Hijacking EU External Relations?
Political Agency, Accidental Leadership and Title VIII in the Constitution for Europe

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Abstract

The Treaty establishing the Constitution for Europe, approved by the European Council in June 2004, constitutes one of the most significant and historically relevant outcomes of recent processes of EU treaty reform. Analysis of the Constitutional Treaty to date concentrated on the negotiation of ‘high politics’ issues in these processes, such as EU institutional reform, such as the distribution of votes in the Council.

Less attention is paid to those provisions or titles in the Constitutional Treaty which are judged ‘uncontroversial’ but which underwent considerable change in the recent process of treaty reform, often based on slippery legal ground and involving actors at the EU level so far unaccounted for.

One example of such provisions is Title VIII in the Constitutional Treaty concerning ‘The Union and its Neighbours’. The articles of this title refer to ‘specific agreements’ to be concluded by the Union with neighbouring states. The provisions give rise to serious questions of the legal base of these agreements, in particular in view of which institutions may conclude or implement them. Moreover, neither Commission nor member states’ representatives in the Council (usually with competences for EU external relations or relations with third states in general) were involved in the formulation of Title VIII.

The following paper aims to identify the actors which were involved in the formulation of Title VIII and why, how and under what conditions they were able to ‘hijack’ such crucial issues of EU external/foreign relations during the recent processes of treaty reform.

The analysis is based on the leadership model as developed by Derek Beach, explaining how and when EU institutions matter in treaty reform negotiations. The model is ‘extended’ to include EU institutions of relevance in the European Convention and complemented by the notion of ‘accidental agency’.

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Introduction
The Treaty establishing the Constitution for Europe\textsuperscript{1}, approved by the European Council in June 2004, constitutes one of the most significant and historically relevant outcomes of recent processes of EU treaty reform.

Analysis of the Constitutional Treaty to date has concentrated on the negotiation of ‘high politics’ issues, such as EU institutional reform, the distribution of votes in the Council or the powers and role of the High Representative.

Less attention is paid to those provisions or titles in the Constitutional Treaty which are judged ‘uncontroversial’ but which underwent considerable change in the process of treaty reform; involving actors at the EU level so far unaccounted for and often based on slippery legal ground.

One example of such provisions is Title VIII in the Constitutional Treaty concerning ‘The Union and its Neighbours’. The articles of this title refer to ‘specific agreements’ to be concluded by the Union with neighbouring states.\textsuperscript{2} Being placed in Part I of the Constitutional Treaty, the provisions give rise to serious questions of the legal base of these agreements, in particular in view of which institutions may conclude or implement them.\textsuperscript{3} Moreover, neither Commission nor member states’ representatives in the Council (usually with competences for EU external relations or relations with third states in general) were involved in the formulation of Title VIII.

The following paper aims to identify the actors which were involved in the formulation of Title VIII and why, how and under what conditions they were able to ‘hijack’ such crucial issues of EU external/foreign relations during the recent processes of treaty reform.

In the first part of the paper, existing approaches for understanding EU treaty reform are reviewed. Neither liberal intergovernmentalism nor ‘structuralist’ accounts of treaty reform are well suited to depict and explain the role of multiple EU institutions.

\textsuperscript{1} Hereafter the Constitutional Treaty for the purposes of simplification and clarity.
\textsuperscript{2} See Annex I.
\textsuperscript{3} For legal certainty, the provisions should have been placed under the respective titles covering the Union’s relations with Third States.
involved in the formulation of Title VIII. Furthermore, the reviewed approaches offer few theoretical tools to understand why, how and under what conditions the respective actors could influence negotiation outcomes successfully in both the European Convention and the following IGC.

The second section outlines a theoretical framework based on the Leadership Model developed by Derek Beach (Beach 2004) for analysing the role of EU institutions in treaty reforms. The model is extended so as to include EU institutions involved in the European Convention. Also, the notion of ‘accidental agency’ is introduced in order to explain why several EU institutions successfully ensured the inclusion of Title VIII in the Constitutional treaty although it was not in their immediate interest to do so.

The third and fourth sections of the paper proceed with an empirical analysis of the formulation of Title VIII (and involved actors) in the European Convention and IGC respectively. The Praesidium of the Convention and its President are found crucial in the initial introduction and eventual inclusion of Title VIII (then Title XI) in the draft Constitutional treaty submitted to the 2003/4 IGC. Both institutions successfully exploited their leadership potential in order to push the inclusion of a title that was clearly one of their political preferences.

The Convention as agency then helped to keep Title VIII on the agenda of the IGC. However, it was only through the ‘accidental agency’ of Council legal/linguistic services and working groups as well as successive Council Presidencies that Title VIII is now part of the Constitutional treaty, including its inherent legal ambiguities.
1. Analysing the outcomes of EU Treaty Reform

EU treaty reform as negotiated in traditional Intergovernmental Conferences is often analysed as an outcome of bargaining between EU member states (Moravcsik 1998, 1999). At the same time, a growing number of scholars have identified sets of ‘social norms’ which guided decision-making on treaty reforms (Christiansen et al 2002, Magnette and Nicolaïdis 2004, Hoffmann 2003: 134). Whereas both currents in contemporary analysis have led to most valuable explanations of treaty reform and its outcomes, by themselves, they cannot provide a full understanding of the actors involved in the drafting process of specific provisions, such as Title VIII.

Liberal intergovernmentalism might be well suited to explain treaty reforms in respect to ‘high politics’ provisions, such as the number of member state votes in the Council or indeed the number of Commissioners, it seems little suited for understanding how other treaty provisions, such as Title VIII, are now part of the European Constitution.

First and foremost, the approach’s emphasis on member states, EU summits and bargaining therein cannot explain the emergence of Title VIII. Although it was the European Council which agreed on all the Constitution’s provisions in June 2004, member states never discussed or bargained Title VIII. Neither was the title part of any ‘pre-defined’ preference of the member states. One of the new member states, Lithuania, had made a suggestion for the Article’s improvement, but by itself, could hardly have had sufficient bargaining power to push for its inclusion. Therefore, other actors must have been responsible for drafting Title VIII, in negotiation processes other than IGC summits.

Secondly, the recent process of treaty reform was different to previous instances of treaty reform. The 2003/04 IGC was preceded by a European Convention which drew up a draft Constitutional Treaty to serve as a basis for negotiations in the IGC. Unlike many of the ‘high politics’ issues in the draft Constitution, the member states did not re-open negotiations on many other parts of the draft, including Title VIII. In other words, actors in the Convention must have been involved in its formulation. In this process, member states were but some of the 102 ? members constituting the Convention.
Overall, it is the state-centrism inherent in liberal intergovernmentalism and its occupation with summity and ‘high politics’ issues which makes it impossible to account for treaty reform outcomes such as Title VIII. Clearly, a wider set of actors was involved in its formulation, actors who played a role in negotiation processes other than IGC summits.

The other and more recent trend in analysing EU treaty reform is based on the recognition of the role of norms and ideas in guiding actors towards particular treaty reforms and political outcomes.

Some scholars point to different discourses at play in an IGC, defining whether negotiations are to be held in problem-solving or bargaining mode (Christiansen et al. 2002: 15-18). Others highlight the logic of intergovernmentalism (or ‘shadow of the veto’) which was competing with an emerging social norm of deliberative constitutionalism guiding negotiations among the members of the Convention (Magnette and Nicolaïdis 2004). Furthermore, there was widespread support for the ‘simplification’ discourse among Convention participants (Hoffmann 2003: 134). Although these ‘norms’ may very well explain why member states decided to bargain on traditional ‘high politics’ issues during the IGC or why the Constitution in most parts is indeed a simplification rather than modification of previous EU treaties, two problems emerge with the above in view of Title VIII.

First, if these ‘norms’ were indeed capable of steering actors involved in the IGC and the Convention, why was Title VIII an addition to existing treaties, a new provision, and not a ‘simplification’? Also, if the mode during the 2003/4 IGC was indeed ‘bargaining’, why the decision by member states to include a number of provisions with dubious legal grounding and potentially harmful consequences to their power?

The second problem with such ‘structurally inclined’ assumptions logically follows. Whereas we might know that most actors followed one or the other norm of IGC or

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4 Although, it must be stressed, Magnette and Nicolaïdis’ assessment of the role of these ‘social norms’ is still fairly critical of their impact on members of the Convention!!!

5 Simplification in the context of Article XIII would have been either not to include it in the first place or at least insert it in Part II of the Constitutional Treaty, Provisions relating to the Union and the World.
Convention, it is not clear why and how some actors were in the position to act ‘out of tune’ with these dominant norms and successfully inserted Title VIII in the European Constitution.

This very brief review has highlighted three crucial problems attached to existing approaches/assumptions for the study of treaty reform outcomes, such as Title VIII: (i) their very narrow definition of actors in treaty reform, (ii) their limitations in analysing treaty reform consisting of the twin-processes of Convention and IGC and (iii) once a number of potential actors was identified, they offer few theoretical tools available for understanding why, how and under what conditions these actors exercised influence over treaty outcomes as Title VIII of the Constitutional Treaty.

The following section of the paper outlines a theoretical framework which aims to address the limitations of the above approaches to EU treaty reform and its outcomes.
2. Political and Accidental Agency in the European Convention and IGC

In order to better understand the role of and conditions for agency in the formulation of Title VIII, this analysis will largely draw on the leadership model designed by Derek Beach for the analysis of the role of European institutions in treaty reform (Beach 2004).

The model here, however, is ‘extended’: First, regarding EU institutions it includes EU institutions which assumed a leading role in the European Convention (Praesidium, Secretariat) as well as additional EU institutions with leadership potential in the IGC (Presidency, IGC Working Groups). The extension may be justified on the grounds that the recent treaty reform process involved more than the traditional IGC as it built on the ‘groundwork’ of the European Convention preceding it. The negotiation environment of the Convention differed from that of IGCs and hence different EU institutions possessed leadership resources and positions. As to the role of EU institutions apart from the Council Secretariat, Commission and IGC, their potential agency in EU treaty reform has been demonstrated sufficiently elsewhere.6

The model advanced by Beach consists of the following assumptions concerning the conditions for leadership of European institutions in EU treaty reform. The following section will highlight the key aspects of the model, how it may be used to understand the formulation of a treaty provision such as Title VIII, including the additions outlined above:

1. **Leadership Resources**: EU institutions are likely to exert influence during negotiations when they are in possession of informational advantages, technical and legal knowledge or if they have earned a reputation as honest broker or trusted intervener (Beach 411-412). This is of particular importance for the role of EU institutions in advancing a provision like Title VIII, as institutions like the Praesidium during the Convention, Presidencies during the IGC and the legal experts in the Council possessed such resources in respect to the draft Constitutional treaty (missing reference).

6 see for example: Christiansen 2002, Dinan 2000
2. *The negotiating context:* According to Beach, EU institutions do also acquire potential leadership qualities if placed in a privileged position during the negotiations, such as a role in the drafting of treaty texts or control over the agenda. Within this framework it is possible to depict the Convention Praesidium which was placed in a formidable position to draft the draft Constitutional treaty and also control the entire agenda of the Convention.

EU institutions are also more likely to assume leadership on advancing issues of less-sensitive issues, such as Title VIII. One may also add here that if in a position to ‘decide’ which issue matter and which do not or which are agreed, a European institutions has even more potential to advance a particular matter – as was the case with the Praesidium (Magnette and Nicolaïdis 2004: 398, Crum 2004: 5) and is often the case for strong presidencies. Finally, the greater the number of issues/parties to negotiations, the easier it is for European institutions to produce mutually agreeable outcomes which serve the institutions’ own interest to a higher degree (Beach: 413-414). The Convention had to revise a substantial number of existing treaty provisions and the following IGC was confronted with the task to discuss and agree on a complete Draft Constitution. Furthermore, both the Convention and the IGC had to operate under enormous time constraints which in turn made it easier for some European institutions to manipulate decision-making (Hoffmann 2002: 9).

3. *Leadership Strategies:* European institutions also have to make use of the above resources and their privileged position. According to Beach they do so through agenda-shaping (emphasise, remove, de-emphasise issues from agenda) or brokerage (crafting of compromises to advance their own interest) (Beach: 413-414). Once again, these strategies might well have been employed by institutions such as the Praesidium of the Convention or the group of legal experts employed by the member states to review the constitutional treaty prior to the IGC.

The second ‘extension’ to the above model relates to the notion of *accidental agency*: Beach’s model is based on the assumption that European institutions influence negotiations for private gain and their own preferred outcomes (Beach: 411). This suggests that European institutions, as actors, possess relatively fixed or
exogenous preferences of their own. Although this is probably the case in many treaty reforms, attention should also be drawn to instances when EU institutions push forward certain issues/provisions even though these are not for their immediate advantage or issues which they themselves are not aware of.

Such ‘accidental agency’ of EU institutions can occur when they exercise some form of leadership in treaty negotiations (i.e. agenda-shaping). While the respective institution may very well want to influence some issues on the agenda or in the negotiations, by ‘drafting treaty provisions’, for example, it also has to include many other issues not of immediate concern to the institution but as ‘part of the job’. It may also be constrained by time pressure and overwhelmed by the sheer amount of issues (as was the case for negotiations of the Convention and following IGC) to analyse and hence advance issues without much deliberation or thought. The notion of accidental agency is crucial for explaining why several EU institutions successively ensured the inclusion of Title VIII in the constitutional treaty although it was not in their immediate interest to do so.

Both the roles of EU institutions as rational actors as well as ‘accidental agency’ in the formulation of Title VIII will be explored in the following empirical analysis.
3. Political Agency, the European Convention and Title XI

Part I of the Draft Treaty on the European Constitution submitted to the European Council in 2003 included a separate Title IX on the ‘Union and its immediate environment’. The provisions outline the development of a ‘special relationship with neighbouring states’ based on cooperation and containing reciprocal rights and obligations as well as joint activities.\(^7\) The title is not a simplification of existing treaties but an addition. Furthermore, its provisions outline a new type of agreement between the Union and third states without clarifying its legal base.

Why and how the European Convention decided to include this new title in the Constitutional treaty is subject to analysis in the following section.

During the initial ‘Listening Phase’ the Convention received numerous contributions from civil society groups and organisations, including reports on national debates in EU member and applicant states. Most of these contributions were filtered directly through the Praesidium which then arranged the key themes in order to be dealt with by the Convention. By the middle of June 2002, the Secretariat of the Convention issued a Digest of contributions to the Forum. Whereas it became clear from this summary that external relations and broader foreign policy would feature in future discussions of the Convention, EU relations with its immediate environment were not explicitly mentioned.\(^8\)

Later in the year, the Praesidium had produced a working paper for the Convention to consider specific aspects of EU external action (including defence) which was followed by a general debate in Plenary on 11\(^{th}\) of July. One week later, a working group was established to analyse external relations. The plenary debate as well as the mandate of the working group was primarily concerned with the simplification of legislative procedures and instruments, for example in view of streamlining mixed agreements or clarification of the role of the High Representative and his/her powers. Once again, there was no mention of establishing a legal basis for new agreements, let alone adding another title to the existing treaty framework.

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\(^7\) Draft Treaty Establishing the Constitution for Europe, submitted to the Prasidency in July 2003 (add details)
\(^8\) European Convention, Digest of Contributions to the Forum, Secretariat to Convention, Brussels, 17.06.2005: CONV 112/02
In October the Praesidium issued its Preliminary Draft Constitutional Treaty to the Convention and, rather unexpectedly, included a new Title IX, Article 42 on the Union and its immediate environment. The title was not discussed in the following plenary sessions or in any working group meeting until the Praesidium issued its draft articles on Title IX on 2nd April 2003. In its comments, the Praesidium explicitly states the Union’s intention to establish a ‘neighbourhood’ policy and that there is ‘no equivalent article/provisions in the current treaties’.

The Praesidium clearly used its leadership resources to advance Title IX and in particular its informational advantages in the ‘Listening Phase’ of the Convention. Furthermore, the institution was placed in a privileged position during these initial negotiations by producing first the preliminary draft treaty and later ‘legally precise’ provisions – many of them on issues which were not immediately ‘high politics’, such as the voting procedures in the Council or the question of subsidiarity. In other words, the Praesidium chose to exercise it leadership via an agenda-shaping strategy, introducing, among others, a new Title IX as a basis for further negotiations.

The role of the Praesidium was further enhanced by the sheer number of issues (the revision of existing treaties) and a severe time constraint on the members of the Convention to discuss them. In that context, the Praesidium planned and actively steered the discussions and its president did not shy away from making decisions on what was ‘agreed’ and when (brokerage strategy).

The members of the Convention had two weeks to propose amendments to Article 42. By the middle of April the Praesidium had received 31 such amendments, most of which by single members of the Convention, with the exception of three collectively proposed amendments. The Title was briefly discussed in a Plenary session in late April, largely reflecting the tenor of the proposed amendments, ranging from deleting the Title altogether to moving it into Part II of the Constitution. It was the President

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9 European Convention Preliminary Draft Constitutional Treaty, Praesidium to Convention, Brussels, 28.10.2002: CONV 369/02
10 European Convention, Title IX: The Union and its immediate environment, Praesidium to Convention, Brussels, 2.4.2003: CONV 649/03
11 Ibid.
who then concluded that there was broad support from the Convention for the inclusion of such an article and promised that the Praesidium would further reflect on the issue.\textsuperscript{12}

The Title was then no longer subject to further discussion and directly inserted into the final Draft Treaty on the European Constitution without taking account of any of he proposed amendments and comments from members of the Convention in the plenary.

The Convention members had only a very short time to deliberate on the draft provisions issued constantly by the Praesidium. Their amendments broadly reflect either the intergovernmental/supranational divide, as in those suggested by national parliamentarians and representatives.\textsuperscript{13} Amendments proposed by most MEPs, on the other hand, were at large following the ‘norm of simplification’, they agreed on deleting the article altogether.\textsuperscript{14} Never-the-less, the members’ response was an example of preferences formed ‘ad hoc’, in response to the Praesidium’s provisions. No member had insisted on including any such title in the Constitution prior to its drafting.

The Praesidium seemed to have used its leadership potential successfully, at least in respect to ‘The Union and its immediate environment.’ This still begs the question of why this article was the ‘preference’ of the Praesidium. The suggestion advanced here is that the Praesidium and its president in particular were primarily politicians rather than technical experts. They might thus have had a preference in sending political messages (rather than technical simplification).

At the time, the issue of EU enlargement began to raise concerns among member states’ heads of state and government about how to address the question of future

\textsuperscript{12} European Convention, Summary Report of the Plenary Session – Brussels, 24\textsuperscript{th}-25\textsuperscript{th} April 2003, Brussels, 30.04.2003: CONV 696/03
\textsuperscript{13} Amendments to Article 42 by members of the European Convention: http://european-convention.eu.int/amendments.asp?content=42&lang=EN (23.2.2005)
\textsuperscript{14} Ibid.
new neighbours. Giscard d’Estaing in particular voiced grave concerns about further enlargement. An additional and visual title in the Constitution on the EU’s immediate environment was an elegant way to send a political message to some EU neighbours that membership was not on the agenda.

15 At the time, however, the Council had not endorsed (or even received proposals) for the new European Neighbourhood Policy or indeed suggested the conclusion of new Neighbourhood Agreements.

4. Political Agency, the IGC and Title VIII

The European Council meeting in Brussels on 17th and 18th of June reached a historic agreement on the Constitution for Europe. Whereas the most controversial issues had related to the composition and powers of European institutions, Title VIII, Article I-57 of the adopted treaty concerns ‘The Union and Its Neighbours’.\textsuperscript{17}

This paper has examined the original drafting of a Title IX, Article 42 on ‘The Union and its immediate environment’ as part of the draft Constitutional Treaty negotiated in the European Convention. The draft treaty was presented to the Italian Presidency in July 2003, which marked the official end of the involvement of the Convention in further negotiations on the Constitution.

It was left to the Intergovernmental Conference, summoned in October 2003, to agree on the final text. In the process, Title IX (later VIII) underwent a certain degree of change, which will be analysed in the following part.

The first party to examine the draft submitted by the Convention was the Legal Service housed in the European Council. The legal experts examined the text and made editorial and legal comments on almost all of the articles contained therein. In respect to the Article on the Union and its immediate environment, it was suggested to make changes to the provisions in order to clarify their content and the legal basis of the proposed new agreements.\textsuperscript{18}

If the objective was not to create a different type of agreement, the experts suggest to state this clearly in the text and to delete the second sentence which deal with the contents of such agreements. If, however, a different type of agreement was to be created, it would require a better definition and for the procedure for negotiating and concluding them to be precisely laid down in Article III-227. In short, the division of power between EU institutions in the conclusion of such agreements was not clear and hence of potential interest to member state governments.

The legal service of the Council, housed in the Council Secretariat, had a significant amount of leadership potential by examining the draft Constitution and highlighting potential issue to be considered during the IGC. The legal service went through the entire draft, crossing out provisions and making comments, drawing on its expertise of and overview over a significant amount of provisions and detail. On some issues it might have well used these resources to exert leadership via shaping the agenda of future IGC negotiations. In respect to Title IX, however, this seems unlikely. Not only would it be far-fetched to suggest that the legal service had any preference of its own in the article any in the changes it proposed. Its prime task was to clarify legal oddities of concern to the member states. It did not delete the Title and therefore ensured its survival in the first stages of the IGC. In other words, the legal service had considerable influence, exercised it but not with the intention to promote Title XI. Never-the-less, it ensured the Title’s survival in the first stages of the IGC - an instance of accidental agency.

The comments by the Council’s legal experts on Title IX, however, were not taken up by any of the delegations of the IGC, most likely because there were many more controversial articles to deal with. The Italian Presidency sent out questionnaires to delegations to establish a list of proposed amendments to the draft treaty. As concerned non-institutional issues the presidency identified around ninety proposed amendments, none was identified which was concerned with Title IX.  

The amended draft of the Constitution was then passed to an IGC Working Group of Legal Experts, consisting of legal experts form the 15 member states, the 10 acceding states and observers from Romania, Bulgaria, Turkey and the EP. The Group met over eight times in October 2003 and then again throughout the start of 2004 (yet in 2004 its mandate concerned the legal verification of declarations and protocols attached to the Constitution). In November 2003 the Working Group of IGC Legal Experts presented its editorial and legal adjustments to the draft treaty in form of a report to the IGC. The document did not contain adjustments (only minimal if at all) to articles

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19 IGC, Note by the Presidency, IGC 2003 – Non-Institutional issues; including amendments in the economic and financial field, Presidency to Delegations, Brussels, 24.10.2003: CIG 37/03
which were NOT judged as politically sensitive, i.e. concerning Council formations, CFSP or the Union Minister for Foreign Affairs.21

With regards to Title XI, The Union and its immediate environment, the group kept the suggestions of the Council Legal Service fully intact as the words ‘and implement’ as well as ‘in accordance with the provisions of Article III 227’ appeared crossed out in the document.22 The earlier comments by the Legal Service, however, had disappeared.

The Working group was in a very strong position to ‘frame’ issues of importance and further shape the negotiation agenda of the IGC. Once again, the group ensured that Title XI was left intact, regardless of its legal problems. Shortage of time seemed to be one of the key constraints in examining all draft provisions (approx. one and a half months between the first meeting of the Working Group on 9th of October and the submission of the report on 25th of November). Never-the-less, Title XI was brought forward by the Working Group, unchallenged, another instance of accidental agency.

One week before the Intergovernmental Conference on 12-13 December 2003, the Presidency produced two documents with consolidated proposals for the constitutional treaty. The first related to issues which the presidency thought to be relatively uncontroversial and which would find a consensus easily among the member states. The second addressed sensitive political issues.23 Title XI was deemed ‘non-controversial’ by the Presidency. It was this division between provisions of the draft Constitution that would prove vital in ensuring the inclusion of the Title in the final version of the Constitutional Treaty agreed upon by the IGC. Given the number of issues at stake and time pressure to conclude the IGC, it was easy for the presidency to set aside negotiations on non-controversial issues (though many were legally most controversial, as Title XI for example).24

21 IGC, Report from the Chairman of the Working Group of Legal Experts to the Intergovernmental Conference, Brussels, 25.11.2003: CIG 51/03
24 Although the Italian Presidency did not manage to successfully conclude the IGC.
The IGC could not reach agreement on a draft constitutional treaty in December 2003 and thus the future of Article I-56 remained uncertain.

The Irish presidency proved more successful in managing the IGC and engineering agreement on the Constitutional Treaty. It was supposed to issue a report to the European Council in March on the prospect for progress in negotiations on the Treaty. In its report, the presidency reconfirmed the division of sensitive/non-sensitive issues in line with the Italian presidency. The Irish presidency, however, defined ‘sensitive’ issues much more clearly and also made suggestions on how to reach consensus. It suggested one meeting on ‘focal points’ in early May 2004 based on CIG 60/03 ADD 1 (non-controversial issues identified by Italian presidency). This list still included the reference to small neighbouring states and article I-56.

After that meeting, the Presidency issued a note to delegations with a series of draft texts on which there seemed to be a likelihood of broad consensus in the context of an overall agreement. It further stated that the presidency ‘does not believe that further discussion at Ministerial level is necessary at this stage’. The ministers did not touch on discussing Title XI in their meeting on ‘focal points’, largely due to the fact that the meeting only lasted a few hours in which over 40 provisions/amendments had to be addressed.

The presidency formally addressed the delegations again with a list of texts which it believed to find consensus among the member states on the 16th of June. It took into account ministerial discussions on 14th of June. Once again, there no amendment was proposed concerning the EU and its immediate environment.

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27 IGC, Presidency Note, IGC 2003 – Presidency proposals following the meeting on ‘focal points’ on 4 May 2004, Brussels, 10.05.2004: CIG 76/04
28 Ibid.
For the crucial meeting of Heads of State and Government in Brussels on 17th and 18th of June, the presidency limited the agenda to only a few outstanding issues which would be discussed, such as those relating to institutions and voting. The issue of the EU’s immediate environment, of course, was not on the agenda as this article – amongst others – was by now excluded from high-level discussions altogether.

The outcome of the Brussels European Council and thus the IGC was an agreement on the text of the European Constitution. In a note of 18th of June, the presidency presents a list of all the modifications to the text of the Constitution as agreed by the IGC. As expected, the modifications do not concern Title VIII (past Title XI).

Accordingly, the first provisional consolidated version of the draft Treaty establishing a Constitution for Europe included the full Title VIII, article I-56 on the Union and its immediate environment. The title no longer included the crossed out text, as originally proposed by the Council legal service. None of the service’s other suggestions, including the comment on the lacking clarity concerning its legal base, however, was taken into consideration.

The two presidencies had used their leadership potential to limit the negotiating agenda of the IGC. Both the Italian and the Irish presidencies (the latter more successfully) had separated controversial from non-controversial issues. As most of the negotiations during the IGC centred around ‘high politics’ issues, little time was spared to closer examine other alterations to existing treaties proposed by the Convention. It was not a preference of either presidency (or expert services) to leave the contents of Title VIII largely unchanged or, to create even more uncertainty, by crossing out some parts without adding more clarity to the nature of the legal base of some of its provisions. Still and indirectly or ‘accidentally’, the involved institutions ensured that the Title remained without much discussion. Title VIII was also not

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32 The numbering of the title had changed due to changes in preceding titles only.
34 Ibid: pp.246-247
reflecting any immediate preference of the member state governments, but their decision to agree on the whole of the draft treaty developed by the Convention (despite the fact that many provisions lacked close scrutiny) ensured that provisions like Title VIII featured in the final Constitutional treaty.

At this point, it may be helpful to imagine the European Convention itself as agency with leadership potential in IGC negotiations on less sensitive issues: it greatly shaped the agenda of the IGC via the provision of a single negotiation text in form of the Draft Constitution and by offering itself as a legitimate broker (not on all issues) to national representatives. It introduced an agenda to the IGC that ‘outstretched’ the IGC’s capacity to closely examine all provisions made. The Convention confronted the IGC with an unknown script: not only was it to deal with some issue areas (certain policies or institutional issues as in the past) but with many additional minor adjustments to existing treaties, such as the addition of Title VIII. The IGC dealt with the familiar issue areas itself, but left many other provisions unaddressed. In other words, the Convention as an institution in treaty reform exercised its leadership very successfully, as the example of Title VIII clearly highlights.

The text of the Constitution agreed in Brussels, however, was not yet the final version. After the Secretariat of the Intergovernmental conference had drawn up the first consolidated version, the Council’s Legal/ Linguistic Experts still had to edit the text in 21 languages.

One would not expect any major change occurring to the text of the Treaty in this final stage. With respect to Title VIII, for example, there was a small change concerning its numbering due to minor adjustments in the numbering of previous articles.35

Most surprisingly, however, was that the linguistic experts had taken the liberty to completely change the heading of the entire Title. Instead of ‘The Union and its immediate environment’ it now reads: ‘The Union and its Neighbours’.36

36 Ibid.
This ‘linguistic move’, of course, can be interpreted as completely harmless in the sense that it does not change the content of the title. On the other hand, the word ‘neighbours’ in the EU context by then had developed its own connotations: Connotations which, arguably, raise specific expectations as to who would be the ‘specific countries concerned’ and what sort of ‘specific agreements’ could be concluded.\(^{37}\) It is worthwhile remembering that by the end of 2003 the Council had endorsed the European Neighbourhood Policy (ENP) and in early 2004 the Commission had started to propose (controversially) the conclusion of new ‘Neighbourhood Agreements’ with some neighbouring states. ‘Immediate environment’ on the other hand, was a largely new term in ‘Euro-speak’ and could have concerned almost any neighbouring state.

In that sense and in light of the particular political context, the linguistic experts clearly exercised accidental agency by altering the wording of Title VIII. The experts were trusted with the modification of provisions ‘lost in translation’ and thus their modifications of provisions were highly likely not to be scrutinised too closely. Even if the linguists did not consciously change the name of the Title, they did create an explicit link between the Title and the European Neighbourhood Policy, a link that hardly any political actor involved in the Convention or the ENP had made before.

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Conclusion
The paper set out to identify and understand which actors at the EU level were involved in the formulation of Title VIII of the Constitutional Treaty ‘The Union and its neighbours’. In addition, it aimed to explain why, how and under what conditions the involved actors were able to ‘hijack’ a crucial issue of EU external relations in the realm of Commission and Council.

Existing mainstream approaches seemed less suitable to explain the formulation and final inclusion of Title VIII in the Constitutional Treaty: Liberal intergovernmental approaches would have drawn attention to member state governments and the bargaining mode, yet Title VIII was not subject to discussions amongst government representatives and hardly any member state delegation was pushing the provision as part of a national preference. ‘Structural’ accounts or assumptions seemed to point to social norms of deliberation or simplification (as in the Convention) or intergovernmental logics (guiding negotiations in the IGC). However, none of these norms were followed by those EU institutions involved in the formulation of the new and legally ambiguous Title VIII ‘The Union and its Neighbours’.

By employing the model of leadership of European institutions in treaty negotiations developed by Derek Beach, including several extensions, three key conclusions can be drawn from the empirical analysis of the formulation of Title VIII:

1. The Praesidium and President of the European Convention were crucial for the introduction and eventual inclusion of Title VIII in the draft Constitutional treaty which was submitted to the following IGC. The institutions’ preference in the inclusion of the title originated in wider political concerns, reflecting the search of EU governments at the time to send the ‘right’ political message to its new neighbouring states (enhanced relations but not the perspective of future membership). Both institutions exploited their leadership potential by drafting Title VIII, guiding the discussion and ‘agreement’ of the members of the Convention and mediating their amendments in order to leave the provisions unchanged.
2. The Convention then acted as ‘agency’ within the context of the IGC and helped to keep Title VIII on the agenda of the IGC. It had provided a single negotiating draft, including an amount of changes that simply ‘outstretched’ the capacity of the IGC to consider all of them carefully. Furthermore, IGC procedures and actors therein are familiar in dealing with sets of reforms at a time and not well equipped in examining reform proposals on almost all aspects of previous EU treaties.

3. The ‘accidental agency’ of Council legal/linguistic services and IGC working groups ensured that Title VIII underwent slight changes in its provisions and also in respect to its ‘sound’ or political message. Yet, neither institution had proposed these changes according to a pre-defined preference and most revisions occurred due to a lack of time to examine Title VIII more closely. Successive Council Presidencies kept the title on the agenda but away from the discussion among member state representatives, exploiting their leadership potential in agenda-setting by separating controversial and non-controversial issues. However, neither presidency was concerned with ‘hiding’ Title VIII from IGC discussions in pursuit of their own preference. Rather, their aim was to conclude the negotiations a soon as possible, hence the main focus on critical issues and their solution. Still and unintentionally, the presidencies ensured that Title VIII was ‘agreed’ and hence included in the Constitutional treaty.

On a final note, it must be pointed out that the aim of this paper was to analyse Title VIII on the ‘Union and its Neighbours’ - and only Title VIII. In order to lend the ‘extended’ leadership model used here enhanced credibility, more provisions of the Constitutional treaty would need to be examined. Never-the-less, the paper could shed some light on its modest ambition to identify and explain who was involved and why in the political ‘hijack’ of aspects of EU external relations in the recent processes of treaty reform.
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Appendix I
Title VIII of the Treaty Establishing the Constitution for Europe: The Union and its Neighbours

TITLE VIII
THE UNION AND ITS NEIGHBOURS
Article I-57

The Union and its neighbours

1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.

2. For the purposes of paragraph 1, the Union may conclude specific agreements with the countries concerned. These agreements may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly. Their implementation shall be the subject of periodic consultation.

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