AN ARTICLE ON THE EU CONSTITUTION

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Without doubt, the European Union has come to a crossroads. Following the failure of the proposed constitution in the referendums in France and the Netherlands, it is now vital to take stock of the situation, in order to develop an overall concept for how European integration can and should progress from this point.
Germany's EU Council Presidency provides an opportunity to hold this discussion. But the fair-weather talk about Europe currently to be heard from all political sides is no help at all.
People are ill-at-ease and increasingly reserved and sceptical about the EU, because they can no longer make sense of the integration process, because they can't shake off the feeling of an ever stronger, increasingly inappropriate centralisation of competencies, and because they cannot see who is responsible for which policies.
These concerns must be taken very seriously, particularly because they are not simply dreamt up.

It is European policy and in part also German policy to want the proposed constitution for the EU to come into force in spite of its failure in France and the Netherlands. In particular, they want to save those aspects which reorganise the competencies of the EU's bodies and its legislative procedures. But it is these aspects in particular which reveal crucial problems and weaknesses. In the end, the proposed constitution is a continuation of those contradictory, intransparent structures of the EU which were material in bringing about the very problems which confront us today.
These problems have resulted from the existence of two mutually exclusive concepts for the final structure of the EU.
On the one side, there are the intergovernmentalists aiming for an association of permanently sovereign states, a "Europe of the mother countries". They are greatly concerned about the increasing centralisation of policy on the EU level, which at the same time dilutes the authority of the individual Member States.
The intergovernmentalists see the cause of this development in the fact that the Commission and the European Parliament together with the European Court of Justice - like all institutions acting in the political field – are aiming to obtain ever greater powers. They see the solution in giving the EU Council of Ministers a greater role: this is made up of representatives from the governments of the individual Member States, and has to approve of every piece of EU legislation. The idea behind this is that the governments of the Member States will prevent any excessive, inappropriate centralisation in the interests of preserving their own power.
The other side consists of the federalists who are aiming for a federal European state. They complain about massive institutional deficits in the bodies and decision-making processes on the EU level, saying that these are ineffective, intransparent and undemocratic, with the feeling that these deficits are growing progressively with the on-going development of the EU. They demand full state structures for the EU along the lines of the classic separation of powers, in particular a parliament as sovereign legislative and a government as sovereign executive – without the governments of the Member States being able to throw a spanner in the works through the Council.
The institutional structure of the EU is a compromise between these two ideal concepts. The Commission is a kind of government, but it must maintain good relations with the governments of the Member States because of their co-determination position in the Council. The legislative consists of two bodies: the Council and the European Parliament, whereby the Parliament shares with the Council in the decision-making process in many but by no means all matters; the Council clearly has greater influence.
Without doubt, both the intergovernmentalists and federalists are correct in their diagnosis of the problems.

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Let us look first at what the intergovernmentalists say. It is true that we are experiencing an ever greater, inappropriate centralisation of powers away from the Member States towards the EU.
The German Ministry of Justice has compared the legal acts adopted by the Federal Republic of Germany between 1998 and 2004 with those adopted by the European Union in the same period. Results: 84 percent came from Brussels, with only 16 percent coming originally from Berlin. It is not relevant to counteract this by claiming that the "more important" laws are made in Germany. Single market legislation, the "fauna flora habitat" environment directive and anti-discrimination legislation, to name but a few examples, are European legal acts which have brought about a fundamental, sustainable change in Germany's legal and social structure.
Where does the centralising tendency come from?

One initial cause is the fact that EU politicians are politicians, and EU civil servants are civil servants. No matter whether they are working in a national ministry or in an EU Directorate General: if they are given the task of protecting the environment or potential victims of discrimination, they will do so as extensively as possible, thus creating corresponding regulation. In these efforts – sometimes well-meaning attempts to solve problems, sometimes simple striving for influence and power – it is frequently only a marginal aspect whether the EU has the necessary competency and whether a pan-EU solution is really necessary.

This explains why when pursuing what are in the end politically dictated objectives, time and again the European Union regulates matters which certainly do not have to be harmonised throughout the EU or for which the EU does not even really have any competency at all. This is repeatedly justified with the argument that the Member States have not brought about any comparable regulation so that the problem can only be solved by the EU.
One example of this is the massive impact on substantive labour law by EU anti-discrimination legislation, although the structural contents of labour law falls under the responsibility of the Member States.

A second cause for inappropriate centralisation is the fact that Brussels is frequently used as a backdoor for introducing legislation. If a national ministry, for example the German Ministry for the Environment, cannot assert a certain regulation project on the national level – for instance because the German Minister of Labour puts up resistance or because it would not obtain a majority in the German Parliament, it discreetly "encourages" the corresponding Directorate General in the European Commission to implement the project on the EU level. In Brussels, this will usually fall on open ears for the reasons stated above. The EU project then runs through the normal legislative process. In the end, the Council of Ministers takes the final decision. As a rule, it will be staffed by exactly that German Ministry which had prompted the suggestion in the first place, together with the corresponding ministries of the other Member States, in our example 27 by environment ministries.
This backdoor approach regularly means that the whole project will not be deliberated about adequately on a national scale and frequently neither on an EU scale, for example with regard to its effects on the labour market. This deprives other ministries and in particular, the national parliaments of the individual Member States, of any kind of effective participation in the decision-making process, as would be a matter of course for a legal instrument of this kind on a national level, and as is actually stipulated in the constitutions of the Member States.
Much legislation which cannot be put through the national parliament is thus implemented through Brussels' back door – now even on a European scale. The consequence is progressive centralisation, triggered by national specific interests.

A third cause consists of the so-called "package deals" in the Council of Ministers. In order to make up majorities for adopting resolutions, the representatives of the Member States forge alliances, frequently bundling together projects which are related in no way whatsoever, and agreeing on compensation deals. In accordance with the logic of political negotiations, such alliances as a rule will result in more rather than less regulation.

The fourth cause for inappropriate centralisation consists in the legal practice of the European Court of Justice. The Court's verdicts on competency issues reveal the systematic tendency to decide in favour of EU competency, as long as it can find any justification at all for doing so.
To use the words of the German Constitutional Court, it interprets EU law "along the lines of making the most exhaustive possible use of the Community powers."
This is no great surprise. After all, Article 1 and Article 5 of the EU Treaty also place an obligation on the European Court of Justice to make a contribution to "bringing about an ever closer union".
One example is the verdict dated November 2005 (Case C-144/04). With this verdict, the European Court of Justice declared the unconditional possibility of concluding temporary employment contracts with older employees contained in the Hartz-I package – a core element of Chancellor Schröder's labour market reforms – to be null and void; this had aimed at reducing long-term unemployment in this particular group of the population. In the face of the amazed experts, the European Court of Justice conjured up the justification that the "prohibition of discrimination on account of age" is a "general principle of Community law".
Another example is the verdict dated January 2006 (Case C-2/05) on the so-called E-101 certificates. These documents say that an employee temporarily delegated to another EU country remains insured in the social security system of his home country, so that he is exempt from the obligation to pay social security contributions in the country to which he has been sent by his employer. Social security fraudsters claim

incorrect facts to obtain E-101 certificates by fraud abroad, in order to escape from having to pay social security contributions at home.
The European Court of Justice has now categorically refused national courts any judicially viable means of checking whether E-101 certificates could have been obtained by fraud. This prohibition means that German social security fraudsters, who have falsely claimed to have sent employees abroad, have to be acquitted in Germany. With this verdict, the European Court of Justice has created the need to establish European regulations in this area which actually belongs to the core competencies of the Member states.

And so the analysis of the problem as seen by the intergovernmentalists, that the EU keeps on acquiring ever greater competencies, is correct.

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But the federalists are also correct with their diagnosis of the problem, that the political decision-making structures of the EU are inadequate, intransparent and above all, not very democratic, given the extent of their influence which today covers practically all aspects of social life. Why is this?
The Council of Ministers plays a central role here. On the one hand, it is made of up the corresponding ministers from the Member States, i.e. representatives of the executive; on the other hand, it makes up part of the European legislative, formally along side but in fact with priority over the European Parliament. In other words, the Council is hybrid by nature: Against the fundamental principle of the separation of powers, the essential European legislative functions lie with the members of the executive.
While this may have been acceptable during the initial phase of European integration, when dismantling trade restrictions was the prior aim, today Brussels is in possession of very extensive positive regulation and, above all, regulating competencies, cue: 84%. In this context, the hybrid nature of the Council of Ministers is definitely a problem.
This applies on the one hand directly on the European level, even if the EU has a European Parliament which is gaining increasingly in influence. But this problem applies even more on a national level: the constitutional competencies of the state bodies in the Member States, in particular the national parliaments like the Bundestag, are being substantially undermined, especially in view of the way the national executives use the backdoor in Brussels, as already explained above.
The figures stated by the German Ministry of Justice make it quite clear: by far the large majority of legislation valid in Germany is adopted by the German Government in the Council of Ministers, and not by the German Parliament. And every directive adopted by the German Government in the Council of Ministers has to be implemented in national law by the German Parliament. The German Basic Constitutional law, however, gives parliament the central role in shaping the political community. And so the question arises whether Germany can still be referred to unconditionally as a parliamentary democracy at all, because the separation of powers as a fundamental constituting principle of the constitutional order in Germany has been cancelled out for large sections of the legislation applying to this country.

Given the overriding power of the national executive in drawing up EU policy, many members of the German Parliament today see themselves faced with a considerable loss of influence.
One expression of this wide-spread feeling is the "agreement" which the German Parliament reached with the German government in September 2006 in order to protect its rights. While the German government undertakes to inform Parliament early on about developments in Brussels, giving Parliament an opportunity to react and taking account of Parliament's opinion in its negotiations in the Council of Ministers, the agreement still entails a delicate aspect which explicitly grants the German government the right "to reach deviating decisions for important reasons of foreign policy or integration policy, while being aware of the votes given by the German Parliament". In other words, the German government can and may act even contrary to the resolutions adopted expressly by the German Parliament.

And so the federalists' analysis of the problem is also correct: the institutional structures of the EU are suffering to a worrying extent from a lack of democracy and from a factual breakdown in the separation of powers.

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What can be done to come to terms with the two key problems: the lack of democracy and separation of powers, together with inappropriate centralisation? Does the proposed constitution offer a solution? What kind of a European solution could address the worries of both the federalists and the intergovernmentalists?

European integration has meanwhile progressed to such an extent that a solution has to be found for the lack of democracy and the breakdown in the separation of powers, in view of all its negative consequences.
This demands a fully empowered European Parliament as legislative. It must therefore be welcomed that the proposed constitution intends to grant the European Parliament far more extensive rights of co-determination than in the past.
On the other hand, what the proposed constitution does not do is to close Brussels' backdoor, which is used extensively by national ministries through the Council of Ministers. Here in particular the constitution fails to offer transparency and clear allocation of responsibility for good or bad policy.
In this context, or at least where the legislative process is concerned, the Council of Ministers should have undergone further development to become a second parliamentary chamber as in a classical two-chamber system: a second chamber which would prevent inappropriate centralisation on the one hand, while at the same time not acting as a driving force behind inappropriate centralisation on the other hand by implementing specific interests through the EU which cannot be asserted on the national level.
Nor can the constitution be said to defuse the problem in the relationship between national executive and national parliament. While the national parliaments are to have the right to censure what they see as infringements in EU draft legislation against the subsidiarity principle, such censure from a national parliament does not have any binding effect on the EU bodies so that there are no mandatory consequences.
But above all, the so-called passerelle clause in the proposed constitution gives the heads of state and government of the EU Member States – i.e. the national executive, not the national parliaments – the right to convert EU competencies subject to unanimous decisions into competencies with majority decisions. In other words, the executive is empowered to modify of its own accord a contract under international law which is of fundamental significance for the individual Member State, without requiring the consent of the national parliament. The six-month right of objection of the national parliaments does not offer adequate compensation, because it constitutes a far greater hurdle to topple a decision already taken by the heads of state and government than to deny the consent needed for a planned contractual amendment in the first place.
And so the proposed constitution does not remedy the lack of democracy and breakdown in the separation of powers.

The second issue, of how to prevent the trend to inappropriate centralisation, is also of quite central significance. The solution to this issue is made up of four elements.

Firstly, it is necessary to draw up a conclusive list of competencies stipulating the scope and limits of EU competencies. The proposed constitution does not contain such a list, although this was in some cases a specific demand in the constitutional negotiations during the European Convention. In particular this is not provided by the non-conclusive order of competencies in the first part of the constitution. When it comes to the scope of EU competencies, reference is made to the corresponding regulations for the concrete Community policies in the third section, which include scarcely any changes to the current situation. On the contrary, the introduction of the "mixed competencies" in the first part threatens to open up new floodgates for an even more dynamic assumption of competencies.
What's more, the proposed constitution entails a changeover from unanimous to majority decisions for many policy-making areas when adopting resolutions in the Council of Ministers.
And so implementation of the proposed constitution would even reinforce the process of frequently inappropriate gradual centralisation as a result of the simpler resolution adopting process, instead of stopping or at least slowing down this development.
The introduction of a conclusive list of competencies with a clear segregation of the competencies for the EU and the Member States was rejected by the European Convention above all on the grounds that this would impair the "dynamic ability of the EU to develop". But that is exactly the point in favour of this kind of list.And anyway, a list of this kind can be amended at any time if it should prove appropriate to expand certain EU competencies.

Secondly, the so-called discontinuity principle must be introduced on the EU level. This entails the automatic expiry of prospective legislation if it has not been adopted within a legislative period, so that the procedure has

to begin again from the start in the new legislative period. This is a matter of course in Germany. Not so in the EU. Here the EU bodies repeatedly have to deal with legislative initiatives which are ten years old and more. The proposed constitution has abstained from introducing the discontinuity principle into EU legislation.

Thirdly, the Member States must be given the right through the European Council to withdraw competency for an area of policy from the European level and restore it to the national level again.
This clearly reduces the risk of structural contents of EU competencies developing contrary to the preferences of the majority of the Member States and in particular the risk of measures which in the end are not covered by the competencies granted to the EU.
For if this possibility exists, then it will be in the own interests of the Commission and the European Parliament to exercise the competencies granted to them with reservation and without excess, in order to prevent the risk of these powers being withdrawn again completely.
For this threat to be real, the right to restore competency to the national level must be based on a majority vote and not a unanimous vote.
The proposed draft constitution does not contain the possibility of restoring individual competencies to the national level as a centralisation brake. Instead, it counts on the same one-way street as before, heading towards ever greater centralisation.

Fourthly, the progressing centralisation through European legal practice by the European Court of Justice must be stopped. This entails setting up an independent "Court for Competency Issues" parallel to the European Court of Justice, to deal solely with questions of distinguishing between competencies on a European level and on the level of the Member States.
In order to remain independent, such a Court for Competency Issues would have to be made up of members from the constitutional courts of the Member States. This court should be able to judge not only the legal instruments and political measures of the Commission and the European Parliament but also the verdicts of the European Court of Justice, where distinguishing between competencies is material to the verdict.

Not only the bodies of the EU and the governments of the Member States should have the right to sue but also the national parliaments and, important for federal countries such as the Federal Republic of Germany, the individual states as well. While the proposed constitution includes the possibility of national Parliaments and the Committee of the Regions taking action following violation of the subsidiarity principle, this right will vanish into thin air because in addressing such action to the European Court of Justice as an EU institution, any corresponding verdict will interpret the competency regulations in favour of the EU as far as possible.
This is why there is a vital need for an independent court in the form of a Court for Competency Issues. But the proposed constitution does not make any provisions for this.

A combination of the four institutional measures described above – the conclusive list of competencies, the discontinuity principle, the possibility of restoring competencies to the Member States and the Court for Competency Issues – could successfully counteract the trend to inappropriate centralisation. As far as day-to-day policy is concerned, they would assume the function of the subsidiarity controller, which up to now was the task of the Council, a role which it was not capable of performing effectively enough, as has become evident in developments over the last 15 years.
Nor do these precautions to prevent inappropriate centralisation contradict the necessary elimination of another most serious deficit in the current proposed constitutional draft: this constitution would make it practically impossible to introduce greater cooperation between willing Member States particularly in foreign and security policy, because this requires the consent of all EU Member States. The proposed constitution is therefore detrimental to the global political interests of Europe and must be rejected for this reason as well.

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The reforms suggested here could tackle both the problems in Europe as diagnosed by the federalists – intransparency, a lack of democracy and the breakdown in the separation of powers – and the weakness identified by the intergovernmentalists – progressive unreason-able centralisation.
On the contrary, European and some German politicians want to forge ahead with a second attempt to introduce the proposed European constitution, in spite of its rejection in France and the Netherlands and in the face of a clearly sceptical population in other Member States as well. They refuse a constructive discussion of the issue whether this constitution is really the best solution for Europe, because they are afraid they will not have the strength to achieve success once again.

But this discussion has to be held, because the proposed constitution would only consolidate the described deficits which threaten the very foundations of the EU.
There is therefore a risk that the policy of "muddling on" in the European integration process will result in exactly the opposite of what it really wants – further erosion instead of greater stabilisation.

Without doubt, a reorientation towards an EU organisation along the lines described above would entail overcoming structures which have become established to an extensive degree, and in particular overcoming the political interests of the Member State governments which are geared above all to the preservation of their power. But that is exactly what we will have to expect and demand from politics if, as can already be seen today, the path taken in recent decades and continued in the proposed constitution threatens to lead to a dead end because the EU overextends when it fails to concentrate on the really essential European problems and because people are no longer willing to go along this path. The argument that such a constitutional order could not be implemented politically therefore is simply not valid.

In unpublished comments, German politicians on a national and state level repeatedly express their criticisms and concerns at the developments being taken by European politics.
But scarcely any of them is prepared to express these fears and concerns in public – for fear that this could harm the on-going unification process.
But exactly the opposite would happen: the German population has progressed further than some politicians think.
Most people have a fundamentally positive attitude to European integration. But at the same time, they have an ever increasing feeling that something is going wrong, that an intransparent, complex, intricate mammoth institution has evolved, dissolved from the factual problems and national traditions grabbing ever greater competencies and areas of power; that the democratic control mechanisms are failing: in brief, that it cannot go on like this.
People expect politicians in particular to show a differentiated attitude to Europe: a fundamental YES to European integration must be followed by a constructive discussion as to HOW this can be implemented.
This is a great challenge. We should use Germany's EU Council Presidency to launch just this kind of discussion process – for the sake of Europe.

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