The Europe We Need

Issue Paper No. 05

The Draft Constitutional Treaty – An Assessment

The EPC Convention Team

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List of abbreviations

AFSJ	Area of Freedom, Security and Justice
BEPGs	Broad Economic Policy Guidelines
CFSP	Common Foreign and Security Policy
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EMU	Economic and Monetary Union
EP	European Parliament
ESDP	European Security and Defence Policy
EU	European Union
FM	Foreign Minister
GAC	Legislative and General Affairs Council
HE	Is used with gender-neutral intention throughout
IGC	Intergovernmental Conference
JHA	Justice and Home Affairs
MEP	Member of European Parliament
MFF	Multiannual Financial Framework
NATO	North Atlantic Treaty Organisation
OECD	Organisation for Economic Cooperation and Development
OSCE	Organisation for Security and Co-operation in Europe
PSC	Political and Security Committee
QMV	Qualified Majority Voting
TEC	Treaty Establishing the European Community
UN	United Nations
UNSC	United Nations Security Council
WEU	Western European Union

Summary

The draft Constitutional Treaty adopted by the Convention on the Future of Europe and accepted by the European Council in Thessaloniki, Greece as "a good basis" for the Intergovernmental Conference proposes the most radical reform of the European Union institutions in the history of European integration. The draft Treaty proposes a semi-permanent chairman of the European Council, the establishment of an EU Foreign Minister, an extension of powers for the European Parliament, more qualified majority voting and grants the EU legal personality. Certainly the staunchest advocates of closer integration would have wanted the Convention to have been bolder in its approach but as its chairman, Valery Giscard d'Estaing, pointed our after the Convention presented its work, the compromises reached represented the most that could have been achieved given the political circumstances within the Member States.

The 460 articles of the draft Constitutional Treaty will now be discussed at the IGC due to start in October under the Italian Presidency. It is hoped to conclude the IGC during the Italian Presidency or early in the Irish Presidency in time for an agreed text to be presented before the elections to the EP in June 2004, a month after the Union enlarges from 15 to 25 Member States. The initial reactions to the draft Treaty in the Member States and in the institutions were generally favourable. France, Germany and the UK all gave the draft broad support. The Presidents of the Commission and EP also welcomed the draft after both had initially voiced hesitations. Some Member States, however, hope to re-open various issues during the IGC. A substantial re-opening of issues already decided in the Convention and accepted by a large consensus would be very damaging. The draft Constitutional Treaty should be accepted substantively as it stands, subject only to legal amendments.

This Issue Paper considers the main changes proposed in the draft Treaty and analyses the impact on a number of policy areas. It does not claim to be comprehensive. Further papers will be produced by the *EPC* in coming weeks covering additional policy areas.

Introduction

On 13 June, after sixteen months of deliberation, the vast majority of the 105 members of the Convention on the Future of Europe accepted the draft Constitutional Treaty proposed by Giscard d'Estaing. A week later, Giscard presented the draft to the European Council in Thessaloniki, which accepted it as 'a good basis' for the work of the IGC. There remains some further, potentially important, tidying up work to be done by the Convention in July. The stage will then be set for the IGC that starts in mid-October and which will include government representatives from all Member States and the Accession States plus the Commission. The aim is to finalise the draft Treaty well ahead of the EP elections in June 2004. Ratification of the new Treaty, which may take up to two years, should begin after the enlargement to include the 10 new Member States on 1 May 2004.

The objective of the new Constitutional Treaty is to ensure that the enlarged Union continues to function in an efficient, transparent and democratic manner. The draft Treaty helps transparency by consolidating all previous treaties into a single text. It remains in part difficult to understand but overall the simplified framework should make the Union somewhat more comprehensible to its citizens. The Treaty also contains a number of important reforms designed to ensure a more efficient and democratic Union. It redresses some of the most important mistakes of the Nice Treaty.

The draft Treaty is divided into four parts and includes a preamble covering the aims and ambitions of the Union. Part I covers constitutional and institutional issues such as the division of competences between the EU and Member States, institutional structures and voting procedures. Part II comprises the Charter of Fundamental Rights already agreed at the Nice European Council. Part III deals with EU policies and Part IV concludes with general and final provisions, including Treaty revision and withdrawal procedures.

Institutional Changes

Following intense debate in the final stages of the Convention, there is a risk of overestimating the importance of institutional reform. Whether the Union will rise to the challenges ahead will depend on political will more than on the legal alchemies of institutional checks and balances. Solutions elaborated to describe the role and powers of each institution, and the balance between them, however, are a reliable indicator of the prevailing attitude towards European integration in various capitals.

Supranational institutions like the Commission, the European Parliament and the European Court of Justice, distinctive to the process of European integration, are by definition dedicated to furthering the common interest, in a spirit of independence from Member States. On the other hand, national governments legitimately bargain with their peers in order to optimise their advantage when they meet in the Council of Ministers and in the European Council. Their involvement is vital for the legitimacy and efficiency of the Union. There is plenty of evidence, however, that (narrowly perceived) national interests hinder strategic policy-making at the EU level.

The relationship between the European institutions is not, therefore, a matter of legal technicalities, but mainly a question of allocation of power and influence. Looking at the outcome of the Convention, and more specifically at Title IV of Part I, it seems that there is little progress in strengthening European institutions and equipping them to actively pursue strategic priorities in an enlarged Union.

The European Parliament

The power of co-decision of the European Parliament, under the so-called 'ordinary legislative procedure', has been extended to 35 new legal bases in Part III (this is still subject to amendment in the final stages of the Convention in July). Most notably, the power of the Parliament has been extended to judicial cooperation, some aspects of police cooperation, and some aspects of agricultural policy and of social policy. The Parliament, however, will only be 'regularly informed' in the area of CFSP.

From an institutional point of view, Article **I-19** raises the number of MEPs to 736, from the ceiling of 732 agreed at Nice. The new provision makes the principle of degressive proportionality – whereby the larger the population of a country, the greater the number of citizens represented by a single MEP – explicit. This is, however, nothing new, as this principle has

governed the distribution of seats since the Parliament has existed, to the relative advantage of small Member States.

The solution agreed upon how to determine the composition of the EP is not a model of simplicity. A new **Protocol** is attached to the Constitutional Treaty, indicating the distribution of seats for the 2004-2009 parliamentary term. Since Romania and Bulgaria have not joined the Union yet, the number of seats allocated to the other countries has been increased to match the Nice ceiling of 732. A **Declaration** attached to this Protocol provides that, upon accession, Romania and Bulgaria shall be represented by 33 and 17 MEPs respectively. For a transitory period, until 2009, the number of MEPs could therefore exceed the limit of 736, established by Article **I-19**. This provision envisages that, before elections in 2009, the European Council will establish by unanimity the final composition of the EP, so that the upper limit of 736 is finally respected (see Annex I).

The European Council and its President

The overall inter-institutional balance has shifted to the advantage of inter-governmental institutions and policy-making. The creation of the **European Council** as a fully-fledged EU institution – envisaged in Article **I-20** – inevitably alters the previous framework. The appointment of a full-time President to chair the European Council for two and a half years seals this shift in political authority.

The European Council is mandated to provide the Union with the necessary impetus for its development, and to define its general political directions and priorities. It does not exercise legislative functions. The European Council preserves its predominant position in CFSP policy-making. Since the formal right of initiative of the Commission in this crucial policy domain has disappeared (see Article **III-196**), and the new position of the FM largely depends on the definition of policy guidelines by the Council, it is arguable that the position of the European Council has been strengthened. Most importantly, following the restructuring of the **Council of Ministers** machinery, the European Council is supposed to decide both on the number of Council formations and on the new system governing the rotating Presidencies of Council formations. Far from enhancing the much needed synergy and cooperation between the Commission and sectoral Council formations, Article **I-23** gives the European Council enormous influence over the Council. This casts a shadow on the ability of the Commission to perform its role of policy proposal and coordination.

Large Member States have insisted that a long-term **President of the European Council** be established to improve its functioning and, above

all, to provide the Union with a single face that will be recognisable to the public and international partners. There was, according to some, an urgent need to scrap the six-month Presidency rotation at the top of the European Council, allegedly the source of confusion and lack of leadership and continuity in domestic as well as international affairs. Unfortunately, however, no convincing explanation has been offered to explain how a long-term President would do better, short of endowing the new position with powers of initiative and coordination currently attributed to the **President of the Commission**.

A dilemma has emerged: either granting the new President considerable powers, which would lead to permanent arm-wrestling with the President of the Commission, or emptying the new function of executive powers, which would make the entire new system questionable. The ambiguity of the new position is reflected in the difference between the title of Article I-21, which refers to the 'European Council Chair', and the text of the provision, where the term 'President' is used. The results of the last-minute compromise on the functions of the new President, described in Article **I-21**, are as follows:

- The European Council will elect its President by qualified majority for a term of two and a half years, renewable once.

- The President will chair the European Council and drive forward its work.

- In cooperation with the President of the Commission, and on the basis of the work of the GAC, he will ensure proper preparation and continuity of the European Council.

- He will endeavour to facilitate cohesion and consensus within the European Council.

- He will ensure, at his level, the external representation of the Union on issues concerning CFSP, without prejudice to the responsibilities of the FM.

The essential need for cooperation between the President of the European Council and the President of the Commission has been acknowledged in the text. This is to be welcomed, but there was no need to introduce a new player in the complex preparation of the European Council. A stable President will naturally insist on having more clout than a rotating one, and will predictably have his own priorities. Moreover, he will be more dependent on national governments, since they appointed him. Finally, although the so-called 'board' of three members of the European Council, envisaged to support the new President, has been removed from the final

version of the text, nothing prevents the new President from establishing new structures to consolidate his position.

Even less clear is the division of tasks between the President of the European Council and the FM on CFSP matters. Bearing in mind the ambiguity of the exact institutional position of the FM, described in Article **I-27**, much will depend on the personalities of the first incumbents and on their ability to work together.

The Council of Ministers

The debate in the Convention on the role of the Council of Ministers mainly revolved around the creation of a **Legislative Council**, separate from the executive formations of the Council which should meeting in public to discuss and enact legislation in conjunction with the European Parliament. This is an innovative idea that goes in the right direction in terms of transparency, simplification and efficiency. Firstly, it breaks with the hybrid nature of Council proceedings and simplifies the system by drawing a clear distinction between executive and legislative functions. Secondly, it abandons the peculiar practice whereby only national ministers responsible for a specific policy area can adopt sectoral legislation, in the absence of adequate scrutiny by another body responsible for overseeing policy consistency. Thirdly, the separation of legislative and executive functions is a pre-requisite if closer cooperation between the Commission and Council formations in carrying out executive business is to be achieved.

The Convention, unfortunately, has failed to achieve a clear separation between legislative and executive functions, and has delivered a half-baked compromise. Some Member States had difficulty with appointing a new, powerful minister based permanently in the Legislative Council and charged with monitoring and coordinating the activity of his colleagues in Brussels. That would have upset the balance of forces in domestic government coalitions. According to Article **I-23**, the same Council formation – the **Legislative and General Affairs Council** – works in two different 'modes':

- When it acts in its legislative function, the Council discusses and, jointly with the European Parliament, enacts legislation. In this function, one or two national ministers with relevant expertise should be part of each national delegation, depending on the issues scheduled on the agenda.

- When it acts in its General Affairs capacity, in liaison with the Commission, it prepares and ensures follow up to meetings of the European Council.

It is far from clear how this 'double-hatted' Council formation will work. Who will sit in the General Affairs formation? Will this person be replaced or flanked by sectoral ministers when the Council undertakes legislative tasks? The obscurity of this provision is a serious setback in terms of simplification of the system, and does not bode well for the efficiency of its future proceedings.

Turning to the **presidency of Council formations**, the Foreign Affairs Council will be chaired by the FM. According to Article **I-23.4**, however, the other formations will be chaired by Member States on the basis of equal rotation for periods of at least one year. The rules governing such rotation will be decided by the European Council. While small Member States achieved their aim of having the term 'equal' enshrined in the text in relation to 'rotation', all Member States failed to appreciate that the likely perspective of a team presidency – with different countries chairing different Council formations at the same time – weakens the Council. This will increase, not diminish, the need for coordination in an enlarged Union. Given the new institutional framework, it is more than likely that such coordination will be provided by the President of the European Council. The refusal by some Member States, notably France, to entrust the chairmanship of the GAC to the President of the Commission, thereby enhancing his ability to oversee the executive activity of the Council, may cost the Union dearly in terms of policy coherence and efficiency.

The Commission and its President

The description of the **role of the Commission** in Article **I-25** marks significant progress, as it emphasises the key function of political initiative of this institution. It has to be seen, however, whether the Commission and the new President of the European Council will cooperate, and not compete, in order to provide the Union with a sense of direction. The European Commission:

- promotes the general interest and takes appropriate initiatives to that end;
- ensures the application of the Constitution and of EU law, under the control of the ECJ;
- executes the budget and manages programmes;
- exercises coordinating, executive and management functions;
- ensures the EU external representation with the exception of CFSP;

- has the monopoly of legislative initiative, with limited exceptions;
- initiates the Union's annual and pluriannual programming.

The last point is extremely important. A year ago, the conclusions of the European Council in Seville envisaged a marginal position for the Commission in the elaboration of the EU work programme. The responsibility was allocated to successive Presidencies of the Council. The explicit attribution of the role of political initiative to the Commission, directed to achieving inter-institutional agreements, is essential to limit the damage caused by the establishment of team Presidencies in the Council.

Although the Commission has been granted wide-ranging powers on paper, it is by no means sure whether it will be in a position to apply them effectively and with the necessary authority. Arguably, the new provisions on the **size and composition of the College** will affect its efficiency and political credibility. According to Article **I-25**, the next Commission, appointed in 2004, will consist of 25 members, including the President. As of 1 November 2009, however, the College will comprise the President, the FM/Vice-President and 13 voting European Commissioners selected on the basis of a system of equal rotation between the Member States. These will be flanked by non-voting Commissioners from remaining Member States, who will not be part of the College.

First, enlarging the College to 25, including 10 Commissioners from new Member States will weaken the internal cohesion of the Commission. In a second stage, the size of the College will be (rightly) reduced, but on the basis of a system of equal rotation that challenges the limits of political credibility. Over a period of five years, at least two large Member States at a time would have a second-ranking Commissioner, with no voting rights. At the same time, Commissioners from, say, Estonia, Luxembourg and Malta might be part of the College. Whether those large countries that are excluded from the College will rely much on the Commission is to be seen. The ideal solution to the question of size and composition of the Commission would have been to leave the President free range to choose his Commissioners, and to determine their number irrespective of their nationality. Given the constraints of the actual political debate, however, it would have been preferable to include in the College *at least* one Commissioner per Member State, so as to meet the concerns of small countries, and leave to the President of the Commission sufficient leeway to select a limited number of Vice-Presidents responsible for the coordination of teams of colleagues, so as to satisfy political convenience.

With respect to the appointment of the new President of the European Council, it seems that the new procedure for appointing the **President of the Commission** falls short of what is required to boost his legitimacy and leadership. In fact, Article **I-26** provides that the European Council -

taking into account the results of European elections and after appropriate consultation - selects by QMV a candidate for President of the Commission and proposes him to the EP. The candidate must then be *elected* by the EP by a majority of its members. Decorative wording apart, it is clear that there is little innovation in comparison with the present procedure. The Convention has failed to establish a direct link between the results of European elections and the election of the President of the Commission by the EP. Although Article I-26 envisages that the European Council should take into account the elections to the EP, and consult before appointing a candidate for the President of the Commission, European voters will not be able to express their preference for a candidate, and the appointment of the President of the Commission will remain a rather distant process for the public. The powers of the President to guide the Commission and to distribute tasks therein are confirmed.

The 13 members of the College will be selected by the President-elect from a list consisting of three names, in which both genders shall be represented, suggested by each Member State. The President-elect, the 13 appointees and the FM/Vice-President, as well as the non-voting Commissioners, will then be submitted as a body to be approved by a vote in the EP.

The Foreign Minister

The new position of the Foreign Minister has been established in order to enhance synergy in foreign policy-making, and merge the current functions of Chris Patten, the External Relations Commissioner, and Javier Solana, the High Representative for CFSP: the FM will therefore be 'double-hatted'. The FM will have at his disposal the instruments, and budgetary resources, of the Commission, and will receive policy guidelines from the European Council and the Foreign Affairs Council to boost the performance of the Union in CFSP. At the same time, he will play an active role in initiating policy and will contribute to the development of foreign and security policy, as described in some detail by policy provisions in **Part III** of the Constitutional Treaty, **Title V**. The FM will also chair the Foreign Affairs Council to ensure the preparation and follow up to its decisions.

According to Article **I-27**, the FM will be appointed by the European Council, by QMV, with the agreement of the President of the Commission. In exercising his responsibilities within the Commission, he will be bound by Commission procedures, notably collegiality. This will not apply, of course, when conducting and managing CFSP in close cooperation with the Council, upon a mandate by Heads of States or Government or by the Foreign Ministers. Some argue that the 'double-hatting', and the different

style of policy-making that goes with it, could affect the Community method, where it applies, and thus weaken the Commission.

It should be noted that, within the Commission, the Foreign Minister will be responsible not only for handling external relations, but also for coordinating other aspects of the Union's external action, namely trade, development policy and, probably, enlargement. This is a sensitive point, because the FM/Vice-President would have wide-ranging powers over his colleagues and potentially threaten the authority of the President of the Commission and his colleagues in the whole external affairs domain. Much will depend on personal relationships.

The European Court of Justice

The Convention on the Future of Europe has substantially affected the role of the ECJ. Although the Court was not expressly considered by a Convention Working Group, an ad hoc 'discussion group' sought to redress this balance and some of the amendments directly related to the ECJ result from its discussions. However, because there are elements of the draft Constitution, which naturally involve the ECJ, there has been a certain lack of consistency in the provisions, which affect the ECJ.

The main articles governing the ECJ, in which substantial changes are to be found, are Article **I-28 (**governing institutional provisions) and Articles **III-254** to **III-285** (governing the details relevant to this institution). There are also various other articles, which call on the ECJ to adjudicate in certain highly political situations.

Role of the European Court

Article **I-28** first states that the ECJ is one institution, made up of three tiers; the European Court, the Court of First Instance (now renamed the High Court to reflect the fact that it hears the bulk of day-to-day cases) and the specialised courts, being the judicial panels set up under the Nice Treaty (expected to hear staff cases, intellectual property rights cases and other discrete matters).

However, Article **I-28** also re-defines the role of the ECJ, which is to '*ensure respect for the law in the interpretation and application of the Constitution.*' This moves away somewhat from the ECJ's original function of ensuring observance of the law. It is likely, however, that the distinction between '*respect*' and '*observance*' will make little difference in practice.

Obligation on Member States

Article **I-28** also contains a new provision requiring the Member States to '*provide rights of appeal sufficient to ensure effective legal protection in the field of Union law*'. This provision is unclear, as the Member States already have a strict obligation to ensure that their legal systems give full effect to Union law and provide appropriate judicial remedies for safeguarding Union rights. Referring to 'sufficient rights of appeal' risks confusion at best, or at worse reducing Member States' obligations under the Constitution.

Members of the Court

Article **I-28** also governs the Members of the Court. The most notable development here, apart from renewable mandates of six years, is the appointment process, which now includes the creation of an appointment panel for Judges and Advocates-General. While the benefits of such a panel is debatable (as it is impossible in practice to identify in advance whether a candidate will be a success or not) the provision may address concerns that ECJ judges are unaccountable. Article **III-258** sets out how the panel will be appointed and includes a role for the Parliament by allowing it to propose one out of the seven panel members (including possibly one of its own members or even a senior member of its Legal Service). The Council appoints the panel members and panel working methods. It is vital that ECJ Members retain their autonomy and independence but the appointments procedure might become politicised as the Parliament and the Council are often before the ECJ. Furthermore, the Constitution increases the possibility of politically charged cases being brought before the ECJ, so that an added political facet to the appointment of Judges is a real concern.

Improving Access to Justice

One of the most sensitive issues focused on is access for individuals to the ECJ (known as 'direct actions'). Under the old EC Treaty individuals could only challenge an EC provision in very limited circumstances and the ECJ tended to apply this principle in a very restricted manner. This created a serious gap in the enforcement of rights, which needed to be tackled in the light of the Union's increase impact on citizens and the new Charter of Fundamental Rights. Article **III-266(4)** has widened this to ensure that individuals can challenge Union measures if they are of direct

concern but without the restriction of requiring implementing measures. The new article gives a political signal that access to the ECJ will be easier but it will still be necessary now to see how the ECJ interprets the new conditions.

Independence of the European Court

Article **III-285** finally ensures that the ECJ Statute can be amended under the QMV procedure. This is a necessary development as it allows the ECJ to react more swiftly to changes in order to ensure an effective administration of justice, which is so important in the context of a Union of 25 Member States.

Politically Sensitive Cases

There are a number of new provisions, which allow the ECJ, if seized, to rule on delicate situations. These include:

- Article **III-3** and **III-338**: Derogation from the functioning of the internal market in the event of e.g. serious internal disturbance, war or the threat of war or the protection of security interests. Under Article **III-14**, the Commission or any Member State may take the matter before the ECJ, if they feel Article **III-13** or **III-338** have been improperly used.
- Article **III-204**: The ECJ can monitor compliance with the implementation of CFSP. The concept of 'monitoring' needs clearer definition, especially as regards the enforcement powers of the ECJ.
- **The Protocol on Subsidiary, Paragraph 7**: The ECJ has the jurisdiction to hear actions for infringement of the principle of subsidiarity.
- Article **III-232 (2)** and Article **III-248** allows the ECJ to dismiss the Ombudsman or a Commissioner if they no longer fulfil the conditions necessary to perform their duties or are guilty of serious misconduct or, under Article **III-246**, Commissioners that breach the obligations they have been charged with.

Qualified Majority Voting

Article **I-24** provides definitions of qualified majority, sets out the date from which provisions of this Article will take effect, states that the Presidents of both the Commission and European Council are excluded

from voting within the European Council, and introduces the so-called "passerelle" clause.

Determination of QMV

As defined in Article **I-24.1**, when the European Council or the Council takes decisions by QMV, such a majority shall consist of the majority of Member States, representing at least three-fifths of the Union's population. Under Article **I-24.2**, however, the required majority shall consist of two-thirds of the Member States, representing at least three-fifths of the population when the Constitution does not require the European Council or the Council of Ministers to act on the basis of a Commission proposal, or when the European Council or the Council of Ministers does not act on the initiative of the FM.

The determination of QMV in the draft Constitutional Treaty does, therefore, simplify the complex Nice Treaty formula, whereby a triple majority of 72 per cent of the weighted votes (in a Union of 25 Member States), the votes of the majority of Member States and votes representing 62 per cent of the Union's population are required for a Council decision. The Convention should have set the population threshold at 50 per cent. The proposals are, however, much better than the arrangements in the Nice Treaty.

The inclusion of a "super qualified majority" in Article **I-24.2** should be welcomed as it may help with the transition from unanimity voting in areas of particular political sensitivity. Part I of the text provides one example of "super qualified majority voting" in Article **I-58**, under which the Council of Ministers acts by a majority of four-fifths of its members when adopting a European decision determining that there is a clear risk of a serious breach by a Member State of the values mentioned in Article **I-2**.

Entry into Force of New Rules

The provisions of paragraphs 1 and 2 of Article **I-24**, which set out the definitions as detailed above, will take effect on 1 November 2009, after the EP elections have taken place. Previous drafts of the text had contained the possibility of the European Council deciding by QMV to prolong the interim arrangements as set out in the Protocol on the representation of citizens in the EP and the weighting of votes in the Council for a maximum of three years. This proposal was, however, removed from the final text presented to the Thessaloniki European Council.

"Passerelle" Clause

Under Article **24.4** Member States can decide by unanimity to move to QMV in areas where unanimity was previously required. While this is useful, the provision itself is restricted by unanimity, and thus may not be capable of facilitating real progress.

Extension of QMV

There have been numerous calls both inside and outside the Convention for QMV to become the general rule. While the new text has extended the application of QMV, unanimity is still required in numerous key policy areas. Thus it can be said that the draft Constitutional Treaty introduces significant quantitative changes but not qualitative ones.

Most notably, the Convention failed to extend QMV to Article **III-196** on decisions under Chapter II on CFSP, Article **I-17** on the flexibility clause (with respect to competences), Article **IV-6** on the procedure for revising the Treaty establishing the Constitution and Article **III-212** on common commercial policy as far as trade in services involving the movement of persons and the commercial aspects of international property. In Annex II is the list of provisions for which unanimity is still required (but it should be noted that the Convention will address Parts III and IV in July, and this list may therefore be subject to revision).

Also it remains to be seen what level of respect Member States' governments afford to the Convention's proposals on the extension of QMV during the IGC. It is well within the realms of possibility that some Member States will seek to reopen this debate at the time when, in the views of many, the real political fighting on this issue will take place.

The New Instruments and Procedures

The Instruments

The Convention has achieved considerable progress in cutting down the range of legal acts available to the Union when exercising its competences. The number of acts has been scaled back from 15 to six, and a sort of 'hierarchy of acts' has been introduced. Article **I-32** lists:

- **Legislative acts**: these include **European laws** (replacing current regulations) and **European framework laws** (replacing current directives). The former have general application, are binding in their entirety and are directly applicable in all Member States. The latter are binding, as to the result to be achieved, on the Member States to which they are addressed, but leave national authorities free to decide the forms and means to achieve that result.

- **Non-legislative acts**: these are **European regulations** and **European decisions**. Regulations can be binding in their entirety (like European laws) or binding as regards the results to be achieved (like European framework laws). However, regulations are implementing, not legislative, acts. Decisions are binding in their entirety and, if they specify those to whom they are addressed, they shall be binding only on them.

- **Non-binding acts: recommendations** and **opinions** are legal acts of the Union, but they have no binding force.

The final text of Part I does not include '**Organic Laws**', whose introduction was discussed by the Convention. Organic laws could have been used for decisions of particular relevance, for example the adoption of the multiannual financial framework or the amendment of some parts of the Treaty. Organic laws would have required a more cumbersome decision-making procedure, short of unanimity. Their exclusion from the new Constitutional Treaty, and the corresponding preservation of unanimity, is regrettable.

Non-legislative acts are described in further detail in Articles **I-35** and **I-36**. The former introduces a new category of delegated regulations, while the latter refers to implementing acts (regulations or decisions) and contains important indications of the allocation of executive powers. Finally, according to Article **I-34**, EU institutions can adopt regulations and decisions when the Constitution so provides. This is most notably the case for decisions adopted by the European Council and by the Council in the area of CFSP, as envisaged by Article **I-39**.

Delegated regulations are adopted by the Commission, when a legislative act so establishes, to supplement or amend certain non-essential elements of a law or framework law. The introduction of this new category of instruments matches the increasing requests to simplify EU legislation by avoiding too much detail and rigidity, and to focus on the core objectives and principles of the legislative act. The law or framework law must include definition of the objectives, content, scope and duration of the delegation. Article **I-35** makes it clear that the delegation would not cover the essential elements of a policy decision, and grants the EP and the

Council tight powers of control. Both branches of the legislative power can in fact decide to revoke the delegation or to object to the entry into force of the delegated regulation. Arguably, this new procedure might replace in due course the 'regulatory' procedure under the 'comitology' system, which was set up to monitor the implementing acts adopted by the Commission. The 'regulatory' procedure entails a call-back option for the Council, in case of disagreement among Member States on the Commission's proposals. This will be, however, superfluous, once the new procedure to adopt and monitor delegated regulations enters into force.

Article **I-36** states the principle that **implementing powers** belong, in principle, to Member States under national law. When required, however, legislative acts can confer implementing powers on the Commission or, in 'specific cases duly justified', to the Council. Also, Article **I-36** contains a reference to legislation establishing mechanisms for control over implementing acts of the Union by Member States – in other words, the 'comitology' framework mentioned above. This is progress with respect to the current system, which envisages unanimity in the Council and simple consultation of the EP for decisions on the system to monitor implementing acts.

The Procedures

The Convention has succeeded in simplifying decision-making procedures for the adoption of the legislative acts indicated above. The old co-decision procedure providing that the Council and the EP carry out legislative functions on an equal footing, is re-named '**ordinary legislative procedure**' and becomes the rule, while the so-called cooperation procedure disappears. The power of the EP is thereby boosted, as the EP will be able to approve or reject legislation, together with the Council, in about 35 new policy domains (the extent of these areas depends on further amendments of Part III in July).

The rule, however, allows for exceptions. The new procedure has been defined 'ordinary' while not excluding in clear terms the legislative nature of a limited range of acts which will be adopted, in specific cases, through **'special' procedures**, as envisaged in Article **I-33.2**. This provision refers to cases when an act is adopted by the Council with the participation of the Parliament, or vice-versa. The preservation of such exceptions is particularly disappointing, given the importance of the decisions that can still be adopted without fully-fledged parliamentary involvement. Special procedures entailing the 'consent' of the EP apply to decisions on own resources and on the multiannual financial framework. A simple consultation of the EP is required to adopt measures needed to combat discrimination, and other measures concerning the rights of EU citizens.

Mere consultation is also sufficient to enact legislation in the fields of police cooperation, company taxation and combating tax fraud.

Turning to the crucial question of the **legislative initiative**, the Commission has succeeded in preserving its monopoly, with the sole exception of Article **III-160**. This provision envisages the power of initiative of a quarter of the Member States, in parallel to the Commission's initiative, for acts in the fields of judicial cooperation in criminal matters and police cooperation. Given the frustrating experience of national initiatives in these policy areas over the last few years, where the cohesive input of the Commission has proven most desirable, it is unlikely that this exception will prove very relevant.

EU Competences and Subsidiary

The revision of the distribution of powers between the EU and Member States (the so-called delimitation of competences), together with the question of the application of the principle of subsidiarity, was at the core of the mandate received by the Convention. It was widely felt that the question 'who does what?' had to be addressed to make the system more transparent to citizens and to make decision-makers more accountable. This reflected growing unease with the perceived intrusion of the Union in the regulation of policy areas sensitive to national identity, from education to health.

The debate was also intimately linked to policy reform, since many argued that some aspects of EU policies should be transferred back to national authorities. Competition policy, state aid and agriculture were considered cases in point. At the same time, however, others stressed that the principle of subsidiarity, whereby action should be taken at the level of governance closest to the citizens, in so far as that is compatible with efficiency, works both ways. While it would not be appropriate for the Union to intervene on the detail of school texts in different countries, it is clear that collective security would be better ensured at the European level. Overall, it is safe to argue that much focus has been dedicated to limiting EU powers through a more precise delimitation of competences, while not much attention has been paid to the new competences that the Union should be granted to confront new challenges.

To a certain extent, the whole discussion is somewhat artificial and misleading. No delimitation of competences between the Union and Member States can convey a precise picture of who does what, for the simple reason that the national and European levels of governance are closely intertwined, and all competences are effectively shared. From a legal perspective, in Treaty terms, 'competence' actually means power to

legislate. In practice, however, no policy decision can be adopted and implemented without the cooperation of various levels of governance, from the European level down to the local. Legislative acts, moreover, are sometimes not the most relevant for citizens, as the case of EU funding programmes such as Erasmus shows. The allocation of entire policy areas to the Union or to national authorities in the name of simplicity, transparency and accountability can be a deceptive exercise, and might just lead to more confusion on the part of citizens. The difficulty met by the Convention in drafting relevant provisions, and the ambiguity of some of these, are the best evidence of the shortcomings of this approach.

Principles

Article **I-9** defines the principles that govern the distribution of competences. According to the principle of **conferral**, the Union exercises only those competences that are conferred upon it by Member States. Within these limits, the principles of **subsidiarity** and **proportionality** apply. Under the former, the Union shall act only if the objectives of the intended action cannot be sufficiently achieved by Member States. If action by the Union is deemed necessary, then, the principle of proportionality applies, whereby such action shall not exceed what is necessary to achieve the objectives of the Constitution. The principle of subsidiarity does not apply to the area of exclusive competences, where only the Union may legislate and adopt legally binding acts. In fact, unfortunately, the proper application of this principle is hampered well beyond the area of exclusive competences, as explained below in addressing individual provisions. The principle of proportionality, on the contrary, applies across the board.

Article **I-10** restates the principle of **primacy of EU law** over national law. The explicit introduction of this principle led to a strong British objection. This is hard to understand, since the supremacy of EU law is a long-established, and unchallenged, principle in the case law of the ECJ.

Categories of Competences

Article **I-11** describes the three main categories of competences: exclusive, shared and the new category of 'supporting, coordinating or complementary actions'. It also refers to the (unclear) scope of EU intervention in economic and employment policies on the one hand, and CFSP on the other. The following provisions include a more detailed account of the policy areas belonging to the various categories, and of the nature of EU action therein.

Exclusive Competences

Exclusive competences (where, as mentioned above, only the Union may legislate and adopt legally binding acts) include, according to Article **I-12**:

- competition rules necessary for the functioning of the internal market;
- monetary policy (for the members of the Eurozone);
- common commercial policy;
- customs Union; and
- the conservation of marine biological resources under the common fisheries policy.

The four freedoms (free movement of persons, goods, services and capital) do not technically constitute a policy area, and as such have been removed from the last version of this provision. Article **I-4**, however, states that these freedoms, together with the freedom of establishment, shall be guaranteed within and by the Union.

The Union shall also have exclusive competence for the conclusion of an international agreement when:

- its conclusion is provided for in a legislative act of the Union;
- it is necessary to enable the Union to exercise its competence internally; or
- the agreement affects an internal Union act.

This simply restates the case law of the ECJ.

Shared Competences

Under shared competences, both the Union and Member States have the power to legislate and adopt legally binding acts. According to Article **I-11**, however, Member States can only exercise their competences to the extent that the Union has not exercised, or has ceased to exercise, its own. The notion that the Union may cease to exercise its competences, thereby determining the repatriation of a policy area, remains however rather unclear and contested. The case of formal repeal of a piece of legislation, or of a 'sunset clause' attached to it, seems rather theoretical.

Article **I-13** defines shared competences by exclusion, i.e. the areas that are not listed under Article **I-12** and **I-16**. These notably include economic, employment and social policy, and CFSP, all subject to separate provisions as described below. Article **I-13**, however, contains a detailed list of residual policy areas too, which includes:

- Internal market;
- Area of freedom, security and justice;
- Agriculture and fisheries (excluding what is reserved to exclusive competences);
- Transport and trans-European networks;
- Energy (a new legal base has been introduced in Part III of the Constitutional Treaty)
- Social policy (but only for the aspects defined in Part III);
- Economic, social and territorial cohesion;
- Environment;
- Consumer protection; and
- Common safety concerns in public health matters (the area of public health is split between shared competences and supporting measures, which cover the protection and improvement of human health).

Article **I-13** separately refers to two broad policy domains, namely:

- Research, technological development and space (space is subject of a new legal base in Part III); and
- Development cooperation and humanitarian aid.

These policies have in common that, unlike what is normally envisaged in the sphere of shared competences, the exercise of Union's competences does not prevent Member States from exercising theirs. This is quite clear: fortunately, Member States continue to provide humanitarian aid while supporting relevant EU programmes!

The ambiguous and rather restrictive wording of Article **I-14** has raised much controversy in the Convention. Leaving aside terminological quarrels, this reflects a basic political disagreement on the role that the Union should play in the fields of economic, employment and social policies. Overall, EU intervention is clearly limited to coordination (which excludes, for example, harmonisation): this is an implicit exception to the full application of the principle of subsidiarity.

This principle is most blatantly disregarded in the crucial area of CFSP, the subject of Article **I-15**. The nature and extent of EU intervention is not explained in this provision, which seems mainly dedicated to trying to prevent Member States' abuses than to defining the scope for EU action.

This is also telling evidence of deeper political divergence on what a CFSP actually entails.

Supporting Action

The introduction of areas of supporting, coordinating or complementary action is one of the main innovations brought by the Convention. Unfortunately, when confronted with the need for more, not less, cooperation between various levels of governance, this seems a step backwards. Article **I-16** has been included in the Constitutional Treaty because of the strong pressure, mainly by the German Länder but also from some small countries like Ireland and Malta, to ring-fence the competences of the Union in policy domains particularly close to regional or national sensitivities. And, it should be added, to the powers and budgets of regional authorities. Policy areas concerned include:

- industry;
- protection and improvement of human health;
- education, vocational training, youth and sport;
- culture; and
- civil protection (covered by a new legal base in Part III of the Constitutional Treaty).

Arguably, it would have been preferable to allow for the full application of the principle of subsidiarity in these domains, following an inclusive dialogue between all the levels of governance involved on the various measures to be adopted. A logic of separation, however, prevailed, whereby the 'legally binding acts' adopted by the Union cannot entail 'harmonisation' of Member States' laws or regulations.

This sentence carries serious implications, but is very ambiguous. The exclusion of 'harmonisation' suggests that the Union could enact legislation in these policy areas, short of harmonising national laws. The use of the wording 'legally binding acts' and not 'legislative acts', which are envisaged in Article **11.2** on shared competences, however, might entail that EU legislation is excluded from these domains *tout court*. This would represent an even more drastic change. The commentary of the Praesidium on this provision seems to confirm the latter interpretation, since it states repeatedly that legislative competence in these areas lies with the Member States. At the same time, relevant provisions in Part III of the Constitutional Treaty envisage that the Union can adopt legislative acts, explicitly including not only framework laws but also laws, in policy areas included in the category of supporting action. Clarification is essential, since these policy fields are among those that touch citizens' lives more directly, on a daily basis.

The Application of the Principles of Subsidiary and Proportionality

The application of the principles of subsidiarity and proportionality is subject to a new monitoring system described in a **Protocol** attached to the Constitutional Treaty. The Protocol outlines a complicated mechanism, which, while envisaging a further level of democratic scrutiny by national parliaments, does not contribute to the simplification of decision-making, and might on the contrary lead to conflicts and blockages. The process includes five main steps:

- Before proposing legislative acts, the Commission shall consult widely taking into account, where appropriate, the regional and local dimensions of the action envisaged. The Commission shall, moreover, justify its proposal with regard to the principles of subsidiarity and proportionality, and include some assessment of the proposal's financial impact.

- The Commission shall send its proposals to national parliaments at the same time as to the EP. The EP and the Council shall also send their legislative resolutions and common positions to national parliaments.

- Any national parliament or chamber of a national parliament may, within six weeks from the transmission of the proposal, send the Presidents of the EP, Council and Commission a reasoned opinion stating why it considers that the proposal does not comply with the principle of subsidiarity. The EP, the Council and the Commission shall take account of this opinion.

- Unicameral parliaments have two votes. Each chamber of bicameral parliaments has one vote. Where reasoned opinions represent at least one third of the votes allocated to national parliaments and their chambers, the Commission shall review its proposal, and then decide whether to maintain, amend or withdraw it.

- If not satisfied with the final legislative act, national parliaments, individual chambers of bicameral parliaments or the Committee of the Regions may bring action to the ECJ on grounds of infringement of the principle of subsidiarity.

It is easy to see the potential for misuse of these new provisions, in particular in bicameral systems where the majority in one of the chambers is in opposition to the national government. It would have been much

better to prevent the intrusion of domestic political conflicts at the EU level of decision-making, and recommend appropriate mechanisms to ensure that national parliaments are able to effectively scrutinise the positions of their government in the Council. From this standpoint, it should be remembered that the many of Commission's legislative proposals actually originate from a request by Member States.

General and Final provisions

The Union that will emerge from the Constitutional Treaty will be very different from the present one. The Constitutional Treaty will abolish the European Community and the European Union, only to recreate a new "European Union" with a single legal personality and a unified set of legal instruments.

Convention debates had led to a rather conservative approach as regards entry into force of the Treaty and revision, with unanimous ratification maintained, combined with two major innovations: the repeal of the previous Treaties and the introduction of the Convention for the revision of the future Constitutional Treaty.

A brand-new "Treaty establishing the Constitution of the European Union"

Article **IV-1** repeals the former European Treaties from the date of entry into force of the Treaty establishing the Constitution. This is significant as it will mark the determination to relaunch European integration. Beyond the symbolism of repealing even the Treaty of Rome, there are also a number of (not yet resolved) legal implications. Firstly, according to international law, a treaty can only be repealed by unanimous agreement between the contracting parties. This unanimity requirement is nothing new since it has consistently applied to previous (less important) Treaty revisions. In a Union of 25 Member States, it may, however, be a serious hurdle if the Constitutional Treaty enters into force. It also highlights the fact that the previous Treaties would remain in force even if the vast majority of Member States decided to adopt the Constitutional Treaty for themselves but a small minority rejected it. Solving this conflict would be both a political and legal challenge.

Secondly, Article **IV-4** clearly states that "*the acts and treaties which gave, supplemented or amended them* [the Treaty establishing the European Community and the Treaty on European Union] *and are listed in the Protocol annexed to the Treaty establishing the Constitution shall be repealed*". While this is at first sight only the logical consequence of the

rupture introduced by the repeal of the basic Treaties, how exactly this will be done is unclear. The Convention has not tackled this issue at all. In at least one case (Article **I-51** on the status of churches and non-confessional organisations), the Convention has restated a provision formerly enshrined in a declaration attached to a Treaty. However, the screening of all protocols and declarations ever adopted is a daunting task, which, arguably, should have been entrusted to the Convention itself. Drafting a list of the legal acts to be repealed will now put a considerable workload on the IGC. It may also reopen conflicts that had been buried for a long time and the number of protocols eventually retained may further burden the constitutional text, which is already much less citizen-friendly than what would be desirable.

The repeal of the previous treaties also raises questions of legal continuity, which are addressed in Article **IV-2**. Of course, the provisions of the acts adopted by virtue of previous treaties remain in force but a protocol is needed to lay down more specifically how acts that would be contrary to the Constitutional Treaty should be treated. This technical and legal issue may be time-consuming if it is to be resolved while safeguarding legal certainty for citizens and economic operators.

The Convention as the Standard Method of Revision

On this point, the Convention has clearly shown that it is (rightly) happy with itself. In spite of inevitable shortcomings, almost everybody would agree that the Convention method is a much more democratic way to prepare an IGC than the usual diplomatic path. It is therefore welcome that Article **IV-6** enshrines the Convention in the Constitutional Treaty as the standard method of revision.

However, there are a number of points on which the Convention should have been more ambitious – and also more precise. There is, for instance, no reason for not specifying the figures for the representatives of the various constituencies. Similarly, it is unclear why the observers (social partners, Ombudsman, Committee of the Regions and Economic and Social Committee in the current Convention) are not mentioned.

It seems wise to allow the European Council "*not to convene the Convention should this not be justified by the extent of the proposed amendments*". However, in order to avoid any abuse of this exclusion by the European Council, there should be a number of safeguards: the decision should be taken by qualified, not simple, majority and should require the approval of the European Parliament and the Commission, or, at the very least, the consultation of these two institutions.

The Convention proposal also marks a step forward by extending to the EP the right to submit revision proposals to the Council, which was previously, limited to the Commission and individual Member States. This is a further improvement of the Parliament's status but, unfortunately, it is not matched by a procedure giving it a right of assent on the final amendment proposal.

Entry into Force and Revision: Stuck with Unanimity

As hinted at above, it seems extremely difficult to circumvent unanimous ratification for the entry into force of the Constitutional Treaty. The Convention here has been timid but this is understandable given the sensitivity of the matter. Some government representatives, notably Peter Hain for the UK, have been adamant that no other solution than unanimous ratification should ever be considered – be it for the entry into force or for ratification. Under these circumstances, the Convention's proposal to attach a declaration to the Final Act of signature of the Constitutional Treaty was probably the most that could have been achieved. This declaration states that, "*if, two years after the signature of the Treaty establishing the Constitution, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council*". The two-year period is probably too long and it is unclear which action the European Council is supposed to take as a consequence, but this can be seen as a recognition of the serious problems created by insisting on unanimity in the ratification procedure.

While legal and political reservations are understandable when it comes to avoiding unanimity for the entry into force of the Constitutional Treaty, the case for future amendments is much less strong. Some Convention members had proposed linking entry into force to the new provision on withdrawal from the Union laid down in Article **I-59**. According to this solution, a Member State that cannot agree with the final Constitutional Treaty should agree to withdraw and to negotiate a new basis for its relationship with the Union. Member States are unlikely to agree, but this mechanism could be used in the revision procedure. In a Union of 25 Member States (and growing), unanimity makes any constitutional change almost impossible. An alternative solution would be a very high threshold, e.g. ratification by four-fifths of the Member States representing at least four-fifths of the population, or even by five-sixths of the Member States representing at least five-sixths of the population. However, if the Convention was not bold enough to propose this crucial move in spite of the compelling arguments in its favour, the IGC is unlikely to take such steps. In effect, this would amount to wiping out unanimity across policies since it would not make sense to maintain any decision by unanimity if it

were possible to overcome it through a less-than-unanimous constitutional change.

An alternate, more realistic model, would suggest that at least some provisions should be subject to ratification by an enhanced double majority of Member States or to unanimity in the European Council but without ratification. This could be applied to Part III – or to Part III only as far as transfers of competences are excluded. A more cumbersome way, but more likely to meet the approval of Member States, would be to screen the Constitutional Treaty article by article and to single out those which might be amended through a "lighter" procedure than unanimous ratification.

The Charter of Fundamental Rights

The body of the Charter of Fundamental Rights has been integrated as Part II of the Constitution. A general provision on fundamental rights, which recognises the Charter as an integral part of the Constitution and which also recommends accession to the European Convention of Human Rights, is inserted in Article **I-7**. Other notable developments include the fact that the Charter now extends to the Union bodies and agencies and that a series of new horizontal clauses aim to clarify the scope of the Charter. The preamble now includes a reference to the Charter Explanatory Notes.

The main points can be summarised as follows:

A Legally Binding Charter

The Charter is incorporated into the body of the Constitution and becomes one of its building blocks. This solution gives visibility to the Charter and sends a strong message to citizens as to the importance, which the Union attributes to fundamental rights.

The Political Compromise

The content of the Charter has not been re-opened and the text reproduces the wording of the Charter as proclaimed by the European Council in Nice 2000. However some amendments of the Charter's horizontal clauses and some adaptations of a purely technical nature have been included.

The only case of amendment of the substance of a right is in Article **II-42** on the *right of access to documents*, which has been extended to cover not

only EP, Commission and Council documents, but also institutions, bodies and agencies of the Union.

Duplication of Rights in the Constitution and the Charter

*Citizens' rights (***Title V of the Charter**) and the *principle of non-discrimination on the basis of nationality* (Article **II-21.2***)* are both mentioned in Part I, Title II on Fundamental Rights and Citizenship of the Union (Articles **I-4.2** and **I-8)**. The explanation given by the Praesidium is that these rights are special to the Union and by definition cannot be guaranteed at national level.

*Access to documents (*Article **II-42**) and *protection of personal data* (Article **II-8**) are also repeated in Part I in Title VI, on the democratic life of the Union (Articles **I-49)** and Article **I-50**). The explanation is that these are key components of the democratic life of the Union and need to be restated. They are also substantive fundamental rights and are therefore included in the Charter.

The need to keep these provisions in Part I of the Constitution is questionable given that duplication could generate considerable confusion.

The "extended" Horizontal Clauses

The general provisions in the Charter (also known as 'horizontal clauses'), which aimed to clarify its scope, were vital in order to achieve agreement on the original text. As with the preamble, it was clear that these provisions had to be maintained. However, some adjustments of the horizontal provisions of the Charter have been incorporated in order to enhance legal certainty and clarity on some of the more difficult questions. The true benefit of these provisions is questionable since most of them appear to repeat what is already established in the Charter text.

A different question is the effect of new Article **II-52.5** that seeks to firmly establish a distinction between 'rights' and 'principles', in order to prevent certain provision from creating directly enforceable rights. Instead of an obligation to implement principles, the new provision merely creates a possibility for implementation: "*The provisions of this Charter which contain principles may be implemented by legislative acts…*"

The incorporation of these provisions was vital in order to achieve consensus within the Convention to give legal value to the Charter.

The new horizontal clauses are the following:

- Article **II-51.1**. The Charter respects the limits of the powers of the Union as conferred by other parts of the Treaty.
- Article **II-51.2**. Restates that the Charter does not extend the scope of application of Union Law beyond the powers of the Union.
- Article **II-52.4**. States that when the Charter recognizes rights resulting from the constitutional traditions of Member States, those rights must be interpreted in harmony with those traditions.
- Article **II-52.5**. Distinguishes between rights and principles, limiting certain provisions from creating directly enforceable rights.
- Article **II-52.6**. States that full account should be taken of national laws and practices.

There are also several developments not directly related to the Charter text which should be noted:

Improving Access to Justice

The new Article **III-266.4** ensures that the conditions of access to justice for individuals are less strict than the old Article 230.4 TEC. The ECJ and the Court of First Instance applied the old Article 230.4 in a restricted manner. The new article sends a political signal that access is wider and expressly gives individuals the right to challenge EU measures which do not require implementing measures.

Accession to the European Convention on Human Rights

The EU's accession to the ECHR is addressed by the introduction of a constitutional provision in Article **I -7.2**, which states that the Union *shall seek* accession to the ECHR. The provision was amended from *may accede* to a determined sentiment requiring positive action by the Union.

The Praesidium Explanatory Notes on the Charter

The Charter Working Group of the Convention on the Future of Europe has praised the Praesidium Explanatory Notes by the Convention, which drafted the Charter on Fundamental Rights between 1999 and 2000, as an important tool for the interpretation of the Charter's provisions, particularly on the points that resulted from compromise.

The Working Group stressed the importance of the document, as a useful tool in clarifying the Charter. The Explanatory Notes should, therefore, be

given greater prominence and widely publicised, although it acknowledged that the Notes had no formal legal value.

The Explanatory Notes unexpectedly gained in importance, when, in the final phases of constitutional drafting, a reference to it was added to the preamble of the Charter: "*In this context the Charter will be interpreted by the Courts of the Union and the Member States with due regard to the explanations prepared at the instigation of the Praesidium of the Convention which drafted the Charter".*

While the overall effect of this is somewhat unclear, it enhances the Explanatory Statement's value to a greater extent than may have been strictly necessary, notably by binding the European courts to interpreting the Charter in practice. It therefore provides a control mechanism to limit the potentially dynamic effect of the Charter and to restrict it. It also reinforces the distinction between rights (subject to legal judgement and therefore legally enforceable) and principles (statement of political aspiration), which many legal commentators argue is unnatural and counter-productive. The rational for this step appears to be to reduce the legal value of the Charter, something that the British Government has constantly championed.

Membership and Suspension of Membership Rights

The inclusion of the Charter in the Constitution supplements in detail the Union's commitment to fundamental rights, under Article **I-7**. Importantly, it adds an additional and very tangible element to the conditions of eligibility for accession to the Union in Article **I-57**, which requires respect for the Union's values as set out in Article **I-2**, and the suspension for risk of or actual serious breach of these values as set out in Article **I-58**. The Charter provides the measuring stick for any such infringement and accession criteria.

The remarkable consensus achieved within the Charter Working Group has permitted its evolution from a political declaration to a legally binding instrument and an integral part of the European Constitution. One of the key areas, which the Member States are expected to debate during the forthcoming IGC, will be the more contentious aspects of the Charter, notably social and employment rights as well as the distinction between rights and principles.

External Affairs

The various articles on external affairs are grouped together under Title V and run to 22 pages. Bringing the articles together improves transparency but each policy area is subject to different rules and instruments, which impedes transparency. Overall, the external affairs articles are an improvement on the existing situation but do not provide a sufficiently solid base for the Union to meet the growing array of challenges it faces in the global arena. There will be a new double-hatted EU Foreign Minister but important decisions will still be taken by consensus. In a Union of 25 plus this is a recipe for inaction. On the defence front, there are complicated provisions for enhanced or structured cooperation. There is a mutual solidarity clause to cover terrorist attacks and a mutual defence clause for some Member States. The main impetus for further integration may come from the draft articles allowing the Eurozone countries to have their own external representation.

General Principles

The Union's guiding principles on external affairs are to reflect those underpinning its internal development, namely democracy, the rule of law and human rights. The aims of external policy include strengthening multilateral cooperation (especially via the UN framework) and good global governance, sustainable development, free trade, conflict prevention and eradicating poverty. In short: a large helping of motherhood and apple pie.

The elusive goal of consistency is to be promoted by closer cooperation between the Council and Commission. Certainly the creation of a new double-hatted EU Foreign Minister should help promote greater consistency.

Defining Interests and Objectives

The European Council is given the task of defining the strategic interests and objectives of the EU and to provide regular threat assessments. Common strategies and joint actions disappear to be replaced by European Council decisions that basically amount to the same thing. The Council, acting unanimously, decides on the objectives, means, scope and duration of a decision. The President of the European Council may call emergency meetings if the international situation so requires. As before, Member States are requested to support the CFSP in a spirit of loyalty and mutual solidarity and refrain from any action, which is contrary to the interests of the Union or likely to impair its effectiveness in international relations.

The Council and the EU Foreign Minister are supposed to ensure that these principles are complied with. The Iraq crisis revealed the limits of loyalty and mutual solidarity. Time will tell if the lessons of the Iraq crisis have been learned.

EU Foreign Minister

Against the advice of both Javier Solana and Chris Patten, who argued that the present system, although not perfect, worked well, the Convention agreed to establish a new position of EU Foreign Minister with two hats. S/he will be both a Vice President of the Commission and responsible to the Council. S/he will chair the meetings of foreign ministers, enjoy a right of initiative (either alone or with the support of the Commission) and be responsible for implementing EU decisions. In addition, s/he will represent the Union to the outside world, conduct political dialogues with third countries and speak for the Union in international organisations (including the UNSC when there is a common EU position) and at international conferences on CFSP issues. It is quite a job description. S/he will have recourse to a merged external affairs bureaucracy in Brussels and the large network of Commission delegations abroad possibly re-organised into a nascent EU diplomatic service. These will now be EU delegations and their heads will speak on behalf of the Union where there is an agreed position. There is stronger encouragement for embassies and delegations of Member States in third countries and in international organisations to intensify their cooperation by providing joint assessments and by formulating a common approach. This could lead to the development of an EU diplomatic service.

Decisions

Common Strategies and Joint Actions are replaced by Decisions that commit Member States to follow the agreed EU policy. Any Member State or the new Foreign Minister may submit proposals to the Council. Unanimity is the general rule but abstention is possible. If more than a third of weighted votes are cast in favour of abstaining the proposal fails. QMV is only foreseen for implementing decisions, for the appointment of special representatives and when adopting a decision on the initiative of the EU Foreign Minister further to a request from the European Council. The European Council may expand the scope of QMV – by unanimous decision – but not to cover defence matters. This is a principal weakness of the new Treaty. With 25 plus Member States, the retention of the veto in CFSP is a recipe for weakness and inaction.

European Parliament

Strangely, MEPs did not push for a greater role for the EP in CFSP/ESDP. The EU Foreign Minister is obliged to consult and inform the EP on the main aspects and basic choices of CFSP/ESDP. The EP may also receive briefings from EU Special Representatives on CFSP e.g. Moratinos on the Middle East. Twice a year there will be a debate on the implementation of CFSP/ESDP. It would have been easy to improve the parliamentary oversight. For example, the twice-yearly debates should also take place in national parliaments at roughly the same time, so that there could be a genuinely pan-European debate on CFSP.

Political and Security Committee

The PSC is to monitor the international situation, provide input, political control and strategic direction of crisis management operations. The Council may delegate additional powers to the PSC.

Defence

The Petersberg Tasks (peacekeeping, peace enforcement and support for humanitarian operations) are extended to cover joint disarmament operations, military advice and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism. The Council may ask a group of Member States "with the necessary capability and desire" to undertake certain tasks on behalf of the Union. Those Member States with high military capabilities are permitted to enter into structured cooperation and accept more binding commitments. There is a new mutual solidarity clause in case of terrorism and natural disaster. There is also provision for a mutual defence clause (basically taking over the WEU commitments), which would be open to all. The text stresses that this would not affect relations some Member States have with NATO.

European Armaments Agency

A European Armaments, Research and Military Capabilities Agency is to be established which will monitor the capability commitments of Member States, promote harmonisation of procurement, multilateral projects, defence technological research and identify ways to ensure more effective military expenditure. The Council can decide by QMV on its statute, seat and operating rules.

Finance

All expenditure except for military operations will be charged to the EU budget. Military operations will use the gross national product scale. The EU foreign ministers will also have available a start-up fund for preparatory tasks related to crisis management. The Council is to decide by QMV the size of the fund, the procedures for its operation and financial control mechanisms.

Trade Policy

The veto remains as regards trade in services involving movement of persons and the commercial aspects of intellectual property

Development Policy

The main long-term aim of development policy is poverty eradication. Union and Member States' policies are to be complementary and mutually reinforcing. To that end they shall consult and coordinate their policies. The Union shall take account of the objectives of development cooperation in other policies that it implements.

Economic/Financial/Technical Assistance

Policies in these areas should also be consistent with the Union's development policy. Decisions on urgent financial assistance may be taken by QMV. The rights of Member States in international bodies are not affected by any agreements signed by the Union.

Humanitarian Assistance

Humanitarian assistance is to be carried out under the principles of impartiality and non-discrimination. A European Voluntary Humanitarian Aid Corps is to be established with the EP and Council determining its rules and operation. It might have been more appropriate to create voluntary corps for development assistance rather than the more complicated and often dangerous humanitarian assistance.

Restrictive Measures (Sanctions)

Decisions are to be taken by QMV following a joint proposal from the EU Foreign Minister and Commission.

International Agreements

With its new legal personality the EU can now sign international agreements. The Council decides who should be the lead negotiator. There are complicated rules for possible agreements regarding the exchange rate of the euro. Potentially the most significant development is the proposal that the Eurozone countries may establish their own external representation. This could lead to an eventual EU seat in the IMF and other bodies.

International Organisations

Specific mention is made of the UN, Council of Europe, OSCE, OECD. It would appear that these organisations are granted a special status.

Union Delegations

Union delegations to third countries and to international organisations shall represent the Union. This amounts to an upgrading of the existing Commission delegations.

The new articles represent a cautious approach to external affairs. There is still no sign of the Members States being willing to share sovereignty in this sensitive area. It remains to be seen whether the very negative impact of the Iraq crisis on EU solidarity may in due course have a positive outcome. Even more important than structures and treaty articles are political will and leadership, Mr. Solana has shown remarkable powers of initiative and leadership despite having a virtually non-existent treaty basis for his activity. If Joschka Fischer, the current favourite, becomes the first EU Foreign Minister, his personality, style and experience would make him a formidable operator. In the end, however, the Member States have to demonstrate the political will to work together if the Union is to achieve its ambitions.

Justice and Home Affairs

The strong public demand for progress in this area is at the origin of the far-reaching reforms in JHA. Significant progress has been made in the JHA articles since the third pillar disappears, the same legal instruments apply to all policies, QMV is extended to a wide range of policies, judicial control is improved and new legal bases are established that bring simplicity and clarity. Relevant provisions include Article **I-41**, on *Specific provisions for implementing the area of Freedom, Security and Justice* and 21 articles in Chapter IV of Part III, called Area of Freedom, Security and Justice. These are divided into five Sections: Section 1 the *General provisions*, Section 2 on *Policies on border checks, asylum and immigration*; Section 3 on *Judicial cooperation in Civil matters*; Section 4 on *Judicial Cooperation in Criminal matters;* and Section 5 on *Police Cooperation*.

Key Reforms

The main points are as follows:

- Abolition of the pillar structure. The provisions covering JHA – the so-called third pillar – are brought under a common legal framework while special arrangements for some policy areas are maintained.

- Application of the same legal instruments to all policy issues covered by JHA should lead to simplicity and clarity.

- Recognition of the principle of mutual recognition as the basis for judicial cooperation in civil and penal matters.

- Enhanced accountability of EU decision-makers to national parliaments.

- Progress in monitoring implementation of EU law in JHA.

- Extension of the general system of jurisdiction of the ECJ to the area of freedom, security and justice while including an exception as regards the maintenance of law and order and the safeguard of public security, for judicial cooperation in criminal matters and police cooperation.

- Reinforcement of operational cooperation through the creation of a standing committee to be set up within the Council.

- The application of QMV and co-decision becomes the rule. Unanimity is still applied in specifically defined and limited circumstances.

    - QMV and co-decision for legislation on asylum and immigration

    - QMV for all aspects of judicial cooperation in civil matters with the exception of family law.

    - QMV and co-decision will be used for crimes of a serious nature and those with trans-border dimension.

- Approximation of procedures for crimes with a cross border dimension.

- Establishment of a legal basis to give effect to the principle of solidarity when adopting and implementing policies on border control, asylum and immigration.

- Strengthening operational cooperation. This involves redrafting the legal basis for Europol and Eurojust, including operational power for Europol.

Legal Instruments

There has been a strong consensus for a simplification of procedures. The cumbersome and mixed third pillar instruments are abandoned. The new articles establish EU laws and EU framework laws, with direct effect, as the legal instruments that will apply to the whole area of JHA. The Conventions disappear and are replaced by standard Union instruments.

Majority Voting versus Unanimity

The legislative procedure, becomes the general rule for most areas covered by the AFSJ. There are almost no exceptions when dealing with border checks, asylum and immigration. The same applies when dealing with Eurojust and Europol. However there are some exceptions, particularly for sensitive areas where unanimity continues to apply, namely:

- Article **III-165.3**. Judicial cooperation in civil matters in those aspects of family law with cross-border implications, including parental responsibility.

- Article **III-166.2.d**. Approximation of those elements of criminal procedure not listed in article 166.
- Article **III-167.1**. Identification of other relevant areas which are not listed in this article and in which it would be necessary to establish minimum rules concerning the definition of criminal offences and sanctions.
- Article **III-170**. Creation of European Public Prosecutor's office.
- Article **III-171.3**. Operational cooperation within the area of police cooperation.
- Article **III-173**. Instruments to carry out police operations on the territory of another Member States.

In all these areas, unanimity will continue to be an impediment to achieving progress in an enlarged Union.

Right of initiative

The general rule is that the Commission should retain its monopoly on the right of initiative. However, this Chapter gives the right to initiate legislation to one quarter of the Member States in the areas covered by judicial cooperation in criminal matters and police cooperation. This is a vestige from the old pillar system. The right of initiative has been a highly problematic question, since it is considered by most experts that the Commission should have the sole right of initiative, as it has the main responsibility for articulating the common interests of Member States.

Control by the European Court of Justice

Judicial control has been greatly improved in this area and the general competence of the ECJ applies to the whole AFSJ. However, an exception establishes that the jurisdiction of the ECJ will not apply to reviewing the validity and proportionality of police action, nor action related to the maintenance of law and order, when such action is a matter of national law in the areas covered by judicial cooperation in criminal matters and police cooperation. This is another remnant of the old third pillar.

European Public Prosecutor

The controversy created in relation with this figure is reflected in the enabling clause, which outlines the possibility for the creation of a European Public Prosecutor within Eurojust, but does not entail any obligation to do so. Furthermore, unanimity applies to this article.

European Border Guard

The establishment of a common integrated management of external border control, and the ultimate objective of creating an EU Border Guard, were the subject of wide discussion and some controversy. The mention of a "gradual establishment of a integrated management of external border control" seems rather weak since it does not imply the creation of a common EU border guard as the ultimate objective.

Fight against crime

One of the most sensitive issues for Member States is judicial cooperation in criminal matters—the fight against crime. A first step has been to establish a rigid list of crimes for harmonisation of substantive criminal law at Union level. This list includes: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. The list should not have been exhaustive since organised crime and new criminal activities develop very quickly. In order to identify other relevant areas of crime, unanimity will apply. This approach is limited to the establishment of minimum rules, which are truly minimal. However, it is already an important step in the right direction.

European Standards for Procedural Rights

In order to facilitate mutual recognition and considering that minimum rules for sanctions and definitions will be established for several crimes, some standards at a European level for procedural rights will be established. There will be minimum rules concerning: mutual admissibility of evidence, rights of individuals in criminal proceedings and rights of victims of crime. For other specific aspects of criminal procedure unanimity will apply.

Position of Third Country Nationals

The provision on immigration now gives the possibility for measures to be taken that are aimed at supporting the integration of third country nationals (TCNs) legally residing in a Member State. However, it is regrettable that the mention of third country nationals is kept to 'fair treatment of third-country nationals', instead of a assuring a 'high level of rights protection'. A stronger commitment towards third countries would have been desirable in order to give TCNs the same rights as Member State nationals.

The External Dimension

Although the Convention was charged with the development of the entire external dimension of JHA, only the external aspect of asylum policy is highlighted through the incorporation of the concept of partnership and cooperation with third countries with a view to improving the management of migratory flows. The external dimension of the AFSJ should have also been stressed in other areas.

Economic governance

When the Convention convened a Working Group on economic governance, it was clear that it would have its work cut out for itself. In this area, the case for more integration is matter for debate between specialists and politicians alike. The Working Group chaired by Klaus Hänsch chose, rightly, to address economic governance in the broad sense, including tax issues. Unfortunately, it proved impossible to reach a consensus on significant amendments to be made to the current treaties.

However, towards the end of the Convention, the notion that economic aspects of economic and monetary union needed to be strengthened following the entry into force of the euro gained ground. The end result was modest, which is unsurprising given the degree of political sensitivity and division on these issues. However, the Union, and notably members of the Eurozone, will be better equipped to ensure the efficient coordination of Member States economic policies, even though some still believe that the proposed constitutional provisions hardly correspond to the challenges facing the world's second-largest (or, depending on the basis of calculations, largest) economy.

Economic and Employment Policy Coordination: a specific type of competence

The Constitutional Treaty organises for the first time policy areas according to the intensity of Union intervention but it has not been obvious in its choice of category for economic and employment policies. Certainly, they would not fall under the exclusive competence of the Union – nor, given that these policies form the "economic pillar of EMU", under "supporting, coordinating or complementary action". The Convention evaded the question by creating a specific type of competence in **Article I-14**: The coordination of economic and employment policies. Under the provisions of this article, the Union "*shall adopt measures to ensure*

coordination of the economic [and employment] *policies of the Member States, in particular by adopting broad guidelines for these policies"; "specific provisions shall apply to those Member States which have adopted the euro"; "the Union may adopt initiatives to ensure coordination of Member States' social policies"*. The wording used is weak. It would have been preferable to use the expression "the Union coordinates economic and employment policies of the Member States", even though this would be largely symbolic.

The Union's objectives, laid down in Article **I-3**, comprise "*a single market where competition is free and undistorted*" and a commitment to "*sustainable development based on balanced economic growth, a social market economy, highly competitive and aiming at full employment and social progress*". This long list waters down the message delivered to citizens but clearly enshrines in the Constitutional Treaty a vision of the Union that goes much beyond a mere market. The mention of the "*social market economy*", which had proved controversial in the working group was finally adopted, thus fulfilling the wish of many Social Democrats and Christian Democrats. The promotion of "*social justice*" and of "*economic, social and territorial cohesion*" also meet the expectations of those favouring a more caring, less market-oriented, Union.

Coordination Procedures better embedded in the Community Method

The coordination methods that lead notably to the adoption of the Broad Economic Policy Guidelines have not been radically overhauled. However, the Convention rightly felt that there was a need for greater authority to be granted to the Commission, as the guardian of the common European interest. At the crucial stage of the procedure against excessive deficits (Article **III-73 (6)**, currently Article 104 TEC), the Commission submits a "*proposal*", and not a "recommendation". The Council can only amend the Commission's text only unanimously, thus strengthening the hand of the Commission and the primacy of the European interest over the addition of national interests.

However, the enhancement of the Commission's role does not cover the BEPGs. In Article **III-68**, the Council still acts "*on a recommendation from the Commission*" and not, as suggested by a number of Convention members "*on a proposal of the Commission*".

The Specificity of the Eurozone

Although there was some considerable resistance from non-members of the Eurozone, the Convention eventually agreed to recognise the

specificity of the Eurozone-though not of a Eurozone Council-that would be able to take decisions autonomously from the Union's Council of Economic and Finance Ministers. Meetings of Eurozone Finance Ministers, which will remain informal, are regulated in a protocol that is referred to in Article **III-85b**.

Article **III-85c** tackles the crucial issue of the "*euro's place in the international monetary system*", specifying that members of the Eurozone shall "*coordinate their action among themselves and with the Commission with a view to adopting common positions within the competent international institutions and conferences*". On the basis of that coordination, "*the Council, on a proposal from the Commission, may adopt appropriate measures to ensure unified representation within the international financial institutions and conferences*". While the wording ('may', 'appropriate measures') is still weak and the role of the Commission in representing the Eurozone externally is not explicitly recognised, these provisions nonetheless indicate a significant step forward.

No Progress on Tax Harmonisation

In an internal market with a single currency, competitive pressure on Member State tax revenues increases, to the extent that it may threaten the provision of public goods, including social security and infrastructures. This is the main rationale used by the advocates of tax harmonisation, who believe it should be decided by QMV instead of unanimity. Others underline that the harmonisation of the basic elements of corporate taxes could be a win-win solution, with a massive simplification for companies and Member States, less tax evasion and a better functioning internal market. However, confronted with the staunch opposition of the United Kingdom, Ireland and some new Member States, the Convention has failed to suggest any progress on "internal-market related taxes", an area where intervention at EU level would be fully justified.

EU Finances

EU finances have always been a sensitive issue. This is shown by the existing budgetary rules of the Union, which have traditionally been removed from standard democratic procedures. Among the peculiarities of the system are: the primacy of financial perspectives, a multi-annual framework laid down in an inter-institutional agreement not mentioned in the basic Treaties; the division of expenditures between "compulsory" (in practice: agricultural) and "non-compulsory", with the European Parliament having no say on the former, i.e. on almost half of the budget;

the impossibility for the Union to run a deficit; financial means called 'own resources' that, for the largest part, are certainly not 'own' but rather contributions from Member States.

The Convention has undertaken a comprehensive overhaul of this framework, simplifying the procedure leading to the adoption of the annual budget and enshrining the financial perspectives, now called the "*multiannual financial framework*" (MFF) in the Constitutional Treaty. However, genuine financial autonomy through the possibility for the Union to levy real "*own resources*" will remain a distant prospect and the increased budgetary role of the EP may prove deceptive.

A Welcome Clarification of Medium-term Financial Planning

Until now, the financial perspectives, the document of reference for the Union finances over a period of seven years, was a merely political document resulting from an inter-institutional agreement. Article **I-54** establishes these guidelines as the MFF, which should "*determine the amounts of the annual ceilings for commitment appropriations by category of expenditures*". The MFF is laid down in a so-called "European law of the Council," but the Council needs the consent of the EP, acting by a majority of its component members. As it is currently the case, "*the annual budget of the Union shall comply with the multiannual financial framework*".

The primacy of the MFF is thus rightly established, together with some useful precisions. In Part III, Article **III-304** fixes a period of "*at least five years*" and specifies that the categories of expenditures for which annual ceilings are fixed should be "*few in number*". The latter provision is important to prevent the Council from micro-managing expenditures – and to safeguard the rights of the European Parliament over the annual budget. It also gives the Union a welcome flexibility in financial terms.

However, the adoption of the MFF is still subject to a number of democratic and efficiency flaws. The most striking is Paragraph 3 of Article **I-54**, which states that "*the Council shall act unanimously when adopting the first MFF following the entry into force of the Constitution*". The positive aspect is, of course, that the need for adopting the MFF by QMV is recognised and will be the standard procedure. But, there is no reason to delay the entry into force of qualified majority. Maintaining unanimity for the next round of financial planning (i.e. the MFF for 2007-2013) or even, if the Constitution enters into force only after the next financial framework has been adopted, for the period beyond 2013, is bound to cause a major political crisis. An enlarged Union needs efficiency now, not in the distant future.

The second disappointment relates to the role of the EP. A "*European law of the Council*" lays down the MFF, which, as many Convention members have said, is a contradiction in itself since, by definition, a law should follow the legislative procedure. In the particular case of the MFF, a procedure along the lines of the one used for the budget could have been devised to ensure a real democratic control by the EP. Its consent is too blunt a procedure to allow it to fully take part in the negotiations and seems to be in contradiction with Article **I-19**, which states that "*the European Parliament shall, jointly with the Council, enact legislation, and exercise the budgetary function*". However, calling the legal instrument for the MFF a "*European law*" may entail significant progress, thanks to Article **I-49** on the transparency of the proceedings of the Union's institutions, which provides that the Council shall meet in public *"when it is discussing and adopting a legislative proposal*", which is clearly the case for the MFF according to the provisions of Articles **I-33**.

Simplification of the Annual Budget

The Byzantine complexity of the existing budgetary procedure will be drastically reduced by the new provisions on the annual budget. The new system is much closer to the budgetary procedures usually applied at national level in bicameral systems. The complex rules governing the annual "*maximum rates of increase in relation to the expenditure of the same type*" (Article 272.9 TEC) is abolished and the adoption of the budget as whole is made less confrontational between the EP and the Council. If, after the first reading, the EP is in disagreement with the Council, a Conciliation Committee is convened, which brings the budgetary closer to the standard legislative procedure laid down in Article III-298 (currently Article 251 TEC on co-decision). In the absence of an agreement between Parliament and Council within 21 days, the Parliament may confirm its amendments, which are thus adopted. Alternatively, it may reject the whole text and ask for a new text. These two possibilities ensure that the Parliament has the last word.

Within the tight budgetary guidelines of the MFF, the EP is confirmed as the master of the annual budget. However, to exercise fully its prerogatives – i.e. when confirming its amendments against the position of the Council or when rejecting the budget as a whole – the Parliament needs to act through a majority of its component members and three-fifths of the votes cast. Given the composition of the Parliament and the possibly difficult task to create large alliances on sensitive subjects, this may prove a powerful constraint.

Another concern for the EP's actual budgetary powers lies in the fact that some expenditure may still be decided without its approval. The abolition of the distinction between compulsory and non-compulsory has been hailed as one of the major achievements of the Convention in the area of finances. However, the picture is much less clear in practice. Compulsory expenditures are concentrated in the agricultural sector. According to the new provisions of the Constitutional Treaty on agriculture, the Parliament will in future gain full legislative rights over this policy area. At the same time, Article **I-53.1** states that "*The Union shall provide itself with the means necessary to attain its objectives and carry through its policies*" while Article **III-315** reads "*the European Parliament, the Council and the Commission shall ensure that the financial means are made available to allow the Union to fulfil its legal obligations in respect of third parties*". The former article is too vague and general to be used in practice but the latter unambiguously defines legal rights for third parties. Hence, the EP could only rubberstamp expenditures incurred by other institutions that create legal obligations for third parties. Since Article **III-122.3** states that "*the Council (...) shall adopt the European regulations or decisions on fixing prices, levies, aid and quantitative limitations*" (regulations and decisions do not involve the European Parliament in any way), this provision could easily be used to perpetuate in practice the existence of compulsory expenditures.

Little Progress on 'Own Resources'

Article **I-53** restates Article 269 TEC: "*Without prejudice to other revenue, the Union's budget shall be financed wholly from its own resources*". Yet it is clear that, except for customs duties and agricultural levies, the share of which has progressively become minimal in the Union's revenue, the Union does not possess real own resources. All Member States have opposed the creation of a (however limited) power of taxation for the Union that would be democratically controlled by the EP. The instrument currently known as the "*own resources decision*" formally becomes a "*European law of the Council*", which will ensure that debates are held in public. But the heaviest possible decision-making procedure is maintained: the Council acts unanimously and the law has to be approved by all Member States according to their constitutional requirement. In practice however, this "law" is a treaty subject to national ratification and the European Parliament is still only consulted on the revenue side of the budget. As for all instances where unanimity is maintained, there are serious doubts that an enlarged Union will be able to take financial decisions on the basis of this rule – a problem further compounded by the blockages that may arise in any of the 25 (or more in future) ratification processes.

However, Article **I-53** may open a window of opportunity for the Parliament since "*detailed arrangements relating to the Union's resources*" shall be laid down in a Council law (by qualified majority) that requires the consent of the EP. Since this provision is new, it is unclear to what extent it will improve the transparency and democratic accountability of budgetary rules.

Member States' Reactions

"Consensus" in the Plenary

On 13 June 2003, at the last Convention plenary session, Valéry Giscard d'Estaing invited members of the Convention "to pronounce" on the final text of Parts I and II of the draft Constitutional Treaty. In response, the vast majority of government representatives welcomed the text for being both successful and historic. It appeared as if all previous disagreements between Member States had been washed away with the emotion of the day in question, as speaker after speaker united in their support for the final text. Giscard, himself, had noted that all Convention members were likely to favour some parts of the text more than others, and this point was borne out in comments both inside and outside the Convention.

Broad Support

Both France and Germany warmly greeted the final text with Joschka Fischer, the German Government Representative, calling the outcome a "historic achievement", with a successful balance struck between large and small Member States. He also welcomed the creation of a new post of EU Foreign Minister, which he described as "an advance". Germany, however, would have preferred a further extension of QMV to foreign policy, and may continue to pursue this as has been indicated by the German Chancellor, Gerhard Schröder. The French government was also happy with the outcome, but the issue of excluding culture from the common commercial policy remains of vital importance for France. This point was raised by Pascale Andréani, the alternate French government representative, during the final plenary of 11 to 13 June, when she stated that this issue could threaten French ratification of the text.

Gianfranco Fini, the Italian Government Representative, expressed his government's satisfaction with the outcome, while stressing the need to give momentum to the IGC that will begin under the Italian Presidency. In his view much progress had been achieved in reducing the democratic deficit, although he like others called for the extension of QMV. The

Dutch Government Representative, Gijs de Vries, also welcomed the significant progress that had been made, including strengthening the role of national parliaments and the EP. For the Belgian Government Representative, Louis Michel, the Convention had managed to achieve more than two or three IGCs, but he asked that the institutions ensure the efficiency of the Community method. Denmark and Ireland also responded positively, with the principle of equality between Member States being crucial in securing their support. Both countries, however, have suggested that there may be areas on which further work is required and issues which will need to be re-addressed at the IGC. The text has been greeted favourably by the Estonian and Latvian governments for the great compromise achieved. Alojz Peterle, of the Slovenian national parliament and representative of the candidate countries on the Praesidium, spoke on behalf of the candidate countries on 13 June, a day that he described as "one of the brightest days that Europe has ever seen". On behalf of the new Member States he embraced the idea of a European Union on the brink of becoming more democratic, transparent, effective and efficient and closer to the people.

Some Reservations

Spain welcomed the successful outcome of the Convention, but it was not unconditional. Speaking at the Convention plenary on 13 June, Ana Palacio, the Spanish government representative, stressed that her government had basic concerns with respect to the institutional provisions. The issue of QMV was also problematic, although Article I-54, which states that the Council will act by unanimity when adopting the first multiannual financial framework after the Constitution's entry into force, seemed to have appeased the Spanish government at least to some extent. Similarly, Danuta Hübner, the Polish Government Representative, stated that she was "happy to recommend" the draft Constitutional Treaty, but reiterated the position of the Polish government on QMV. Poland, along with Spain, had led the charge of 18 current and future Member States in their attempt to prevent the voting system put in place by the Nice Treaty from being replaced from 2009. This issue is likely to resurface in the IGC, as already indicated by the Polish Prime Minister Leszek Miller.

Both Finland and Portugal have given the text a less than enthusiastic reception. According to the Finnish Prime Minister Anneli Jäätteenmäki (who has just resigned) the draft Constitution Treaty does not reflect "a collective will of EU Member States". This statement appears to relate to the proposed reform of the Commission and the creation of a European Council President. Despite the fact that Hannes Farnleitner, the Austrian government representative, stated that the Convention had achieved a fantastic result, 95% of which was satisfactory, the creation of this new

position also looks likely to be an issue of concern for the Austrian Chancellor Wolfgang Schüssel. Likewise, Jean-Claude Juncker, Prime Minister of Luxembourg, remains unconvinced about the role of the European Council President.

British Prime Minister, Tony Blair, has deemed the draft text to be a "good basis for starting in the IGC", a view no doubt aided by the fact that unanimity has been maintained for taxation and foreign policy, and the inclusion of a reference to the explanatory notes in the preamble of the Part II at the eleventh hour of the last plenary. The UK does, however, have reservations on the passerelle clause in Article I-24.4, and areas of criminal law.

Views from the Commission and EP

Welcoming the progress made by the Convention with respect to the Union's new tasks and the institutional architecture, the Commission stated its belief that the Convention method should be used for all new constitutional changes. The Commission, however, drew attention to the shortcomings on important matters, such as the extension of QMV (including Treaty revision by a "reinforced majority" procedure), the institutional balance and clarification of the roles of the institutions, and economic governance and external representation of the euro. In the view of the Commission, much work remains to be done on Part III. Responding to the final text, Pat Cox, President of the EP, identified twelve key achievements of the Convention and stated that, in its first reactions, the EP had "broadly endorsed" the result. The President of the EP also noted the need for further work on Parts III and IV during first half of July.

From Convention to IGC

At the final plenary session on 13 June it fell to Henning Christophersen, the Danish Government Representative, to speak on behalf of the 28 government representatives in the absence of a representative from the Greek Presidency. He deemed the text to be an "unconditional success" because it was a fair compromise and very good basis for the IGC. The extent to which Member States' governments adhere to the Convention's proposals in the forthcoming IGC remains to be seen. Perhaps only then will the full extent of opinions on the Convention's output become apparent.

Conclusion

Giscard, following his Charlemagne prize last month, may now go down in history as a founding father of the new constitution. Despite much bitterness and divisions between large and small Member States' in recent months, he has succeeded in presenting a draft Treaty to the European Council based on a broad consensus among the 105 Convention members who also had one eye on history. The reforms agreed by the Convention have failed to match the critical internal and external challenges faced by the Union, but this failure is not primarily institutional and reflects the lack of political will by the Member States. Given the lack of a shared vision of the future of Europe, the draft probably represents the maximum currently obtainable. Considering the views of the government representatives in the Convention, it is doubtful whether the IGC will improve the texts from an integrationist perspective. It is, therefore, most unfortunate that the conclusions of the European Council do not state in unmistakable terms that the draft Constitutional Treaty is a coherent text, which should be respected as an overall package by the IGC.

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ANNEX I : Weighted votes in the Council (until 2009) and seats in the Europan Parliament

Member State	Votes in the Council	Seats in the EP
Belgium	12	24
Czech Republic	12	24
Denmark	7	14
Germany	29	99
Estonia	4	6
Greece	12	24
Spain	27	54
France	29	78
Ireland	7	13
Italy	29	78
Cyprus	4	6
Latvia	4	9
Lithuania	7	13
Luxembourg	4	6
Hungary	12	24
Malta	3	5
Netherlands	13	27
Austria	10	18
Poland	27	54
Portugal	12	24
Slovenia	4	7
Slovakia	7	14
Finland	7	14
Sweden	10	19
United Kingdom	29	78
EU 25	321	732

ANNEX II : Provisions still requiring unanimity

Unless stated otherwise the draft articles appear in Part III of the new Constitutional Treaty.

OLP	*ordinary legislative procedure*
SLP	special legislative procedure (where a legislative act is adopted either by the Council or by the European Parliament)
NLA	*non legislative act*
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
MS	Member States
EP	European Parliament
ESC	Economic and Social Committee
ECB	European Central Bank
CoR	Committee of the Regions

Current TEC provisions

Current Art No	New Draft Art	Subject	New Procedure
13(1)	5(1)	Adoption of appropriate measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.	Council European law or framework law by unanimity after consulting EP
18(2)	6(2)	Measures concerning passports, identity cards, residence permits or any other such document and measures concerning social security or social protection.	Council European law or framework law adopted by unanimity
19(1)	7	Citizenship: right to vote and to stand as a candidate.	Council European law or framework law by unanimity after consulting EP

22	10	Extension of rights laid down in Article I-8	Council European law or framework law by unanimity after consent of EP, and entry into force only after approval by each MS in accordance with its constitutional requirements
End of 57(2)	43(3)	Adoption of measures on the movement of capital to or from third countries which constitute a step back in Union law as regards liberalisation.	Council European law or framework law by unanimity after consulting EP
65, 67	165(3)	Judicial cooperation in civil matters: measures concerning those aspects of family law with cross-border implications.	European framework law by the Council acting unanimously after consulting EP
65, 67	165(3)	Judicial cooperation in civil matters.	European Decision adopted by unanimity after consulting EP
72	130	Discrimination on grounds of nationality in field of transport.	Unanimous adoption by Council of a European law to grant a derogation.
88(2)	54(2)	Decisions on the compatibility with the internal market of State aid having regard to competition.	Council European decision by unanimity
94	61	Harmonisation of laws.	Council European law or framework law by unanimity after consulting EP and ESC
104(14)	73(13)	Replacing the Excessive Deficit Procedure Protocol	Council European law by unanimity after consulting EP and ECB

111(1), 1st sentence	223	Exchange-rate system for the Euro in relation to non-Union currencies.	Unanimity on a recommendation from ECB or Commission, following consultation with ECB and EP
112(2)(b)	82(2)(b)	Nomination of the executive board of the ECB.	Common accord of governments of MS at level of heads of state or government, on a Council recommendation, after it consults EP and ECB governing council.
123(5)	87(3)	Abrogation of a derogation granted to a State outside the single currency and other measures necessary to that end.	Unanimity of members of Council representing MS without a derogation and Member State concerned, after consulting ECB
133	212(4)	Conclusion of agreements in the fields of trade in services involving the movement of persons and the commercial aspects of intellectual property.	Unanimity where such agreements include provisions for which unanimity is required for the adoption of internal rules
137	99(3)	Derogation from 99(2) for social security and social protection of workers.	European law or framework law adopted by Council acting unanimously after consulting EP, CoR and ESC
139(2)	101(2)	Application of agreements concluded between the social partners in the fields covered by Article III-33.	Unanimity for 2nd sentence
161	114	Structural Funds and Cohesion Fund (Nice Treaty - QMV from 2007 or adoption of financial perspective)	OLP but unanimity until 01/01/2007
175(2)	125(2)	Provisions of a fiscal nature, measures concerning town and country planning and land use, measures affecting energy supplies and biodiversification.	European law or framework law adopted unanimously by Council

181a	216(3)	Association agreements referred to in III-221(2) and association agreements to be concluded with the States which are candidates for accession to the Union.	Unanimity
187	186	Adoption of provisions as regards the detailed rules and the procedure for the association of the overseas countries and territories with the Union.	Unanimous adoption on basis of experience acquired under the association of the countries and territories with the Union and of the principles set out.
190(2)	I-19(2)	Composition of the EP.	European Council Decision by unanimity on basis of EP proposal and with its consent.
190(4)	227(1)	Elections in accordance with a uniform procedure.	Unanimity after obtaining consent of EP
190(5)	227(2)	Rules or conditions relating to taxation of current or former MEPs.	Unanimity within Council.
213(1), 2nd subpara		Alteration of the number of Members of the Commission	In future this will be subject to the revision procedure of the Constitution
222	255	Increase in the number of Advocates-General.	Unanimity after request from European Court of Justice
223	I-28, 256	Appointment of Judges and Advocate Generals of the Court of Justice.	Common accord of MS governments, after consulting panel provided for in Article III-258.
224	I-28, 256	Appointment of members of the High Court.	Common accord of MS governments, after consulting panel provided for in Article III-258.
225a	260(4)	Appointment of members of specialised judicial panels	Unanimity
263	288	Composition of the CoR.	European law of Council adopted

			unanimously.

269	I-53(3)	Union's resources arrangements.	Council to act by unanimity after consulting EP, and entry into force after approval by MS in line with constitutionals requirements.
279	314	Financial rules.	Unanimity until 1/1/2007
289	334	Determination of seat of Union's institutions.	Common accord of MS governments.
290	335	Establishment of the rules governing the languages of the Union's institutions.	Unanimously adopted Council regulation
296(2)	338(2)	Amendments to the list of products covered by the provisions connected to the production of or trade in arms, munitions and war material.	Unanimous European Decision, acting on a proposal from the Commission
300(2), end of 1st subpara	222(9)	Signing, provisional application and suspension of application of agreements concluded by the Council in fields for which unanimity is required for the adoption of internal rules and for association agreements.	QMV except when agreement covers a field for unanimity is required for adoption of Union act, association agreements and for Union to accession to European Convention for the Protection of Human Rights and Fundamental Freedoms
300(3), 2nd subpara	222(9)	Association (Art 310) and other agreements establishing specific institutional framework, having important budgetary implications and entitling amendment of an act adopted under the co-decision procedure.	QMV except when agreement covers a field for unanimity is required for adoption of Union act, association agreements and for Union to accession to European Convention for the Protection of Human Rights and Fundamental Freedoms

308	I-17	Adoption of appropriate measures if action by the Union proves necessary within the framework of the policies defined in Part III to attain one of the objectives set by this Constitution.	Unanimity on a proposal from the Commission after obtaining consent of EP

Current TEU provisions

7	I-58	Determination of the existence of a serious and persistent breach by a MS of values in Article I-2.	European Decision adopted by European Council, acting by unanimity.
13(2)	189	Identification of the strategic interests and objectives of the Union in CFSP.	European Council acting by unanimity on a recommendation from the Council.
17(1)	I-40	Decision to lead to a common defence.	Unanimity.
17, 17(2), 23(1), 25	205(2)	Adoption of decisions relating to the tasks referred to in this Article, defining their objectives and scope and the general conditions for their implementation.	Unanimous adoption of decisions
23(1)	196(1)	Adoption of decisions under title on Provisions on a Common Foreign and Security Policy (with limited exceptions).	Unanimity (with the some limited exceptions and QMV upon a European Council decision)
24	222	Agreements with third countries or international organisations covering an issue for which unanimity is required fort the adoption of internal decisions.	Unanimity
28	210	Decision on CFSP expenditure other than expenditure normally charged to the Union's budget.	Unanimity
29, 31	166(2) (d)	Any other aspects of criminal procedure which the Council has identified in advance in order to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters with a cross border dimension	European framework law with Council acting by unanimity

29, 31(e)	167(1)	Identification of other areas of crime that meet the criteria specified in Article I-167(1).	European decision adopted by unanimity after approval from EP
30(1)	171(3)	Police cooperation measures concerning operational cooperation between the authorities referred to in Article I-171.	European law or framework law of the Council, acting by unanimity after consulting EP
32	173	Conditions and limitations under which the competent authorities of the MS referred to in Articles III-166 and III-171 may operate in the territory of another MS in liaison and in agreement with the authorities of that State.	Council European law with Council acting unanimously after consulting EP
44(2)	324	Common expenditure for implementation of enhanced cooperation.	Unanimity after consulting EP
48	IV-6, IV-7(1)	Procedure for ratifying and revising the Treaty establishing the Constitution (entry into force of amendments).	Ratification by all MS in accordance with their respective constitutional requirements
49	I-57	Acceptance of new Member States.	Unanimity after consulting Commission and obtaining consent of EP

New legal bases subject to unanimity

	I-54(4)	Adoption of the first multiannual financial framework.	Council to act unanimously after the Constitution's entry into force.
	65	Language arrangements for the instruments to provide uniform intellectual property rights protection throughout the Union.	Council European law adopted unanimously on a Commission proposal, after consulting the EP.
	170(1)	Establishment of a European Public Prosecutor's Office	Council European law with Council acting unanimously after approval by EP
	196(3)	Decision that the Council shall act by QMV in cases other than those referred to in III-196(2).	Unanimity

“Passerelle” clauses

	I-24(4)	Decision allowing for the adoption of European laws or framework laws according to the ordinary legislative procedure.	Unanimity.
	I-39(8), 196(3)	Passerelle clause for decisions in the field of CFSP.	Unanimity.
93	59(2)	Harmonisation of indirect taxation for measures concerning administrative cooperation or combating tax fraud (following a unanimous Council decision).	SLP: Council law adopted by QMV after consulting EP
93	60 new	Company taxation measures unanimously deemed to relate to administrative cooperation or tax fraud necessary for the functioning of the internal market and to avoid distortion of competition.	SLP: Council law adopted by QMV after consulting EP
	99	Passerelle clause for decisions in the social field.	Unanimity.
	125(5)	Passerelle clause for decisions in the field of environment.	Unanimity.
	165(3)	Passerelle clause for decisions in the field of family law with cross-border implications.	Unanimity.

Protocol on Enlargement

4(3)	I-25(3)	System of equal rotation of Commissioners.	European Decision adopted by European Council.