



**Advanced Research on the Europeanisation  
of the Nation-State**

*A basic research programme under The Research Council of Norway*

*ARENA  
Working Papers  
WP 03/4*

***Towards Finality?***  
**A preliminary assessment of the achievements  
of the European Convention**

By

**Ben Crum**

*Centre for European Policy Studies, Brussels*

**Introduction**

In his widely received speech on 12 May 2000 at the Humboldt University in Berlin, German Minister of Foreign Affairs Joschka Fischer characterised the debate on the future of the European Union as concerning the "finality" of European integration. While this expression may set the standards too high, the current Convention on the Future of the European Union seems determined to clear the ground for a revolutionary revision of the Union. Even if the Convention will not determine the structure of the Union once and for all, it seems at least to be determined to put an end to the continuous Treaty-revision process that started with the Treaty of Maastricht in 1992 and then led to Amsterdam and Nice.

The grain of the emerging revolution is apparent in the form proposed for its end-product: a *Constitutional* Treaty that is to replace the existing treaties as the fundamentals of European cooperation. Thus the Convention has given its own twist to the mandate it received from the European Council of Laeken: "to consider the key issues arising for the Union's future development and try to identify the various possible responses". The question of what might be the basic features of a constitution of the Union featured only as one question among more than 50 others. By proposing a new Constitutional Treaty, the Convention aims for a fundamental overhaul of the existing Treaty framework.

This paper seeks to present a first impression of what the Convention will achieve: will it really provide the final outlines of the European Union or will it merely be another step along the long and winding road of European political cooperation? It does so by filtering from the Convention debates those proposals that are most likely to be adopted and to have a lasting impact. The paper thus focuses on the substance of the Convention's work. It does not address the procedures followed by the Convention, nor the ways in which the debates have developed inside and outside its sessions.<sup>1</sup>

Obviously as long as the Convention has not finished its work, some speculation is required as to what its actual conclusions will be.<sup>2</sup> Even if nothing has been agreed yet, the contours of the final solutions are clearly dawning as the Chair has engaged the Convention in a kind of encircling process. The Chair first had the Convention focus on relatively technical issues such as simplification and legal personality. After that the debate moved on to take stock of various competences. The most contentious issues, involving the institutional order and democracy, were purposefully left to last.

Thus a firm foundation has been established that structures the actual drafting work in which the Convention is now engaging. For sure, there are still quite a number of contentious issues to settle and in principle the Convention may still fail if any one of these would turn the current constructive atmosphere into a polarised one. However, even then the work of the Convention so far has already established an 'acquis'<sup>3</sup> that clearly indicates the way the current Treaties are to be revised.

## **1. From Simplification to Constitutionalisation**

The single biggest achievement of the Convention during the first half of its work has been the consensus it has been able to forge on the need to re-found the Union on the basis of a single comprehensive Constitutional Treaty. For sure, academics have for a long time recognised the Union as having evolved towards a constitutional structure (Weiler, 1999; Mancini, 1998). Member States have, however, been reluctant to

---

<sup>1</sup> The procedural organisation and politics of the Convention are already receiving considerable academic attention: Philippart (2002), Reh & Wessels (2002), Hughes (2002), Closa (2002), Magnette (2002), Føllesdahl (2002) and Norman (2003).

<sup>2</sup> This version of the paper was finished on 6 March 2003. Subsequent developments have thus not been taken into account.

<sup>3</sup> This expression was used by Convention Vice-Chair Jean-Luc Dehaene speaking at the CEPS International Advisory Council, 21 February 2003.

recognise the Union as a political system with some autonomy in allocating power beyond what has emphatically been conferred to it by the Member States.

Thus it was quite a bold move for Convention President Valéry Giscard d'Estaing to assert at the Convention's opening session that the Convention should aim to work towards "a constitutional treaty for Europe" (Giscard d'Estaing, 2002: 11). In due course, however, the choice for a Constitutional Treaty kind of logically emerged from the proceedings of the Convention. To inform and structure the first debates in the Convention, the secretariat drafted working documents systematising the formal Treaty situation with regard to a number of specific themes, like the delimitation of competences, the legal instruments, legislative procedures and, finally, simplification and drawing up of a constitutional treaty. These papers suggested that, to get its work organised and focused, the Convention would be well advised to start with devising a common constitutional framework and streamlining the provisions in force.

### **Legal Personality and Re-integrating the Treaties**

Under pressure from the Convention's floor, the Praesidium established eleven Working Groups on selected themes. One of the Working Groups in the first round was organised around the topic of the 'legal personality of the EU'. The fact that this Working Group was to be led by Convention Vice-Chair Giuliano Amato might already have been taken as a clue to its potential importance. This became even more clear from the questions included in its mandate (CONV 73/02: 2):

- What would be the consequences of explicit recognition of the EU's legal personality?
- And of a merger of the Union's legal personality with that of the European Community?
- Could these contribute to the simplification of the Treaties?
- 

In close consultation with the Convention President, Amato was going to use this Working Group as a laboratory to develop some ideas that would be fundamental to the rest of the Convention's work.

Indeed the Working Group quickly agreed on the first two questions. Conferring legal personality on the Union emerged as a rather uncontested issue within the Working

Group. Further, on the grounds of clarity and simplicity, the Working Group also decided in favour of the Union's legal personality replacing the existing legal personality of the Community rather than having them existing alongside each other.

This being established, it was really on the last of the three questions of its mandate that the Working Group came to the most far-reaching proposals. The Working Group enthusiastically jumped on the idea that the Union's single legal personality might pave "the way for a merging of the Treaties and for greater coherence of the Union's constitutional architecture" (CONV 305/02: 4). Most notably it was established that "merger of the two Treaties [TEU and TEC] would be a logical consequence of the merger of the Union's legal personality and that of the Community" (CONV 305/02: 4). In particular the Group suggested that "the Union should have a single constitutional text" that would replace the existing treaties (CONV 305/02: 2). It was further suggested that this text should consist of two parts, the first setting out the basic constitutional provisions, while the latter could contain the more detailed arrangements organising the various policy fields as they are already contained in the existing treaties.

Finally, the Working Group proposed another bold move as it advocated the abolition of the Union's pillar structure that distinguishes the old community pillar organised around the single market from the Union's Common Foreign and Security Policy (2nd pillar) and the common policy on Justice and Home Affairs (3rd pillar). While admitting that this step did not follow necessarily from the former, it was submitted that retaining the pillar structure in a future constitutional text "would seem outdated, not to say obsolete" and, moreover, amount to "a needless complication" (CONV 305/02: 6).

The full importance of the groundwork done by the Working Group on Legal Personality came into view when late in October 2002, Giscard d'Estaing revealed the "Preliminary draft Constitutional Treaty" (CONV 369/02). In essence this draft presents an outline for the final report of the Convention. Following the suggestions of the Legal Personality Working Group, the outline proposes to merge the existing treaties in one "Treaty establishing a Constitution for Europe". It further suggests to start this Constitutional Treaty with a part covering the "constitutional structure" consisting of about 50 articles. A second part is then to set out the legal basis for the

various Union policies. In a third part (legal) specificities such as revision procedures, entry into force, territorial application, protocols, etc. are to be dealt with

### **Incorporating the Charter of Fundamental Rights**

One other major constitutional issue that the Convention has to solve was the status of the EU Charter of Fundamental Rights. This Charter had been devised by an earlier Convention over the year 2000. The European Council of Nice “solemnly proclaimed” the Charter. The European Council refrained, however, from incorporating the Charter into the Treaties, leaving its legal status for further consideration. Eventually, this task was added to the mandate of the Convention. Among the first wave of working groups, one, led by Commissioner António Vitorino, was thus to examine “the procedures for and consequences of any incorporation of the Charter into the Treaties”.

The Working Group decided that it would not renegotiate the content of the Charter. Still, as the Group was aiming for “an incorporation of the Charter in a form which would make the Charter legally binding and give it constitutional status” (CONV 354/02: 2), some re-negotiation of the so-called horizontal articles defining the scope of the Charter and its position vis-à-vis the national constitutions and traditions turned out to be required. Some passages were added to constrain the scope of the guaranteed rights and to make it absolutely clear that the Charter will in no way modify the allocation of competences between the Union and the Member States. There was some debate in the Convention whether or not these amendments did undermine the original character of the Charter. Eventually, however, this is a question of interpretation that will be left to the European judges.

In any case, the amendments have paved the way for a broad support for the legal incorporation of the Charter in a form that would make it legally binding and give it constitutional status. The draft Constitutional Treaty provides for the incorporation of the Charter of Fundamental Rights. Though some have suggested that it would be best attached as a protocol to the Constitutional Treaty, quite likely the integral Charter will find its place as the second section of the Constitutional Part.

## **Simplification of Legal Instruments and Procedures**

As said, from the beginning of the Convention onwards, the Praesidium asked the secretariat to provide working documents systematising the formal Treaty situation on specific themes. A major topic in this regard turned out to be the systematisation of the legal instruments available to the Union. As one of the early documents observed: “Here as elsewhere, the evolution of the Community and of the Union in line with successive Treaties has led to matters being superimposed in a way which ultimately excludes any possibility of systematisation” (CONV 50/02: 4). Over time the Union has come to dispose of over 30 different kinds of legal instruments (CONV 2002, WG IX – WD 4). Some of these instruments, while bearing different names, have similar effects (CONV 424/02: 3). What is more, some instruments bearing the same name (‘decision’) have different effects. Complexity increases even further as we turn to the various procedures in use to adopt Union acts that turned out to amount to more than 30 involving the different institutions and bodies in different ways (CONV 424: 13).

All in all there emerges a clear need for simplification and systematisation. Hence in the second wave of working groups established in July 2002, Convention Vice-President Amato was asked to chair another Working Group that was to explore the possibilities of reducing the number of legislative procedures as well as the number of legal instruments in the Treaties.

In the little time it had, the Working Group on Simplification has succeeded in presenting some far-reaching proposals. The Working Group singles out the ‘co-decision procedure’<sup>4</sup> as the procedure that “should become the general rule for the adoption of legislative acts” (CONV 424/02: 15). As a consequence this procedure can be renamed as the Union’s ‘legislative procedure’. The Working Group also suggests that whenever this legislative procedure applies, the Council should decide by qualified majority rather than by unanimity. Further, it is proposed to strengthen the rights of the EP and the Council to request the Commission to present legislative proposals on certain matters, involving in particular the requirement on the Commission to substantiate any refusal.

---

<sup>4</sup> The ‘co-decision procedure’ is currently defined by Article 251 TEC. Basically, it involves the EP and the Council deciding on an equal standing on a proposal for legislation of the Commission. For this

The Working Group suggests reducing the number of legal instruments for the Union to no more than six. The main Union acts are to be adopted as European laws and European framework laws, the latter leaving Member States free in determining the form and methods by which an agreed objective is to be attained. With these choice of words the former Eurospeak designations of ‘regulations’ and ‘directives’ become obsolete. As non-binding instruments ‘recommendation’ and ‘opinions’ are maintained.

The remaining two instruments are the most interesting; they are binding but non-legislative in character. First, the concept of (European) ‘decision’ that over the last years has proliferated to be used in all kinds of situation for all kinds of (binding and non-binding) acts is maintained as “a flexible, non-legislative act (...) that can be applied in various situations”. Basically, the decision will be the main instrument the Council will apply to act in a non-legislative context. Most importantly the decision will become the main instrument to be used in the Union’s Common Foreign and Security Policy, and thus replaces all instruments that were specifically introduced for this field (‘joint action’, ‘common position’ etc.).

Finally, there are European regulations that are basically acts that serve to implement Union laws or specific Treaty provisions. With regard to regulations the Working Group has introduced an additional distinction. First, the group recognised that the Treaty or the legislator sometimes mandates the Commission to adopt ‘implementing acts’ to complement Member State implementation of Union law. However, the Group considered further that the EU legislator required a second mechanism that would enable it “to delegate technical aspects or details of legislation whilst retaining control over such delegation” (CONV 424/02: 8). Thus it is proposed that the legislator might empower the Commission (or in specified cases, certain executive Council formations) to flesh out or amend certain elements of a legislative act by way of a ‘delegated regulation’. The creation of this new class of acts should also prevent the Union legislature from entering into too much detail. At the same time, the use of delegated regulation will be subject to limits and to ex-post control mechanisms by the legislature, for instance through call-back or approval rights.

---

purpose the article provides for two rounds of readings involving both legislative institutions and, if

The Working Group on Legal Simplification has clearly put its mark on the proposed Title V of the Constitutional Treaty dealing with the instruments of the Union. However, this title also shows the limits of simplification, as it does envisage a number of exceptional provisions for specific policy fields (CFSP, defence, police and criminal law). Indeed there is a clear risk that the abolished Union pillars will re-emerge in a new distinction between community action following the standard legislative procedure and more intergovernmental policies that remain under strict control of the Member States in the Council and in which the Union enjoys few powers to actually bind them. To properly assess this prospect, we need, however, to turn to the various policy fields.

## **2. Objectives, competencies and ability to act**

The Laeken Declaration did not ask the Convention to reconsider the objectives of the Union. It did, however, recognise that there is a mismatch between the Union's objectives and citizens' expectations: "Citizens often hold expectations of the European Union that are not always fulfilled. And vice versa - they sometimes have the impression that the Union takes on too much in areas where its involvement is not always essential" (European Council, 2001). On the other hand, the European Council also recognised a gap between the Union's objectives and its actual performance. This gap is most glaring in the two intergovernmental 'policy pillars': foreign policy and justice and home affairs. Notably, citizens rank 'maintaining peace and security in Europe' and 'fighting terrorism' among the top-3 EU priorities (Eurobarometer 2002: §6.1). The terrorist threat and the international engagement in Afghanistan and Iraq that dominated political agendas after September 11th, reveal EU policies in these fields to be lacking still.

The Convention's work has basically proceeded on the assumption that "Union competence corresponded in principle to its tasks, but that there was a need to further clarify the system for delimitation of competence and to strengthen competence in certain areas" (CONV 60/02: 3). Rather than adding new objectives, the Convention has focused on reconsidering the Union's existing objectives: to clarify their focus where needed, to ensure better implementation of the objectives set and, not least, to

---

this does not suffice to reach an agreed text, a so-called 'conciliation procedure' is invoked.



consider the way competencies are divided between the Member States and the Union.

Above all, the development of certain competencies has been impeded because they still require the Member States to act by unanimity. Obviously, after enlargement the likelihood that agreement can be reached on these matters reduces even further. Hence, the question is whether the Convention can succeed where Amsterdam and Nice fell short: to generalise the use of qualified majority voting (qmv) in the Council.

Even if the Council is able to adopt legislation, concrete policy results are often slow to materialise. In particular there have emerged, beyond Member States' implementation efforts, concrete demands for effective co-ordinating and implementing powers at the European level. Most notably, the Commission does not have powers in such fields as the common foreign policy and police and criminal law, whilst as regards macroeconomic policy it has no more than an advisory role. Circumventing the Commission, Member States have delegated certain executive powers to specialised bodies like Europol and Eurojust and turned the Council Secretariat into the European foreign secretariat.

### **Economic and social policy-making beyond the single market**

Notably, the Convention has little to add as regards the Union's powers in the sphere of the internal market. Instead the debate was dominated by the question whether, after monetary integration, there is a need to step up European coordination of economic and social policies. In particular much debate focused on the organisation of the macro-economic coordination mechanisms currently in place: the Broad Economic Policy Guidelines and the Stability and Growth Pact (CONV 357/02: section IV). There appears a need here to strengthen the arbitrating role of the Commission by extending its administrative power to signal warnings. Still the Member States seem intent on retaining the political decision to impose sanctions in the Council.

Bordering on the issue of economic governance, there are two policy fields in which Member States fundamentally divide on the desirability of common policies: taxation and social policy. There has been considerable pressure to have certain tax issues addressed under the normal legislative procedure rather than requiring Council

unanimity. No one proposes to have the Union interfere with national income tax systems. But some do think that, to prevent harmful tax competition between Member States, the Union should be able to agree on approximation of rates, minimal standards and tax bases in the areas of indirect and company taxation (CONV 357/02: 6).

The debate on Social Europe underlined the importance of enshrining certain basic values and social objectives in the future Constitutional Treaty, including the social values of social justice, solidarity and equality, and objectives ranging from full employment to quality of work. The Union's social competences will be marginally expanded by the strengthening of the legal basis for Union action in cross-border health issues (communicable diseases, bioterrorism). Also some strengthening of the Union's competence to act on 'services of the general interest' can be foreseen, though the appropriate balance to be struck with the imperatives of competition law and the internal market will need to be calibrated in practice. Eventually, the plea for a Social Europe is undermined as a Convention consensus is unlikely to emerge on moving from unanimity to majority decision-making in key social fields as social security and social protection and workers' representation and co-determination.

Possibly of more consequence is the beefing up of social policy coordination so that it should take an equal place besides the Broad Economic Policy Guidelines at the spring European Council. Furthermore, the open method of coordination, adopted by the Member States to exchange experiences in fields such as social exclusion and social protection, will be defined in the Constitution.

### **Towards a European public order**

Under the heading of Justice and Home Affairs, the Union has collected a whole range of policies: migration and border policies, civil law, and police and criminal law. Initially the development of European initiatives in these fields was left to the Council. Over time, and especially with the Treaty of Amsterdam, certain competences have been brought under the Community framework involving the European Parliament as well as the Commission in the legislative and implementation processes. Still, both legislation and, even more so, implementation of common policies have been marked by fragmentation and sluggishness.

To improve the effectiveness and clarity of decision-making in this sphere, the Convention has sought to distinguish between legislative and operational tasks. With regard to legislation, the Convention built upon the work done earlier on legal simplification, in agreeing that European policy-making on Justice and Home Affairs is to be brought under the general legislative procedures of the Union. Thus the specific instruments used so far (e.g. conventions, framework decisions, and common positions) will be abolished.

The Union already enjoys considerable competences in the fields of refugee and migration policies. In civil law the Union's competences have so far mainly been derived from the requirements of the internal market. The Convention now suggests providing a distinct legal basis for Union action in civil law matters, retaining, however, its restrictions to matters with cross-border implications and insofar they are necessary for the proper functioning of the market. It is recognised that maintaining the unanimity requirement will prevent much legislative progress in these fields. A full-scale transition to qualified majority voting and co-decision is proposed in the fields of refugee and migration policies, and civil law (however, with the exception of family law).

Much of the new proposals focus on the field of criminal law. As the Working Group on Freedom, Security and Justice put it, the existing legal basis defining the Union's competences in this field (Arts. 30 and 31 TEU) are "too vague in many respects, and too narrow in some other aspects" (CONV 426/02: 8). Instead it is suggested to delineate a limited number of ('Euro')-crimes with regard to which the Union may adopt legislation defining criminal acts and regulating penalties. Eventually unanimity is only to be maintained with regard to other crimes than those labelled as 'Eurocrimes' and for various decisions regarding operational powers: the creation of new Union bodies, national police forces and cross-border police activities.

While the current organisation of operational matters are recognised to lack efficiency, transparency and accountability (CONV 426/02: 15), only some minor steps for improvement are proposed. The Convention shuns away from proposing new authorities such as a common European border guard ('a long-term issue') and a European Public Prosecutor. With regard to Europol it focuses on the need to simplify its legal basis to ensure greater control of its activities by the EP, the Council and the

ECJ. Similarly, it suggests facilitating an expansion of the powers of Eurojust by defining its mission in a more general way as pertaining to judicial coordination and cooperation.

### **A Single European Voice in the World**

The common foreign and security policy may be considered the ultimate test-case whether member governments not only recognise the merits of cooperation in principle but are actually willing to match their words with the provision of common powers. Acting in unison, the EU would potentially constitute a world super power. In actual practice, national governments find it hard to relinquish any sovereignty on this point and, as demonstrated by the Iraq crisis, political preferences diverge at times on fundamental points.

The Convention has sought to define the principles and objectives of EU external action (CONV 459/02: 2/3). It has further underlined the importance for the EU to define its common objectives and interests, as well as strategies regarding specific themes and/or regions to follow up on these. In line with the existing provisions, once common strategies have been adopted by unanimity, further, more operational decisions may be taken by qmv. There is, moreover, wide support for adopting qmv on those external issues that do allow for some kind of legislative programming, in particular the common commercial policy. In these decisions the EP can also be given a role, although, short of full co-decision, this role is more likely to consist of consultation or, at most, consent.

Further, it is suggested that the Union's ability to act can be facilitated by allowing Member States to move ahead without requiring the consent of all. Member States may, for instance, make more use of the possibility of 'constructive abstention' to exclude themselves from a certain action. Alternatively, given the various degrees and ways of international engagement among the member states, there are some clear attractions in moving to enhanced cooperation between a limited number of states on specific issues: joint operations, armament production, and army cooperation (cf. CONV 461/02). In the fields of defence, where the present Treaty actually excludes the option of enhanced cooperation, one might even see the formation of a more structural 'defence Euro-zone'. However, such forms of flexibility threaten to

undermine the integrity of the Union by associating it with (military) actions against which some member are opposed in principle.

In any case, the main challenges in the field of external action are recognised to stem from the lack of coherence and efficiency on the executive level. Not only has the EU's external policy come to be dispersed over a broad range of instruments, this fragmentation is also apparent in the organisation and allocation of powers. Most notably, the responsibility for external relations is at the moment split between two officials. First, there is a Commissioner who is responsible for maintaining external relations to the extent that they concern competencies that fall under the Commission's remit, such as development policy and maintaining bilateral relations. Secondly, the Council has charged its Secretary-General with the responsibility of acting as its High Representative of the CFSP.

The Convention is tending to move towards the conclusion that these two functions are best merged into one 'double-hatted' 'European External Representative', who in effect could be regarded as the foreign secretary of the Union. This double-hatting is complemented at a more operational level with the proposal to establish one integrated European External Action service bringing together the staff currently associated with the External Relations Commissioner (DG RELEX) with that of the High Representative and staff seconded from national diplomatic services.

In the specific field of the European Defence and Security Policy the Convention has suggested adding a number of tasks – including joint disarmament operations and post-conflict stabilisation – to the so-called Petersburg tasks that have so far delineated the scope of the Union's activities (CONV 461/02: 16). The Convention further suggests the inclusion in the future Constitutional Treaty of what it calls a 'Solidarity Clause' that would "enable all the instruments available to be mobilised in actions undertaken within the territory of the Union aimed, in particular, at averting the terrorist threat, protecting the civilian population and democratic institutions and assisting a Member State within its territory in dealing with the implications of a possible terrorist attack" (CONV 461/02: 20). Notably, this solidarity clause would not amount to a mutual defence clause as lies for instance at the basis of military cooperation in the Western European Union. Rather the solidarity clause aims to

enshrine inter-European solidarity in the face of new threats that do not necessarily involve an enemy state, nor are necessarily restricted to man-made threats.

### **Consolidating competences and allowing for flexibility**

All in all it turns out that the Convention will assign little to no new competences to the Union. Notable extensions of the Union's ability to legislate by using qualified majority voting rather than unanimity in the Council, most likely will be limited to the field of Justice and Home Affairs and possibly some relatively minor social issues. By retaining the unanimity requirement in the Council, Union action in the fields of tax, social policy, foreign policy and defence can be expected to be slow to get off the ground, if at all.

On the other hand, there have been strong concerns about “a creeping expansion of the competence of the Union”, encroaching upon the exclusive areas of competence of the Member States and regional authorities (European Council, 2001). Already in the run-up to the Treaty of Nice, various actors had expressed their concern that the Union failed to adhere to the principle of subsidiarity and that a more precise delimitation of the Union's powers was required. German *Länder* even floated the idea of strictly delineating the Union's powers by way of a *Kompetenzkatalog*.

From very early onwards a broad majority in the Convention rejected the idea of a *Kompetenzkatalog* preferring a “flexible system of delimitation of competence allowing for some adaptation of the Union's mission” (CONV 40/02: 6). Still there remains a clear demand for a further clarification of the Union's competences. The Constitutional Treaty will seek a clear and comprehensive statement of the main competences of the Union. Moreover, a distinction seems desirable between those ‘shared’ competences on which Union law naturally takes primacy over national law and other, ‘complementary’ competences in which Union actions are not to pre-empt national action. However, as the Convention's proceedings demonstrate, it is easier to assert that there is a class of complementary competences than to identify which policy fields belong to that class. Even in fields like education, culture and public health, where no one contests Member States' autonomy, one may still envisage beneficial Union action defining binding policy frameworks.

Instead of a strict delineation of competences, the main guarantee in the Constitutional Treaty against creeping competences probably will come from the reinforcement of the principles of subsidiarity and proportionality (CONV 286/02). Notably, the Convention recognises the application of these principles to be essentially a political task, not to be delegated to a (constitutional) court. Besides increasing the sensitivity to these principles among the European institutions (the Commission in particular), it has been proposed to engage the national parliaments in the monitoring of subsidiarity through the design of an ‘early warning system’.

### **3. Institutions and democratisation**

In the end the institutional organisation of the Union serves as the main focal point of the Convention’s work. This is in recognition of the fact that, however you define the constitutional setting and the formal rules of competence, actual decisions eventually emerge from actors interacting with each other through the institutions.

Each of the central Union institutions – Council, Parliament and Commission - faces particular problems of its own. Eventually, however, the challenge arises from the institutional framework as a whole lacking in continuity, consistency and effectiveness (cf. Art. 3 TEU). When in a few years time the number of member states of the Union will almost double, all of these deficiencies are bound to worsen. The Treaty of Nice envisages some incremental changes that reorganise the composition of the EP, reweigh the votes in the Council, and re-affirm the principle of equality between member states in the composition of the Commission. Still it is clear that these reforms fail to resolve the fundamental problems that hamper the performance of the institutions.

Basically, the Convention faces the puzzle of seeking an optimal allocation of political powers between the various institutions. The challenges this puzzle poses can only be understood if one recognises the intricate balances upon which the Union’s institutional architecture has been built (Lenaerts & Verhoeven, 2002). On the one hand the Union has been built to maintain an appropriate balance between the political primacy of the Member States and the imperatives of policy-integration. On the other hand the power allocation within the Union has to reconcile two principles: the equality of the Member States and the equality of the peoples of Europe.

This intricate balancing act is reflected in the different roles played by the institutions in the political triangle at the heart of the Union: Parliament, Council and Commission. The unprecedented political formation of the Union does not allow for the simple superimposition of a separation of powers system as we know it from national context. Still much might be done to clarify the various roles through a more effective bundling as well as a better delineation of responsibilities. We have already seen above that, as the Union's procedures are re-organised around the co-decision procedure as the standard legislative procedure, the Council and the European Parliament will in principle act as two legislative chambers of equal importance.

Far less equivocal – as can also be derived from section 2 above – is the picture of executive powers (cf. Crum, 2003). While the implementation of Union legislation has always been primarily the responsibility of the Member States, on many fields there emerges a clear lack of complementary powers to enact, co-ordinate and monitor implementation on the European level. Indeed the capacities that have emerged at the European level have been dispersed between the Commission, the Council and its secretariat and various independent bodies (ECB, Europol, Eurojust). Beyond legislative and executive powers (and of course judicial powers that have a clear locus in the ECJ), there is one more kind of power that merits special attention in the present Union, namely the power of agenda-setting and legislative planning.

### **Unravelling the Council of Ministers**

As is widely recognised, the Council is the Union institution most in need for reform and clarification. What on the face of it is presented as a single institution, actually hides a conglomerate of different ministerial formations and committees. At its meeting in Seville in June 2002, the European Council already took some first steps towards clarifying the organisation of the Council and improving its effectiveness. For one thing it reduced the number of Council formations to nine. Eventually this number may be reduced further, possibly to no more than four: a General affairs council, Ecofin, an External affairs council and a Justice and home affairs council. Eventually, however, the number of Council formations appears as an issue best settled by the Council itself.



However, more is needed to secure the effectiveness and comprehensibility of the Council. For a start, there needs to be a clearer delineation of its various responsibilities and the formation in which they are actually exercised. Hence there is much support for distinguishing a Legislative Council from the other, executive council formations that are responsible for the coordination of national policies. To further contribute to the visibility and accountability of the Council's legislative work, the Legislative Council would sit in public and would have a more or less stable membership.

A further issue is to ensure more continuity in the running of the Council by having more permanent chairs rather than the current rotating system. The easiest solution here would be that each Council formation would simply select one of its members to act as a chair for a period of say 1½ to 2½ years. One disadvantage of this option is that one's responsibility as chair and one's interest as national representative need not always coincide. This problem may be overcome by having several members share the chairmanship. A further alternative is to have executive councils chaired by Union officials. Thus it has been suggested to have the Commission President chair the General Affairs Council (but not the legislative council) and to have the future EU foreign secretary chair the external relations Council.

### **Securing Continuity and Leadership in the European Council**

Over recent years the European Council has emerged at the apex of the institutional architecture, driving the Union forward by opening up new Union agendas, like the enlargement agenda of Copenhagen 1993, the Justice agenda of Tampere 1999, the defence agenda of Helsinki 1999 and the competitiveness agenda of Lisbon 2000. Still the situation is less satisfying than it appears. With the notable exception of the enlargement agenda (of which crucial executive tasks have been delegated to the Commission), the actual follow-up to the ambitious statements of the European Council has been rather slow and faltering. Notwithstanding the yearly follow-up on its progress, the boast of the Lisbon European Council that Europe is to be the world's leading economy by 2010 probably best illustrates the gap between European Council rhetoric and the Union's actual implementing capacity.

The Convention will seek to (re-)focus the European Council by providing a clear definition of its organisation and its tasks (cf. de Schoutheete & Wallace 2002). The

Convention will probably further substantiate the European Council's role that is currently defined as to "provide the Union with the necessary impetus for its development and define the political guidelines thereof". One way to achieve this is to bind this task to the programming of the Union's activities through the adoption of a multi-annual strategic programme as the European Council itself has proposed at its June 2002 meeting in Seville. It is equally important to exclude certain responsibilities from the European Council's remit. It should be prevented from acting as a court of appeal in legislative or executive matters when other Council formations fail to reach a decision. The establishment of a Legislative Council and a strengthening of the General Affairs Council should go some way towards achieving this aim. Moreover one may want to reconsider the European Council's key role in the Lisbon economic strategy and the Union's foreign policy.

Still there is no denying the European Council's role as the Union's super-executive or, indeed, its government or 'collective head of state' (Lamassoure, 235/02: 12). Especially, as long as certain Union competences are still in the process of developing, some decisions probably require being fought out at the highest level.

In this light the position of the European Council Presidency has become an object of much debate. The existing system of half-yearly rotating presidencies is running out of steam as the requirements of the Presidency have become so big that one can hardly expect a government to take them up alongside its normal tasks. Also, the capacity of the Member States to take up the Presidency varies, especially when it comes to representing the Union in the world. Moreover, Presidencies establish their own priorities, which do not always fit neatly in the EU agenda, whilst the follow-up of decisions taken under previous presidencies is often insufficient.

Hence, initiated by the British, the French and the Spanish governments, calls have emerged to establish a more permanent president of the European Council. Besides overseeing the preparation and conduct of the meetings of the European Council, the President may come to play an important role in the Union's representation in the world. At the time of writing it is hard to say what solution the Convention will put forward (cf. Coussens & Crum, 2003). In any case the continuity of the presidency is likely to be increased. Still any solution will need to be flanked by measures ensuring the equal involvement of all member states as well as a wellbalanced working

relationship with the Commission. One option is to embed the European Council in a team of the presidents of the various Council formations (allocated on the basis of a rotation scheme). Working relations between Council and Commission may be secured by exploring the possibilities of 'double-hatting' certain posts, like the position of the EU's External Representative mentioned above.

### **Commission: Strengthened or sidelined?**

No one in the Convention contests that the Commission should be strengthened. There is, however, a fundamental split between those who see the Commission as the administration of the single market and those who see it potentially developing as a driving force and central co-ordinating body of the full range of European competences. As far as economic issues relating to the single market are concerned, there is a broad understanding that the Commission requires more powers to implement the Union's policies and to control their implementation by others. Drawing on section 2 above, we may conclude that the Commission's remit is likely to be extended in the field of Justice and Home Affairs and most notably in those fields where this was already agreed in Amsterdam. However, in foreign and defence policy and macroeconomic coordination, the Member States are clearly reluctant to grant the Commission any substantial powers.

More generally, the Commission's agenda-setting and programming role is challenged. First, as we saw, the primacy of the European Council in multi-annual programming is likely to be formally enforced, reducing the role of the Commission to the filling in of the details. Secondly, the Commission's exclusive right of initiative is put under pressure. While it will be a step too far to grant rights of initiative to the EP or to the Council (in those fields in which it has now delegated them), under the new Treaty it will probably be harder for the Commission to put a request for legislation aside.

With regard to the Commission's internal organisation, the Treaty of Nice left open the question of the sustainability of the principle of one Commissioner for every Member State. Indeed, while recognising the problems of ever-increasing size, the Convention will probably seek to uphold this principle. One major reason for this is that it makes an important contribution to the morale of new Member States. The

ensuing management problems can then probably be solved by organising the College along two tiers (with junior ministers or state secretaries) and/or in clusters.

A related issue is the position of the Commission President vis-à-vis the rest of the Commission. Indeed under the Treaty of Nice the role of the President was already beefed up by formally recognising his or her powers to freely allocate and reshuffle the responsibilities of the other Commissioners (Art. 217 TEC). The Treaty provides, moreover, that the Commission President can dismiss any Commissioner after obtaining the approval of the College. Eventually, the President's powers in appointing and dismissing Commissioners are likely to be strengthened further, even though some controls of the Council and the EP will be maintained.

### **Democracy: involving parliaments and citizens**

While the issue of democracy featured prominently in the Convention's mandate, it has been left as one of the final issues to be addressed. Notably, the draft Constitutional outline does feature a separate title on "the democratic life of the Union", but so far its content has been slow to develop.

One issue that has received extensive attention within the Convention has been the position of national parliaments. So far the Treaties were silent on national parliaments except for a Protocol (no. 9) adopted in Amsterdam. The future Constitutional Treaty is to strengthen the involvement of national parliaments in EU decision-making through a combination of measures. First, they are to be actively informed by the Union institutions. Having the Council act in public will further enable the national parliaments to scrutinise their performance. Furthermore national parliaments are called upon to be more active in exchanging experiences, possibly by drafting a common code of conduct. Most notably, the Convention has developed the idea of a 'early warning mechanism' that would allow national parliaments a formal right to register their objections against any European legislation in progress.

Where national parliaments' powers find their limits, the European Parliament should step in to ensure democratic control. Clearly, the Parliament has much to gain from the co-decision procedure becoming the standard EU legislative procedure. In many ways the EP would thus emerge as a full and equal co-legislator beside the (Legislative) Council. Still certain Union powers are bound to remain excluded from

its remit, including the by now well-known list of policies that would retain an intergovernmental character (CFSP, ESDP, criminal law and police matters), as well as policies whose execution the Treaties have so far directly delegated to the Commission and Council (most notably, the Common Agriculture Policy).

Notably, however, the considerable extension of the EP's powers has not been matched by an increase of its electoral appeal. Some improvements may be expected from harmonising the electoral procedures and thus strengthening the trans-European character of the elections. As a first step in this direction the Council has already formulated some common principles that these elections have to respect, including, most notably, the requirement of a "proportional-type ballot" (CONV 477/03). These principles will probably be inserted in the Constitutional Treaty. They may well be strengthened with a commitment to the use of regional constituencies (of a limited size) as to foster closer bonds between electorate and representatives. At the same time the Constitutional Treaty is unlikely to go too far in affecting the Member States' prerogative to set their own electoral procedures.

To really boost electoral engagement with the EU, elections will need to have a direct impact on executive authority. Distinct political offices, like the Commission President, the EU's HR/Foreign Secretary and the European Council President, are key in this regard, as is their democratic accountability. Executive mishaps need to be subject to direct consequences finding expression in the public debate and being enforced through the executive control exercised by Council and Parliament. It should be clear that none of these offices can function without the confidence of both the Council and the EP. Thus it appears logical to enshrine in the Constitutional Treaty that the Commission President is accountable to both the Council and the European Parliament (Commission, 2003). At the same time one might consider that (a supermajority in) the Parliament should be able to express its lack of confidence on executive officers that serve primarily under the Council structures (like the HR and a possible European Council President).

In this light also the prospects to democratise appointment procedures warrant consideration, above all the appointment of the Commission President. While initially the Commission President was decided upon by unanimity in the European Council, the voice of the Parliament in this process has been steadily strengthened over time.

This process can be read as leading to the logical conclusion that the Commission President should be elected by the Parliament subject to approval of the European Council. Still this option may well tend to push the Union too much towards a federalist model, undermining the equality between states (Hix, 2002). Such a development may be prevented by specific control mechanisms, like requiring an EP supermajority or Council veto powers over the election or nomination process. However, the more controls, the more likely the selection procedure is to elude the democratic process and become subject to political deal-making again. A more fundamental way out is to bypass the two legislative institutions by having the Commission President elected directly by the citizens or by some kind of Electoral College involving national parliamentarians.

#### **4. Conclusion**

So, does the Convention succeed in defining the final, definitive form of the Union? The answer to this question must be a negative. On various institutional issues, the Convention will probably have to settle for some preliminary compromises. As regards the Union competences, their structure will be much clarified, but clearly the distribution that is now attained can and should not be cast in stone. The example of the Common Foreign and Security Policy suffices to show that a common policy cannot be forced by constitutional decree but requires a long process of political confidence-building.

Yet, the Convention may claim to lay the groundwork for the form the Union will eventually take. From that perspective its greatest achievement is the transformation of the Union's legal basis from the old Treaties into a new Constitutional Treaty. It provides a much clearer structure for the allocation of competences. It also introduces some important premises for the further development of the institutions.

Presuming, at this moment, that the Convention will bring its work to a satisfactory conclusion in the summer of 2003, there is still a difficult road to go before the proposed Constitutional Treaty will enter into force. First, there will need to be an Intergovernmental Conference on the Convention's proposals. Considering the progress achieved within the Convention and the active involvement of national governments, the Intergovernmental Conference is unlikely to reconsider the whole of

the Constitutional Treaty. Still it may well be tempted to single out certain points – most notably regarding the institutional structure – for slight revisions that are better to the liking of the Member States.

However, after the governments will sign the new Constitutional Treaty, there remains what may well be the most difficult part of the process: ratification. Of the 25 member states that will make up the Union of 2004, the Constitutional Treaty will probably be subject to a national referendum in up to 20 of them (Louis et al., 2002: 6).<sup>5</sup> Precautions will be taken to ensure that the new Constitutional Treaty can enter into force even if one of the member states fails to ratify it (cf. Lamoureux et al., 2002: XI). Yet the use of the Constitutional Treaty would be much complicated as in such a situation the old Treaties could not be revoked.

If the Constitutional Treaty will enter into force by 2005 or even later, it will be put to the test right away. The world will not have waited in the mean time. Enlargement will have taken effect. Europe is likely to have lived through another economic slump. New challenges on the international scene will have to be faced. And, indeed, some European governments that were present during the drafting process will have been replaced.

The Constitutional Treaty will clarify the political playing field in which these challenges are faced and make it easier to navigate. It does not, however, provide a binding roadmap. While the Convention has come a long way in integrating the legal framework, it leaves it up to future generations of politicians to decide upon the further political integration of Europe.

---

<sup>5</sup> Presumably, these include all Member States that have had treaty referenda in the past: Ireland, Denmark, France, United Kingdom, Austria, Finland, Sweden and Italy. Also in the Netherlands and Spain there appears to be a strong movement in favour of having a referendum about the Constitutional Treaty. Finally, all the new member states that organised a referendum on accession in 2003 can be expected to repeat this exercise on the Constitutional Treaty.

## References

- Closa, C. (2002), 'Improving EU Constitutional Politics? A preliminary assessment of the Convention', paper presented at the 1<sup>st</sup> Pan-European Conference on European Union Politics, Bordeaux, 26-28 September.
- Commission of the European Communities (2002), *For the European Union; Peace, Freedom, Solidarity. Communication of the Commission on the Institutional Architecture*. Brussels, 11 December, COM (2002) 728.
- Convention (40/2002), 'Note on the plenary meeting – Brussels, 15 and 16 April', Brussels, 25 April.
- Convention (50/2002), 'The legal instruments: present system', Brussels, 15 May.
- Convention (60/2002), 'Note on the plenary meeting – Brussels, 23 and 24 May 2002', Brussels, 29 May.
- Convention (73/2002), 'Mandate of the Working Group on Legal Personality', Brussels, 31 May.
- Convention (286/2002) 'Conclusions of Working Group I on the Principle of Subsidiarity', Brussels, 23 September.
- Convention (305/2002), 'Final Report of Working Group III on Legal Personality', Brussels, 1 October.
- Convention (354/2002), 'Final Report of Working Group II', Brussels, 22 October.
- Convention (357/2002), 'Final Report of Working Group VI on Economic Governance', Brussels, 21 October.
- Convention (369/2002), 'Preliminary draft Constitutional Treaty', Brussels, 28 October.
- Convention (424/2002) 'Final report of Working Group on Simplification', Brussels, 29 November.
- Convention (426/2002), 'Final Report of Working Group X 'Freedom, Security and Justice'', Brussels, 2 December.
- Convention (459/2002), 'Final Report of Working Group VII on External Action', Brussels, 16 December.
- Convention (461/2002), 'Final Report of Working Group VIII – Defence', Brussels, 16 December.
- Convention (477/2003), 'The Functioning of the Institutions', Brussels, 10 January.
- Convention (2002, WG IX – WD 4), 'Liste des instruments d'action dont dispose l'Union', Brussels, 11 October.



- Coussens, W. & B. Crum (2003), 'Towards effective and accountable leadership in the Union'. EPIN Working Paper no. 3, Centre for European Policy Studies (CEPS), Brussels.
- Crum, B. (2003), 'Legislative-Executive Relations in the EU', forthcoming in the *Journal of Common Market Studies*, June, Vol. 41, No. 3.
- De Schoutheete, Ph. and H. Wallace (2002), *The European Council*, Groupement d'Etudes et de Recherche Notre Europe, Research and European Issues, No. 19, September.
- Eurobarometer (2002), *Standard Eurobarometer 57*, European Commission, Brussels.
- European Council (2001), 'The Future of the EU: Declaration of Laeken', 15 December (SN 273/01).
- European Council (2002), 'Presidency Conclusions', Seville European Council, 21 and 22 June (SN 200/02).
- Fischer, J. (2000), 'From Confederacy to Federation', speech at the Humboldt University, Berlin, 12 May.
- Føllesdahl, A. (2002), 'Drafting a European Constitution – Challenges and Opportunities', paper presented at the Conference on European Governance and Democracy, 14-15 November, Brussels.
- Giscard d'Estaing, V. (2002), 'Introductory Speech to the Convention on the Future of Europe', SN 1565/02, Brussels, 26 February.
- Hix, S. (2002), 'A Constitution for the European Union: A Comparative Political Science Perspective', *Collegium*, No. 23, Spring, pp. 17-35.
- Hughes, K. (2002), 'The Future of Europe Convention: travelling hopefully?', EPIN Working Paper no. 1, Centre for European Policy Studies (CEPS), Brussels.
- Lamassoure, A. (2002), 'The European Union: four possible models', Convention Contribution 83 (CONV 235/02), Brussels, 3 September.
- Lamoureux, F. et al. (2002), *Feasibility Study. Contribution to a Preliminary Draft Constitution of the European Union Working Document*, European Commission, Brussels, 4 December.
- Lenaerts, K. & A. Verhoeven (2002), 'Institutional balance as a guarantee for democracy in EU governance', in Ch. Joerges and R. Dehousse (eds.), *Good governance in Europe's integrated market*, Oxford: Oxford University Press.
- Louis, J.-V., P.-V. Dastoli, Th. Jansen & S. Rodrigues (2002), 'Document de l'Agora académique pour le futur de l'Europe et la Convention Européenne', manuscript, Brussels.

- Magnette, P. (2002), 'Deliberation vs. Negotiation. A first analysis of the Convention on the Future of the Union', paper presented at the 1<sup>st</sup> Pan-European Conference on European Union Politics, Bordeaux, 26-28 September.
- Mancini, F. (1998) "The Case for Statehood" *European Law Journal*, Vol. 4, No.1: pp. 29-42.
- Norman, P. (2003), 'The European Convention. Into the crucial months'. Briefing Note No. 11. Eurocomment, Brussels.
- Philippart, E. (2002), 'The Convention on the Future of the EU'. CEPS Policy Brief No. 11, Centre for European Policy Studies (CEPS), Brussels.
- Reh, C. & W. Wessels (2002), 'Towards an Innovative Mode of Treaty Reform?', *Collegium*, No. 24, Summer: pp. 17-42.
- Weiler, J.H.H. (1999), *The Constitution of Europe*, Cambridge: Cambridge University Press.