

THE EUROPEAN CONVENTION

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COVER NOTE

from	Secretariat
to	The Convention
Subject :	Contribution from Mr Vytenis Povilas Andriukaitis, membre de la Convention: - “Draft of articles 1 to 16 of the Constitutional Treaty”

The Secretary-General of the Convention has received the attached contribution from
Mr Vytenis Povilas Andriukaitis, member of the Convention.

**Contribution from Mr Vytenis Povilas ANDRIUKAITIS, member of the Convention,
on the Draft of Articles 1 to 16 of the Constitutional Treaty**

Based on the opinion of the Lithuanian legal experts

The work of the Convention has been gathering pace lately. Even before a fundamental discussion on the draft structure for the European Union's Constitutional Treaty (henceforth - Constitutional Treaty) has taken place, we have been asked to put forward in a fairly short period of time proposals for amendments to Articles 1 – 16. I would therefore like to make a pause and reflect in greater detail on the main goal set before the Convention.

I believe that we must first of all make clear to ourselves what it is that the Convention is attempting to produce: a yet another Treaty for an enlarged European Union, or the European Union's Constitutional Treaty? We must make up our minds as to what is more important: the simplification of the existing Treaties establishing the European Communities and the European Union, or the elevation of the constitutional values of the European Union? We are evidently facing a dilemma here in drafting a text of a Constitutional Treaty that would be inspiring, short and memorable. Taking into consideration the size of the existing Treaties this practically impossible.

I agree with the provision of Article 5 (1) of the draft Constitutional Treaty, which states that the Charter of Fundamental Rights is an integral part of the Constitution. But is this enough? Taking into consideration the constitutional traditions of member states, the fact that human rights constitute the basis of constitutional law and in order to ensure clarity of the Constitution, I believe that the text of the Charter should become Part One of the Constitutional Treaty. In my view, such was also the opinion of the majority of members of the Charter Working Group of the Convention, the more so that, by amendments to the horizontal clauses of the Charter, it has been ensured that having acquired a legally binding “constitutional status”, the Charter will not create preconditions for extending European Union competences.

Therefore, I would tend to disagree with the proposals of the authors of the draft Constitutional Treaty to incorporate the Charter into Part Two of the Constitutional Treaty or to annex it as a separate Protocol. Although from the legal point of view all of these proposals are equal, they differ essentially in terms of approach to the Charter. I believe that the fundamental rights and freedoms enshrined in the Charter are more important to the citizens of the Union than the Union's institutional setup or division of competences between the Union and its member states.

It is important to bear in mind that institutions and competences of the Union are nothing more but instruments to guarantee the rights and freedoms enshrined in the Charter.

In order to deal with the dilemma of the scope of the Constitutional Treaty I would suggest that it consists of several parts, the first of which being the EU Charter of Fundamental Rights. It is this part that the citizens of the Union would be able to carry in their pockets and refer to in cases when the need arises to defend their legitimate expectations, in the way that we proudly refer to our national Constitutions now. Thus the answer to the question as to what we, as members of the Convention, are attempting to draft for our own sake and the sake of our fellow citizens can be very simple: we are drafting a Constitution for the European Union.

Let us have a look, however, at the subtitle of the draft text of the Constitutional Treaty, which runs “the Treaty establishing a Constitution for Europe” One gets the impression that the concept of “Constitution for Europe” has no object. Europe is generally perceived as a geographical, historical, maybe ethnical category, or even, from the historical point of view, a category with certain confessional features. However, it is hardly possible to grant Europe constitutional legal personality. Although representatives of the candidate countries are participating in the work of the Convention, the latter is not a constituent forum of all the states and peoples of Europe with a mandate to draft a Constitution for Europe, i.e. also for Switzerland, Norway, Croatia, etc.

In the light of the mandate granted to the Convention by the Laeken Declaration, a principal question arises in this connection: are these provisions of the Constitutional Treaty aimed at creating a new Union, or are we, on the contrary, talking about drafting a new constitutional treaty that consolidates and enhances the principles and provisions enshrined in the existing founding treaties and improves and broadens the activity of the EU. I believe that the title of the Treaty, most faithfully reflected in the wording “the Constitutional Treaty of the European Union”, should be first of all associated with the European Union as a multilevel governance system and with the powers granted to the Convention.

That is why I would like to propose that the title of the draft Constitutional Treaty be amended by adding the word “Union” and should read “Treaty Establishing a Constitution for the European Union”.

TITLE I. Definition and objectives of the Union

Article 1. Establishment of the Union

This Article of the draft Constitution would establish a double-faceted Union (of European states and of peoples) within which policies of the Member States shall be co-ordinated and which shall administer certain areas on a federal basis.

As we know, the development of the European Union may follow one of the two routes: either as a unique specific union and system (multilevel governance system) of states and other entities (citizens, nations, social-economic partners, regions etc.), or, in theory, as a certain form of a federation. As early as in Article 1(2), emphasis is put on respect to national identities of the Member States (“respect the national identities”). Art 9(6) of the Draft of the Treaty Establishing a Constitution lists aspects of the Member States’ national identity, the preservation of which will call for a special effort of the Union acting within the limits of its competencies. The list consists of the states’ fundamental functions as well as political, constitutional and other key national bodies, including organisation of public administration on the national, regional and local levels. The analysis of Art 1, Art 9(6) and other articles of the draft Constitutional Treaty leads to the conclusion that in the European Union guided by the new Constitutional Treaty, the Member States will continue enjoying sovereign rights. Neither the Convention, nor the new intergovernmental conference have been authorised to create a European federation on behalf of nations and citizens.

Leaving the theory of sovereignty aside, here we should limit ourselves to the statement that the simplest way to define sovereignty would be to describe it as unlimited competencies of an entity to establish its own competencies. The very wording of Art 1(1) of the draft Constitutional Treaty implies that the competencies of the Union will be restricted: on a federal basis, the Union will administer only certain common competencies delegated to it by the Member States. The co-ordination of the Member States’ policies is not limited to areas; nonetheless, in any case, the Union will not be able to exceed the objectives set out in Art 3 of the draft Constitutional Treaty. Absolute sovereignty of a state, i.e. absolute power within a state and non-accountability to any other authority, is impossible under modern international law. The power of a state is restricted by international customs, by common principles of law, and, lastly, by the rules of treaty law. The principle “*pacta sunt servanda*” is special in that the parties to the agreement are free to decide on the contents of their agreement; however, the agreement itself imposes certain obligations on its parties, i.e. the states are bound at their own will. A country acceding to the European Union will

express its will by ratifying the Constitutional Treaty. The decision to assign new competencies to the European Union will have to be taken by common assent of all Member States. Thus, accession to the Union in no way implies a restriction or removal of a state's sovereign rights for the sake of a federation.

It was a functional rather than federalist approach that was underlined in the 2001 Laeken Declaration on the Future of the European Union. The paragraph on "The expectations of Europe's citizens" runs "What they expect is more results, better responses to practical issues and not a European superstate or European institutions inveigling their way into every nook and cranny of life". Even though in its essence the contents of the term "administer on a federal basis" does not differ from the term "exclusive competence of the Union", the provisions of the Constitutional Treaty should be worded along the same lines. For that reason, I believe that the term "administer on a federal basis" should be rejected in the Constitutional Treaty, and the text should be amended and set forth as follows: in Article 1, a dot should follow the word "Union", and the second part of the provision should be deleted: "~~within which the policies of the Member States shall be coordinated, and which shall administer certain common competences on a federal basis~~".

Demarcation of powers of the Union and its Member States is very important for defining the European Union. Therefore I suggest that Article 1 should be amended by supplementing it with "All powers of the Union derive from the powers and agreements of its Member States and their citizens". In my view, the concept of "sovereignty" should be introduced into Article 1 (2) of the Constitutional Treaty, and the provision should be set forth as follows: "The Union shall respect sovereignty and the national identities of its Member States".

The Draft stipulates the main conditions for European Union membership in Article 1 (3). Title IX of the Constitutional Treaty provides for accession, suspension and withdrawal procedures available to the Member States. Neither the effective treaties establishing the European Communities nor the Treaties on European Union stipulate the procedure for leaving the European Communities and the European Union, however, this does not mean that Member States may not do so referring to international law. Declaration of a possibility to leave the Union as well as regulation of a respective procedure drafted in the Constitution emphasises once again that the new Union will continue to be conceived as a particular union of states rather than a federation. Taking this into account and noting the contractual nature of the Constitutional Treaty, we might think of providing a legal element of accession to the EU Constitutional Treaty beside provision for accession into the European Union *expressis verbis*.

Article 2. The Union's values

This Article contains a short list of fundamental values on which the Union is founded - human dignity, liberty, democracy, the rule of law, and respect for human rights. The list, however, lacks one of the most essential fundamental values - equality. In my opinion, taking account of the unanimous view of the Working Group on Social Europe working within the Convention, Article 2 should list equality as one of the fundamental values of the Union.

The Explanatory Note says that the Draft will stipulate that manifestation of risk of serious breach of one of those fundamental values by a Member State would be sufficient to initiate the procedures for alerting and sanctioning the Member State, even if the breach took place in the field of the Member State's autonomous action.

The European Union is established by free will of its Member States and their citizens. On the other hand, when establishing the Union, the States are committed to adhere to certain principles and to fulfil certain duties. Upon its accession to the Union, which is based on human dignity, liberty, equality, democracy, rule of law, and respect for human rights, the State declares that these values are fundamental values of the State, thus it commits itself to neither breaching these values nor creating risk of serious breach. As I see it, the imposition of sanctions that might be applied against the Member State that fails to keep to its commitments does not undermine the sovereignty of the State because, on the one hand, States express their consent to the application of such sanctions, in their free will, by acceding to the Union, and on the other, sanctions should not go further than limiting the Member State's membership of the Union. And stipulating such sanctions in the Constitutional Treaty would ensure the effective functioning of the Union.

Article 3. The Union's objectives

The Article sets forth the main objectives of the European Union justifying the very establishment of the Union and providing for joint efforts to attain the objectives on the European level. In their essence the objectives cover the principal fields of the Union's competence. Furthermore, while coordinating the policies of its Members States, the Union will not overstep the limits the Union's objectives set by Article 3. The significance of the Article lies in empowering the Union to take action covering different areas of competence for the attainment of the objectives in certain cases. On the other hand, the objectives of the Union may be analysed only in the context of particular competences of the Union.

Doubtful is the term mentioned in Article 3(4) "Europe's independence". The independence of a state is declared in the very first article of the Constitution of the Republic of Lithuania "Article 1. The State of Lithuania shall be an independent and democratic republic." The declaration of

Europe's independence poses some contradictory questions, i.e. should the independence of the European Union be understood separately from the independence of EU Member States? Besides, is the independence of Europe possible with regard to European States? Lithuanian legal experts are of the view that the term "Europe's independence" as a general principle set forth in the Constitutional Treaty is unable to deny the category "independence of European Union Member States". Even the goals pursued by the implementation and enhancement of the Common Foreign and Security Policy do not imply the independence of the European Union in its category comparable to the independence of EU Member States or even determining it. Therefore the inclusion of the term "Europe's independence" in the Article should be comprehensively discussed.

Article 4. Legal personality

This Article confers legal personality on the European Union. The specific legal content of the Union will be defined in Part Two of the draft Constitutional Treaty. In contrast to the European Communities, the European Union is well known to have no legal personality at present. The Constitutional Treaty also aims at merging the European Communities and the so-called second (common foreign and security policy) and third (police and judicial co-operation) pillars into one legal entity. It is possible to presuppose that the European Communities will lose their status with the Constitutional Treaty entering into force, and their rights and duties will be taken over by the new Union. Moreover, Article 49 of the Treaty on European Union sets forth that any European State may apply to become a member of the Union. The possibility of joining the European Union only allows to believe that, in a way, the European Union possesses legal personality already, what the latest EU international agreements prove to be true. Therefore, the proposal to confer legal personality on the European Union is necessary.

At present, there is no unanimous approach as to whether the European Union can be attributed to an international organisation, however, it should be noted that the majority of international organisations have international legal personality. The conferment of such personality on the European Union will have no effect on international legal personality of the Union members. As it has been mentioned, in any case, the conclusion of the Constitutional Treaty will not mean and cannot mean the establishment of a federation, however, everybody knows that when federations are being established, their entities generally lose their international legal personality.

TITLE II. Fundamental rights and citizenship of the Union

Article 5. Fundamental rights

As I have mentioned before, I believe that the EU Charter of Fundamental Rights should be included into Part One of the Constitutional Treaty.

In the process of evaluating the entire Article 5 it is worth to recall the mandate given by the Laeken Declaration, i.e. the Convention has to give thought to “whether the Charter of Fundamental Rights should be included into the basic treaty and to whether the European Community should accede to the European Convention on Human Rights”. These are parallel and closely interrelated issues.

Meantime, Article 5 of the Draft offers quite different answers from the point of view of legal obligation. Paragraph 1 of the Article provides that “The Charter of Fundamental Rights shall be an integral part of the Constitution”, whereas Paragraph 2 of this Article establishes that “The Union may accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms”. Such a contradiction can be partly justified by the fact that the accession of the European Union to the European Convention on Human Rights will not be a unilateral decision of the Union. Some of the fundamental provisions of this Convention should be amended, too, to make this accession possible. Taking into account unquestionable support of the Council of Europe to the intention of the European Union to accede to the European Convention on Human Rights, I believe that the Convention could make a more substantial statement in favour of the Union’s accession to this Convention. Otherwise, the problems of legal certainty may arise if the decision is left to the Council that will have to decide unanimously when and how the European Union becomes a party to the European Convention on Human Rights.

Therefore, a possibility should be discussed on whether it is necessary to reinforce the provision of Article 5 (2) and set it forth as follows: “The Union shall accede to the European Convention for the protection of Human Rights and Fundamental Freedoms”. Another alternative is to leave the proposed provision unchanged, but supplemented with a clear commitment in favour of accession contained in the introduction or explanations of the Constitutional Treaty.

Article 6. Non-discrimination on the grounds of nationality

This Article in practice echoes prohibition on all discrimination on grounds of nationality, which is currently enshrined in Article 12 TEC, however, in contrast to the TEC, the Constitution of the Union places this prohibition of discrimination in a separate Article rather than forming part of the provision on citizenship of the Union. The Explanatory Note to the draft Constitutional Treaty

states that this provision must be placed in Part One of the Constitutional Treaty considering its fundamental importance for the development of Union law without limiting its application to any individual area of competence. I believe that the formulation of Article 6 is insufficiently precise. This Article provides for the prohibition of discrimination on grounds of nationality in the field of application of the provisions of the Constitution. Nationals of third countries will not be entitled to the rights granted to the citizens of the Union by the provisions of the Constitutional Treaty. The principle of non-discrimination on grounds of nationality as it has been formulated in Article 6 would require granting equal rights to the citizens of both the Union and third countries.

Article 12 (2) TEC envisages that the Council may adopt rules designed to prohibit such discrimination. The Explanatory Note to the draft Constitutional Treaty also states that such legal norms will be established in Part Two of the Constitution. It should be discussed whether it is reasonable to fix a norm which is similar to that in Article 12 (2) TEC and Article 6 of the Constitutional Treaty, as it is not possible to include comprehensive rules prohibiting discrimination in the Constitution. Moreover, the problem will not be properly resolved by Part Two of the Constitution providing for specific areas of the Union's competence after the Council is granted the right to adopt rules designed to prohibit such discrimination.

TITLE III. The Union's competences

Article 16. Flexibility clause

The flexibility clause is to be discussed within the context of the so-called "appropriate measures" (DE *Lueckenschliessungsverfahren*) referred to in Article 308 of the Treaty establishing the European Community. Thus, a question may be raised on how the competences are conferred on the Union according to Article 16 of the Constitutional Treaty in all cases (which means extension of the competences) or on maintenance of the restrictions to application of the provisions only to achieve the common market (as set forth in Article 308 TEC).

In my point of view, such extension of application of Article 308 TEC in the new Constitutional Treaty can be justified as it (1) retains the principle of unanimity and (2) eliminates the threat of the trend developed in the work of the Convention to detail the issues of competences in the act of a constitutional level, which may halt the future activity of the European Union. However, in such a case, the provisions of Article 16 (2), if applied adequately, would eliminate possibilities of misuse of the provisions of Article 16 (1).