

RECON Online Working Paper 2008/08

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June 2008

URL: www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html

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RECON Online Working Paper Series | ISSN 1504-6907

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Issued by ARENA

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University of Oslo

P.O.Box 1143 Blindern | 0317 Oslo | Norway

Tel: +47 22 85 76 77 | Fax +47 22 85 78 32

www.arena.uio.no

Abstract

This paper proposes to assess the representative quality of European Union decision-making by way of a micro-approach which traces the effectiveness of the mechanisms of representation that connect the European peoples to the decision-making process. In particular, it proposes to distinguish systematically between 'upstream' controls that delimit the mandate of political representatives and 'downstream' controls that allow political representatives to justify their decisions through deliberation. This approach is applied to the various phases of the making of the EU Constitutional Treaty and its dramatic failure due to the negative referendum verdicts in France and the Netherlands. Thus it is demonstrated that the EU Constitutional process has suffered from a lack of mechanisms for aligning politicians with public opinion. In particular, 'upstream' controls fell short in the very conception of the process in the 2001 Laeken Declaration and in the negotiations in the Intergovernmental Conference. On the other hand, 'downstream' controls remained under-activated in the European Convention and came too late in the ratification phase. Thus the Laeken process emerges as a process involving drifting political elites that, once brought face to face with their democratic principals again, failed to convincingly justify their actions. As the superimposition of the various phases had the overall effect of blurring all lines of political control and accountability over the process, it was eventually to the people to pull the emergency brake to prevent its outcome from taking effect.

Keywords

Deliberative Democracy - European Convention - European Council - Intergovernmental Conferences - Legitimacy - Political Representation

Introduction*

Compared to national political systems, the European Union (EU) is often found wanting as it lacks certain systemic properties that are deemed essential for the democratic character of the former (cf. Weiler et al. 1995; Coultrap 1999; Siedentop 2000; Follesdal and Hix 2006). At the same time, many have submitted that our established models of democracy are unlikely to fit the EU and that its *sui generis* nature requires us to reconsider the models and criteria we use. However, in the absence of an appropriate standard, this approach risks justifying any *ad hoc* revision of our models as befitting the distinctive nature of the EU. What is more, much of the debate on the EU's democratic character has tended to remain at a rather general, theoretical level and to stay devoid of concrete empirical indicators that would allow us to identify when and where democratic deficits occur (but note Lord 2004).

In this paper I want to suggest that, instead of departing from general systemic criteria, an empirical approach that traces the making of EU decisions allows a significantly more valid and concrete assessment of the democratic representative quality of the EU. Departing from the assumption that the bottom-line of any democratic process is that at some point the decisions made need to be aligned with the expressed will of the people, this paper proposes a more empirically oriented micro-approach to the democratic deficit in EU decision-making. Building on recent work on democratic representation, this approach distinguishes between 'upstream' and 'downstream' mechanisms by which political decisions and the representatives that take them can be aligned with their popular constituencies.

In the second part of this paper this approach is applied to the most dramatic demonstration of a mismatch between the European decision-making process and the will of the European people: the Treaty establishing a Constitution for Europe.¹ Paradoxically, whereas the making of the EU Constitutional Treaty was set up as the most open and democratic process ever used for European treaty revisions, its end product eventually floundered on the negative verdict of the electorates in France and the Netherlands. How can this treaty revision process that was designed towards greater popular engagement have stranded on the rejection by those very people? Was the failure of the EU Constitutional treaty a failure of political representation? More specifically, one may ask *where* then did the Constitutional Treaty loose the people: was the process misguided from its inception in the 'Laeken Declaration', did the European Convention or the subsequent IGC go astray, or were the fatal mistakes only made in the ratification procedures?

Thus far scientific analyses of the Constitutional process have failed to go into the details of the process or have been limited to particular stages (most notably the Convention) of it only. Using the distinction between upstream and downstream representation as a heuristic, this paper revisits the representative qualities of the various phases in turn and seeks to identify their contribution to the eventual outcome of the process. However, before moving to the empirical analysis, the first

* Research for this paper has been supported by the RECON Integrated Project sponsored by the European Commission under its 6th Framework Programme, contract nr. FP 6-028698. Previous versions of this paper have been presented at the NIG Work Conference in Nijmegen (NL), 11 November 2005, and at the 4th ECPR General Conference Pisa, 6-8 September 2007.

¹ Following common parlance I refer in the rest of this paper to the 'Treaty establishing a Constitution for Europe' as the 'Constitutional Treaty'.

part of the paper lays out the theoretical framework and operationalises it for the process of EU treaty revision.

Representation across a Multi-Layered Process

Upstream and downstream representation

In thinking about political representation we generally assume some kind of principal-agent relationship. Thus the electoral constituency appears as a principal that elects representatives to act as its agents in making political decisions (cf. Strøm 2000; Mansbridge 2003). In its classical formulation the principal-agent approach focuses attention on the effectiveness of 'upstream' controls whereby the principal (the constituency) can ensure that its agents (the political representatives) act as it wishes them to act and to prevent 'agency loss' by them drifting away from its expressed preferences. Much of the debate in political science has focused on the distinction between a mandate- versus a trustee-model, where the mandate-model binds the representative to a strict and comprehensive mandate, while the trustee-model leaves him or her considerable discretion in acting upon a situation (Pitkin, 1967). The indeterminacy that is implied by the trustee-model can however be resolved at a later point in time when the representative has to return to the constituency and to justify the choices he or she has made.

In fact, in actual representative democracies, representation is always set between two electoral moments that both have a role in constraining the political representative (Manin et al. 1999). On the one hand, *ex ante* there are the expectations (as represented by a manifesto, public pledges etc.) on the basis of which the political representative has come to office. These expectations are taken to operate as upstream constraints on the actions of the representative and may to a lesser or greater extent be subject to monitoring through institutions like political parties and faction discipline. At the other end, *ex post* there is the moment of re-election and the standing that the political representative will have gathered by then. Anticipating the return to the polling booth and the sanction of loss of office it may impose, representatives may find their room for manoeuvre limited to what they think they will be able to justify by the end of the term.

As has been highlighted by Jane Mansbridge (2003), there is an important asymmetry between these two moments. Traditionally, thinking of political representation has tended to privilege the former, upstream (or, as Mansbridge labels it, 'promissory') model that is essentially static as it relies on the original preferences of the constituency and on upstream controls to keep the representatives in check. In contrast, the second (deliberative or, Mansbridge's label, 'anticipatory') model allows for downstream communication from the representatives so as to establish congruence of their views by shifting the constituency their way. The position where congruence is to occur is thus not given by the constituency's original intentions but may be found anywhere where the constituency, by the force of reason, can be convinced to go.² As Mansbridge highlights, moving from the upstream to the downstream model has major implications as it

² Beyond promissory and anticipatory representation, Mansbridge distinguishes two further models, 'gyroscopic' and 'surrogate representation'. These models add force to her move away from the promissory standard and the plea for a pluralist approach. However, for my purpose, there is no need to explore these other models.

makes us shift our normative focus from the individual to the system, from aggregative democracy to deliberative democracy, from preferences to interests, from the way the legislator votes to the way the legislator communicates, and from the quality of promise-keeping to the quality of mutual education between legislator and constituents.

(Mansbridge 2003: 518)

Mansbridge concludes that it is not necessary to look at the various models of representation as excluding each other. She rather suggests that the models, notwithstanding some tensions, “have complementary functions for different contexts and can, thus, be viewed as cumulative, not oppositional” (Mansbridge 2003: 526). Notably, all models of political representation retain “the criterion of constituent-representative congruence” (Ibid.); sooner or later the positions of constituent and representative will have to be aligned.

Representation in EU treaty-making

In EU decision-making national politicians generally mediate between the public and the EU level. To compensate for this indirect involvement, the directly elected European Parliament has come to be involved as a co-legislator besides the member governments gathered in the Council of Ministers. However, when it comes to the primary law of the Union, the Treaties, negotiations thus far remained firmly in the hands of the representatives of the member states, who would convene at different levels (civil servants, Ministers of Foreign Affairs, and Heads of Government) in the Intergovernmental Conferences (IGC), and in which the European Parliament has been granted nothing more than a consultative role. As is generally the case with international treaties, the outcome of the negotiations was subject to ratification in all member states according to their own procedures before it could enter into force.

The IGC model of treaty negotiations thus strongly relies on the electoral mandate enjoyed by the national governments and their ability to adequately represent the people’s wishes with regard to European integration. The requirement of ratification adds to these upstream controls the possibility for downstream controls as ratification can be made subject to a national debate. Indeed, this has become the case in those countries that have tied ratification of EU treaty reforms to popular referendums, most notably Denmark and Ireland. However, in the great majority of EU member states, national parliaments have dealt with the ratification of EU treaties as a mere formality. Thus the representative quality of EU treaty reforms by way of IGCs remains mostly secured by way of the upstream controls on the Heads of Government (see Table 1).

Table 1: Democratic controls on EU treaty reform by IGC

	1) Upstream	2) Downstream
A. IGC	X	
B. Ratification		X

The European Council in Laeken of December 2001 inaugurated a treaty revision process that was to be essentially different from the previous ones, most notably because it established a European Convention that was to “to pave the way for the next Intergovernmental Conference as broadly and openly as possible” (European Council 2001). The Convention was to be composed of 105 politicians (excluding alternates and observers) from all across the EU and its candidate members, including representatives of Heads of Government, national parliaments, the European

Commission and the European Parliament. Moreover, the Convention was to proceed as openly and transparently as possible with its discussions and all official documents being accessible to the public.

Academic appraisal of the Convention has generally been positive, even if most observers agree that its promise has inevitably been somewhat compromised in practice. Comparing decision-making in the Convention with that in previous IGCs, Risse and Kleine (2007: 77) maintain, for instance, that the “Convention method scores better than conventional IGCs” in terms of input, throughput and output legitimacy. In particular, they point to the greater plurality of interests represented, the better transparency and increased deliberative quality of the proceedings, and the greater efficiency of the Convention’s outcomes. More specifically with regard to the ‘representative quality’ of the Convention method, Pollak and Slominski (2004) conclude: “the Convention is by no means perfect but still a considerable improvement to an IGC”. Also for them the greater plurality of interests represented is an important consideration, but they also point to the considerable freedom that the mandate of the European Council left the Convention and to the increase in mechanisms for responsiveness.

However, a one-on-one comparison of the Convention with the Intergovernmental Conference is problematic for various reasons. For a start, such an approach goes to suggest that the Convention did replace the Intergovernmental Conference, which it did not. The European Council emphatically established the Convention as an advisory body to the subsequent Intergovernmental Conference without any powers to conclude agreements. The fact that the Intergovernmental Conference eventually adopted, with only a limited number of modifications, the text prepared by the Convention may testify to the quality of the Convention’s work. However, it may also indicate the effectiveness of the shadow of the IGC that hung already over the Convention. What is more, even after the Intergovernmental Conference no binding decision on EU treaty reform had yet been made, as its agreement still needed to be ratified in all member states. Importantly, due to the disregard of the embeddedness of the Convention in the broader procedure of treaty reform, the positive appraisals of the Convention method fail to come to terms with the subsequent popular rejections of the Constitutional Treaty.

This paper proposes that any assessment of the representative quality of EU treaty reform cannot look at the Convention in isolation but has to look at the whole of the process, from the drafting of its mandate through to its ratification. Only such an approach allows us to confront the apparently positive features of the Convention with the eventual rejection of the Constitutional Treaty by the majority of the electorate in two member states. Developing the model presented in Table 1, the Laeken process thus involves the addition of two more phases to the treaty reform process. First, the Convention has to be inserted as an additional phase, which in principle can be taken to be subject to both upstream (as communicated through its mandate and the selection of its membership) and downstream controls. Secondly, it is useful to distinguish the setting of the mandate at the Laeken European Council from the intergovernmental negotiations that were only formally initiated after the conclusion of the Convention. Given that decisions in both these phases take place under the direct responsibility of the Heads of Government, the analysis in these phases can focus mostly on upstream mechanisms of democratic control. Downstream mechanisms become relevant again in the ratification phase, especially in those countries that organised referendums.

Table 2: Democratic controls on EU treaty reform in the Laeken process

	1) Upstream	2) Downstream
A. Laeken mandate	X	
B. Convention	X	X
C. IGC 2003-04	X	
D. Ratification process		X

What we find then is that, when we trace the conception of the Constitutional Treaty through its different phases, each phase provided different democratic controls that were to connect the process to the European citizens.

Assessing the EU constitutional process

As much public attention as the EU constitutional process may have drawn, thus far there are not that many analyses that have assessed it in its totality. Instead many analyses rather have examined the Convention in isolation (Norman 2003; Magnette and Nicolaïdis 2004), and also the ratification referendums have received quite some attention for themselves (e.g. Crum 2007; Glencross and Trechsel 2007). The most prominent overall assessment of the constitutional process has been Andrew Moravcsik's (2005a; 2005b; 2006). In Moravcsik's view the constitutional process appears as "the last gasp of idealistic European federalism", "an unnecessary public relations exercise based on the seemingly intuitive, but in fact peculiar, notion that democratisation and the European ideal could legitimate the EU" (Moravcsik 2005a). According to him, the Laeken process was set for failure as the whole process lacked any substantive ground in the popular will. Rather than being in need for fundamental reform, Moravcsik (2006: 376) contends that the EU has "reached, through a characteristically incremental process, 'a stable constitutional settlement'". While citizens recognise this, their politicians fail to see it. Given that the Union's competences are concentrated in policy domains that are only of secondary concern for citizens and given the way these competences are constrained and embedded in a system of political checks and balances, there is little justification for the much-invoked 'democratic deficit' of the EU. As a consequence, there is little point in insisting that citizens need to be engaged more with European politics, since "citizens fail to participate in EU politics not because they are blocked from doing so, but because they have insufficient incentive" (Moravcsik 2005a).

In Moravcsik's view, there was never any upstream demand for the Laeken mandate or for the Convention's work. As a consequence, the Laeken process was bound to become an exercise for and by political elites:

The constitutional convention attracted little public interest, the result was modest, and the political costs now threaten to sink the entire project. Few Europeans were aware of the convention's existence, and only a handful could explain what happened there. [...] So the task of preparing a constitutional draft was left, as tasks so often are in EU affairs, to parliamentarians, diplomats and Brussels insiders. Two hundred conventionnels came, they deliberated and, sixteen months later, little had changed.

(Moravcsik 2005b: 375)

Even if Moravcsik does find little fault in the substance of the Constitutional Treaty that emerged, by the time it came to ratification, the distance the elites had travelled

from their constituencies could no more be bridged and rather fed into a further process of mutual estrangement:

When pro-European political elites found themselves defending a constitution with modest content, they felt they had no alternative but to oversell it using inflated notions of what the EU does and rhetoric drawn from 1950s European idealism. Small wonder they were outgunned by grumpy populists with stronger symbols rooted in class, nation and race (and even more inflated views of what the EU does). Publics became confused and alarmed by the scare tactics of both sides.

(Moravcsik 2005a)

In short, in Moravcsik's view, the Laeken process was an initiative of political representatives that was uncalled for by their constituency, proceeded without many public controls from the people or any successful attempts from the politicians to re-align with them. As the process was thus allowed to drift away, when its outcome was eventually brought back to the electorate it was bound to be voted down.

Another comprehensive assessment of the Laeken process has been made by John Erik Fossum and Agustin Menéndez (2005). Whereas Moravcsik underlines the absence of upstream controls, Fossum and Menéndez's analysis of the Laeken process rather emphasizes the importance of downstream mechanisms of elite-public re-alignment, as their perspective is informed by deliberative democracy. Comparing the Laeken process to an ideal model of deliberative constitution-making, Fossum and Menéndez identify a number of aspects in which the process has fallen short. Rather similar to Moravcsik, they observe how already in the run-up to the Laeken declaration there was a genuine lack of public debate. More importantly, in their view, once the process had been put in motion, opportunities for downstream re-alignment were not exploited (Fossum and Menéndez 2005: 410).

In particular, Fossum and Menéndez find the Convention falling short of constituting a constitutional assembly proper (Fossum and Menéndez 2005: 402-5). The Convention only had the power to make suggestions since the formal decision on the constitutional proposal was left to the Intergovernmental Conference. More generally, the Laeken Declaration imposed from the start heavy constraints on the work of the Convention that prevented it from acting as a genuine autonomous body. Fossum and Menéndez observe moreover that "the Convention did not perform brilliantly in its role as catalyst of a wide public debate in European general publics" (Fossum and Menéndez 2005: 405). Further, once the Convention had delivered its draft Constitutional Treaty, the member states failed to leave time for proper public debate before proceeding with the negotiations in the Intergovernmental Conference. While at the time of writing Fossum and Menéndez were unable to assess the actual debates that took place (nor to foresee the outcomes of the first referendums), they observe that "Given the democratic shortcomings of all previous phases [...] a strong democratic input is needed at this stage to make the Constitution a democratic one" (Fossum and Menéndez 2005: 406).

If we compare these two analyses of the Laeken process as a whole, we find that Moravcsik points to the ineffectiveness of upstream controls on the Laeken process. The lack of popular demand for a Constitutional Treaty should already have prevented the adoption of the Laeken declaration. But even in the course of the process, in the Convention or, more probably, in the IGC, political representatives in

touch with their constituencies should have corrected the course of the process. This clearly raises question I): *Why were upstream controls ineffective and why did politicians proceed with the Laeken process?* The analysis of Fossum and Menéndez points in a different direction, emphasising the lack of downstream re-alignment between political representatives and their constituencies, which raises question II): *Why did politicians fail to engage with the public in the Laeken process so as to re-align their positions?*

These two questions are anything but mutually exclusive. Indeed, their complementarity is already implied in Fossum and Menéndez's analysis. However, the claim of this paper is that to fully bring out the aggregate effect of upstream and downstream controls on the Laeken process, they need to be systematically distinguished from each other, for each of the four phases of the Laeken process. What is more, with Fossum and Menéndez's account being rather theoretical in character, as it was conceived ahead of the ratification phase, we are now in a position to undertake a full empirical analysis. After the analysis, I hope to be able to better specify the aspects in which political representation has failed in the Laeken process, to comment on the relative merits of the competing perspectives set out by Moravcsik and by Fossum and Menéndez, and to draw some more general lessons about political representation and supranational (constitutional) politics.

Each of the two leading questions touches upon different phases of the Laeken process. Whereas Question I) on upstream controls concerns above all the European Council agreement on the Laeken declaration, the Intergovernmental Conference and, to a somewhat lesser extent, the Convention, Question II) on downstream mechanisms concerns above all the Convention and the ratification phase. Thus we can derive the following sub-questions for each of the four phases:

- A. Why did the EU Heads of State and Government agree on the Declaration of Laeken? (reviewing upstream controls)
- B. How was the European Convention aligned with the EU citizens? (reviewing upstream and downstream controls)
- C. Did the Intergovernmental Conference re-instil national interests on the Constitutional Treaty? (reviewing upstream controls)
- D. Did the ratification process serve to re-align voters with politicians? (reviewing downstream controls)

These questions will be addressed in turn in the next, empirical section.

The Phases of the Laeken Process: An Empirical Review

Why did the EU Heads of State and Government agree on the Declaration of Laeken?

The Laeken Declaration formally involved a unanimous decision of all Heads of State and Government of the, then, fifteen EU member states. If this agreement was not driven by upstream pressures of public demand, as Moravcsik and Fossum and Menéndez seem to agree, whence did it then come from?

In a way the Laeken process emerged as the logical follow-up in a process that had led European co-operation from the Single European Act (1985), to the Treaty of Maastricht (1991), to the Treaty of Amsterdam (1997) and to the Treaty of Nice (2000).

However, in two ways the Nice negotiations laid the groundwork for the Laeken process to aspire to become more than just another step in this trajectory. For one thing, the general atmosphere of the negotiations and especially the length, acrimoniousness and confusion that marked the final meetings in Nice, all contributed to a general sense that was well expressed Tony Blair's dictum "we can't go on like this" (as cited by Grabbe 2000). After five Intergovernmental Conferences in fifteen years, EU treaty negotiations had turned into trench wars and the treaties themselves had turned into labyrinthine texts reflecting their contorted conception. Secondly, admitting the gap between the grand aspirations and the actual achievements in Nice, the Heads of Government added at the end of the negotiations a Declaration that recognised the need to bring the Union and its institutions closer to the citizens, called for "a deeper and wider debate about the future of the European Union", and committed to launching a new formal treaty changing exercise in 2004.

That this new treaty changing exercise acquired the distinctive character that it did was very much the result of the political entrepreneurship of some specific member states. For one, the government of the biggest member state, Germany, played an important driving role, starting with Foreign Minister Joschka Fischer's May 2000 call for a move towards a European federation (Fischer 2000). Notably, Fischer's speech provoked one Head of Government after the other to respond by outlining their own vision of Europe. Even if most of these responses were less ambitious than Fischer's, they all shared the diagnosis that European integration faced great challenges and that to meet these challenges major institutional reforms were in order. As the Treaty of Nice got bogged down in specific reforms, these greater ambitions were naturally projected on the new treaty revision exercise.

Besides the Germans, another major driver behind a new treaty revision process was Belgian Prime Minister Guy Verhofstadt who provided the 2001 Belgian EU Presidency term with its headline objective by securing the promise that the exact initiatives for this process would be determined by the end of its term at the December European Council (cf. Magnette 2004; Norman 2003: Ch. 3). The Swedish EU Presidency of the first semester of 2001 limited itself to floating various formats for the new treaty negotiations ranging from a group of government representatives, a small group of wise men and women, or "a broad and open preparatory forum" with a structure "similar but not necessarily corresponding to, the convention that [in 2000] successfully prepared the European Charter of Fundamental Rights" (Council of the EU 2001: 21). Once the Belgians had taken over the helm of the EU, the option of holding a Convention rapidly gained ground. Even the more sceptic governments refrained from opposing a Convention, given their general recognition that something had to change in the treaty negotiations, the obvious public appeal of the Convention idea, and the insistence of the Belgian presidency (cf. Norman 2003: 24/5).

Rather than seeking to prevent the Convention, more sceptic member states sought to insert procedural safeguards that were to prevent the Convention from drifting away from the European Council's control (cf. Magnette and Nicolaïdis 2004: 402f.). For one thing, it was made very clear that the Convention's "final document will provide a starting point for discussions in the Intergovernmental Conference, *which will take the ultimate decisions*" (European Council 2001, emphasis added). The Declaration gave moreover a half-hearted indication of the nature of the final document stipulating that it might "comprise either different options, indicating the degree of support which they received, or recommendations if consensus is achieved" (Ibid.). Furthermore, the Declaration ensured that in the composition of the Convention the representatives of

national governments and parliaments outnumbered those from the European institutions. The Declaration also stipulated that the Convention should complete its work within one year from its start on 1 March 2002, so as to allow sufficient time for diplomatic preparation and public debate before the commencement of the 2004 IGC. Last but not least, the Heads of Government provided for a Praesidium that would steer the Convention and in which again national representatives would outnumber the representatives of the European institutions. The European Council made sure that it would have privileged access to the Chairman of the Convention, attributing to him a driving role in structuring the Convention's proceedings and insisting that he would attend each European Council to deliver an oral progress report and to receive the views of the Heads of State and Government.

What we find then is that the inauguration of the Laeken process was anything but a direct follow-up of the European Heads of Government to public appeal. For sure, public appeal played a role as it stimulated the exchange of grand views on Europe following Fischer's Humboldt speech. More specifically, however, the Laeken process solved the puzzle of the Heads of Government who recognised the need for further EU institutional reform but also realised that the normal IGC-approach would not get them there. The Belgian Presidency moved into this window of opportunity by proposing a Convention that would work under a set of specific political controls.

How was the European Convention aligned with the EU citizens?

The European Convention can be said to have been connected with the European public in three ways. First, there was the upstream connection running through the Heads of Government assembled in the European Council that established the Convention and gave it its mandate. Secondly, the members of the European Convention could claim to maintain more direct links to the public without mediation of the European Council as they were selected as delegates of different institutions. Crucially, besides these two upstream mechanisms, the European Convention was moreover marked by its public way of proceeding, which was to serve the engagement of the public and might thus work as a downstream mechanism of political-public alignment.

As said, the European Council established the Convention as an advisory body that would prepare for the upcoming IGC under specific constraints. The Convention would report to the European Council but, whatever it would conclude, the ultimate responsibility for adopting reforms would be left to the member governments acting by unanimity. However, the very way in which the European Council had defined the Convention fed into a fundamental "*tension between its constitutional role and the constraints imposed upon it*" (Fossum and Menéndez 2005: 402). From the very beginning, many Convention members did not see themselves merely in an advisory role but rather as autonomous constitution-makers. Like a sorcerer's apprentice, the Convention aspired to rise beyond its principal and to tie its hands in turn.

Thus, the Convention came to construct its own 'Constitutional self-mandate' (Closa 2004). Notably, it was the Convention's Chairman Valéry Giscard d'Estaing who took the lead in this process. In his opening address he turned to the choice that the Laeken Declaration had left for the Convention to submit either a single text or various options, observing that

our recommendation would carry considerable weight and authority *if we could manage to achieve broad consensus on a single proposal which we could all present*. If we were to reach consensus on this point, *we would thus open the way towards a Constitution for Europe*. In order to avoid any disagreement over semantics, let us agree now to call it: a 'constitutional treaty for Europe'.

(Giscard d'Estaing 2002: 11, original emphasis)

Clearly, Giscard realised that if the Convention's report would consist of various options, it would basically leave any decision at the discretion of the Intergovernmental Conference. In contrast, the Intergovernmental Conference would have much more trouble bypassing a single proposal carried by a broad consensus, especially if this consensus would directly involve government representatives and had been able to wield considerable public legitimacy.

The aspiration of the Convention to transcend its role as a mere agent of the European Council relied on the two other claims to democratic representation that it could put forward, one upstream and one downstream. On the upstream side, the Convention members could claim to represent a whole host of interests without the mediation of the European Council. Indeed, the composition of the Convention reflected that it was to heed far broader interests than only those of the member governments of which the IGCs had previously been composed (Shaw 2003: 57; Closa 2004). Besides representatives from all fifteen Heads of the member Governments and from the thirteen governments of the EU candidate countries, the Convention involved two representative from each parliament, sixteen Members of the European Parliament and two members from the European Commission. Furthermore, representatives from the Economic and Social Committee, the European social partners, the Committee of the Regions and the European Ombudsman were invited to join the Convention as observers. In total, the membership of the Convention amounted to 105 full members, 102 alternates, 13 observers and 12 alternate observers. With such a broad composition, the Convention was easily led to come to think of itself as a representative assembly.

Given the variety of institutional backgrounds of the Convention members, each European citizen would be represented in multiple ways (through national parliamentarians, their government and European representatives). Yet, however broad the composition of the Convention, in many respects it formed anything but a fair reflection of the EU citizenry (Shaw 2003: 57ff.; Closa 2004). Notably, the European Council only determined the composition of the Convention in terms of institutional background. It did not stipulate anything concerning the composition of the delegations of the European institutions in terms of nationality or political affiliation. While all countries were guaranteed at least three members from their national institutions, some were much better represented among the delegations from the European institutions. Thus the EU G-4 (F, D, UK, IT) each took at least six full members and France even seven, while Greece, Luxembourg, Sweden and the new Member States remained stuck on the minimum of three. Also given the limited number of delegates each institution could send, the major political party-groups were heavily overrepresented with Christian-Conservatives and Social-Democrats amounting to two-thirds (68/105) of the full members. In contrast, only very few Convention members were affiliated to Eurosceptic parties that generally tend to be smaller and out of the political mainstream. One rather striking bias was that among the 105 full members of the Convention, only 17 were women (Shaw 2003: 58). Also lacking in presence were representatives of religious and ethnic minorities.

What is more, the multiplicity of representative principles did not necessarily facilitate the upstream transparency of the Convention's politics. Notably, depending on their institutional background, Convention members would operate along different political lines (Crum 2004). While government representatives would mostly operate along national lines, sticking to their compatriots or forming coalitions with other governmental representatives, representatives of the European and the national parliaments rather organised themselves first and foremost along party-ideological lines. Thus, while formally each European citizen should be able to recognise herself in various Convention members, in practice the sense of representation was likely to get lost in the diversity of representative principles for which the Convention membership catered.

Ultimately, however, rather than on its mandate or on the diversity of its composition, the Convention's claim to democratic representation relied on the upstream mechanisms of the rationality of its proposals and its ability to communicate them to the public. Crucial to this was that the Laeken Declaration explicitly provided that "The Convention's discussions and all official documents will be in the public domain" (European Council 2001). Two important merits can be attached to the Convention's public character. First, the public character of the Convention was to engage the public to develop its own ideas on issues discussed and to weigh the merits of the different views exchanged. It might even act as an open invitation to people to contribute directly or indirectly to the debates if they would feel they had anything to add to what was being said. Thus the Convention might develop into the common focus for political debate on the future of the EU. Secondly, the public nature of the Convention was to stimulate the deliberative nature of its proceedings: strategic behaviour, which generally motivates negotiators to hide their true motives and to engage in power games, was to give way to the force of the better argument (Elster 1998; Magnette 2004). Under the eye of the public, participants would be forced to justify their positions by good reasons; they would listen respectfully to each other and respond with arguments rather than by the mere invocation of (veto) power. In turn, these conditions would contribute to the likelihood of the Convention's proposals being accepted (downstream) by the public in due course.

Again the importance of the Convention becoming a deliberative arena, rather than becoming bogged down in political power games, was well understood by its President. As Giscard d'Estaing emphasised in his opening address:

This Convention cannot succeed if it is only a place for expressing divergent opinions. It needs to become the melting-pot in which, month by month, a common approach is worked out. ... in order to think about what proposals we can make, the members of the Convention will have to turn towards each other and gradually foster a '*Convention spirit*'.

(Giscard d'Estaing 2002: 13, original emphasis)

To allow this '*Convention spirit*' to emerge, the Convention chairmanship provided for a four-month '*listening phase*' over which Convention sessions were dedicated to the discussion of working documents prepared by the Convention Secretariat. By the time the Convention entered the next, study phase (July 2002) in which it moved to address specific themes in smaller working groups, "a strong internal culture" had already taken shape (Shaw 2003: 54).

In the Convention culture that emerged, political-ideological divisions were suppressed in favour of technical arguments around concrete, legal proposals. Typically, as has been highlighted by Paul Mignette, a commitment to the simplification of the organisation of the EU developed as a *Leitmotiv* connecting the work of the conventionnels (Mignette 2005: 442f.). Thus, the Convention work reached unexpected levels of technical, legal sophistication. The very design of a single integrated Constitutional Treaty rather than the set of messy preceding treaties may be ranked among the foremost of these. Other typical examples are the proposal of a single legal personality for the Union, the introduction of a standard legislative procedure, a clear hierarchy of legal acts, the abolition of the three EU policy pillars, and the carefully calibrated integration of the EU Rights Charter in the Constitutional Treaty. With these simplifying proposals shaping its text and some unavoidable political compromises on issues of power-allocation at the end of its proceedings, the Convention succeeded in overcoming its internal differences and produced an integrated Constitutional Treaty endorsed by an overwhelming majority. Even if many of these ideas had been floated during preceding EU treaty revision exercises from Maastricht till Nice, they had never been able to secure the necessary unanimous support of the member states.

However, as Jo Shaw (2003: 56) already pointed out early on, “there is a flipside to autonomy [and a strong internal culture - BC], however, and that is the risk of isolation”. The development of the thinking, its technical sophistication and its ability to usher into practical compromises within the Convention was not necessarily followed by the general public and, indeed, tended to increase the distance between the two. The pressure felt within the Convention to secure a consensus on a single text so much engrossed the conventionnels that they had little time to also engage with external signals. The Forum that was foreseen by the Laeken Declaration to ensure regular contacts between the Convention and European civil society became a rather perfunctory channel and most civil society organisations eventually fell back on their usual lobbying strategies if they were to have any effective influence on the work of the Convention. Links between the Convention members and their popular constituencies remained underdeveloped. In the direct feedback to their home institutions, practices among Convention members varied widely both in the depth of these communications and their organisation. Still, it appeared that such public events mainly served for Convention members to report back from the Convention rather than for them to receive ideas and instructions (Schönlau 2004).

In terms of publicity, it became quite clear that establishing the formal preconditions of meetings in public and public accessibility of all relevant documentation in combination with sophisticated technical debates, ensured anything but engagement of the general public. Newspaper coverage of the Convention meetings was generally low and the substantial debates did anything but allow themselves for easy public presentations. Indeed even as the Convention neared its conclusion, less than 30% of the EU citizens had heard of it, and much fewer of them could comment on its work (Eurobarometer 2003). Thus, however high the level of deliberation might have been inside of the Convention, it did by no means confer any public legitimacy on it. This would still need to be secured in later stages.

Did the IGC re-instil national interests on the Constitutional Treaty?

Formally, once the Convention President had handed its conclusions to the European Council in July 2003, the governments were free to reassert their role as principals in

the Intergovernmental Conference. As it turned out, they did so only to a very limited extent. Naturally, there was no government that would not want to change several or more issues in the draft Constitutional Treaty. However, they were well aware that if each of them was allowed to put its own grudges on the table, Pandora's box would be opened and the IGC might well come to have an infinite agenda. What is more, through the involvement of representatives of all Heads of Government in the Convention, some level of commitment to the draft Treaty had already been built up.

Yet there were notable variations in the extent to which member states were willing to put aside their particular concerns for the sake of having the draft Constitutional Treaty agreed. As the IGC began, three positions could be distinguished among the EU governments. On the one extreme there were Spain and Poland whose representatives in the Convention had only signed up to the draft Constitutional Treaty with reservations. Their key issue of contention was the Convention's proposal to re-define the qualified majority required in the Council in a way that would undo the relatively big voting share the two states had secured in the Treaty of Nice. The Spanish and Polish governments signalled that they were willing to veto any new treaty if their concerns on this issue were not met. This threat clearly distinguished them from the second group of governments that were keen to see some specific amendments being adopted but did not threaten to upset the Constitutional Treaty as a whole. Typically this position was held by small and medium-sized member states like Finland and Austria that, besides specific grudges of their own, shared objections against the reduction of the size of the European Commission and the establishment of a potentially very powerful European Council President. Also the British government fitted in this group as it adopted a markedly conciliatory stance with Prime Minister Tony Blair claiming "the Convention's end product [...] is good news for Britain" whilst at the same time putting forward a limited but resolute set of 'red lines' (Foreign Office 2003). Finally, there was the group of the six founding members of the Union who expressed themselves "satisfied with the draft Constitution" and hence pushed for a short IGC that would leave the Convention's text as much as possible intact (Euractiv 2003). With the Convention's draft on its side, this last group commanded considerable weight, in particular because it included Germany and France.

What is more, also the Italian government that as holder of the EU Presidency was to be in charge of the opening of the Intergovernmental Conference was part of the latter group. Besides their basic endorsement of the substance of the draft Constitutional Treaty, the Italians appeared particularly keen on the Constitutional Treaty becoming the crown of their EU Presidency and becoming baptised as the second 'Treaty of Rome'. Hence, they were determined to conclude the negotiations within the term of their Presidency, i.e. by December 2003 at the latest. Little attention was thus given to the plea of some countries (a.o. Sweden) to have a phase of reflection on the Convention's work before commencing the IGC. A slightly more complicated issues to resolve was the insistence by, in particular, the Spanish government (backed by the Polish government) that the negotiations formally were to depart from the agreements reached in Nice and would thus only use the Convention proposals as proposals to be considered (cf. Palacio 2003). However, in a note circulated shortly ahead of the opening of the IGC, the Italian Presidency clearly outlined its position on this issue:

The Thessaloniki European Council welcomed the text of the draft Constitutional Treaty drawn up by the Convention and considered it to be a

good basis for starting the IGC. The Presidency is therefore of the firm view that *the IGC should maintain the same level of ambition*, especially in institutional matters, and should aim to depart as little as possible from a balanced text which is the result of 18 months of intense negotiation.

(Presidency of the EU 2003: 1, original emphasis)

Obviously, the Italian presidency was determined to establish the Convention's text as the basis of the negotiations and to limit the number of issues that were to be reopened. Indeed, following a round of consultations, the Italian Presidency sought to start the IGC with a substantial agenda of no more than seven issues, three of which it considered to be merely matters of clarification rather than political disagreement.

Eventually, the Italian attempt to constrain the debates in the IGC was not fully successful and, indeed, backfired in some important respects. Most notably, the Italians did not see the negotiations concluded under their ward but had to hand the helm over to the Irish government. In particular they were unable to reconcile the Spanish and Poles with the rest of the governments on a new formula for qualified majority voting in the Council of Ministers. What is more, yielding to pressures from various governments, the Italians had the IGC agenda steadily expand, so that by the end of their term it already included more than 50 issues, most of which however were already in sight of a solution. It was eventually left to the Irish Presidency, after a cooling down period and extensive informal and bilateral consultations, to bring the IGC to a conclusion in June 2004.

What we find then is that rather than using the IGC to retrench their positions, reasserting their representative mandates and realigning with their citizens, the EU governments yielded to the Convention's Constitutional Treaty for a variety of reasons. Above all, having been involved in the Convention themselves, they had come to appreciate the merits of the Convention's proposals. With the exceptions of Spain and Poland, the governments held that whatever changes they sought were better negotiated on a one-by-one basis than by putting the whole Constitutional Treaty at stake. In many respects, after the bitter experiences in Nice, all were probably pleased to jumpstart the negotiations without an endless list of contention points and no one desired to see the package as a whole unravel. The Italian Presidency well exploited this situation by subjecting the IGC to a strict timeframe and keeping its agenda as short as possible. Even if it failed to conclude the negotiations in its own term, it clearly laid the ground for the conclusion under the Irish Presidency. That being done, one more hurdle remained: ratification.

Did the ratification process serve to re-align voters with politicians?

Having been in the making for almost three years, ratification allowed for the possibility to bring the Constitutional Treaty back to the public. Indeed, for many such a move seemed to follow logically from the more open nature of the treaty revision process as well as from the ambitions inherent in the Constitutional Treaty. Already in the course of the Convention, calls had been raised to have the Constitutional Treaty ratified by way of referendums. Most notably, a group of 37 Convention members submitted a proposal that argued:

The Laeken Declaration recognised the need to bring Europe closer to the people. This was the impetus for the Convention on the Future of Europe, which will produce a Constitution or a constitutional treaty for Europe. If the

Constitution is to have real democratic legitimacy, then it ought to be put to the people of Europe in a Europe-wide referendum. Not to do so would simply reinforce the impression of a deep democratic deficit in Europe; it would also send a signal that Europe is not about the people but about the governing elites.
(European Convention 2003: 2)

The signatories of the proposal involved mostly parliamentarians and reflected the peculiar coalition that would lobby for ratification referendums. At the heart of the group were staunch advocates of an ambitious European Constitution who genuinely believed that Europe and its citizens required a full-blown democratisation and who trusted to be able to convince the European people of the merits of the Constitution. On the other hand, the group involved well-known Eurosceptics who appeared to gamble that even if their views would not prevail in the Convention then at least the electorates might prove their right by jettisoning the Constitution. Indeed, the argument that the constitutional aspirations of the Constitutional Treaty needed to be matched by the democratic legitimacy of popular referendums clearly had a resonance in many countries. Even in Germany where the Basic Law prohibits federal referendums, the possibility was raised to revise the Basic Law to allow for a referendum on the Constitutional Treaty to take place.

Eventually, however, a majority of 15 of the 25 EU member states stuck to parliamentary ratification (cf. Closa 2007). Of the ten referendums announced, only four would actually take place. While parliamentary ratifications proceeded as usual with 11 out of 15 being concluded within ten months of the signing of the Constitutional Treaty, the ratification of the Constitutional Treaty was greatly jeopardised when on 29 May and 1 June 2005 the electorates of France and the Netherlands decided in majority against ratification. The positive referendum results in Spain (20 February 2005) and Luxembourg (10 July 2005) could not undo this. As eight countries suspended their ratification (the remaining six that had still a referendum scheduled plus Finland and Sweden), the EU Heads of Government decided to suspend the ratification process (European Council 2005).

Notably, regardless of which side prevailed, the four referendums display notable similarities in the engagement of the public. First, all four referendums revealed a major disjunction between the size of the opposition to the Constitutional Treaty among the political elite and that among the populace (Table 3). Even in the Spanish referendum, which came first and ushered in a comfortable majority of 77% for the Yes-camp, popular support fell considerably short of the landslide endorsement that the Constitutional Treaty would have received in parliament. The negative referendum outcomes in France and the Netherlands revealed major gaps between the inclination of the parliamentary representatives and the people. Also in Luxembourg the 57% popular support still fell far short of the prevailing inclination among the parliamentary representatives.

Table 3: Shares of Constitutional Treaty supporters among parliamentary factions and electorate

	A. Parties Seat Share Lower House (%Yes)	B. Parties Vote Share Last Lower House Elections (%Yes)	C. Electorate (%Yes)	A-C	B-C
Spain	95%	86%	77%	18%	9%
France	93%	70%	45%	48%	25%
The Netherlands	85%	83%	38%	47%	45%
Luxembourg	92%	87%	57%	36%	31%

More specifically, at the level of party affiliations, the referendums revealed a major divide between the politicians and their constituencies (Crum 2007). This applies in particular for the major parties that supported the Constitutional Treaty. Parties that through their engagement in the government had been co-signatories to the Treaty found as much as from a quarter up to a half of their constituency defecting to the No-camp. Even more dramatic was the situation for opposition parties that joined the pro-Constitution camp. Most of these parties saw the majority of their following joining the No-camp. On the other hand, anti-establishment parties opposing ratification seem to have been considerably more effective in appealing to their voters as we find around 80% up to 90% of their constituencies sharing the party stance.

Furthermore, in all four referendum countries, major parts of the electorate felt information on the Constitutional Treaty to be too little too late. In Spain and the Netherlands this applied in fact for more than half of the voters and in France and Luxembourg it was still about one-third. Similarly, large segments of the societies, in particular in the Netherlands and Luxembourg, felt that the debates on the Constitutional Treaty started too late. Close to half of the electorates in all four countries only made up its mind on how to vote in the final weeks before the referendum, one-fifth up to one-third (in the Netherlands) only decided this in the final week.

Table 4: Indicators of referendum campaign exposure

	Spain	France	The Netherlands	Luxembourg
Had all the necessary information?				
Yes	43	66	41	62
No	52	33	56	37
Don't know	5	1	3	1
Debates on the Constitution started				
Too late	46	37	67	68
Just at the right time	22	39	13	20
Too early	13	15	7	6
Don't know	19	10	13	7
Moment of vote decision				
At referendum announcement	35	29	26	29
Early in campaign	23	29	21	22
After Referendums in F and NL	-	-	-	4
Final campaign weeks	16	20	20	23
Final week before Referendum	15	14	21	17
Day of Referendum	10	7	11	6
Don't know	2	1		

Source Eurobarometer (2005a-d). Blank answers disregarded, hence not all pairs sum up to 100%. Respondents' Party Proximity is determined on the basis of the following question: "To which of the following parties do you feel the closest to or the least furthest from?"

All in all then the Constitutional Treaty appears to have given rise to a major gap between the political elite and the electorate. While if considerable segments of the electorate only made up their mind quite late in the campaign, the information whereby the political elites might have persuaded them failed to arrive or came late. One may wonder whether an earlier start of the campaign or greater investments in it

would have sufficed to correct this, or whether the Laeken process and its product had already much earlier departed from what the large segments of the public could be easily convinced of. Of course two referendums did usher in the required Yes and even in the two others there were also significant segments still coming out in favour. But as was clearly recognised by the Heads of Government's decision to call for a period of reflection, the failure to convince the majority of two EU electorates could not be treated as merely accidental but should rather be treated as an indicator of a wider problem: the failure to align the Constitutional Treaty and the people it was meant to serve.

Conclusion

Quite distinctively the Laeken process emerges as a process involving drifting political elites that, once brought face to face with their democratic principals again, failed to convincingly justify their actions. Notably, of course, the political elites should all the time have been quite aware that the adoption of a European Constitutional Treaty would require more than marginal majority support. Indeed, many of them had argued that widespread support would be indispensable to instil the required legitimacy on the Constitutional Treaty. However, if the referendum results demonstrate anything, it is that the Laeken process as it moved along came at a great distance from the electorates, so great a distance that it was not easily bridged in the referendum campaigns.

Looking closer we find that the causes for this gap can be traced all the way back to the start of the Laeken process. Whatever good reasons may have persuaded the Heads of Government to start the process and however much 'the citizens' were invoked in the Laeken Declaration, little effort was made to verify the analysis and approach proposed with the public. In a way the Convention appears as the Heads of Government's self-built Trojan horse as the Convention quickly shrugged off the safeguards imposed upon it and sought to subject the IGC to its will. However, in the process the Convention not only distanced itself from the governments as its direct principals but also from its principals' principals, the general European public. Its remarkable achievement of drafting a single Constitutional text that could count on broad support across the many political dimensions involved came at the price of limited public exposure. In the two-level game of the Convention, while escaping from most upstream controls of their constituencies, Convention members enjoyed a wide discretion in accomplishing a deal at the higher, Convention level. Looking at it counterfactually it appears rather unlikely that its members would have been able to forge as broad and deep a consensus as they did if the Convention had really stirred up public opinions across the EU.

Notably, once the Convention had presented its Constitutional Treaty, the desire to conclude the process prevailed over any attempt to realign the proposals with public opinion. No time was left to have the IGC preceded by public debates. The Constitutional Treaty might have survived if referendums had been limited to Ireland and Denmark. However, popular and oppositional forces were only all too keen to exploit the democratic and constitutional claims attached to the Constitutional Treaty. Much suggests that only in a minority of the ten countries where referendums were scheduled the political elites were in a position to persuade the public of the merits of the Constitutional Treaty. In the other countries, the Constitutional Treaty and the

way it had come about rather fed into a sense of alienation of the electorate from its political representatives.

Basically, this account leaves Moravcsik's claim unchallenged that the Constitutional Treaty was, and remains, uncalled for by the citizens of Europe. Fossum and Menéndez's claim that citizens could have been persuaded of the merits of the Constitutional Treaty is not necessarily invalidated. However, as it stands, the way the Laeken process actually unfolded gives little empirical support to this counterfactual claim. Where my analysis seeks to advance upon the previous ones is in exposing the political dynamics of the process and in particular the various steps by which elite opinion formation became disassociated from the general public. Moravcsik's characterisation of the Laeken process as "the last gasp of idealistic European federalism" is certainly a gross simplification (Moravcsik 2005a). Even if federalist proponents (like Joschka Fischer and various EP-representatives in the Convention) may have fulfilled important catalysing function in the process, much broader political coalitions carried the process through its various stages. Thus, in marked contrast to his work on earlier treaty negotiations, by reducing the Laeken process to a federalist plot, Moravcsik leaves its internal political dynamics a black box. In contrast to Moravcsik, Fossum and Menéndez's deliberative perspective does help to highlight the opportunities that politicians missed in the course of the Laeken process to subject their ideas to public testing. However, whereas they suggest that the Laeken process, and the Convention in particular, was compromised by the safeguards imposed upon it, including its "forward-linkage to the IGC" (Fossum and Menéndez 2005: 409), I argue to the contrary that it is a shortage of effective safeguards that eventually jeopardised its successful conclusion. A better alignment of the political representatives with the general public would probably have led to a less ambitious agreement, rather than ushering in an even more radical Constitutional Treaty.

Ultimately, it can be concluded that the Laeken process has suffered from a lack of mechanisms for aligning politicians with public opinion, both upstream in constraining the scope of political action and preventing agency drift as well as downstream in the full and timely exposure of political insights to public opinion. One reason for this is that the Heads of Government consciously loosened the traditional long chain of delegation – from electorates to national representatives to governmental negotiators – by recognising the exhaustion of the IGC-model and inserting the Convention. The Convention took this further by completely removing itself from the chain of delegation and rather invoking the downstream values of deliberative rationality. In the subsequent IGC the governments choose not to re-establish their pre-eminence. The overall effect of this process was a blurring of all lines of accountability and thus it was eventually left to the people themselves to pull the emergency brake to prevent its outcome from taking effect.

In many ways the EU Constitutional process was a unique enterprise in European decision-making (which, indeed, given its outcome, is unlikely to be repeated). As the process went through its various stages, a whole range of notions of political representation was invoked: upstream and downstream, direct and more indirect, territorial and ideological etc. The referendums with which the process was concluded provided moreover a unique opportunity to register the electorates' opinion on the proposal. In comparison, other, more day-to-day instances of EU decision-making may lend themselves less for a similarly close analysis of their representative qualities. Yet, in some respects the Constitutional process can be taken

to have amplified certain features typical of EU decision-making in general. In that sense some of the findings may well be generalisable to EU decision-making at large. For one, it is suggested that the superimposition of multiple principles of (upstream) representation (through national governments, directly elected representatives, interest groups) does not necessarily have the aggregate effect of improving the alignment of EU policies with the citizens. On the contrary, it even risks obscuring where exactly the electorate accesses the process. Furthermore, it can be suggested that the widespread efforts to ensure the expertise, transparency and deliberative quality of EU decision-making do not in and by themselves translate in a better downstream alignment of the policies with the interest of the electorate. Thus, for the moment the search for appropriate and effective representative mechanisms in EU decision-making in general and in treaty revision processes in particular is to continue.

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RECON is an Integrated Project financed by the European Commission's Sixth Framework Programme for Research, Priority 7 – Citizens and Governance in a Knowledge-based Society. Project No.: CIT4-CT-2006-028698.

Coordinator: ARENA – Centre for European Studies, University of Oslo.

Project website: www.reconproject.eu

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