

Targeted interventions at neuralgic points – for a limited agenda of the intergovernmental conference

Claus Giering and Janis A. Emmanouilidis

Key points: An acceptance of the Convention's draft Constitution without reservations is no longer realistic. There is a need to find solutions for the most disputed points, which do not put the success of the constitutional project at risk:

- *Commission:* Since a substantial reduction of the Commission currently does not seem to be possible, one should, instead of opting in favour of the controversial solution proposed by the Convention, choose to retain the Nice model, which foresees a reduction and equal rotation once the EU has reached 27 member states.
- *Weighted votes:* The weakest point of the Nice regulations relates not to the weighted votes per se, but rather to the high quorum of more than 71% of required votes in the Council. A considerable reduction of the quorum would make it easier to shape majorities and reduce the number of potential blocking coalitions.
- *Council reform:* The Council reforms should principally be retained, as they increase transparency and leadership of the EU. However, one should aim to define the working method of the legislative Council and the role of the Foreign Minister more precisely.
- *ESDP:* The Constitution should give the member states that are willing to cooperate room to move forward in the area of ESDP. Otherwise they will organize their cooperation outside the EU. However, the Foreign Minister should be attributed a stronger role.
- *Reference to God:* The Constitution should not fail because of this question. A possible new formulation of the Constitution should, however, neither be discriminating nor should it be instrumentalized as a criterion for exclusion.

The intergovernmental conference should limit itself to finding solutions to these neuralgic points.

The Constitution is the first common grand project of the EU-25. The member states now have to prove that the enlarged Union is able to face the future. In the intergovernmental conference, the fate of 17 months of Convention work will be decided. The failure of either the negotiations in the intergovernmental conference or the subsequent ratification procedures in one or more of the member states would endanger not only the Constitution but also the overall success of enlargement. A retreat to the Treaty of Nice would condemn the enlarged EU to gridlock.

Thus, the intergovernmental conference is under enormous pressure to succeed. But what results can principally be expected from the negotiations?

1. The Convention's draft will be accepted without any changes.
2. The intergovernmental conference limits itself to formal editorial changes in wording and phrasing.
3. There are interventions targeted at some neuralgic points of the draft Constitution.
4. The whole package is opened up again, and new negotiations begin based on the Convention's draft.
5. The Convention's draft is rejected, and new negotiations begin based on the Treaty of Nice.

Politically, the member states cannot allow the Convention's draft to be rejected (option 5), because representatives of the national governments and the European Parliament were part of the drafting process. Rejecting the draft would call their own credibility and even that of the entire integration process into question. The same reasoning holds for a fundamentally new negotiation of the Convention's reform package (option 4). Further, an intensive re-negotiation of the draft Constitution in the framework of an intergovernmental conference with a set time limit would not only be barely possible, it would also endanger the progress already made by the Convention.

On the other hand, an acceptance of the Convention's draft without reservations (option 1) or with only limited changes (option 2) does not appear very realistic either. In many member states "red lines" have already been publicly drawn, which some governments will be unable to cross, or only able to cross with extreme difficulty, given their individual ratification procedures in parliament or in national referenda. Five themes might prove to be particularly contentious in the course of the coming negotiations:

- the composition of the Commission;
- the weighted votes in the Council of Ministers;
- the chairmanship and composition of the Council;
- differentiation in security and defence policy;
- the reference to God in the Constitution's Preamble.

If the Constitution-making project is to succeed, these questions will probably be the neuralgic points that the intergovernmental conference must successfully re-negotiate (option 3). Even if, due to other deficits, no perfect Constitution emerges from the conference, compromise formulations on precisely these points are necessary to prevent a failure of the intergovernmental conference and to secure the success of the constitutional project.

1. Composition of the Commission

According to the draft Constitution, from 2009 onwards the Commission will be composed of its President, the foreign minister as vice president, 13 “European Commissioners”, who are appointed according to a system of equal rotation among the member states from national lists with three candidates each, and a number of non-voting “Commissioners” from the remaining EU-countries.

Many small and medium-sized member states as well as the Commission itself are opposed to this construction. Behind their objections stand concerns that the Convention’s proposals will call the equal access of all member states to initiatives and information into question, create excess influence for the larger member states, and lead to a loss of prestige for the small and medium-sized states. For these reasons, every member state should continue to be represented in the Commission by a Commissioner with equal rights.

The construction proposed by the Convention is not only being disputed by several member states, but it also does not offer an improvement over the status quo. Only a real reduction in the Commission’s size, without a differentiation among its members, would have offered more efficiency. When it comes to taking important decisions, the non-voting Commissioners from the large or affected member states will also want to have a strong say. This will in the end nullify the supposed improvement of a smaller Commission’s ability to act. Furthermore, selecting the members of the Commission from national lists with three names will tend to politically deter the most suitable candidates.

In contrast, retaining one Commissioner per member state will not necessarily weaken the collegium’s efficiency. In this case the President of the Commission would, however, require stronger rights concerning the selection of candidates and the disposition of the individual portfolios, as well as a strengthened authority in matters of general policy. Since a substantial reduction in the number of Commissioners currently does not seem to be a viable option, one should not opt in favour of the half-hearted solution proposed by the Convention, but rather choose to retain the Nice model. The agreement reached in Nice foresees that a decision to reduce the number of Commissioners on the basis of an equal rotation will be taken only once the EU has reached 27 member states.

2. Weighted Votes in the Council

According to the decisions taken in Nice, from 2005 onwards a triple majority of weighted votes, member states and – at the request of a member state – at least 62 percent of the Union’s population will be required for qualified majority decisions. The draft Constitution now proposes that from 1 November 2009 qualified majorities in the Council must “consist of a majority of Member States, representing at least three fifths [60 percent] of the population of the Union” (Art. I-24). The criterion of weighted votes would thus be dropped.

In terms of the European Union's ability to act with 25 and more member states, the Convention's draft simplifies the formation of potential majorities able to shape policies (shaping majorities) and reduces conceivable blocking minorities in the Council of Ministers. On the other hand, the four large member states, primarily Germany but also Great Britain, France and Italy, will be strengthened while the small and medium-sized states will lose influence. Poland and Spain would retain their absolute weight, but compared with the four largest member states – and in particular with Germany – both countries would lose a considerable amount of their relative importance as potential coalition partners. Although almost all states must accept some loss of power, to date only Spain and Poland have announced their resistance to the Convention draft and insisted on retaining the system of weighted votes laid down in the Treaty of Nice.

If the Convention's model of a double majority should not be attainable because of these explicitly drawn red lines, one needs to find an alternative solution to improve the decision-making ability of an EU with 25 and more members. One of the strongest criticisms of the Treaty of Nice is the inefficient means of reaching decisions in the Council. Besides the Nice regulations' susceptibility to blockades in cases of national vetoes, their weakest point relates to the quorum required for a majority decision, currently at 71.3 percent of the weighted votes, rising to nearly 74 percent after enlargement. In member states, a two-thirds majority (66.7 percent) is usually sufficient even for constitutional changes. In terms of improving the Union's decision-making ability, the weighting of votes is less of a problem than the high hurdle posed by the quorum. If some member states remain steadfast in their position to veto the Convention's model, some compensation could be found in reducing the quorum to three fifths (60 percent) or at least two thirds (67 percent) of the required votes in the Council. This would make it considerably easier to shape majorities and reduce the number of potential blocking coalitions.

3. Chairmanship and Composition of the Council

In view of the future structure of the European Council and the Council of Ministers, the Convention's draft proposes substantial changes. These include the introduction of both an elected President of the European Council and a European Foreign Minister, who will preside over the Foreign Affairs Council, the creation of a "Legislative and General Affairs Council", informal meetings of the ministers of the Euro Group under an elected president, and a rotating Presidency for all other Council formations, serving for periods of at least a year.

The idea to introduce a President of the European Council draws particular criticism, because there are fears that this would weaken the role and influence of both the Commission President and the smaller states. The description and the tasks of the future Foreign Minister have also been questioned. The third point of criticism relates to the

introduction of a Council formation dedicated to legislation, as its composition and decision-making procedures raise a number of open questions.

Because of these strong reservations, there is considerable danger that the intergovernmental conference will retreat to the status quo of the Nice Treaty, and that the increasing weakness of political leadership at the EU level will not be overcome. But it is especially the personification of European politics through the President of the European Council and the Foreign Minister that are intended to bring about more coherence, visibility and leadership when it comes to taking and implementing decisions. Furthermore, the abolition of the current system of a Council Presidency rotating every six months would greatly improve the continuity in the Council without requiring the member states to give up their right to regularly chair a Council formation. For these reasons, the basic structure set up in the Convention's draft should not be called into question.

However, due to the lack of clarity of the Convention's draft the intergovernmental conference should concentrate on a more precise definition of the composition and working method of the legislative Council as well as on the competencies of the future Foreign Minister in particular in relation to the President of the European Council. But the European Foreign Minister should under no circumstances be tied up closer to the Council, because this would further reduce the Commission's current role in external relations.

4. Differentiation in Security and Defence Policy

Without differentiation, European integration would not have made any substantial progress. Following the Euro and the Schengen area, this will be increasingly true for the area of European Security and Defence Policy (ESDP). In these fields, the draft Constitution provides new means of flexible integration. First, the rules of "enhanced cooperation", as the general instrument for differentiation, will also apply to the area of ESDP. Second, the new instrument of "closer cooperation" will extend obligations of collective defence into the framework of the EU (similar to Article V of the WEU Treaty), at least for those member states prepared to join this new form of defence cooperation. Third, "structured cooperation" could lay the foundation for a European defence union that ties participation to the fulfilment of a number of pre-defined criteria.

Some member states, particularly Great Britain and Poland, are concerned about a double division. On the one hand, they are worried about developments that might lead to a two-speed Europe, and on the other they fear that the NATO-alliance might be weakened by the creation of parallel or even competing structures within the framework of a limited number of EU member states. Moreover, some small and medium-sized EU-members are concerned about a strong dominance of the big member states in this crucial policy field.

Despite these reservations, the future Constitution should give the states that are willing and able to cooperate room to move forward in the area of ESDP. If this does not take place within the framework set up by the Convention's draft, then the states that are prepared to work together will organize their cooperation outside of the constitutional framework. For this reason, one should principally hold on to the instruments that have been proposed. One possible way to ease the concerns that have been raised would be to regulate more clearly the establishment of and the subsequent admission to structured cooperation. In this context, the European Foreign Minister as an independent authority representing the interests of all member states should be attributed a stronger role. Furthermore, Javier Solana should be tasked as soon as possible with developing a draft protocol for structured cooperation based on the EU security doctrine accepted by all member states.

5. Reference to God in the Constitution's Preamble

Following long discussions, an explicit reference to God and Christianity was not made in the Preamble to the draft Constitution. Instead, there is a reference to the "cultural, religious and humanist inheritance of Europe." Especially Italy, Ireland, Spain, Poland and Portugal have stated their opposition. For France and other countries, however, calling on "God" in the Preamble would be a clear break with their secular constitutional traditions.

The Constitution should not fail because of the question related to a reference to God. A new formulation of the Preamble would not call the entire construction into question. If the intergovernmental conference is able to find a balanced formulation that includes God and the Christian inheritance, without discriminating against atheist and non-Christian believers within and outside the EU, there is no reason to oppose a change of the Preamble. On the other hand, the term "Christianity" should not be instrumentalized as a criterion for exclusion. A possible compromise could be found in referring to "God", without an explicit reference to Christianity. In general, some reference to God in the Preamble may prove essential to ease the ratification of the Constitution in certain member states.

Conclusion: Limiting the Mandate for Negotiations

From a present point of view, the five issues mentioned above are the central and key elements that must be discussed and re-adjusted, if the draft Constitution is not to fail in the intergovernmental conference and the subsequent ratification process. To ensure that the entire package is not reopened in the coming months, the member states should agree at the beginning of the intergovernmental conference to limit the negotiations to these neuralgic points. In these areas, compromise formulas are possible, which at the final count will not only accommodate all member states but also leave the basic tenets of the Convention's draft undisturbed. Above all, the Convention's progress concerning the integration of the Charter of Fundamental Rights, the fusion of the existing treaties

into one document, the assignment of a single legal personality to the EU, a simplification of European decision-making instruments and procedures, as well as the extension of qualified majority voting and the co-decision rights for the European Parliament should not be up for negotiation. At the end of the day, these are the breakthroughs achieved by the Convention that better prepare the European Union for future challenges by bringing it to a new level of integration. The intergovernmental conference should not step back from this level, if it does not wish to fundamentally question the development of an enlarged EU, and with it the political integration of Europe.