/04, ISSN 1087-2221, 2004.

² “Our constitution ... is called a democracy because power is in the hands not of a minority but of the whole of the people.” Thucydides’ Description of Democracy (2.37.1) and the EU-Convention of 2003, Mogens Herman Hansen, *Greek, Roman, and Byzantine Studies* 48 (2008) 15–26, 2008 GRBS .

³ Erik Oddvar Eriksen, John Erik Fossum, Mattias Kumm and Agustin Jose Menendez, *The European Constitution: the Rubicon Crossed?*, ARENA Report No 3/05, ISSN 0807-3139, 2005.

⁴ CT, Article I-1.

⁵ Lisbon Treaty, Article 1[1].

ing the common will and pursuing the common destiny and thus clearly identifying itself with the European Union.

Hidden perceptual intent

Following the failure of the draft text of the CT and the no votes of referendums, in 2007 German Federal Chancellor Angela Merkel sent a confidential letter to the governments of the EU member states⁶ posing twelve questions concerning the amendments that should have been introduced to the CT in order for it to become more acceptable and easily endorsable. The letter was leaked and it revealed the important perceptual challenges that logically stood behind the failure of the CT and thus needed to be addressed.

Questions referred to the introduction of the following initiatives⁷:

- Returning to the classical method of treaty changes, instead of the CT, and maintaining the four existing treaties in force;
- Not to include an article on the symbols of the EU in the Treaty;
- Not to include an article explicitly stating the primacy of the EU law;
- Not to make the Charter on Fundamental Rights as a part of the Treaty but to make a short cross reference instead although having the same legal value;
- To address the newly emerged challenges for example in the fields of energy, climate change or illegal migration;
- To highlight Copenhagen criteria with regards to enlargement;
- To address more the social dimension of the EU;
- To enable opt-in/out provisions to some new policy provisions introduced by the CT.

Apart from this, two most important perceptual questions set bluntly were the following:

- “How do you assess the proposal made by some Member States using a different terminology without changing the legal substance, for example with regard to the title of the treaty, the denomination of EU legal acts and the Union’s Minister for Foreign Affairs?” and
- “Do you agree that the institutional provisions of the Constitutional Treaty form a balanced package that should not be reopened?”

This way the propositions clearly indicated that there was no intent to change the institutional framework of the CT and the problems were not related to its legal content but rather concerned the perceptual part of the document. It was not about the introduction of qualified majority voting or more powerful European Parliament, or even a legal personality of the EU. Moreover, it was not even about the primacy of the EU law, Charter on Fundamental Rights or even the EU symbols, but in how all this was in fact packaged and portrayed, how was all this named and delivered to the society as well as to member states, and what perceptual feelings did they instigate.

These perceptual challenges, first of all, concerned the title of the document – EU citizens and member states would rather welcome the novelties as amendments to the existing treaties that aimed at achieving “an ever closer union” rather than becoming “united ever more closely” “to build a common future” under the framework of Constitution. In reality, if adopted, the CT would legally create absolutely the same context as did Lisbon Treaty. As illustrated above, the introduced legal amendments do not make substantive differences between two texts and are rather perceptual than legally distinct. However, what could ultimately differ was the political and personal perception of the EU and the amendments brought to the preambles were in fact the most essential ones.

In Treaty ambit, as long as it is concluded by the contracting parties, it’s easier for the member states as well as their citizens to maintain national identity and the feeling of sovereign actors, even if in reality this feeling may

⁶ Debates at the European Parliament on the Roadmap for the European Union’s constitutional process, Brussels, 6 June 2007; Bonde, *supra* note 17.

⁷ JEF Europe answers to Merkel’s 12 points-questionnaire, JEF Europe, Press Release, 30 April 2007.

prove to be just an illusion and even if the ECJ states that Treaty has a constitutional character. And vice versa, it is much more difficult to believe that your national identity and sovereign will still counts if you are united with others under a document called Constitution that you've been always taught to be something comprising one state and one entity, even if legally and in practice the provisions of the Constitution do not have purely constitutional nature and is rather operated under the principle of intergovernmentalism. In fact, it is not surprising that one of the reasons for the no votes to the CT on referendums is believed to be nationalistic factors⁸ and the use of term "Constitution" is seen as symbolic pushing towards a single group of European peoples⁹.

Also, it is much more convenient to accept and live with the understanding that the countries are united around the common values and principles while discussing together what should be the future of Europe rather than forging a common destiny, which foremost means psychologically and politically thinking and acting as one. The CT did not need the reference and a special emphasis on European identity, which by the way does not necessarily imply the existence of collective self-understanding¹⁰ and, as illustrated above, throughout the EU history it was rather understood as the adherence to common values and principles and the implementation of common foreign and defense policy. The CT had an ambition to already represent a product "of the will of the citizens and States of Europe" having the common past and pursuing the common future. Left without such perception, the Lisbon treaty, instead, could not at least avoid the reiteration of European identity as a minimum standard for a more united Europe. It should be acknowledged that, despite the existence of a single entity, the EU member states remain others to each other both in what is different between them and in what is common¹¹.

Conclusion

The whole process related to drafting of the CT and finalized with the adoption of the Lisbon Treaty clearly reveals one of the most important challenges that the EU faces and was never able to overcome– the lack of unity. This deficiency concerns not only problems related to the political decision making but foremost to the perception of the EU by the member states and its citizens. In fact, it is the perception that preconditions the existence of challenges related to politically acting as one entity. The EU member states and its citizens were proposed once to stand higher their sovereign aspirations and national mentality and this attempt was called the Treaty establishing the Constitution of Europe, but the attempt failed. The countries and its nationals appeared not to be politically and psychologically ready to take such a huge step ahead and realize that what may follow the ever closer union is being united, even if formally, under a constitution being founded on the will of citizens and not a treaty of international law character emphasizing the existence of high contracting parties. The drafters of the CT had a clear vision and they wanted to see Europe as one, politically and mentally, not only member states, but its nationals as well, that would enable the real development of the EU. Although rejected at that time, the future of Europe in fact depends on this understanding – whether notwithstanding the political, national and cultural divergences, it would be able to overcome the existing perceptual challenges and conceive the EU exactly in the prism of united citizens, acting together and having a strong will to forge a common destiny.

⁸ AnkeGrosskopf, Why 'non' and 'nee' to the EU Constitution? Reconsidering the Shock of the Dutch and French Referenda, paper presented at the EUSA Tenth Biennial International Conference, Montreal, Canada, May 2007

⁹ Bogdandy, supra note 57.

¹⁰ Gerard Delanty, Is There a European Identity?, Global Dialogue, Volume 5, Number 3/4, Summer/Autumn 2003.

¹¹ Leonard F.M. Besselink, National and constitutional identity before and after Lisbon, Utrecht Law Review, Volume 6, Issue 3, November 2010.