Summary and conclusions

The European Union since May 2004 is composed of 25 Member States. However, since the 90's it has been clear that the institutional and constitutional structure of the European Union is not designed for such a large number of Member States. Legal experts feared that if no substantial changes were made to this architecture, the European integration process could stagnate (Part A).

This book deals with this issue. Firstly, attention is paid to the institutional issue of the composition of the institutions of the EU which are involved in the decision-making process: the European Commission, the (European) Council, the European Parliament and the Court of Justice. It is clear that if these institutions (separately and in relation with each other) do not function properly, EU decision-making could be frustrated (Part B).

Secondly, attention has also been paid to constitutional issues that were *inter alia* mentioned in the IGC-2004 agenda and in the Declaration of the European Council of Laken (2001). These issues are the following: is there a need for a European Constitution, how can citizens be granted maximum protection against possible breaches of their fundamental rights, how can democracy at the EU level be strengthened, how should the competences between the EU and the Member States be divided, are the current legislative instruments of the Union transparent and efficient; should the EU apply the instrument of 'closer co-operation' in order to keep the integration process dynamic (Part C)?

The central question in this book is, 'How should the institutional and constitutional architecture of the European Union with at least 27 Member States be organised so that the European Union can function efficiently, democratically and transparently?'

This question can be answered by dealing with the following three subjects:

- 1) Composition of the institutions;
- 2) Decision-making and competences;
- 3) Judicial protection.

1 Composition institutions

Commission

The debate about the future composition of the European Commission is from a political perspective a very sensitive one. Most Member States want to see them 'represented' in the Commission. At the same time the Member States realise that a Commission composed of 27 members can frustrate the efficiency of the decision-making of the Commission. The importance of an efficient Commission outweighs in that respect the interests of the single Member States. The European Commission must be limited in size. 20 Commissioners is already the maximum. That means that

some Member States at a certain point in time will not have a 'representative' in the Commission. Given the tasks and role of the Commission, this is not an objection. Commissioners are no representatives of their Member State of origin. The Commission should operate independently of the Member States.

What is proposed herein is a system to determine the number of Commissioners in relation with the necessary policy areas of the European Union. To ensure that Member States are treated equally, a rotation system needs to be developed on the basis of complete equality between the Member States. This will not be an easy task, but is of somewhat minor importance: the key is that the Commission is not too large.

Council

The weighting of the votes within the Council of Ministers was the most delicate issue in the IGC's of 1996, 2000 and 2003. Member States barely reached consensus over the number of votes of each Member State and over how to establish a qualified majority (a single, double, of triple key). Of course, the more conditions that have to be met in order to establish a qualified majority, the less efficient the decision-making of the Council will be.

What is proposed herein is a Commission proposal made in 2000. A qualified majority should be reached when a normal majority of the Member States that represent at least half of the population of the Member States is in favour of a Commission proposal. This system has the advantages of efficiency and transparency.

European Parliament

The European Parliament was, before the enlargement of the European Union in 2004, the biggest parliament in the world. After the enlargement, it has become even bigger. The Treaty of Nice provides a system where the seats of the European Parliament can exceed the number of 800. Moreover, this system is hardly understandable. These two facts are not acceptable.

What is proposed herein is a minimum number of seats of 6 for each Member States whereby each Member State gets one additional seat for every millionth number of citizens. This system is simple and will keep the number of seats of the European Parliament limited. Even after the future accession of Romania, Bulgaria and, possibly, Turkey the number of seats of the European Parliament will hardly exceed the number of 700.

Court of Justice

As far as the composition of the Court of Justice (ECJ) and the Court of First Instance (CFI) is concerned, the modalities as laid down in the Treaty of Nice are – given the future heavy workload of the courts – satisfactory. Therefore, in this respect no new proposals are made.

2 Decision-making and competences

In an enlarged European Union there is a strong need for a powerful Commission. Only the Commission can guard over the interest of all the Member States and the EU as a whole. The Commission should in the future initiate all legislation exclusively. Therefore, the current system of dividing the competences between the Union and the Member States (as laid down in Article 5 EC) must remain unchanged. However, the principle of subsidiarity must be abolished. It can frustrate the efficiency of the decision-making. It might therefore be necessary to clarify a number of legal bases (e.g. Article 95 and 308 EC). Sometimes it can be made more obvious what the Union can and cannot do.

A so-called 'Kompetenz-Katalog' (a catalogue of competences) has no additional legal value. To draw a distinction, as in done in the European Constitution, between exclusive, shared and additional competences leads to artificial and confusing results. Moreover, it can frustrate the dynamic development of the EU-integration process.

The new modalities of the European Constitution regarding the legislative instruments result in an improvement compared to the current system. A distinction is drawn between legislative and non-legislative acts. This reduces the number of the different categories of EU-decisions from over 20 to 5 and introduces a clear hierarchy of norms. Furthermore, the legislator (European Parliament and Council) can decide on a case-by-case basis whether legislation or non-legislation should be enacted. This reduces the scope of application of the co-decision procedure.

As far as the European Council is concerned, the creation of a European President is the best alternative to the current rotation of the EU-presidency, which obviously will not work in a European Union with at least 27 Member States. However, the tasks of the President should be limited to 'solely' the co-ordination of the tasks laid down in Article 4 EU.

Having said that, if a legal basis allows for the possibility of enacting legislation, the Commission will send the proposal to the Council and Parliament. In that case the 'normal' co-decision procedure applies. An idea might be that voting in the European Parliament occurs between two parties. This could introduce, in other words, a two-partysystem, consisting out of a party that supports a further transfer of sovereignty from the Member States to the EU on the one hand, and out of a party that is (more or less) against a further transfer of sovereignty on the other hand. National representatives of national parties shall have to decide which party they will join. The discussion over the question of how powerful the European Union should be must primarily take place in the European Parliament. The two-party system could contrary to other solutions decrease the so-called 'democratic deficit'.

In an enlarged Union there is no need for a so-called 'core'-Europe and to a lesser extent for the 'closer co-operation'-modalities. There are alternatives that can keep the integration process dynamic and which will not be considered as discriminatory by the new and candidate Member States. Closer co-operation and the forming of a an 'avant-garde' are contrary to the notion laid down in the preamble of the Treaty of 'an ever closer Europe'. Moreover, these modalities can frustrate the efficiency and transparency of the decision-making process.

3 Judicial protection

The reforms of the Treaty of Nice and the European Constitution regarding the direct appeals (Article 230 EC) and the preliminary rulings (Article 234 EC) are satisfactory. The CFI should, will it be seen as a 'true' European Union court, be responsible for practically all direct appeals and some of the preliminary rulings. However, the introduction by the Treaty of Nice of the so-called 'judicial panels' (Article 225A) is to be considered unnecessary. They lead to a burdensome '3-layer' judicial procedure. This might lengthen in stead of reduce the duration of the judicial procedure.

Decisions given by the Court of First Instance in direct appeals and preliminary rulings may be subjected to review by the Court of Justice where there is a 'serious risk of the unity or consistency of Community law being affected' (Article 225 EC). This criterion is vague and can undermine the authority of the CFI. Furthermore, the possibility of filtering the actions or proceedings brought against judgements on a direct appeal by the CFI before the ECJ is contrary to the principle of legal certainty. The possibility of an appeal against judgements of the CFI in direct appeal-issues must always be open.

This brings us to the judicial protection possibilities for individuals. Individuals can under Article 230(4) EC institute proceedings acts of the institutions of the EU. The strict 'Plaumann-doctrine', however, must be reconsidered. In the future, any action of the institutions of the EU must be open for appeal by an individual if this action is incompatible with one of the fundamental rights as laid down in the Charter of fundamental rights. In that case, it should suffice that individuals are directly concerned by the contested decision. This introduces a so-called 'EU-Verfassungsbeschwerde'. Apart from that it is, of course, necessary that the Charter of fundamental rights becomes legally binding. In that case however, Europe is faced with two binding catalogues of fundamental rights: the Charter and the Convention on Human Rights. This has several disadvantages. First, there is the risk of "forum shopping" and diverging jurisprudence. This does not contribute to the principles of democracy, effiency and tranparency. The two Courts can interpret differently the same fundamental right. Second, The Court of this Convention, the European Court on Human Rights (ECHR) in Strasbourg, has indicated in some of its recent judgements that it can be the primus inter pares when guarding the respect for human rights. This may imply that any action of (one or all of the Member States of) the Union can be open for review by the ECHR. This situation is contrary to the autonomous character of the legal order of the EU. In the European Union there can and must only be one Supreme Court and that is the ECJ. In order to achieve this objective, the Member States of the European Union should withdraw from the European Convention.

Once adopted, these suggestions will certainly contribute to the efficiency, transparency and democracy of the whole of the European Union. This would be in the interest, not only of the EU itself, but also of its citizens.