

COVER NOTE

from	Secretariat
to	The Convention
Subject :	Study by the European University Institute, presented by Vice-President Amato:
	"Ten reflections on the Constitutional Treaty for Europe"

The Secretary General of the Convention has received from Mr Giuliano Amato, Vice President of the Convention, the attached contribution concerning a paper by the European University Institute.

The European University Institute has produced a weighty study on the main topics that are currently under the attention of the Convention: preamble, Charter, competences, simplification of instruments, institutions, main policy areas, entry into force and revision. The study has been edited by Prof. Bruno de Witte, and other distinguished scholars have signed each of the chapters.

I do not endorse every single word of this study, but I consider it would be very useful for all the members of the Convention to be able to give it the attention it deserves. To this effect I ask you to kindly circulate it as a contribution presented by me.

G. AMATO

Ten Reflections on the Constitutional Treaty for Europe

Edited by
Bruno de Witte



EUROPEAN UNIVERSITY INSTITUTE
Robert Schuman Centre for Advanced Studies
and
Academy of European Law

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Preface

The Robert Schuman Centre for Advanced Studies, part of the European University Institute in Florence, has a long-standing interest in the question of the reorganisation and reconfiguration of the European Treaties. Since 1996, the Schuman Centre has undertaken four projects relating to the architecture and evolution of the European Treaties.¹ The most widely known of these earlier projects is a study, undertaken in 2000 on request of the European Commission, entitled *A Basic Treaty for the European Union*. This study deals with the feasibility of a reorganisation of the Treaties into two parts, by which the basic (or ‘constitutional’) Treaty provisions would be separated or distinguished from the rest. This idea, and indeed its experimental implementation in the EUI report, have played a role in framing the current EU constitutional reform process, as it developed since the Nice summit of December 2000.

The present study is a further contribution by the EUI to the debate, within the radically changed political context of today, in which the constitutionalisation of the European treaties is no longer a hypothetical scenario for the future, but a living reality in the work of the Convention on the Future of the European Union.

The study was undertaken by the Schuman Centre in cooperation with the Academy of European law at the EUI. A number of, mainly legal, experts both from within and from outside the EUI met on several occasions in order to reflect together on ten selected constitutional reform themes. These themes correspond to important

¹ These earlier studies can be accessed on the website of the Robert Schuman Centre: <http://www.jue.it/RSCAS/Research/Institutions/EuropeanTreaties.shtml>

building blocks of the constitutional treaty that is being elaborated within the framework of the Convention.

The aim of the present document is not to provide a complete commentary on the latest draft being discussed within the Convention, nor that of drafting a full-fledged Constitution of Europe, but to draw the attention of the Convention members and of other participants in the European constitutional debate on some of the legal and political constraints and implications that should be heeded by those drafting the European Constitution. The 'Ten Reflections' take the form of short essays on each of the themes, authored by individual members of the group, who propose and expose their own views on the matter after having discussed them within the group. Most authors have made specific recommendations that are not couched in formal legal language; these recommendations are highlighted throughout the text in **bold**. Some of the authors have, in addition, made specific drafting proposals for articles of a constitutional treaty; these are highlighted in ***bold italics***.

We are confident that this study, which will soon be made available also in printed form, will form a useful contribution to the debate on the future constitution of Europe.

Florence, 23 March 2003

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The Preamble

Armin von Bogdandy

A constitutional text serves many objectives. Its immediate tasks are to set up, organize and direct public power in order to attain certain ends while respecting certain fundamental principles: all this can easily be deduced from the text itself. But there is also a “between the lines” and a “beyond the words”: it is widely assumed that a constitutional text fulfils further functions. Among those, the “manifesto” function appears to be of particular importance for the preamble and the introductory provisions, because more than most other parts they give an account of the basic features of a political organization in a way accessible to most citizens.

In the tradition of legal thought and political philosophy, this function can be given further readings. For example, it is assumed by many that a polity declares through those parts its basic understanding of public power and perhaps even its self-understanding. For those who understand a constitution as an instrument of identity formation for the citizenry, these parts are of utmost importance. In particular any *direct* influence of a constitutional text on the self-understanding of a citizenry¹ will largely depend on these parts, as the quantity of text that can be expected to be read and understood by the public is rather limited.

Last but not least, the following proposals are as close as possible to the current Treaties, respecting thereby the European constitutional *acquis*, the intention of Declaration No. 23 to the Nice Treaty and the mandate granted by the European Council at Laeken.

¹ In my understanding, indirect effects of a constitutional text for identity-formation are far more important. To the extent that a constitutional text contributes to the convincing operation of a political organization, it indirectly furthers the identification processes.

Preambles—as far as they can be found in constitutional texts²—are the parts most clearly expressing fundamental convictions, experiences or aspirations. It appears safe to say that there isn't any constitutional homogeneity among the constitutions of Member States when it comes to preambles; there is not even a broad European understanding of what should be part of a constitutional preamble. The current preambles of the national constitutions rather display the European diversity. They are, however, usually quite short, the longest being the Portuguese with six sentences. Preambles of international treaties, by contrast, are usually rather long. The overwhelming understanding of the European Union as something “in between” international organizations and states or a “*tertium*” to these two forms of political organization could find expression in an intermediate solution with respect to the length.

1 – At the beginning of the new preamble, one has to decide who speaks: the heads of state, the national parliaments alone or together with the European Parliament, the European people or the European peoples in (or of) the countries of Austria, Belgium, Denmark, Germany, Greece, Spain, Finland, France, Ireland, Italy, Luxembourg, Netherlands, Portugal, Sweden and the United Kingdom of Great Britain and Northern Ireland (as well as the other countries that will have joined by the time the Constitutional Treaty is adopted).

If the new Treaty is to resemble a constitution, it appears inappropriate to refer in its preamble to the heads of state. In democratic societies the enactment and amendment of a constitutional text is largely understood as an act of *auto*-determination or at least as an act of an institution of parliamentary character. Placing the heads of state at the outset would give the preamble a rather paternalistic tone and could recall constitutional settlements of the 19th century (see, e.g. Preamble of the Statute for the Kingdom of Italy of Feb. 18, 1848). Furthermore, such wording would not reveal the substantive legal situation: the legally decisive acts are in all countries the national parliaments' laws of consent whereas the role of the heads of state is in most

2 The constitutions of Belgium, Denmark, Finland, Italy, Luxemburg, Netherlands, Austria, and Sweden do not possess any preamble; preambles, mostly short or very short ones, are to be found in the constitutions of Germany, France, Greece, Ireland, Portugal, and Spain.

countries very limited. The inspiration from international treaties with regard to the formulation of actors appearing in the preamble should be given up.

Currently, the *pouvoir constituant* in the Union lies with the European peoples collectively. So they should speak directly, as was already proposed in the draft of a statute for a European Political Community of March 10, 1953 and in many other more recent proposals. An alternative approach closer to what actually happens might choose the terminology “in the name of the European peoples” thereby underlining that the act is mostly based on the decision of representative institutions; see in this regard the Proposal by the of Committee on Institutional (now Constitutional) Affairs of December 10, 1994 (the “Herman project”). The grave disadvantage of this proposal is, however, that the actors speaking are not revealed. Given the overwhelming desire for clarity, some (theoretically well founded) metaphysics might be acceptable; therefore the peoples themselves should speak. The formula “in” the Member State x rather than “of” the Member States x makes, however, clear that the bond between state and people is not as strong as under the traditional principle of the nation state. Moreover, it is also more precise: an Italian living in France but represented through the Italian parliament participates in the process.

One might consider referring to the European peoples in a way that further Members are embraced, thereby giving late-comers not the impression of being of a somewhat second order as is the case in the current founding Treaties. I cannot think up, however, a convincing formula. Such undesirable wording can be avoided if the acts of accession contained a clause that adopts the wording by nominating the new Members, as has happened with the German Basic Law after the unification of the two German states.

To what extent should the European Parliament be involved in this exercise? In the Herman project of 1994, the EP would have adopted the constitution together with the Member States. Currently, there is a role for the European Parliament mediated through its representatives in the Convention. However, the European Parliament as an institution does not participate in any decisive form in the relevant procedure under the current Treaties and it appears highly unlikely that it will have any formal role in the process of adopting a possible constitution. Hence it should not appear in the Preamble. One might consider, however, referring to the Convention, depending on its final role in the whole process. If it succeeds in organizing a convincing process of public deliberation and in imposing its proposal, a reference might appear suitable, such as: “after deliberating in the European Convention” or “following the proposal of the European Convention”.

Therefore, a possible avenue might be to start *with the European peoples in (or of) the countries of Austria, Belgium, Denmark, Germany, Greece, Spain, Finland, France, Ireland, Italy, Luxembourg, Netherlands, Portugal, Sweden and the United Kingdom of Great Britain and Northern Ireland*. (To be amended after accessions.)

2 – It should be taken into consideration whether something should be invoked “beyond” the actual peoples as the sovereign. There is nothing similar in the current preambles of the founding Treaties. Some constitutions of Member States, by contrast, refer to deity (Ireland, Greece) and/or mankind in general (Germany). Some other Member States are, however, strictly secular (in particular France, Art. 1 French Constitution). This issue might become an important battleground.

A possible line of compromise might be a reference to future generations (or mankind), for example *“Recalling their responsibilities towards future generations”*. There are theological understandings which will find deity in those future generations, but these words are also open to a secular understanding. Such an *evocatio* to future generations might also appear appropriate because these generations will be bound by the act, but do not have any voice in its adoption. By referring to “future generations” without further specification, enough room is left for an understanding that the European peoples are recalling their responsibility not only for their own offshoot, but that they also have responsibilities for mankind in general, which would be in line with a theological reading and an adequate understanding of public power in an interdependent world.

3 – After an *evocatio*, the fundamental convictions should be spelled out, those convictions which motivate the adoption of the Constitution.

The memory of European wars, particularly World War II, as well as the memory of the division of Europe is a fundamental motive and perhaps the most compelling reason for European integration. That is well said in the second paragraph of the EU Treaty preamble through *reaffirming the historic importance of ending the division of the European continent*. It is not outdated at all, but rather remains a monumental task, if only for the successful integration of the countries acceding in the next years.

It would, however, be too little to express only this motive because many forms of cooperation since World War II are based on it (e. g. the Council of Europe, OSCE).

In addition the motive of *integration* should be expressed. A very important aspect of integration can be found in the last paragraph of the ECSC Treaty preamble, which speaks of “*merging their essential interests*”. This spells out the idea that the Constitution assumes a common interest, and that the political process should not only consist of bargaining, but also of arguing. It might become an argument that policies of the Union are not to be measured against the ill-defined concept of “national interest”.

There is another aspect which is peculiar to European integration: it is the conviction that something historically new has to be created. That idea is well expressed in the first paragraph of the ECSC Treaty preamble: it refers to “*creative efforts*”, which are the creative efforts *to lay a firm basis for the future Europe*. This idea expresses the conviction that the EU is a new polity whose blueprint cannot be taken from any other polity. At the same time, it asks for understanding if the values spelt out in the next “whereas” are not realised in the traditional way of national constitutional law. If these elements are put together, one reads:

“The European peoples, recalling the historic importance of ending the division of the European continent, of merging their essential interests, and of making creative efforts to build a firm basis for the future Europe.”

4 – After the motives, it might be appropriate to state the overall aim of the whole endeavour. A formula can be found in the first paragraph of the EC Treaty preamble, which is also the most famous passage of any of the Treaties’ preambles: “*Determined to lay the foundations of an ever closer union among the peoples of Europe*”. It expresses the notion that the EU is a European enterprise and therefore regional by design. Moreover, it points out that European integration is an ongoing process, that it has not reached any final state.

This paragraph of the EC preamble has received much criticism in the last decade. But in many areas national societies are still very much separated, there is little solidarity; and Europe will not thrive if a European society does not gain more substance. Even if one considers that a further expansion of the Union’s powers is not what the Union and its peoples need, the “closer union” (written with a lower case “u”) is a much broader concept and cloudy. It might indicate more union through more “solidarity” or “community” (see below). It also points out that Europe understands itself as something specific, that there is a “Europeanness” common to all European peoples, that this “Europeanness” is worth preserving and

developing, while leaving open in what that “Europeanness” might consist. At the same time, the plural makes clear that the intention of the Constitution is not to wipe out the “peoples” for one European people. Rather, their respective identities, traditions and political organisations are an integral part of the integration project.

5 – This “Europeanness” should be defined with respect to the central principles of a political community. Often, one finds the terminology of “values”. I assume that this terminology, problematic as it may be when it comes to its theoretical foundations, is used in order to assert that the principles of the legal order are based in something outside that legal order, that they have a societal basis. The second and the eighth paragraphs of the EU Treaty preamble give important indications of what they are. The values named there express the positive normative heritage of Europe and the points of convergence of the basic principles of the Member States constitutions and the relevant normative philosophy. Even though these are universal values, Europe claims the authorship of them and to be at the vanguard of how to preserve these values when political action transcends the realm of the nation and the state.

However, the current formulation of these paragraphs of the EU preamble does not totally convince. For example “attachment”, as the current whereas says, to these values appears too weak, given the importance of these values (the German version is much stronger: “*Bekanntnis zu*”). Instead, one might “confirm their fundamental importance” which would also make clear that these values are the yardsticks with which to judge the European Union. One could consider at this point one addition: in a polity based on the principle of democracy, human rights and political rights are of identical importance. This could be expressed by adding “civil rights”.

In the end, the Constitution might simply confirm *the fundamental importance of their common values of democracy, liberty, human and civil rights as well as the rule of law.*

6 – A Constitution should not only spell out the basic motives, convictions and values, but also the tasks that the organisation should handle, particularly if it is one based on limited competences such as the European Union. What is it there for? What can the citizen expect? In fact, various parts of the existing preambles spell out such tasks (4th, 7th, 9th paragraphs of the EU Treaty preamble, 2nd paragraph of the EC Treaty preamble, and the 5th paragraph of the ECSC Treaty preamble, as well as paragraphs 3 to 6, and 9, of the EC Treaty preamble, and paragraph 4 of the ECSC

preamble). The problem with these paragraphs is that given their sheer number they do not give a clear idea of the aims of the Union.

A close analysis of the aims of the Treaties shows that three aims motivate and justify the European endeavour: security (internal and external), prosperity, and community. They should be spelled out clearly at the outset of the Treaty. In the current treaties, they get lost because their preambles are much too detailed.

The first aim is “*peace and security*”. Historically, security (internal and external) is the first good a public authority has to provide; this justifies it being in first place. “Peace”, which can be found in various other preambles and paragraphs, is a good qualification to security, because it gives a normative note to it and qualifies thereby the general outlook of the Union. Since peace is the central aim and task of the United Nations, the Union declares that its basic thrust conforms to that of the global Community.

The second aim is “*economic and social progress*”. It spells out the central area of activity of the European organisation. It points out that the Union helps the citizens in the satisfaction of their needs and desires. In a homocentric view, protection of the environment is part of social progress, so there is no need to spell it out specifically. The same is true for the advancement of certain disfavoured groups. Moreover, any specific mention of one group or situation might be considered as discrimination against those not mentioned.

The third aspect is “*solidarity and community*” as expressed by the last paragraph of the ECSC preamble. European integration is not just meant to make life safer, easier and more prosperous for European citizens. It is also meant to make them “better”. It is meant to create new bonds, to create the social basis for a broader polity in which the individual acts as a responsible *social* being.

One should qualify these aims. It should be pointed out that all efforts and particularly the effort to build a new community is not meant to wipe out the existing bonds and feelings of belonging. This is well expressed in the 5th paragraph of the EU Treaty preamble where it states the words “*while respecting their history, their culture and their traditions*”. One could consider using these words also as a qualification to the “ever closer union”. Thereby, the central line of tension between uniformity and diversity is addressed.

Bringing these aspects together, one might see the European peoples as **resolved to promote peace and security, economic and social progress, solidarity and community while respecting their history, their culture and their traditions.**

That can also be said in a much shorter way: *resolved to promote peace, progress and solidarity while respecting diversity.*

One could consider strengthening at this point the international outlook. One might wish a more explicit declaration that the Union considers itself as part of a global community with respective responsibilities. In that case, one might add at the end: *“while respecting their history, their culture and their traditions and the legitimate expectations of the other peoples in the world.”*

Further qualifications should not be added given that the preamble should be short.

Summing up:

‘The European peoples in (or of) the countries of Austria, Belgium, Denmark, Germany, Greece, Spain, Finland, France, Ireland, Italy, Luxembourg, Netherlands, Portugal, Sweden and the United Kingdom of Great Britain and Northern Ireland (to be amended after accessions);

Recalling their responsibilities towards future generations;

Reaffirming the historic importance of ending the division of the European continent, of merging their essential interests, and of making creative efforts to build a firm basis for the future Europe;

Determined to lay the foundations of an ever closer union among the peoples of Europe;

Confirming the fundamental importance of their common values of democracy, liberty, human and civil rights as well as the rule of law;

Resolved to promote peace, progress and solidarity while respecting diversity and the legitimate expectations of the other peoples in the world;

Adopt this Treaty on a Constitution for the European Union³, following the proposal of the European Convention.’

³ It is beyond the task of this contribution to address the issue of the denomination of the constitutional act.

Fundamental Rights and Citizenship

Gráinne de Búrca

1 – Introduction

Given the lack of political agreement over its legal status which followed the proclamation of the Charter of Fundamental Rights in 2000,¹ and given the deadlock which has persisted for decades in relation to the question of accession by the EC to the ECHR, one of the more striking results to have emerged from the Convention process so far has been the overall support both within the Working Group on the Charter (II)² and within the plenary Convention for the legal incorporation of the Charter into the Treaties and for accession of the EU (with single legal personality) to the ECHR. These two issues were considered to be politically difficult, and the broad consensus quickly reached on their resolution has been somewhat surprising.

I will focus in this contribution on what I perceive to be the main issues which now arise in relation to the incorporation of the Charter into the Treaties: first, whether the incorporation of the Charter into a constitutional treaty of this kind could have the effect of altering the ‘fundamental rights *acquis*’; secondly, whether it should be integrated in its entirety into the basic treaty or incorporated by reference and annexed in a protocol or otherwise; third, whether the amendments proposed by Working Group II to the horizontal clauses would affect the substance of the Charter,

1 OJ C 364 of 18.12.2000, 1

2 See the final report of the Working Group, CONV 354/02.

contrary to the decision taken by the Group not to re-open any substantive questions which had been agreed by the previous Convention which drafted the Charter; and fourth, a number of residual questions including access to justice, the need for a ‘mainstreaming’ or ‘objectives’ clause, and the need for a clause authorising accession to the ECHR will be identified.

Before addressing the topic of the Charter and fundamental rights, the subject of citizenship will briefly be discussed.

2 – Citizenship

At first glance, it seems that the debate on a new constitutional treaty for the Union has not generated any proposals for change in the notion of EU citizenship which has existed for over ten years. No working group dealt specifically with the issue. Presumably this implies that change was not considered vital in this area; or perhaps it simply reflects the more general absence of focus on substantive issues within most of the Convention’s working groups: the only four which could be considered to focus on “substantive” matters were those on justice and home affairs, defence, economic governance, and belatedly, social policy, but even several of these have been preoccupied more with institutional than with substantive issues.

As far as citizenship is concerned, however, the basic framework elaborated by the Praesidium in its draft constitutional treaty of October 2002³ provides essentially that ‘Union citizenship’ should be incorporated in an early Article (currently article 5) of such a new constitutional text. The existing rights and attributes of EU citizenship under the EC Treaty, namely the rights of movement, residence, voting and standing as a candidate in municipal and European Parliament elections etc, are referred to in the draft outline of Article 5. I will argue below, when discussing the substantive provisions of the Charter, that if the Charter is to be incorporated with its substance unchanged, then Article 5 (or equivalent) of the new constitutional treaty should not repeat all of the rights again, but rather should simply introduce the concept of EU citizenship, and should refer to the Charter articles for enumeration of the rights.

3 CONV 369/02

One curious and undesirable novelty, however, has been proposed in the Preliminary draft constitutional treaty, and this is that EU citizenship should be reconceptualised as ‘dual citizenship’, such that a national of any member state may “use either, as he or she chooses”. The notion of dual citizenship is an unfortunate way of describing the co-existence of national and EU citizenship. If it is intended as a description of the currently existing relationship between EU and national citizenship it is misleading, and if it is intended to define these categories in a new way for the future, under the basic Constitutional Treaty, then it is a regrettable move. The concept of dual citizenship suggests full and competing loyalties/relationships to two different and entirely separate polities, each of which makes similar claims of allegiance on the individual. This could be an undesirable development in a number of ways.

In the first place, EU and national citizenship, from the time of their introduction by the Maastricht Treaty, have been conceptualised as complementary rather than competing, and as mutually reinforcing rather than as alternatives. Each is seen as encompassing a relationship which is distinct from yet connected with the other (just as the Member States are distinct from yet part of the EU), so that neither status in itself should interfere with or challenge the essence of the other. European citizenship reflects the relationship between a member state national and the EU polity, defining the core legal and political rights pertaining to that relationship, but it is not an entirely separate and alternative status to national citizenship. Further, the ‘complementary’ nature of the two citizenships has been reflected not only in understanding and practice since the Maastricht Treaty, but also in the legal texts adopted since then. Thus the citizenship provisions of the Amsterdam Treaty were amended precisely in this way, specifying in Article 17(1) that ‘citizenship of the Union shall complement and not replace national citizenship’. The sentiment underlying this declaration could well be applied to the proposal to introduce a notion of dual citizenship, in the sense that ‘citizenship of the Union should complement and not compete with national citizenship’.

A second criticism of the language of dual citizenship is that it suggests two full and co-equal relationships between citizen and polity, as though the relationship between the individual and the EU were the same as that between the individual and his or her member state of nationality. Yet this is not what is currently represented by EU citizenship. It may reflect an aspiration, a hope that the EU may develop into a fully federal polity, but at present the notion of EU citizenship has neither the same content as, nor is a real alternative to national citizenship, and it does not reflect the substantive relationship of belonging to a full political and social community. Certainly many hope that the notion of EU citizenship will one day evolve into a

more meaningful status of this kind, but to label it as such at present (which the conceit of dual citizenship suggests) risks painting a glossy veneer of constitutional language on something which remains rather empty in content. Indeed, the current opposition of so many Member States to the provision in the Commission's draft proposal on the right of movement and residence of EU citizens which would grant a permanent right of residence to an EU citizen in another Member State after a five-year residence period,⁴ provides a sharp reminder that EU and national citizenship are far from equal alternatives. And the failure of various Member States and sub-national regions in many cases to facilitate the right of non-nationals to vote or to stand in local and European Parliament elections, as the EC Treaty currently requires them to do, also suggests that the practice of EU citizenship in its present form remains rather thin.⁵

For these reasons, the concept of “dual” citizenship is a problematic one in the context of EU citizenship, and I would recommend against introducing it into the basic constitutional treaty.

3 – The Charter of Fundamental Rights

A. Maintaining the fundamental rights acquis

A first question to be addressed is whether the Charter will replace all other references to fundamental rights currently contained in the Treaties such as in Article 6 TEU, and whether it will ‘crystallise’ the fundamental rights jurisprudence of the Court of Justice for the future. While the Charter was drafted on the basis that it would be essentially declaratory of the existing legal situation, and that it would not reduce or restrict the fundamental rights *acquis* built up over the years, it must nevertheless be recognised that the relatively open-ended and non-exhaustive approach adopted by the ECJ could possibly be restricted by the constitutional

4 COM(2001)527.

5 See the Commission's third report on citizenship of the Union COM(2001)506, and also COM(2000)843.

enactment of the Charter, if the latter is henceforth to be taken as the definitive and closed list of EU rights and values.

On the one hand, the Preamble to the Charter declares that the Charter “reaffirms ... the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States”, including specifically the ECHR and the two Social Charters (of the Council of Europe and the EC respectively). However, this seems merely to suggest that the rights actually specified in the Charter are derived from national constitutions and from these common international obligations, rather than that the EU continues to hold itself bound or at least inspired by international human rights obligations and standards more broadly. Further, while Article 53 of the Charter makes mention of human rights derived from international law and international agreements to which the Member States are party, as well as national constitutions, this is done merely to affirm that the Charter should not be used in such a way as to restrict those rights within their proper sphere of application. What is missing, however, is any equivalent in the Charter or its preamble to the ECJ’s often-repeated statement that “fundamental rights form an integral part of the general principles of law ... for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories”. This assertion of a category of general principles of EU law inspired by international human rights treaties is more fluid and is non-exhaustive (take the example often cited of the rights of minorities, which are protected under the European Framework Convention on the Rights of Minorities and under the ICCPR, but not mentioned in the Charter, although the former are international agreements on which Member States have ‘collaborated’ in accordance with ECJ case law), by comparison with the enumerated rights approach of the Charter, even if the latter are themselves derived from international law and from ECJ case law.

It is possible, of course, that the ECJ will continue to adopt an open approach to human rights protection, and to make references to the general principles of law and to internationally protected rights which are not specifically mentioned in the Charter, even though the Charter will exist as a first and primary reference point. It was indeed an article of faith during the drafting of the Charter that it was not to *change* the existing state of the law, but rather was designed to showcase the fundamental rights *acquis* of the EU. Nonetheless, if the Charter as it stands is incorporated as one of the first articles in a new constitutional document, then there is a danger that it may become the authoritative reference point for EU fundamental

rights, to the detriment of international human rights norms which are not specifically included.

For this reason, in order to make sure that the normatively open *acquis* is not ‘closed’ by the incorporation of the Charter in a basic constitutional treaty, it would be advisable to include in the new treaty—for example in Article 2 of the preliminary draft constitutional treaty—a clause affirming that openness e.g. by mentioning the general principles of EU law which are inspired by international law.

B. Full incorporation of the text of the Charter or incorporation by reference?

The majority of the Working Group favoured the full incorporation of the text of the Charter articles into the constitutional treaty, rather than incorporating it by reference by one of the other suggested methods. However, the debate in the Convention plenary indicated a range of views, and in the preliminary draft constitutional text, the three main options are set out for consideration: (a) a reference to the Charter (b) a statement of the fact that the Charter is an integral part of the Constitution with the articles of the Charter being set out elsewhere in the treaty or in an annexed protocol (c) full incorporation of all articles of the Charter.

It seems likely that the Working Group favoured the “full incorporation” option (c) primarily for symbolic purposes, in the sense of indicating the central place of these values and principles in the new constitutional text, rather as the Bill of Rights tends to be a central chapter in modern state constitutions. And while this option poses various difficulties due to the way in which the Charter was drafted as a separate and self-standing instrument, yet with complex overlaps and interactions with the existing EC Treaty, it seems nonetheless to be the best way forward for a number of reasons.

Option (a) Incorporation by simple reference

Option (a), to include a reference to the Charter, would presumably be along the lines of the current Article 6 of the EU Treaty, indicating that the Union commits itself to respect fundamental rights as they result from the EU Charter of Fundamental Rights, along with the ECHR and national constitutional traditions. Such a reference would place the Charter outside the constitutional treaty, as a source of inspiration for the fundamental rights recognised by the EU, rather than as an integral part of the new constitutional text, and would identify the Charter as one of the sources of rights alongside others. This would maintain the value of openness of the current position,

but it seems to be the option less favoured both within the Working Group and also within the Convention's plenary debate. Certainly it would not give the prominence or centrality to the EU's commitment to human rights which the actual incorporation of the Charter into a new constitutional treaty would do. Had the question of the Charter's incorporation into the Treaties arisen at a time when there was no serious discussion of an EU constitution, then the option of incorporation by an additional reference in Article 6 of the EU Treaty would possibly have been the best solution. However, the fact that the current process and the 2004 IGC is likely to produce a basic constitutional text for the EU introduces a fundamental symbolic and substantive change, which would make the omission of the Charter from the new constitution a much more significant exclusion.

For this reason, option (a) of incorporation by reference would not be the best solution in the current context.

Option (b) Incorporation by reference and by inclusion of the Charter in a protocol to the constitutional treaty

Option (b) provides an intermediate solution. On the one hand it would achieve the full incorporation of the Charter into the new constitutional text with equal legal status alongside all other provisions of the latter, rather than leaving it as an external source of inspiration only [as under option (a)]. And on the other hand it would achieve this without the awkwardness of inserting a relatively lengthy and self-standing text such as the Charter, with its own preamble, into the first articles of a new constitutional treaty.

However, this solution has two disadvantages. The first and most important is that it would lack the symbolic commitment of placing the Charter centrally within a new constitutional text, and would seem to relegate it to the less pivotal status of a protocol or annex. Given the importance of the message conveyed by placing the Charter's commitment to human dignity, equality and solidarity at the heart of a new documentary constitution, this would be a very significant loss. Further, while one apparent advantage of the incorporation-by-reference option is that it would seem to avoid some of the problems of duplication and overlap between the provisions of the Charter and those of the existing EC Treaty, that advantage would in fact be one of appearance only. This is because, given the equal legal status of the Charter and the Treaties under option (b), the practical problem of actual legal overlap and duplication would remain, even if the location of the Charter as a separate integral document in an annex or protocol would superficially reduce the degree of textual and visual awkwardness.

For this reason, option (b) of incorporation by reference combined with inclusion of the Charter in a protocol or annex to the Treaty, should not be the preferred solution.

Option (c) Full incorporation of all of the Charter provisions

Option (c), which would incorporate the full text of the Charter into a constitutional treaty was the choice favoured by most of the Convention Working Group members, and has also been proposed in the ‘Feasibility Study’ draft Constitution recently prepared by the Lamoureux working group for the Commission (published 4 December 2002, and referred to, rather strangely, as Penelope).⁶ The essential value and importance of this approach would be the visibility and symbolism of setting out, at an early point in the new constitutional text, what is effectively a constitutional bill of rights. While this approach presents certain practical and legal problems which will be discussed below, it is nonetheless, in my view, the option to be preferred. In particular, the solution proposed in the Penelope draft of having a separate Part II in the basic constitutional treaty containing the full Charter would be preferable to placing it in the middle of something like Part I of the Praesidium’s October 2002 draft. The detailed policies and legal bases would then be contained in a separate Part III of the constitutional treaty.

A first problem, however—one which has animated most of the political discussion of a constitutional treaty or a constitution for the EU—is arguably that of simplicity and readability. From this perspective, one might doubt the wisdom of incorporating a document of fifty-four articles into a basic constitutional treaty, which, according to the Praesidium’s preliminary draft would contain no more than forty-six articles. However, the prospect of simplifying by reducing the number of articles in the Charter and changing its text in any substantive way (other than by the purely cosmetic change of ‘grouping’ several current Charter articles together under a smaller number of umbrella articles of the new constitutional treaty, as was mooted during the Convention debate on the Working Group’s final draft) would be ill-advised, given the almost unchallenged assumption so far that the substance of the Charter should remain unchanged, in deference to the procedure by which it was drafted and proclaimed in 2000.

⁶ See http://europa.eu.int/futurum/documents/offtext/const051202_en.pdf

Perhaps a more substantial problem in relation to the feasibility of option (c), however, is that the Charter was drafted as a complete and integral instrument with its own preamble, its own internal coherence and with a set of final horizontal clauses, rather than being designed as one part of a larger text. Further, as a consequence of its having been drafted as a separate and complete instrument by the first Convention, the Charter contains many provisions which either duplicate, partially overlap with, repeat in slightly different form, or are somewhat in tension with provisions of the existing EC Treaty. If all of the Charter's provisions are to be incorporated into the new constitutional treaty in their current form it is inevitable that consequential changes to the substance of the existing EC Treaty will need to be made, and it seems likely that some duplication will in any event persist.

On the basis of the Praesidium's preliminary draft, it seems that the fundamental provisions establishing the single market and all of the legislative bases for action would be contained in a separate part of the constitutional text, which obviously raises the question of the relationship between legal bases such as the current Articles 12, 13 and 141 of the EC Treaty and the 'corresponding' rights contained in provisions of the Charter such as Articles 21 and 23. It seems unlikely, despite the opinion of the Working Group to that effect, that the 'referral clause' in Article 52(2) of the Charter is sufficient to deal with the replications and overlaps which are likely to result from its incorporation into the constitutional Treaty containing much of what currently exists in the EC Treaty. It would seem, on the contrary, that a significant 'cleaning-up' job would need to be done on the remaining provisions of the EC Treaty which intersect or overlap with the provisions of the Charter and which are likely to be included in the new constitutional document.

As an initial step in the direction of this task, annexed at the end of this paper is a table illustrating the various articles of the Charter which correspond in different ways with—whether by overlapping with, repeating, or even potentially contradicting—provisions contained in the current EC Treaty. In some of these instances, it is evident that versions of these EC Treaty provisions would have to be included in the remaining Part of the preliminary draft constitutional treaty. The comments in the third column of the table attempt to indicate those cases where it is possible to envisage the EC Treaty provisions being adapted so as to relate more directly to the corresponding provision in the Charter, e.g. to provide the legal basis and mechanism for implementing or fleshing out the right expressed in the Charter.

In other words, for provisions such as Articles 21 and 23 (discrimination and gender equality), or 27, 28, 30 and 31 (workers' rights), which would have corresponding legal bases in the relevant Part of the constitutional treaty, the latter provisions could

make direct reference to the Articles of the Charter. These could be expressed in a form such as: 'the Council, acting under the [co-decision procedure] shall adopt legislation to combat discrimination in accordance with Article [21, 23...] of the Charter of Rights'. A similar and careful coordination of the competence provisions of the constitutional treaty in the field of social policy with the declaration of workers' rights and other social rights contained in the Charter would need to be undertaken. In other instances, for example the exhortatory provisions concerning cultural diversity, consumer protection and health protection, these could be mentioned in the remaining part of the constitutional treaty by means of an express reference to the relevant Charter provision. In the case of the citizenship provisions, as argued above, it would be advisable for the current draft of Article 5 of the preliminary draft constitutional text only to introduce and assert the basic concept of EU citizenship, rather than listing all of the specific rights pertaining to it. Instead, what is now draft Article 5 should refer to the Charter for a listing of the specific rights and incidents of EU citizenship. Finally, a corresponding legal basis providing power to adopt legislation to implement the citizenship rights contained in the Charter would be needed in the remaining part of the constitutional treaty. Indeed, the Penelope draft included an additional article 57 in the text of the Charter itself conferring competence to adopt measures to implement and facilitate the citizenship rights contained therein. This, however, is not recommended, since there are no other competence provisions in the Charter itself, and corresponding competence provisions for many other Charter rights will in any case need to be contained in the remaining part of the constitutional treaty.

Therefore it is recommended that the Charter (complete with preamble) be incorporated, along the lines indicated in the Penelope draft, in Part II of a three-part Constitutional Treaty, before Part III which would contain the detailed policies and legal bases. It could, if considered necessary, be specified that Part III of the constitutional Treaty should be read in conformity with the more fundamental Parts I and II.

C. Proposed Working Group amendments to the horizontal clauses of the Charter

Article 51(1) and (2)

The amendments proposed by the WG are shown in italics:

"51 (1): The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity

and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers *and respecting the limits of the powers of the Union as conferred on it by other parts of [this Treaty / the Constitutional Treaty]*.

51 (2): This Charter does not *extend the scope of application of Union law beyond the powers of the Union or* establish any new power or task for [the Community or] the Union or modify powers and tasks *defined by the other [Chapters / parts] of [this Treaty / the Constitutional Treaty]*."

A number of commentators had earlier pointed out the tension between the obligation in Article 51(1) on the institutions of the EU to 'promote' the application of the rights contained in the Charter and the assertion in Article 51(2) that the Charter does not modify powers or tasks defined by the Treaty. As a consequence of this, the Working Group has proposed something of a 'belt and braces' approach, supplementing both paragraphs (1) and (2) with limiting clauses designed to further underscore the intention not to increase, change or extend any of the existing powers under the EC or EU treaties. Arguably, these additional clauses are superfluous, somewhat ugly to read, and they do not remove the tension in question. It seems simply inevitable (and from the point of view of at least some, desirable) that the existence and incorporation of the Charter will influence the nature and interpretation of EU tasks and powers, although in subtler ways than the bald notion of 'establishing new power' suggests. The explicit articulation for the first time in the basic EU constitutional treaty of an array of fundamental rights seems unlikely not to 'modify' the way other aspects of the EU's powers and tasks are construed, at least by the Court of Justice if not by other actors. The fiction that the Charter of Rights, whether fully legally incorporated or not, 'makes no difference' to anything in the EU legal and political order is not an easy one to maintain, and although no doubt there were strong interests to be appeased within the Working Group which led to the belt and braces approach as a way of maintaining this fiction, the amended Article 51 presents a curious picture. It is of course a feature typical of the way in which the EU operates—in particular at high constitutional moments such as these—that bold and powerful new developments such as the constitutional incorporation of a new Bill of Rights are accompanied by a series of countervailing safeguards and even contradictory limiting provisions. Nevertheless, it seems unlikely that there will be much political opposition to the newly proposed 'double padlock' provision, and on the contrary that there will be clear political support for it as an assertion of the limits of EU competence.

However, for the reasons just given, it is recommended that the amendments proposed by the Working Group to Article 51 of the Charter be rejected.

Article 52(4)

The amendment proposed by the Working Group in adding this new subparagraph is:

"52(4) Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions."

This proposal seems a useful one. It reads as a direction to the Court of Justice to interpret the rights contained in the Charter in harmony with national constitutional traditions, in so far as the rights in question are derived from those traditions. This direction to strive for 'soft harmony' between national constitutional rights and the expression of those rights contained in the Charter is a more promising constitutional means of addressing the tension between them rather than positing the supremacy of one over the other—quite apart from the fact that political agreement on such a supremacy clause (of either kind) would be virtually impossible to achieve. Like the provision already contained in Article 52(3) concerning the relationship between the Charter and corresponding provisions of the ECHR, this proposed amendment leaves many questions open, but that seems inevitable and appropriate to the complexity of Europe's legal pluralism.

It is recommended that the Working Group's proposed amendment to Article 52(4) of the Charter be accepted.

Article 52(5)

The amendment proposed by the Working Group in adding this new subparagraph is:

"52 (5) The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality."

Article 52(5), like the proposed amendments to Article 51 discussed above, seems to be a legally superfluous and fuzzy political compromise. This is the one amendment proposed by the Working Group which seems to be an attempt—or perhaps better described as a compromise proposal in response to such an attempt—to revisit the substance and content of

the Charter, despite the Group's assertion that it proceeded on the basis that the content of the Charter which had been proclaimed at the Nice European Council should not be re-opened. If the 'integrity' of the Charter as a whole, on account of the mechanism by which it was drafted and proclaimed is to be taken seriously, then this in itself provides a clear argument against including the proposed amendment in Article 52(5).

The amendment seems likely to have been pressed by one of the UK members of the Working Group—although a large majority of the Working Group supported it—in particular since the UK government's previous representative on the Convention which drafted the Charter in 2000, Tony Goldsmith, had fought hard for a distinction between rights and principles to be made in the text, but had been defeated in this attempt at an early stage of the Charter drafting process.⁷ The main thrust behind this position seems to be the wish not to render many of the so-called economic and social rights (which are considered to require positive action and social expenditure) justiciable, and therefore to reclassify them as 'principles', while maintaining the more traditional and often negatively framed civil and political rights (which are considered to require only non-interference) as justiciable individual rights. According to the proposed amendment, Charter provisions "which contain principles ... shall be judicially cognisable only in the interpretation of [acts which implement these principles] and in ruling on their legality".

Without needing to engage in the longstanding academic and policy debate on the distinction between economic/social and civil/political rights, and on their alleged indivisibility under international law,⁸ the likelihood of the proposed amendment rendering all 'social rights' contained in the Charter non-justiciable seems in any case extremely slight. This is partly because the distinction which the amendment introduces between 'principles' and 'subjective rights'—to use the language of the Working Group's explanatory note on the proposed amendment⁹—is extremely hazy, and partly because there is no clear division between economic/social and

7 For an account of the Charter from his perspective, see T. Goldsmith, 'A Charter of Rights, Freedoms and Principles' (2001) 38 *Common Market Law Review* 1201'

8 See H. Steiner and P. Alston, *International Human Rights in Context* (2nd edn., OUP, 2000), Chap. 4; C. Fabre, 'Constitutionalising Social Rights' (1998) 6 *Journal of Political Philosophy* 263.

9 See WD 023.

civil/political rights in the Charter. The latter division does not in any case map neatly onto a distinction between ‘rights requiring positive action or expenditure’ and rights which require only non-interference for their protection.

Further, the polarisation of the notions of justiciability and non-justiciability underlying the proposed amendment reflects a simplistic and legally unsophisticated understanding of the function and operation of a Charter of Rights such as this. It is unlikely that the rights and values set out in the Charter will be used in any significantly different way from the way in which fundamental rights and provisions of the ECHR have until now been used in litigation before the ECJ. The legal and constitutional culture within which the ECJ has operated over the past four decades, and the approach it has adopted to fundamental rights adjudication has shown no indicating of following the strong paradigm associated with the US legal system of rights as weapons used to ‘trump’ legislation. Indeed the complaint has more usually been that the ECJ does not ‘take rights seriously’ in the sense that it has only extremely rarely struck down any provision of EU law, other than individual administrative or staff actions, for violation of human rights.¹⁰ Instead, the articulation of legal rights in a text such as the ECHR and now the EU Charter is much more likely to continue to function as a source of values and norms other than those set out in the other Treaties, to influence the interpretation of EU legislative and other measures, and to feed into policy-making and into EU activities more generally. And it is unlikely that the ECJ’s role and approach in relation to these values and norms will change very much from the approach it has demonstrated to date with other fundamental rights and norms derived from the ECHR and national constitutional law.

There is therefore a range of arguments in favour of abandoning the Working Group’s proposed amendment to Article 52(5) (which, incidentally, was accepted in the Penelope draft). It represents an attempt to re-open the substance of the Charter as agreed by the previous Convention by consensus; it is premised on a very unclear distinction between ‘principles’ and everything else; it is based on a rather crude understanding of the notion of justiciability; and it reflects a lack of awareness of the

10 See J. Coppel and A. O’Neill, ‘The European Court of Justice: Taking Rights Seriously?’ (1992) 29 *Common Market Law* 669, and the response in J. Weiler and N. Lockhart ‘“Taking Rights Seriously” Seriously: The European Court and its Fundamental Rights Jurisprudence’ (1995) 32 *Common Market Law Review* 51, 579.

role and approach which has over the years been adopted by the ECJ (and CFI) in cases raising fundamental rights issues. The best that can be said about the proposed amendment is that the ECJ can decide for itself what constitutes a 'principle', and that this language is unlikely to restrict it in drawing on the range of values and norms expressed in the Charter in its adjudicative role.

It is recommended that the Working Group's proposed amendment to Article 52(5) of the Charter be rejected.

Article 52(6)

The amendment proposed by the Working Group in adding this new subparagraph is:

"52 (6) Full account shall be taken of national laws and practices as specified in this Charter."

This seems to be an exhortatory and fairly uncontroversial amendment encouraging those who apply and interpret the Charter to pay full account to national laws and practices when the Charter specifies this.

It is recommended that the Working Group's proposed amendment to Article 52(6) of the Charter be accepted.

D. Some remaining questions

(1) Is there a need, in particular because of Opinion 2/94 of the ECJ, for a special clause to be inserted in the new treaty authorising the EU to accede to the ECHR? Some have argued that, for the sake of legal certainty and clarity, such a clause does need to be included, and this is certainly the view taken by the Working Group. It seems unlikely that such a provision would be legally or constitutionally necessary, however, given that the circumstances in which Opinion 2/94 was written will have radically changed if a new constitutional treaty along the lines which are currently emerging comes into force. In the first place, a Charter of Rights will be incorporated into the treaty; secondly, the EU will have legal personality; and more generally the institutional and constitutional architecture which existed at the time of the 1996 Opinion will have altered in many significant ways. Arguably such a clause is not strictly necessary, but the Working Group recommendation to include a legal basis in the new Treaty may well be sensible for the avoidance of doubt and to help provide political impetus at a later stage to accede. The Penelope draft has included such a clause in a new Article 55(1) of the Charter, which would be incorporated into Part II of a new EU Constitution.

It is recommended that a provision be included in the constitutional treaty containing an explicit legal basis for accession by the EC/EU to the European Convention on Human Rights.

(2) Should there be a reform of Article 230 to complement the incorporation of the Charter of Rights? The Charter Working Group did not wish to make a recommendation on this issue, on the basis that it was not properly within their mandate, and that it should be addressed either by the Working Group on Justice and Home Affairs together with other questions of judicial control by the ECJ, or as part of the work on judicial control of subsidiarity. There are few questions on which the EU law academic world (not to mention the CFI and the Advocates General of the ECJ) is so united as that the right of individuals to seek judicial review by the ECJ under Article 230 is excessively restrictive, and that it undermines respect for the principle of access to justice in the EU. The adoption of the Charter of Rights only heightens this sense (and not only because of the content of Article 57 of the Charter itself on access to court), and the response that the ECJ is already overburdened simply cannot provide an answer to the criticisms of *locus standi* under Article 230. The problem of overburdening is a significant one which must be addressed in the reflections on reform of the judicial system after the introduction of the Nice Treaty changes, but it cannot be addressed entirely at the expense of individual access to justice. There are very strong arguments for introducing a reform to Article 230, and the incorporation of the Charter into a new constitutional treaty provides a forceful new reason for doing so.

It is recommended that the current Article 230 of the EC Treaty be amended to provide for less restrictive *locus standi* for individuals before the Court of Justice.

(3) Should there be a human rights mainstreaming clause, along the lines of the ‘environmental’ and ‘gender equality’ integration clauses of the current EC Treaty? There are strong arguments to be made in favour of such a clause, in particular because the Council has asserted in its Annual Reports on Human Rights in the Union that it is committed to mainstreaming human rights concerns into all EU internal and external policies. However, given the extreme caution displayed in the ‘horizontal articles’ of the Charter in relation to any possible change in the nature of EU powers, it seems likely that a mainstreaming article would be viewed with political suspicion in various quarters as a possible Trojan horse for smuggling a more positive or proactive human rights dimension into EU policy. Nonetheless, a new constitutional Treaty which places protection for human rights in a central

position and which incorporates a Charter of Fundamental Rights, would be enhanced by a human rights mainstreaming clause which should not, if the Council's annual reports are to be believed, bring about any major change in current practice.

It is recommended that a human rights integration clause, along the lines of the current Articles 3(2) and 6 of the EC Treaty on gender equality and environmental protection, be included in the constitutional treaty.

(4) Should there be a clause in the constitutional treaty which makes protection of human rights an explicit objective of the Union? Since the ECJ handed down its Opinion 2/94 on accession to the ECHR,¹¹ the question whether the EU legislature could act under Article 308 on the basis that protection of human rights is an objective of the Union has remained unclear. Some have taken the view that the Court's opinion indicated a negative answer, while others have taken the opposite view.¹² Joseph Weiler has recently argued, in the context of the current constitutional debate, that the opportunity should be taken now to insert an express objective of this kind into the reformed treaty.¹³ This would constitute a positive step in favour of a more proactive human rights policy, but it seems unlikely to have political support in view of the opposite tendency displayed in relation to Article 51(1) and (2) of the Charter.

It is recommended that protection for human rights be specified as an objective of the EC/EU.

(5) Should there be a provision for establishing a mechanism to enforce the 'suspension of rights' provision of the Treaty where there is a 'serious and persistent breach' of fundamental rights by a member state—currently Article 45 of the

11 [1996] ECR I-1759

12 See the range of views expressed in the commentaries on the case: J.H.H. Weiler and S. Fries, "A Human Rights Policy for the European Community and Union: the Question of Competences" in P. Alston, M. Bustelo and J. Heenan (eds), *The EU and Human Rights* (OUP, 1999), N. Burrows (1997) 22 *European Law Review* 58; G. Gaja (1996) 33 *Common Market Law Review* 973; S. Peers (1998) 35 *Common Market Law Review* 539; A. Dashwood and A. Arnall in *C.E.L.S. Occasional Paper* no. 1, and C. Vedder, *Europarecht* (1996) 309.

13 'A Constitution for Europe: Some Hard Choices' (2002) 40 *Journal of Common Market Studies* 563

preliminary draft constitutional treaty? The absence of such a mechanism is a fact to which a number of commentators have drawn attention, but some would treat it as a matter of implementing detail rather than a central constitutional issue. Further, it is also an issue which would raise the same ‘increased competences/powers’ fears as demonstrated in Article 51 of the Charter, since an enforcement mechanism would probably entail a monitoring procedure, and hence a degree of supervision of Member State activities. From this perspective, it may be better at least initially to allow a process to evolve in an organic way, as seems to be suggested by the approach adopted in the European Parliament’s most recent Annual reports on human rights within the Union.¹⁴

¹⁴ See A5-0223/2001 and A5-0451/2002.

Appendix

“Corresponding” Provisions of the Charter and the current EC Treaty

Charter	EC	Comment
<p><i>Article 14</i> <i>Right to education</i></p> <p>1. Everyone has the right to education and to have access to vocational and continuing training.</p> <p>...</p>	<p><i>Article 150 (ex Article 127)</i></p> <p>...</p> <p>2. Community action shall aim to:</p> <ul style="list-style-type: none"> - facilitate adaptation to industrial changes, in particular through vocational training and retraining; - improve initial and continuing vocational training in order to facilitate vocational integration and reintegration into the labour market; - facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people; - stimulate cooperation on training between educational or training establishments and firms; - develop exchanges of information and experience on issues common to the training systems of the Member States. <p>...</p>	<p>Article 14.1 Charter and Article 150(2) EC (access to vocational training)</p> <ul style="list-style-type: none"> ▪ Likely interaction: EC Treaty provision could be adapted to provide that Community/ Union action shall aim also to implement the right contained in Article 14 of the Charter

<p><i>Article 15</i> <i>Freedom to choose an occupation and right to engage in work</i> ...</p> <p>2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State. ...</p> <p><i>Article 16</i> <i>Freedom to conduct a business</i> The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.</p>	<p><i>Article 39 (ex Article 48)</i> ...</p> <p>3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.</p> <p>4. ...</p> <p><i>Article 43 (ex Article 52)</i> Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue</p>	<p>Articles 15(2) and 16 Charter and Articles 39(3), 43 and 49 EC Treaty (rights to work, establish, provides services):</p> <ul style="list-style-type: none"> There is some overlap and duplication here; while this is not particularly problematic, greater coherence could be introduced by making reference to the rights contained in Arts 15 & 16 of the Charter in Arts 39, 43 & 49 EC Treaty which elaborate on those rights.
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	<p>activities as selfemployed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.</p> <p><i>Article 49 (ex Article 59)</i></p> <p>Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community.</p>	
<p><i>Article 21</i> <i>Non-discrimination</i></p> <p>1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.</p>	<p><i>Article 12 (ex Article 6)</i></p> <p>Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.</p>	<p>Article 21 Charter, and Articles 12 and 13 EC (freedom from discrimination):</p> <ul style="list-style-type: none"> There is considerable overlap here : the EC Treaty

<p>2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.</p>	<p><i>Article 13 (ex Article 6a)</i></p> <p>Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.</p>	<p>provisions (12-13) could refer to the Charter provisions and should provide a legal basis also for the additional grounds of discrimination covered in Art 21.</p>
<p><i>Article 22</i> <i>Cultural, religious and linguistic diversity</i></p> <p>The Union shall respect cultural, religious and linguistic diversity.</p>	<p><i>Article 151 (ex Article 128)</i></p> <p>1. The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.</p> <p>2. Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:</p> <ul style="list-style-type: none"> - improvement of the knowledge and dissemination of the culture and history of the European peoples; - conservation and safeguarding of cultural heritage of European significance; - non-commercial cultural exchanges; - artistic and literary creation, including in the audiovisual sector. 	<p>Article 22 Charter and Article 151 EC (respect for cultural diversity):</p> <ul style="list-style-type: none"> ▪ Some overlap here: reference to the Charter provision could be made in the EC Treaty article.

	<p>3. The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.</p> <p>4. The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures.</p> <p>5. In order to contribute to the achievement of the objectives referred to in this Article, the Council:</p> <ul style="list-style-type: none"> - acting in accordance with the procedure referred to in Article 251 and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States. The Council shall act unanimously throughout the procedure referred to in Article 251; - acting unanimously on a proposal from the Commission, shall adopt recommendations. 	
<p><i>Article 23</i> <i>Equality between men and women</i></p> <p>Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.</p>	<p><i>Article 141 (ex Article 119)</i></p> <p>1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.</p> <p>2. For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the</p>	<p>Article 23 Charter and Article 141 EC (equality between men and women):</p> <ul style="list-style-type: none"> ▪ There is considerable overlap here: reference should be

	<p>worker receives directly or indirectly, in respect of his employment, from his employer. Equal pay without discrimination based on sex means:</p> <p>(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;</p> <p>(b) that pay for work at time rates shall be the same for the same job.</p> <p>3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.</p> <p>4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.</p>	<p>made to the Charter provision, esp. in paras 3 and 4 of Art 141 .</p>
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<p>Article 27 Workers' right to information and consultation within the undertaking</p> <p>Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.</p> <p>Article 28 Right of collective bargaining and action</p> <p>Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.</p> <p>Article 30 Protection in the event of unjustified dismissal</p> <p>Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.</p> <p>Article 31 Fair and just working conditions</p> <p>1. Every worker has the right to working conditions which respect his or her health, safety and dignity.</p>	<p>Article 137 (ex Article 118)</p> <p>1. With a view to achieving the objectives of Article 136, the Community shall support and complement the activities of the Member States in the following fields:</p> <ul style="list-style-type: none"> - improvement in particular of the working environment to protect workers' health and safety; - working conditions; - the information and consultation of workers; - the integration of persons excluded from the labour market, without prejudice to Article 150; - equality between men and women with regard to labour market opportunities and treatment at work. <p>2. To this end, the Council may adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings. The Council shall act in accordance with the procedure referred to in Article 251 after consulting the Economic and Social Committee and the Committee of the Regions. The Council, acting in accordance with the same procedure, may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating</p>	<p>Articles 27, 28, 30, 31 Charter and Articles 137 and 140 EC (rights of workers):</p> <ul style="list-style-type: none"> ▪ There is evidently some overlap here. Appropriate reference to the various Charter rights could be made in the EC Treaty provisions; There is however some tension between Article 28 Charter and Article 137(5), the latter excluding EC legislative competence in the field of strike action while the former recognises the right to engage in strike action as an EU right.
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<p>2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.</p>	<p>experiences in order to combat social exclusion.</p> <p>3. However, the Council shall act unanimously on a proposal from the Commission, after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions in the following areas:</p> <ul style="list-style-type: none"> - social security and social protection of workers; - protection of workers where their employment contract is terminated; - representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 6; - conditions of employment for third-country nationals legally residing in Community territory; - financial contributions for promotion of employment and jobcreation, without prejudice to the provisions relating to the Social Fund. <p>4. A Member State may entrust management and labour, at their joint request, with the implementation of directives adopted pursuant to paragraphs 2 and 3. In this case, it shall ensure that, no later than the date on which a directive must be transposed in accordance with Article 249, management and labour have introduced the necessary measures by agreement, the Member State concerned being required to take any necessary measure enabling it at any time to be in a position to guarantee the results imposed by that directive.</p> <p>5. The provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty.</p>	
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	<p>6. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.</p> <p><i>Article 140 (ex Article 118c)</i></p> <p>With a view to achieving the objectives of Article 136 and without prejudice to the other provisions of this Treaty, the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this chapter, particularly in matters relating to:</p> <ul style="list-style-type: none"> - employment; - labour law and working conditions; - basic and advanced vocational training; - social security; - prevention of occupational accidents and diseases; - occupational hygiene; - the right of association and collective bargaining between employers and workers. <p>To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultations both on problems arising at national level and on those of concern to international organisations. Before delivering the opinions provided for in this Article, the Commission shall consult the Economic and Social Committee.</p>	
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<p>Article 35 Health care</p> <p>Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.</p>	<p>Article 152 (ex Article 129)</p> <p>1. A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities. Community action, which shall complement national policies, shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to human health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education. The Community shall complement the Member States' action in reducing drugs-related health damage, including information and prevention.</p> <p>...</p>	<p>Article 35 Charter and Article 152(1) EC (integration of high level of health protection):</p> <ul style="list-style-type: none"> • The duplication here ('high level.. etc') could be reduced by amending the EC Treaty provision so as to make reference to the Charter's guarantee instead
<p>Article 36 Access to services of general economic interest</p> <p>The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.</p>	<p>Article 16 (ex Article 7d)</p> <p>Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.</p>	<p>Article 36 Charter and Article 16 EC (services of general economic interest):</p> <ul style="list-style-type: none"> • Same as the previous column:

<p><i>Article 37</i> <i>Environmental protection</i></p> <p>A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.</p>	<p><i>Article 6 (ex Article 3e)</i></p> <p>Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.</p>	<p>Article 37 Charter and Article 6 EC</p> <ul style="list-style-type: none"> • Same as previous column;
<p><i>Article 38</i> <i>Consumer protection</i></p> <p>Union policies shall ensure a high level of consumer protection.</p>	<p><i>Article 153 (ex Article 129a)</i></p> <p>1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.</p> <p>2. Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.</p> <p>3. The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through:</p> <p>(a) measures adopted pursuant to Article 95 in the context of the completion of the internal market;</p> <p>(b) measures which support, supplement and monitor the policy pursued by the Member States.</p>	<p>Article 38 Charter and Article 153 EC (consumer protection):</p> <ul style="list-style-type: none"> • Same as previous column

	<p>4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 3(b).</p> <p>5. Measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.</p>	
<p>Article 39 <i>Right to vote and to stand as a candidate at elections to the European Parliament</i></p> <p>1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.</p> <p>2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.</p> <p>Article 40 <i>Right to vote and to stand as a candidate at municipal elections</i></p> <p>Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.</p>	<p>Article 18 (ex Article 8a)</p> <p>1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.</p> <p>2. The Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1; save as otherwise provided in this Treaty, the Council shall act in accordance with the procedure referred to in Article 251. The Council shall act unanimously throughout this procedure.</p> <p>Article 19 (ex Article 8b)</p> <p>1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same</p>	<p>Articles 39, 40, 43, 44, 45, 46 Charter and Articles 18, 19, 20, 21, 190 and 194 EC (citizenship rights):</p> <ul style="list-style-type: none"> • This extensive duplication could be avoided by introducing only the basic concept of citizenship in the EC Treaty provision and making reference to the Charter provision for a listing of the

<p>Article 43 Ombudsman</p> <p>Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.</p> <p>Article 44 Right to petition</p> <p>Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.</p> <p>Article 45 Freedom of movement and of residence</p> <p>1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.</p> <p>2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.</p> <p>Article 46 Diplomatic and consular protection</p> <p>Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the</p>	<p>conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.</p> <p>2. Without prejudice to Article 190(4) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.</p> <p>Article 20 (ex Article 8c)</p> <p>Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.</p>	<p>specific rights; the legal basis provision would also refer to the implementation of the Charter rights.</p>
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<p>diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.</p>	<p><i>Article 21 (ex Article 8d)</i></p> <p>Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 194. Every citizen of the Union may apply to the Ombudsman established in accordance with Article 195. Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 7 in one of the languages mentioned in Article 314 and have an answer in the same language.</p> <p><i>Article 190 (ex Article 138)</i></p> <p>1. The representatives in the European Parliament of the peoples of the States brought together in the Community shall be elected by direct universal suffrage.</p> <p>2. The number of representatives elected in each Member State shall be as follows:</p> <p>Belgium 25 Denmark 16 Germany 99 Greece 25 Spain 64 France 87 Ireland 15 Italy 87 Luxembourg 6 Netherlands 31 Austria 21 Portugal 25 Finland 16</p>	
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	<p>Sweden 22 United Kingdom 87.</p> <p>In the event of amendments to this paragraph, the number of representatives elected in each Member State must ensure appropriate representation of the peoples of the States brought together in the Community.</p> <p>3. Representatives shall be elected for a term of five years.</p> <p>4. The European Parliament shall draw up a proposal for elections by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States. The Council shall, acting unanimously after obtaining the assent of the European Parliament, which shall act by a majority of its component members, lay down the appropriate provisions, which it shall recommend to Member States for adoption in accordance with their respective constitutional requirements.</p> <p>5. The European Parliament shall, after seeking an opinion from the Commission and with the approval of the Council acting unanimously, lay down the regulations and general conditions governing the performance of the duties of its Members.</p> <p><i>Article 194 (ex Article 138d)</i></p> <p>Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the</p>	
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	Community's fields of activity and which affects him, her or it directly.	
<p><i>Article 42</i> <i>Right of access to documents</i> Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.</p>	<p><i>Article 255 (ex Article 191a)</i> 1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3. 2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam. 3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.</p>	<p>Article 42 Charter and Article 255 EC (access to documents):</p> <ul style="list-style-type: none"> • The EC Treaty provision should make reference to the Charter right.

Competence

Stephen Weatherill

Introductory Remarks

There is much to admire in the Laeken Declaration. Under the sub-title “A better division and definition of competence in the European Union”, it sets out three series of questions. They are (1) How to make the division of competence more transparent; (2) Does there need to be a reorganisation of competence?; and (3) How to ensure that a redefined division of competence does not lead to a creeping expansion of EU competence, while at the same time ensuring the European dynamic does not come to a halt. Question (3) is happily and properly well-balanced. Both concerns are important, though tension is evidently created by the quest to meet both. It is hard to avoid the impression that the first aspect—restraint—appears to be higher on the Laeken priority list and the subsequent political agenda than the second—dynamic growth. Perhaps, if this is the moment at which the first cycle of European (quasi-) federalism is coming to an end, and past practice of shift from State-level to European-level is being replaced by a second cycle characterised by a much harder look at the value of such one-way traffic, then that choice of emphasis is inevitable, or at least predictable. All federal systems are cyclical in the weight attached to competing preferences for allocation of competence. But a major anxiety is that the process of clarifying the division of competence (question (1), above) and of, if appropriate, reorganising competence (question (2), above) should not be seen simply and crudely as a matter of defending State prerogatives from interference by the EU. Rather, the EU supports and supplements the Member States and vice versa. Both are better off with each other than without. In thinking about the scope of EU competence and its relationship with the competence of the Member States, the issue is finding how best to take forward that mutually beneficial relationship, while also advertising better the benefits of transnational co-operation.

The proposals advanced in this paper are guided by three perspectives on the law and practice governing the question of the scope of the European Union's competence.

1. Attempts to impose a rigid division between Union and State competences are likely to prove damaging. They will rob the system of its necessary capacity for dynamism and adaptability. Moreover, they will misleadingly portray the relationship between Union and State as confrontational rather than co-operative.

2. Attempts to provide a division between Union and State competences that is wholly predictable ex ante are likely to prove damaging. They will promise more than can actually or desirably be delivered. "Golden formulae" cannot capture the complexity of the issues at stake, except by providing at a general level for an understanding of the issues that need to be taken into account in making specific decisions.

3. Inadequate respect for existing devices designed to balance the allocation of competences between Union and States will deepen the perceived problem rather than contribute to its cure. In fact, current practice reveals a number of worthwhile devices for, in short, controlling the outward creep of Union competence, albeit that the pattern is unsystematic.

A few brief comments, designed to elucidate the relevant anxieties, are appropriate before a more focussed examination of particular Treaty provisions is offered, below.

1. Attempts to impose a rigid division between Union and State competences are likely to prove damaging. They will rob the system of its necessary capacity for dynamism and adaptability. Moreover, they will misleadingly portray the relationship between Union and State as confrontational rather than co-operative.

It is important to avoid perpetuating the mistaken assumption that power is held either by the EU or by the Member States and that arguments about power are arguments about who wins and who loses. And it is quite erroneous to enter the debate about allocation of competence by treating the vice to be a long-term power-grab by the EU and the virtue an entrenchment of State power. Rather, the mutually reinforcing virtues of EU- and State-level governance must be appreciated. Power is increased to mutual benefit by the very fact of action in common. It is timely to be fearful that an elaborate system of competence-demarcation that is presented as a basis for deciding who does what tends to reinforce the misguided and damaging picture of "them or us" which poisons the debate about European integration. As a

general observation there is much to be said in favour of a relatively flexible formula governing competence allocation, which will be capable of a detailed application that will allow proper account to be taken of the demands for effective and representative decision-making in particular sectors (which in any event may vary over time). This does not imply a simple “yes or no” approach to which level of governance possesses a particular competence, but rather implies a sharing of competence as the norm. The required emphasis on transparency then attaches less to an ability to provide a clear statement in advance of who is competent to act in a particular matter and more to the need to improve citizen understanding of how decisions have been reached, by whom, and why.

In particular, an attempt to construct a “hard list” of competences that are reserved to the Member States and/or a “hard list” of Union competences is ill-advised. A hard list of competences is, in a historical perspective, unlikely to succeed in solving the problems currently perceived to dog the question of competence demarcation in the EU. This is simply not how systems of governance based on divided power work, or ever have worked. Of particular pertinence to the current quest to defeat popular scepticism (or at best apathy) about the contribution of the EU to “Europe”, a hard list suggests there are activities that “belong” to the Community and activities that “belong” to the Member States, which is a separation that would tend to reinforce the damaging view that the question of locating power in Europe asks us to choose between the Union or the Member States.

2. Attempts to provide a division between Union and State competences that is predictable ex ante are likely to prove damaging. They will promise more than can actually or desirably be delivered. “Golden formulae” cannot capture the complexity of the issues at stake, except by providing at a general level for an understanding of the issues that need to be taken into account in making specific decisions.

Once the “hard list” of EU competences is abandoned as an appealing or even feasible solution, as is argued above, a more realistic and constructive approach asks us instead to realise that the Community strengthens the States, and the States strengthen the Community - it is a win-win situation of mutually reinforcing engagement. Naturally the awkward question asks how to convert that into a transparent formula governing the allocation of competence. This is fiendishly difficult to convey to citizens who want to know who is in charge.

The sub-title “A better division and definition of competence in the European Union” is immediately followed in the Laeken Declaration by the observation that “Citizens often hold expectations of the European Union that are not always fulfilled”. In that vein, one aim in the “competence debate” is to bring the citizen “closer to Europe”—but only in areas that are properly governed with a European dimension. It is disturbingly tempting to argue the apparently unimpeachable case for decision-making “close to the citizen” without recognising that in some circumstances, made more common by transnational economic integration, a decision taken by one bloc of citizens may have serious negative consequences for another, politically more remote bloc of citizens. So localised decision-making may be neglectful of the full constituency of interests affected by those decisions. It is right to concede the value of decision-making below the European level - but it is equally important to expose the limitations of decision-making below the European level. The principle of subsidiarity currently found in Article 5(2) EC includes an assumption of national level decision-making over European-level decision-making in so far as all things are equal, but in fact subsidiarity has been widely presented as a much more aggressive protection of State power than its text should actually allow. This is a tendency that is perilous in so far as it may lead to under-appreciation of the capacity of States to inflict harm on parties un- or under-represented in their orthodox political processes.

In any event, the EU should be presented in more positive vein, as *inter alia* an arena through which States can better fulfil responsibilities to citizens. So the EU is not taking away State power but rather the EU, working with its States, is improving their capacity to deliver effective governance. This suggests a formula for allocating competence that will be based on ability to deliver the most efficient and most representative (of all affected interests) decisions. The argument must be taken seriously that we truly require a relatively flexible “rule” governing the allocation of competence which is apt to allow account to be taken of what is required in particular sectors. The demands of European integration vary sector-by-sector, and they vary over time too. This implies that although one may not accept the value of a hard list of EC competences, it is nevertheless important to develop some clearer basis for understanding and explaining the scope of, and values underpinning, Community competence than is presently available. That may or may not involve a change to the current pattern of allocation of competences—in fact, clarifying the basis for allocation of competences may usefully be seen as essentially preliminary to debating whether to change what is done at present.

3. Inadequate respect for existing devices designed to balance the allocation of competences between Union and States will deepen the perceived problem rather than contribute to its cure. In fact, current practice reveals a number of

devices for, in short, controlling the outward creep of Union competence, albeit that the pattern is unsystematic.

Many of the perceived problems associated with the growth of EC competence may be traced to the days when unanimous voting was the norm in Council. A good example is supplied by the readiness to use the Treaty-conferred competence to harmonise laws as a cover for the (unanimously-agreed) political preference to develop a form of consumer protection and environmental protection policy at EC level, despite the absence of any adequate Treaty support for such extended policymaking. Competence became a largely political, not constitutional, matter. Many of the problems associated with the outward competence creep pursued by the Community legislature have been addressed, albeit not necessarily entirely satisfactorily, since Qualified Majority Voting in Council became more widely available, initially as a result of the amendments made with effect from 1987 by the Single European Act and later extended into new areas of legislative activity of the EC by the subsequent Treaties of Maastricht, Amsterdam and Nice, and, moreover, even into the non-EC EU. Geographical and functional expansion demands Qualified Majority Voting in place of a cumbersome rule of unanimity in order to make the integration process viable, but the rise of “QMV” in the legislative procedure ruptures the direct link between Community law as a vigorous system susceptible to deep penetration into national legal and political systems and the ability of the Member States to use veto power as a means of guarding the gate through which rules must pass before becoming invested with that force. To be clear: even in a world of QMV it is *not* the case that States are outvoted day in day out, nor even that the preferences of an “outvotable” state are routinely ignored. But a regime of QMV, in place of unanimity, generates a quite distinct and sharper appreciation among political elites of the importance of defining the limits of Community competence from that which prevailed in times when an anxious State knew the Council acted only if every State was in agreement and that therefore ultimately it could refuse to budge.

So the rise of Qualified Majority Voting in Council has altered the dynamics of the system. It re-generated a concern among Member States to devise methods for exerting control over the trajectory of European decision-making that were more subtle than the crude but (in many sectors) abandoned veto in Council. Features of the system that bear witness to such concern include:

The development of the principle of subsidiarity, which is properly taken as part of a mood of devoting closer attention to the merit of Community intervention.

- ✓ Periodic Treaty revision has expanded Community competence, but one should also be aware how carefully defined the new competences have tended to be. For example, the Community has lately been allowed competence to act in the fields of public health, consumer protection and culture. But it is not a broad competence. It is a competence defined as essentially supplementary to that of the Member States.
- ✓ Even where harmonisation is permitted, recently introduced Treaty provisions commonly provide only for minimum harmonisation. Articles 176, 137 and 153 EC, governing competence to legislate in the fields of environmental protection, social policy and consumer protection respectively, stipulate that national measures that are stricter than the agreed Community standard are permitted, provided they are compatible with the Treaty.
- ✓ “Flexibility” is a many-headed beast, but loosely it involves the development of collaborative inter-State endeavour which does not necessarily involve orthodox *communautaire* method nor the participation of all the Member States. Room is left for the expression of local preference; the Community does not simply swallow up the sector. Scope for opting out, the provisions on enhanced co-operation invented at Amsterdam and adjusted at Nice and the open method of co-ordination all fit on this agenda.
- ✓ Judicial control is more prominent today than in the past. In its “Tobacco Advertising” judgement the European Court itself joined the cause of insisting on the seriousness with which the limits of the Community’s attributed competence must be taken when it annulled Directive 98/34 on application by Germany, which had been outvoted in Council¹. It is submitted that especially (but not only) in a regime of “QMV” it is appropriate that the Court should police the constitutional bounds of valid Community action, and refuse to accept that a political majority can, in effect, assume responsibility for fixing the reach of the Treaty.

These may be regarded as (admittedly diverse and fuzzy-edged) forms of “constitutional safeguards”: as part of the bargain according to which enhanced power is allocated to the EU level where it may be exercised by majority vote, States

¹ Case C-376/98 *Germany v Council and Parliament* [2000] ECR I-8419.

have put in place mechanisms for protecting local preference from over-ride by majority wishes. So far, one could persuasively argue that the EU has collected rather an odd bag of devices—and that it is time for a more systematic overall basis for determining competence allocation. And this, of course, is a major stimulus to the current Laeken and post-Laeken debate, taking shape in particular in the setting of the Convention. But one might question whether the vitality of the existing array of devices as means for tackling the “problem of competence” has been underestimated. This might lead one to look with some scepticism at the more radical proposals for reform that have been advanced. This is not to argue complacently that the relationship between the competence of the EC and that of the Member States is unproblematic. It is instead to argue that such problems are currently under interrogation.

To specific matters—nine specific matters, in fact. What might be contained in a section dealing with competences in a model constitutional Treaty?

1 – That the Union Has only the Competence Attributed to It by Its Treaty

Article 5(1) EC currently provides that “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.” Assuming the adoption of an approach based on a single Union Treaty, then “Community” should be replaced by “Union” but otherwise there seems no reason not to adopt the essence of this formula. So:

“The Union possesses only the competences conferred on it by this Treaty. It shall act within the limits of the competences conferred upon it by this Treaty and of the objectives assigned to it therein.”

2 – What of the Competence Not Attributed to the Union by the Treaty?

It rests with the Member States. That is (perfectly obviously) the legal position, and no explicit statement to this effect is formally required. Currently the EC Treaty includes no provision making plain that powers not transferred to the Union rest with

the Member States. However, in the cause of clarification such a provision may be helpful:

“Competences that are not conferred on the Union by this Treaty belong with the Member States.”

But, for the reasons explained above in the introductory overview, there are powerful considerations that militate against going any further than this. There should not be any “hard list” of competences that are reserved to the Member States.

3 – The Nature of the Competence Conferred on the Union

This provision is centrally important in the quest to put a reader of the Treaty on notice that competence is not an antagonistic “either/ or” matter but rather a more constructive process of co-operation between different but mutually reinforcing levels of governance. Power is not being won and lost but rather (in most instances) shared. Given the depth of sectoral inter-dependence between different layers of governance in modern Europe, there will be few competences that are exclusive to the Union (and few that are exclusive to the Member States).

“The competence enjoyed by the Union shall be either an exclusive competence or a competence that is shared with the Member States.

The Union enjoys an exclusive competence only in exceptional circumstances where the achievement of effective decision-making dictates that it is necessary to allocate the competence to regulate a particular activity to the Union and to preclude action by the Member States.

Where competence is shared between the Union and the Member States, it remains in principle open to the Member States to act subject only to a requirement of compliance with the rules of this Treaty. Action taken by the Union in areas of competence shared with the Member States may exceptionally preclude Member State action where this is necessary to achieve effective decision-making (concurrent competence), or it may co-exist with Member State action (parallel competence), or it may serve to support Member State action (complementary competence).”

This package is not designed to be so very different from the current position, although of course this formula is currently not set out in the Treaty nor has the European Court ever sought to elaborate any principled statement about the nature of

available competences. Moreover, although the Treaty, as applied by the political institutions and interpreted by the Court, recognisably contains the three different versions of shared competence, it does not treat them in a systematic fashion.

A. To explain the chosen approach to exclusive Union competence

“The Union enjoys an exclusive competence only in exceptional circumstances where the achievement of effective decision-making dictates that it is necessary to allocate the competence to regulate a particular activity to the Union and to preclude action by the Member States.”

This provision is designed to convey both the reason why, in some circumstances, Union exclusivity is necessary and the appreciation that it is very rare. It insists that the achievement of effective decision-making is the key ².

It is not here proposed to list the areas of exclusive competence, either exhaustively or illustratively. There is no agreement on what currently constitutes an exclusive competence (although, admittedly, an illustrative though not an exhaustive list could currently be drawn up). Even if consensus could be reached, whether descriptive of the current position or as a normative choice, a list would be static and hostile to the need for a dynamic and adaptable system. So, as part of an overall desire to maintain a workable system of governance for the Union, it is proposed to match up particular areas of material competence to the applicable type of competence only in Part Two of a constitutional treaty, and to leave the matter open in Part One.

B. Competence that is shared, rather than exclusive to the Union

“Where competence is shared between the Union and the Member States, it remains in principle open to the Member States to act subject only to a requirement of compliance with the rules of this Treaty. Action taken by the Union in areas of competence shared with the Member States may exceptionally preclude Member State action where this is necessary to

2 This suggestion is designed to be more helpful than that of the Working Group on Complementary Competencies which advocates that areas of exclusive and shared competence should be defined in accordance with the criteria developed by the Court but neglects to state what it considers those criteria to be.

achieve effective decision-making (concurrent competence), or it may co-exist with Member State action (parallel competence), or it may serve to support Member State action (complementary competence).”

Concurrent, parallel and complementary are here presented as distinct versions of shared competence.

A concurrent Union competence leads to acquisition of exclusive Union competence over limited areas when it is exercised. This is stated in the formulation presented above to be subject to the same rationalisation as that which governs exclusive Union competence generally, i.e. a criterion based on effective decision-making. Secondary legislation concerning agriculture and the making of the internal market provide current examples of this phenomenon of “pre-emption”, but particular sectors do not need to be spelled out here.

A parallel Union competence is one which confers competence on the Union in areas also subject to the regulatory competence of the Member States. There is no pre-conception about the appropriate actor. It will depend on the circumstances. Many competences are currently of a parallel nature, in this sense. However, it should not be made explicit here what falls within this category. Such an approach would contradict the dynamic approach to questions of competence allocation which seems to provide the most satisfying basis for shaping a mutually supportive relationship between the Union and the Member States into the future.

A Union competence that is complementary operates in an area in which the assumption is that the predominant role as regulator is performed by the Member States. The Union merely acts to support or complement State action³. Examples under the current arrangements include the provisions governing industry and culture (leaving aside the possibility of harmonisation under Article 95 EC impinging on these areas).

3 This classification may also be found in the report of the Working Group on Complementary Competencies under the label “supporting measures”. It is here argued that, in the quest to maintain flexibility, one should prefer to avoid writing in references to specific competences that are to be treated as complementary (or “supporting”). See also Article 12 of the Preliminary draft Constitutional Treaty.

C. The proposed relationship between Parts One and Two of a Constitutional Treaty

The Preliminary draft Constitutional Treaty locates provisions specifying the type of competence applicable to each area in Part Two of a Constitutional Treaty, “Union Policies and their Implementation”. In Part One Article 9 of the Preliminary draft would list the categories of Union competence—this is also here proposed. The Preliminary draft proceeds to state that Articles 10 - 13 of Part One shall *indicate* areas falling within the different categories of competence. The use of the relatively soft verb “indicate” in all four draft Articles suggests a tentative stance on what, if anything, should really be specified here. But it may be unwise to place too much weight on the point of language: *indiquer* is used in the French text, but the stronger *angeben* appears in the German text, while the Spanish version uses the verbs *indicar* (twice), *señalar* and *enumerar*. The question of precisely what should be included seems open. The argument advanced in this paper is that unhelpful controversy and unwelcome rigidity would be introduced by an attempt to attach particular areas of competence to particular types of competence, and that accordingly the matter be better left for treatment in Part Two of a Constitutional Treaty.

4 – The Co-operation Principle

In the light of an enduring general concern to emphasise and even to celebrate the mutually re-inforcing functions of different levels of governance in the Union, this provision becomes very important to the vision of what should be announced in a constitutional Treaty.

Article 10 EC currently provides that: “(1) Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. (2) They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.”

“Community” should be replaced by “Union”. Radical change to the language might generate unwanted and unintended arguments that the Court’s case law under Article 10 EC is to be regarded as abandoned or adjusted. A degree of textual conservatism makes good sense in the light of this anxiety. So:

“(1) Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this

Treaty or resulting from action taken pursuant to it. They shall facilitate the achievement of the Union's tasks.

(2) They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

The main failing is not what is included, but rather what is excluded. The Court has confidently extended the reach of Article 10 EC to cover not only obligations of the Member States owed to the Community but also obligations owed by the institutions of the Community to actors in the Member States. This richer version of the duty of co-operation should be written into the Treaty not simply in the cause of completeness but also because it helpfully emphasises the mutually re-inforcing and mutually beneficial ties between different levels of governance in the Union. So to emphasise the broader context of mutually supportive endeavour it is proposed to include a new supplementary provision, which is designed to convey the flavour of each level of governance being inextricably entwined with the others in the quest to deliver to citizens what they want/need;

"The Union and the Member States shall support and co-operate with each other in the fulfilment of their activities undertaken on behalf of their citizens. The Union shall show respect for the constitutional and political structures within the Member States. Member States shall take account of the effects of their actions on the Union and on other Member States".

In short, this is a solidarity principle. Referring to "constitutional and political structures within the Member States" rather than "of" the Member States is intended to provide that respect is due not merely to national capitals but also to regional units of governance. But to spell that out more fully is unwise, not least because the matter has different resonances in different Member States. It is not proposed to include a reference to respect for "identities" of the Member States, which is an alarmingly slippery notion.

5 – The Material Scope of Union Competence

This needs to be, roughly, an amalgamation of what is currently found in Articles 2, 3 and 4 EC plus Article 2 EU. Clearly something cleaner and better-organised than currently exists is desirable here. What is to be found in the Treaty at present is a rag-bag of material that has been accumulated over cycles of periodic Treaty revision. Article 3 EC, in particular, is a dull shopping list, making no distinction between the

intensity and importance of EC activity in the field of, for example, competition policy and tourism. Moreover, tasks, objectives and activities are muddled together, although in fact it may be over-ambitious to suppose that everything can be neatly and uncontroversially re-categorised for the purposes of Treaty revision.

In reorganising this material, there are some difficult choices to be made. However, it is not proposed to include detailed provisions governing each area of EU activity; that is, this would not be the place to stipulate, for example, that activity in the field of public health is pursued by a particular defined form of legislative procedure or that harmonisation of public health policy is not within EU competence or that action by the EU in the field of public health does not preclude the adoption of higher standards of protection by the Member States. Such elaboration would belong in Part Two of a constitutional treaty. Here would merely be the place to acknowledge that public health is a competence of the EU. The broad function of this provision or provisions is to allow a reasonably well-informed observer to grasp the nature, purpose and—broadly—the extent of EU activity.

One provision should aim at setting out the objectives of the Union, and then another at setting out its competences.

The first might look something like this:

“The Union shall have as its objectives to promote throughout the Union a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, social inclusion and equality, lasting and non-inflationary growth, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, solidarity among Member States, respect for the fundamental rights and freedoms of all human beings and the effective discharge of international responsibilities to secure a peaceful, just and prosperous future for the world.”

This started life as the current Article 2 EC. Beyond altering “Community” to “Union”, also deleted is the phrase “by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4” in the first sentence of the current Article 2. It is not helpful to refer to some activities explicitly but not to others. This is mere historical bias and better abandoned. Then further adjustments to the current text of Article 2 are advocated, in part to broaden it (simply “equality” not just gender equality; also “social inclusion”) but also to cure some repetition (e.g. the second “sustainable” now becomes “lasting” – the German text uses different words, so why leave the

English text with two “sustainables”?); and the reference to “economic and social cohesion” which was, of course part of the Single European Act’s bargain, is deleted for it does not now seem to add anything significant. And then “the effective discharge of international responsibilities to secure a peaceful and prosperous future for the world” represents an attempt to summarise material currently found in Article 2 EU.

The principal purpose of this provision is to set the scene. The detailed wording is of secondary importance. A much shorter alternative version could read:

“The Union shall have as its objectives to raise the standard of living and quality of life in its Member States and to secure a peaceful, just and prosperous future for the world.”

Then, a provision setting out the Union’s competences:

In pursuit of its objectives set out in Article [...] the Union shall have competence to act in order to:

Maintain an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital and the abolition of competitive distortions;

Promote coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment;

Pursue an economic policy which is based on the close coordination of Member States' economic policies;

Define and conduct a single monetary policy, the primary objective of which shall be to maintain price stability;

Pursue a common policy in the field of visas, asylum and immigration and other matters related to the free movement of persons within the Union;

Pursue a common foreign policy; and a policy in the sphere of development cooperation; and a common commercial policy;

Develop policies in the spheres of agriculture and fisheries; transport; social protection; health protection; consumer protection; environment; education and training; culture; energy, civil protection and tourism; and combating crime;

Strengthen economic and social cohesion and promote equality and eliminate discrimination;

Strengthen the competitiveness of Community industry and promote research and technological development;
Encourage the establishment and development of trans-European networks.

The current Article 3(2) EC, “In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women”, has been omitted. The Treaty’s *Querschnittsklausel* are best grouped together. At the very least, it seems odd to have a single such provision standing alone in the general provision governing Union activities/ competences.

Generally, however, this provision remains vulnerable to the criticism that it amounts to a rather dull collection because it fails to provide any hint of what really matters and what is peripheral. However, the chief alternative to a rather colourless list of this nature is to combine it with an explicit allocation to each policy sector of the nature of envisaged Union competence—exclusive, shared/ concurrent, shared/ parallel, shared/ complementary. That is not unattractive. It might make the provision(s) more tangible. But, on balance, it is preferred not to deal with that matter here, for fear that it would be capable of damaging the adaptability of the Union’s system of governance. Rather, the connection between an area of material competence and the nature of the applicable Union competence should be settled in a Part Two that is more readily susceptible to amendment than Part One of a constitutional Treaty. This also has the advantage that it allows the current text to remain lean and easier for the reader to digest.

6 – The Residual Provision – Retaining a Version of Article 308 EC

Should there be preserved a provision that fulfils a role that is similar to that currently performed by Article 308 EC?

The strongest argument *in favour* is that it would supply a valuable injection of flexibility. Without the possibility of recourse to a residual enabling provision to act in pursuit of Union objectives, new demands would be capable of being met only by revision of the Treaty. This would imperil the capacity of the Union to act in a dynamic manner as a problem-solver. The strongest argument *against* is that it would confer significant power on the executives of the Member States to advance the reach of the Union while subverting the proper constitutional controls associated with formal Treaty revision. One might indeed argue that much of the current anxieties about the creeping outward drift in EC competence has been generated by abusively

broad reading of the power to act in Council by unanimity under Article 308 (ex 235 - and also in the past under Article 94 (ex 100)), and that to reaffirm the value of a general residual provision is to evade the very core of the concerns expressed in the Laeken Declaration ⁴. From this perspective, one may feel the need to sacrifice some of the system's flexibility in order to uphold the principle of attributed competence as something with (relatively) sharply defined edges on which national Parliaments and courts (in particular) can rely.

The balance is a fine one, but the retention of the flexibility provided by such a provision is of sufficient weight to win the day ⁵.

But some protection against over-generous use of such a broad competence is appropriate.

This could rest in an insistence on unanimity in Council. However, that is not enough. Merely to insist on a unanimity requirement in Council as the basis for the exercise of any such residual competence is an insufficient guarantee of due constitutional restraint under the Union's legislative system. It does not adequately protect the principle of attributed competence; it confers too much power on State executives. Although enlargement seems to make the assembly of unanimity ever more awkward, that is simply not the point. The risk is (persisting) executive-dominated expansion of Union activity. This calls for the elaboration of a special system of constitutional safeguards, which will constitute a more reliable method of control than that available via the orthodox system of institutional involvement in the Union's legislative process backed up by orthodox judicial control. So a residual provision could look something like this:

“If action by the Union should prove necessary to attain one of the objectives of the Union and this Treaty does not provide the Union with the necessary competence, action shall exceptionally be permitted according to [a legislative procedure involving Parliamentary approval plus unanimity in Council].”

4 And by the Bundesverfassungsgericht in its *Maastricht* judgement, BVerfGE 89, 155; English translation at [1994] 1 CMLR 57.

5 This conforms to the majority preference expressed in the report of the Working Group on Complementary Competencies; and see also Article 8 of the Preliminary draft Constitutional Treaty.

The reference to the common market, still to be found in the current Article 308 EC, has been deleted—as is remarked above in relation to a re-modelling of what is now Article 2 EC this explicit economic focus seems dated. Moreover, proper Parliamentary involvement, incongruously confined to the consultation procedure under Article 308 EC, should be added.

But this formula needs to be supplemented by a new form of institutional supervision. This new form of institutional supervision should be the same one as stands guard generally over perceived over-reaching of Union competence. This is explained below, as issue 9, and involves “early-warning” of perceived problems about legislative proposals from the perspective of attributed competence and subsidiarity. But an extra twist is required in dealing with proposals advanced under this residual provision. Exceptionally, when relying on this provision, the Commission would be required to make explicit inquiry of recognised bodies (see below, issue 9) whether they identify “competence problems” in the proposal.

7 – Subsidiarity

A lengthy formula is ill-advised in so far as it is likely to be read as a false promise that mere words can provide a reliable and predictable basis for deciding in advance who does what. And a rigid formula is ill-advised in so far as it is likely to increase the perception that European integration imposes an “either/or” approach to the ownership and exercise of political power. So the inclusion of the subsidiarity principle should be regarded as a nod to the general idea of the need to pay attention to locating the best level for effective governance for Europe but it should not be invested with any undeserved weight as a sector-specific answer to “whose does what” questions. This suggests a cautious transplant of the existing formula.

Replacing “Community” with “Union” in the current Article 5(2) offers:

“In areas which do not fall within its exclusive competence, the Union shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Union.”

Given that, as proposed above, there will be included, as is not currently included, some explanation of what constitutes an exclusive Union competence, or at least some Treaty-based recognition that there is such a thing as exclusive Union competence, it is appropriate to maintain the exclusion of matters of exclusive

competence from the ambit of the subsidiarity principle (though they are, of course, subject to the proportionality principle, below.)

This provision remains open to criticism on the basis that it is abstract. Admittedly much will depend on how the test is elaborated and on the institutional settings for controlling its application (see issue 9, below). But this is exactly in line with the thesis advanced in this paper that a clean-cut rule that also has a concrete separation of Union competences and State competences is neither desirable nor workable. It is the institutional setting within which the rule is applied that really matters. So this proposal constitutes a refusal to be lured by the strong hints made in the Laeken Declaration that formulae providing firmer controls over the expansion in Union competence need to be devised.

8 – Proportionality

“Any action by the Union shall not go beyond what is necessary to achieve the objectives of this Treaty.”

That is the perfectly satisfactory current Article 5(3) EC, amended to use “Union” rather than “Community”.

9 – Institutional Control

Even though, as explained in the Introductory Remarks above, it is here submitted that the causes, nature and gravity of the “problem of competence” tend to be misrepresented in contemporary debate, nevertheless it is accepted that there is a need for a new form of institutional control, applying both to general challenges to the competence of the Union to adopt particular acts, to the application of the subsidiarity principle and to supervision of the potentially untrustworthy residual provision that will serve as a successor to Article 308 EC. A degree of innovation in this matter is capable of contributing to shaping a more satisfying and durable basis for the further development of multi-level governance in Europe.

Who applies the criteria governing competence allocation? At stake here is both the question of involvement in the decision-making process that generates EU measures and the question of the methods for scrutinising the validity of those measures. Devices may be imagined for ensuring that the “competence question” is taken (more) seriously both *ex ante* and/or *ex post*.

It is here submitted that two points deserve general attention. First, the problem is not as great as it is sometimes painted, not least because of relatively recent “post-QMV” adjustments of the variety discussed above in the general introduction. Second, one must be aware of the risk that the costs of an over-elaborate new system might exceed any benefits.

This dictates a preference for modest, not to say minimalist, solutions.

Plans which improve the possibilities for “early-warning” of sensitivity about questions of competence are especially appealing. Ex ante scrutiny of drafts by national and sub-national Parliaments is currently notoriously patchy. There are a number of reasons for this. Ministers may be guilty of calculated or merely ill-organised failure to transmit relevant drafts in good time to allow effective debate by those bodies. The depth of this problem will vary State by State, and the ease with which it can be remedied will also depend heavily on local constitutional arrangements. Curing the relatively poor participation of national and sub-national Parliaments in discussions about EC legislative proposals, both at the level of substance and of available competence, is accordingly not a job sensibly addressed “top down”—at least, not exclusively or even predominantly so. The principle of subsidiarity dictates that the impediments to effective Parliamentary involvement, which differ State by State, should be dealt with State by State, where understanding about local problems and preferences is most fully developed. The Union should be confined to inducing improvement⁶.

In this vein, it is true that potential Parliamentary supervisors need more information. But procedures involving transmission of all legislative proposals to relevant actors, asking for “competence scrutiny”, would submerge everyone in paperwork and, because they would be for these reason impractical, they would tend to amount to mere show. After all most legislative proposals simply do not throw up competence problems. In this electronic age, a wider dissemination of legislative proposals by the Commission to, in particular, national and nominated sub-national Parliaments is feasible and desirable, but on its own it will not help much. Potential supervisors need more information but, more significantly, they also need a better incentive to

6 The view of the Working Group on National Parliaments that the Council should normally legislate with “open doors” deserves endorsement; so too its preference for benchmarking best practice concerning Parliamentary scrutiny.

scrutinise proposals and, in turn, to create a fuss if local constitutional arrangements preclude their effective involvement in the pre-legislative debate. So the Committee of the Regions, the Economic and Social Committee and national Parliaments plus also any sub-national “Parliaments” nominated for these purposes by a Member State should be able to raise a “red flag” if they find anything in a legislative proposal which they consider questionable from the perspective of the principle of attributed competence or the principle of subsidiarity. The Commission, in submitting proposals, is not obliged to ask a particular question of these bodies from the perspective of competence. Rather it is up to those bodies to scan proposals. The ability to raise the red flag would be their incentive. The sole exception is proposals advanced under the residual provision (issue 6, above), which the Commission would be required to notify to these bodies with an explicit invitation to consider the draft from the perspective of competence; one might also apply this requirement of an explicit invitation to be issued by the Commission to draft measures of harmonisation, which would pick up the Laeken Declaration’s identification of Articles 95 and 308 as requiring special attention by establishing a scrutiny procedure unique to them.

The “red flag”, which would have to be raised within a defined period expiring well before formal adoption of the legislation, would take the form of the submission of a statement of objections, setting out the reasons for doubting the compliance of the proposal with the Treaty. The Commission would be required to circulate the paper to all the supervisory bodies, who would be able to submit their own comments. The Commission would be required to respond in detail and it would be required to justify its decision to make the proposal. Once it has done so, the proposal continues through the legislative process in the normal way unless, of course, the Commission has chosen to withdraw it.

This procedure could provide constructive deliberation about what is truly needed at supra-State level, at least in part insulated from the normal inter- and intra-institutional hurly-burly of the Community’s legislative process, and made richer by the input of national and sub-national Parliamentary actors. It would supplement action taken by national Parliaments to control “their” Ministers’ behaviour in Council within a purely local setting ⁷. A formal veto power is not proposed as part

⁷ The Working Group on National Parliaments is correct to emphasise the central importance of this function.

of the red flag process. It is assumed that, in the current and probably enduring climate of “competence sensitivity”, the Commission would be politically obliged to take this process of explanation and persuasion seriously. It is aware too that *ex post facto* review by the Court is feasible. To turn to this:

Ex post - the current system should be maintained. Control of matters of competence by a judicial or even a non-judicial body that is separate from the European Court would land a severe blow to the Court’s prestige as an independent institution and would be far too costly to the credibility of the whole system. So the European Court should be, and deserves to be, trusted. Special generous standing rules introduced explicitly in favour of sub-State units in “competence cases” are not proposed. Interested non-privileged actors will have been allowed involvement under the envisaged *ex ante* procedure, and this is probably enough not only to secure their voice in the debate but also to allow them standing to challenge any subsequently-adopted act under the normal approach taken under Article 230 EC.

This system is designed to avoid high costs and delay to the legislative process and to trust much of the existing apparatus, while also aiming to maintain subsidiarity review as a predominantly political process of dialogue, with judicial intervention confined to *ex post facto* review according to normal *communautaire* institutional assumptions. The system proposed—in particular, in the special treatment of “Article 308 measures”, harmonisation initiatives, and in the “red flag”—is intended to offer the prospect of a more focused and procedurally imaginative means of addressing problems associated with competence and subsidiarity than is likely under alternative systems which advocate indiscriminate transmission of all proposals and policy documents. Such arrangements promise an explosion of transparency but are vulnerable to criticism as likely to submerge national Parliaments in such a vast volume of drafts and documents that sight of the truly controversial minority of proposals may be lost ⁸.

⁸ This anxiety attaches to the system advocated in the report of the Working Group on National Parliaments, which, though certainly well-intentioned and properly eager to avoid new cumbersome procedures, would risk hiding the minority of proposals that are likely to cause concern under a blanket of proposals that are uncontroversial in competence terms.

Concluding Comment

A final caution would be to accept that it is highly unlikely that a fully satisfying solution will be or can be provided. The relationship between different levels of governance typically fluctuates over time in all divided-power systems that currently exist or have existed. This is because of changing functional need but also because of varying political fashion. There is no reason to suppose the EU is, or should be, any different in this respect. The Convention should not aspire to “finalise” the process.

Institutions et organes judiciaires

Jacques Ziller et Jaroslaw Lotarski

Introduction

Le présent chapitre a pour objet de regrouper toutes les dispositions concernant le « pouvoir judiciaire » dans l'Union dans un ensemble d'articles unique.

Les dispositions relatives au pouvoir judiciaire de l'Union peuvent difficilement être réduites à un seul article du traité constitutionnel. A notre sens, un (court) chapitre devrait être consacré aux institutions judiciaires de l'Union, en raison du caractère particulier des juridictions qui fonctionnent selon des modalités et des procédures propres, différentes de celles régissant le fonctionnement des institutions « politiques » de l'Union (Parlement, Conseil, Commission).

L'ensemble du présent projet a la vocation d'être inclus dans la première partie du traité constitutionnel, les dispositions résiduelles trouvant leur place dans le statut de la Cour de justice. En effet, il n'est pas souhaitable d'inclure des dispositions concernant les institutions judiciaires dans une autre « partie » de la constitution. Une telle dispersion entre les différentes « parties » de la constitution, les actes « attachés » ou protocoles ainsi que les statuts des juridictions provoquerait une complexité et une illisibilité substantielles. De surcroît, des problèmes juridiques pourraient apparaître du fait que ces différents textes entretiendraient entre eux des rapports hiérarchiques complexes.

Dans la rédaction de ce projet, nous avons examiné les dispositions pertinentes tant des traités communautaires que des statuts de la Cour de justice afin de déterminer quelles dispositions devraient figurer dans un texte à caractère constitutionnel. En effet, certaines dispositions des traités en vigueur ont la vocation d'être intégrées dans

les statuts de la Cour de justice. En outre, certaines dispositions des statuts, notamment de son titre I, méritent d'être incluses dans le traité constitutionnel. Nous avons donc inclus dans le traité constitutionnel toutes les dispositions fondamentales pour assurer le bon fonctionnement des autorités judiciaires de l'Union. Ainsi, étant donné le caractère particulier de l'Union, l'indépendance du juge de tout autre pouvoir de l'Union ou des États membres est primordiale. En revanche, les questions de procédure ou de recevabilité des différentes voies de droit doivent garder une certaine flexibilité, même si elles sont d'une grande importance pour garantir au quotidien le respect de la règle de droit. Leur place relève ainsi du statut de la Cour de justice qui, peu importe sa forme juridique (protocole joint au traité constitutionnel, loi organique...), devrait pouvoir être modifié plus facilement que le traité constitutionnel lui-même.

Ainsi, nous proposons d'inclure dans le traité constitutionnel quatre articles distincts, consacrés à :

- ✓ la définition de la mission des juridictions de l'Union et des juridictions des États membres qui appliquent le droit de l'Union ainsi que les relations entre ces juridictions [article (1)]
- ✓ la composition des juridictions de l'Union, les modalités de la nomination des leurs membres ainsi que leurs règles de fonctionnement [article (2)]
- ✓ les compétences des juridictions de l'Union [article (3)]
- ✓ la procédure d'adoption des statuts des juridictions de l'Union et de leur règlement de procédure [article (4)].

Quant au fond, l'essentiel des dispositions du présent projet correspond aux dispositions actuelles des traités constitutifs et du statut de la Cour de justice. Toutefois, nous ne les avons pas reprises dans leur formulation actuelle. Les changements proposés ne prétendent pas, en règle générale, modifier les textes en vigueur sur le fond. Les nouvelles formulations ont été choisies essentiellement pour deux raisons. Premièrement, il s'agit de rendre le texte du traité constitutionnel conforme à la pratique actuelle du droit de l'Union et notamment aux développements de la jurisprudence de la Cour de justice. Deuxièmement, la réécriture de certaines dispositions s'impose afin de les rendre intelligibles pour les non spécialistes.

En ce qui concerne la terminologie utilisée, nous avons employé les termes « constitution » et « traité constitutionnel » pour désigner la future « constitution » européenne. De même, nous avons retenu le nom « Union » comme l'appellation de

l'entité européenne. Le choix de ces termes est purement instrumental et n'influence pas le contenu de ce projet quant au fond.

1 – Mission et organisation

Le traité constitutionnel fonde les institutions et organes judiciaires de l'Union et définit la mission qui leur est assignée dans le système institutionnel. Dans les traités en vigueur, c'est essentiellement l'article 220 CE¹ qui remplit cette fonction. Il définit de manière générale la mission assignée à la Cour de justice et, dans sa rédaction issue du Traité de Nice, au Tribunal de première instance (TPI). Les dispositions des traités en vigueur concernant les institutions et organes judiciaires ne permettent pas d'ailleurs de définir avec certitude ce qu'on entend par « Cour de justice ». Depuis la création du TPI, certaines dispositions des traités distinguent la « Cour de justice » du « Tribunal de première instance ». D'autres en revanche impliquent que les termes « Cour de justice » se réfèrent tant à la Cour de justice elle-même qu'au Tribunal de première instance. Pour éviter cette confusion, une distinction entre les différentes juridictions de l'Union s'impose dans la rédaction des dispositions spécifiques. L'introduction d'un concept englobant toutes les institutions et organes judiciaires ne nous paraît pas souhaitable. Dans cette hypothèse, on créerait une juridiction « virtuelle » qui « existerait » seulement dans le texte du traité. Il est douteux qu'une telle solution contribue à la qualité rédactionnelle du traité constitutionnel.

Ainsi, il nous paraît opportun d'affirmer uniquement la mission de la « Cour de justice » sans évoquer les autres juridictions qui connaissent le droit de l'Union, dont le TPI. Ainsi la référence à la seule Cour de justice consacre son rôle de juridiction « suprême » du système juridique de l'Union. La référence expresse au TPI impliquerait d'ailleurs la nécessité de se référer également aux chambres juridictionnelles, voire aux juridictions nationales des États membres qui peuvent connaître le droit de l'Union. L'introduction d'un alinéa spécifique, qui consacre d'autres juridictions de l'Union qui « assistent » la Cour de justice dans sa mission, constitue à notre avis une solution plus pertinente.

1 Pour des raisons de clarté nous avons volontairement omis les références aux articles correspondants du traité CEEA (EURATOM).

En ce qui concerne l'objet de la mission de la Cour, la formulation « *assure le respect du droit de l'Union* » nous semble plus pertinente que la formulation issue du traité de Rome « *assure le respect du droit dans l'interprétation et l'application du présent traité* ». En effet, la référence à l'« *interprétation* » et à l'« *application* », semble indiquer une limitation qui ne correspond à rien dans la vie juridique de l'Union. La référence au seul « *présent traité* » peut également induire en erreur les non-spécialistes quant à l'étendue de la compétence de la Cour. La mission de la Cour de justice pourrait donc être formulée ainsi :

La Cour de justice assure le respect du droit de l'Union.

Cette formulation qui se limite à la seule Cour de justice implique la mention d'autres juridictions de l'Union. Il convient de consacrer l'existence du Tribunal de première instance et des chambres juridictionnelles, dont la création est prévue par le Traité de Nice. Une telle disposition correspond aux articles 224 CE, paragraphe 1 (version abrogée par le Traité de Nice) et 220 CE, alinéa 2 (introduit par le Traité de Nice). Ces dispositions ont été regroupées et simplifiées :

La Cour de justice est assistée dans sa mission par le Tribunal de première instance et par les chambres juridictionnelles.

Après avoir consacré l'existence des juridictions de l'Union, nous proposons d'introduire une disposition nouvelle qui évoque le rôle des autorités juridictionnelles des États membres. Les juridictions nationales sont, *de facto*, des juridictions de droit commun de l'Union et le silence du traité constitutionnel à leur égard peut difficilement être justifié. A notre sens, les juridictions nationales « *sont associées* » « *dans le cadre de leurs compétences respectives* » à la mission d'assurer le respect du droit de l'Union. Elles n'« *assistent* » pas la Cour de justice, comme le TPI et les chambres juridictionnelles, cette dernière formulation impliquant une relation hiérarchique. Un troisième alinéa pourrait donc être rédigé dans les termes suivants :

Dans le cadre de leurs compétences respectives, les autorités juridictionnelles des États membres sont associées à la mission de la Cour de justice.

Après avoir mentionné les différentes juridictions compétentes « *dans le cadre de leurs compétences respectives* » à connaître le droit de l'Union et à en assurer le respect, il convient d'introduire une disposition générale les contraignant à appliquer le droit positif. Une telle disposition, connue de certaines constitutions nationales, constitue une nouveauté dans le droit constitutionnel de l'Union, pour le moins sur le plan formel. Elle consacre une certaine « *séparation des pouvoirs* » au sein de l'Union, fondée sur le concept de « *l'État de droit* ». En effet il existe un risque, plus

au moins réel, que les juridictions refusent d'appliquer le droit positif issu des institutions « politiques » de l'Union ainsi que les règles du droit international que les institutions « politiques » de l'Union ont accepté de respecter². On notera que cette disposition ne préjuge pas de « l'effet direct » des règles particulières que les juridictions sont censées appliquer. Quant aux autorités juridictionnelles des États membres, il convient de mentionner que le droit de l'Union n'est pas pour elles un droit « étranger » et qu'il doit être appliqué au même titre que le droit interne sans une attribution de compétence spécifique. Ainsi, nous proposons d'inclure dans le traité la disposition suivante :

La Cour de justice, le Tribunal de première instance, les chambres juridictionnelles ainsi que les autorités juridictionnelles des États membres sont tenus d'appliquer, dans le cadre de leurs compétences respectives, le droit de l'Union, y compris le droit international qui lie l'Union.

Les dispositions relatives à la mission des institutions et organes judiciaires doivent être complétées par des règles portant sur les relations entre les différentes juridictions de l'Union. D'une part il convient d'énoncer les relations entre la Cour de justice et le Tribunal de première instance, d'autre part de prévoir une base juridique pour créer des chambres juridictionnelles.

Ainsi, concernant le Tribunal de première instance, nous proposons de reprendre ici les dispositions de l'article 225 CE, paragraphe 1, alinéa 2 et de l'article 225 CE, paragraphe 3, alinéa 2 tel que modifiés par le Traité de Nice. D'une part, ces dispositions permettent de contester les décisions du TPI devant la Cour de justice et, d'autre part, elles autorisent le TPI à se dessaisir d'une affaire d'une importance particulière et à la renvoyer devant la Cour de justice.

Les décisions rendues par le Tribunal de première instance peuvent faire l'objet d'un pourvoi devant la Cour de justice, limité aux questions de droit, dans les conditions et limites prévues par le statut.

Lorsque le Tribunal de première instance estime que l'affaire appelle une décision de principe susceptible d'affecter l'unité ou la cohérence du droit

2 Dans l'état actuel du droit, on peut déduire l'obligation faite à la Cour de justice, en tant qu'institution de l'Union, d'appliquer les accords internationaux conclus en vertu de l'article 300 CE (Article 300 CE, paragraphe 7).

de l'Union, il peut renvoyer l'affaire devant la Cour de justice afin qu'elle statue.

Finalement, quant aux chambres juridictionnelles, on reprendra l'article 225 bis CE tel qu'il a été introduit par le Traité de Nice, en adaptant la procédure de création des chambres juridictionnelles aux nouvelles procédures prévues par le traité constitutionnel.

La loi [organique?] peut créer des chambres juridictionnelles chargées de connaître en première instance de certaines catégories de recours formés dans des matières spécifiques.

L'acte portant création d'une chambre juridictionnelle fixe les règles relatives à la composition de cette chambre et précise l'étendue des compétences qui lui sont conférées.

Les décisions des chambres juridictionnelles peuvent faire l'objet d'un pourvoi limité aux questions de droit ou d'un appel portant également sur les questions de fait, devant le Tribunal de première instance.

2 – Composition, nomination, fonctionnement

Comme pour toute autre institution de l'Union, il convient d'inclure dans le traité constitutionnel des dispositions relatives à la composition, nomination et fonctionnement des juridictions de l'Union.

Dans le traité actuel, la composition de la Cour de justice est régie par l'article 221 CE, alinéa 1 ainsi que par l'article 222 CE. La composition de la Cour de justice doit d'une part, refléter les différentes traditions juridiques présentes dans l'Union et d'autre part, rester relativement flexible. Contrairement à la solution actuelle (un juge par État membre), nous proposons de ne pas indiquer le nombre de juges et d'avocats généraux dans un texte constitutionnel. Pour être plus facilement modifiable en fonction des évolutions, ce point relève du statut. Toutefois, pour assurer la représentation de tous les systèmes juridiques des États membres de l'Union, nous avons introduit la formule : « *Le choix des membres de la Cour de justice doit, dans la mesure du possible, refléter la diversité des traditions juridiques de l'Union* ». A notre sens, elle devrait être interprétée comme impliquant qu'un juge au moins, devrait représenter chaque système juridique national. La composition de la Cour de justice pourrait ainsi se résumer à la disposition suivante :

La Cour de justice est composée des juges et des avocats généraux.

Le nombre de juges et d'avocats généraux ainsi que leurs rôles respectifs sont fixés par le statut. Le choix des membres de la Cour de justice doit, dans la mesure du possible, refléter la diversité des traditions juridiques de l'Union.

Le traité constitutionnel peut difficilement se limiter à mentionner la simple composition de la Cour de justice sans s'efforcer de garantir l'indépendance des membres de la Cour vis-à-vis des autres institutions de l'Union ou des États membres. Ainsi, certaines dispositions qui relèvent actuellement du titre I^{er} du statut doivent, selon nous, figurer dans le traité constitutionnel. Un alinéa supplémentaire peut être ainsi ajouté :

Les membres de la Cour de justice sont indépendants et ne sont soumis qu'au droit. Ils sont inamovibles. Ils ne peuvent être révoqués, pour les motifs et dans les conditions prévues par le statut, que par la Cour de justice elle-même.

Les conditions requises pour exercer la fonction de juge ou d'avocat général font actuellement l'objet de l'article 223 CE, alinéa 1 et de l'article 4 du statut. Nous proposons de simplifier la formulation de ces conditions sans que ce changement affecte ces dispositions sur le fond. Par ailleurs, dans le souci de garantir l'indépendance des membres de la Cour de justice, nous avons renforcé les règles de non cumul des fonctions par les membres de la Cour de justice, qui n'est pas suffisamment assurée par le droit positif. Ainsi,

Les juges et les avocats généraux sont choisis parmi des personnalités offrant toutes garanties d'indépendance et d'impartialité et possédant des compétences notoires. Pendant la durée de leur mandat ainsi que durant les trois années précédant leur entrée en fonction, ils ne peuvent appartenir ni au Parlement européen, ni à la Commission, ni aux Parlements et aux Gouvernements des États membres.

La procédure de nomination des membres de la Cour de justice et du TPI qui figure actuellement aux articles 223 CE et 225 CE est d'une importance fondamentale pour la légitimité des institutions judiciaires et de ses décisions. La procédure de nomination actuelle conduit à un ensemble de procédures purement nationales qui, dans certains États membres, sont totalement dépourvues de transparence. La procédure actuelle conduit également à une situation de dépendance potentielle des membres de la Cour par rapport à l'autorité qui les désigne, en l'occurrence le gouvernements des États membres dont ils sont ressortissants. En conséquence, nous proposons que les membres de la Cour et du TPI soient nommés par le Parlement européen sur proposition du Conseil, ce qui pourrait constituer une solution de

compromis entre l'exigence de légitimité démocratique d'une part et les intérêts des gouvernements des États membres d'autre part. Ainsi, la participation du Parlement permettrait de rendre la procédure plus transparente que celle existant actuellement et la légitimité de la Cour de justice et du TPI s'en trouverait renforcée. Toutefois, les gouvernements des États membres, à travers le Conseil, garderaient une certaine influence sur le choix des candidats. On pourrait également imaginer que le Parlement européen nomme les membres de la Cour sur proposition non pas du Conseil, mais directement des gouvernements des États membres. En revanche, la nomination des membres de la Cour par le Conseil ou par le Conseil européen ne présente *de facto* guère de différences par rapport à la procédure actuelle et en présente les mêmes inconvénients.

Quant à la durée de fonction des membres de la Cour et les modalités de leur renouvellement, nous avons repris, telles quelles, les solutions prévues aux articles 223 CE et 225 CE. Cependant, on aurait pu envisager de porter le mandat des membres de la Cour à une durée plus longue (9 ans par exemple) et/ou d'opter pour un mandat non renouvelable. Ces options pourraient contribuer à renforcer l'indépendance des membres de la Cour vis-à-vis des institutions/autorités chargées de leur nomination.

La version finale de la disposition relative à la nomination des membres de la Cour est la suivante :

Le Parlement européen nomme les juges et les avocats généraux sur proposition du Conseil pour un mandat de six ans. Les juges et les avocats généraux sortants peuvent être nommés à nouveau. Un renouvellement partiel des juges et des avocats généraux a lieu tous les trois ans dans les conditions prévues par le statut.

Les dispositions relatives à la composition et à la nomination des membres de la Cour de justice et du TPI doivent être complétées par certaines règles fondamentales concernant le fonctionnement des juridictions de l'Union. Ces règles, qui figurent actuellement soit dans le traité, soit dans le statut, doivent trouver leur place dans le traité constitutionnel.

En premier lieu, il s'agit de garantir la collégialité dans la prise de décision de la Cour qu'on retrouve à l'article 221 CE, alinéas 2 et 3 et que nous proposons de formuler de manière suivante :

La Cour de justice siège en formation collégiale, en conformité avec les règles prévues par le statut.

En second lieu, il convient de « constitutionnaliser » le caractère secret des délibérations de la Cour ainsi que l'obligation de motiver les décisions. Les dispositions correspondantes font actuellement partie du statut de la Cour de justice³ :

Les délibérations de la Cour de justice sont et restent secrètes. Ses décisions sont écrites et motivées.

Ces deux dispositions étant étroitement interdépendantes, elles devraient être lues comme un ensemble. La composition collégiale de la formation du jugement et le secret des délibérations sont primordiales pour garantir d'une part, l'indépendance des membres de la Cour et, d'autre part, la légitimité de ses décisions. En effet, il ne faut pas oublier qu'aux yeux d'une partie des justiciables, les décisions prises par un juge sont associées à sa nationalité. Ainsi, la « constitutionnalisation » de ces dispositions qui, à l'heure actuelle, relèvent du statut de la Cour, s'impose.

Finalement, il convient de préciser l'applicabilité des dispositions de cet article au Tribunal de première instance et aux chambres juridictionnelles. Quant à sa composition, la nomination de ses membres et son fonctionnement, le TPI est soumis aux mêmes règles que la Cour de justice, ce qui correspond au droit en vigueur. La seule exception concerne la forme collégiale du jugement. Cette exception vise à permettre au TPI de statuer en formation de juge unique. Les règles propres aux chambres juridictionnelles sont fixées par les actes relatifs à leur création.

Les dispositions du présent article, à l'exception du paragraphe 3, alinéa 1, s'appliquent au Tribunal de première instance.

L'acte portant création d'une chambre juridictionnelle fixe les règles relatives à la composition de cette chambre et précise l'étendue des compétences qui lui sont conférées

3 – Compétences

Le troisième article énumère les différentes compétences des juridictions de l'Union. Volontairement, nous avons décidé de ne pas inclure dans le traité constitutionnel les conditions de recevabilité et les procédures relatives à chaque type de recours. Ces

3 Articles 32 et 33.

questions – à défaut d’être laissées à la discrétion de la Cour - doivent être réglées dans le statut, et cela essentiellement pour garantir leur flexibilité.

Une difficulté certaine apparaît quant au recours qui permet le contrôle direct de la constitutionnalité/légalité des actes pris par les institutions, organes ou autres organismes de l’Union. Il correspond à l’actuel recours en annulation, prévu aux articles 230 CE et 231 CE. En effet, on pourrait être tenté d’instaurer plusieurs recours spécifiques au lieu d’un seul recours « général » en annulation. Le critère de différenciation serait l’argument soulevé par le requérant à l’encontre de l’acte attaqué. L’introduction de recours spécifiques permettrait de formuler des conditions de recevabilité et/ou de procédure différentes de celles d’un recours « général ». On pourrait ainsi imaginer un recours spécifique « en droits fondamentaux » visant à sanctionner les actes de l’Union qui violent les droits fondamentaux garantis par le traité constitutionnel, inspiré de la *Verfassungsbeschwerde* allemande ou du recours en *Amparo* espagnol. Étant donné la gravité de la violation, les conditions de recevabilité de cette voie de droit pourraient être plus ouvertes que les conditions « générales ». De même un recours « en subsidiarité » relatif à la répartition des compétences entre l’Union et ses États membres pourrait être instauré dans l’hypothèse d’un contrôle judiciaire spécifique du respect du « principe de subsidiarité ».

Toutefois, on peut imaginer que les conditions de recevabilité et de procédure spécifiques peuvent être prévues, dans des situations juridiques particulières, dans le cadre d’une seule voie de droit. On peut prévoir ainsi un recours en annulation unique. Les éventuelles dispositions spécifiques relèveraient, pour les raisons d’une plus grande flexibilité, du statut.

L’alinéa instaurant le recours en annulation pourrait ainsi être rédigé de la manière suivante :

La Cour de justice est compétente pour statuer, selon les conditions prévues par le statut

a) Sur la légalité des actes adoptés par les institutions, organes ou autres organismes publics de l’Union et visant à produire des effets juridiques vis-à-vis des tiers.

Nous ne nous prononçons pas ici sur la question de l’accès à ce recours par des institutions et des organes « non-privilegiés » ainsi que par des personnes physiques et morales. Nous sommes toutefois convaincus que cette voie de droit doit être plus accessible qu’elle ne l’est actuellement et cela tant pour les autorités publiques de l’Union (institutions et organes « non-privilegiés ») et les États membres (autorités

sub-étatiques) que pour des opérateurs privés⁴. A notre avis, le texte du traité constitutionnel n'est pas un endroit approprié pour résoudre ce problème. Sa solution sera certainement complexe et devrait être relativement flexible, elle devrait par conséquent relever du statut. En revanche il convient de reconnaître ici l'ouverture de recours en annulation contre tout acte visant à produire des effets juridiques vis-à-vis des tiers, ce qui résulte de la jurisprudence constante de la Cour.

L'on peut également prévoir les recours spécifiques en protection des droits fondamentaux et de la subsidiarité, plus par souci de lisibilité que par nécessité de logique juridique.

a bis) Sur le respect des droits fondamentaux garantis par la présente constitution dans l'action des institutions, organes ou autres organismes publics de l'Union.

a ter) Sur le respect du principe de subsidiarité par les institutions, organes ou autres organismes publics de l'Union.

D'autres voies de droit, qui correspondent aux voies de droit existantes sont prévues sous forme d'une liste :

- ✓ le recours en carence prévu aux articles 232 CE et 233 CE

La Cour de justice est compétente pour statuer, selon les conditions prévues par le statut

b) Sur le manquement d'une institution, organe ou autre organisme public de l'Union à son obligation d'adopter les actes qu'elle est tenue de prendre.

- ✓ le recours en manquement prévu aux articles 226 CE à 228 CE. La nouvelle formulation qui établit l'origine du manquement dans la violation du *droit de l'Union* et non seulement du *présent traité* est plus conforme à la réalité de cette voie de droit.

(...) c) Sur le manquement d'un État membre à une des obligations qui lui incombent en vertu du droit de l'Union.

4 La Cour de justice elle-même a soulevé ce point (CJCE, 21 mars 2001, *Unión de Pequeños Agricultores c/Conseil*, aff. C-50/00 P)

- ✓ le recours en manquement prévu aux articles 227 CE et 228 CE, la procédure prévue à l'article 239 CE est lue à la lumière de l'article 292 CE.

(...) d) Sur les différends entre les États membres relatifs à l'objet de la présente constitution.

- ✓ la procédure d'avis prévue à l'article 300 CE, paragraphe 6. Cette disposition d'une importance certaine a été reformulée. En particulier, le terme « compatibilité » est remplacé par celui de « conformité » qui indique une relation hiérarchique entre le traité constitutionnel et le projet d'accord. Le terme « accord envisagé » a été substitué par « projet d'accord », sans implications sur le fond.

(...) e) Sur la conformité des projets d'accords internationaux avec la présente constitution.

- ✓ le recours en « responsabilité contractuelle » de l'article 238 CE. Toutefois, la règle devient la compétence de la Cour, l'exception devient la compétence d'une autre juridiction selon l'accord des parties, à l'inverse de la formulation actuelle du traité.

(...) f) Sur les litiges résultant d'un contrat passé par l'Union ou pour son compte sauf si le contrat en cause s'y oppose.

- ✓ le recours en « responsabilité non-contractuelle » prévu aux articles 235 CE et 288 CE.

(...) g) Sur les litiges relatifs à la réparation des dommages causés par les autorités publiques de l'Union ou par ses agents dans l'exercice de leurs fonctions.

- ✓ le recours entre l'Union et ses agents qui correspond à l'article 236 CE.

(...) h) Sur les litiges entre l'Union et ses agents.

Nous avons introduit une disposition permettant d'attribuer de nouvelles compétences à la Cour de justice. Cette disposition correspond également à certaines voies de droit spécifiques, prévues aux articles 229 CE, 229A CE (introduit par le Traité de Nice) et 237 CE. La référence aux accords internationaux concerne tant les accords conclus par l'Union elle-même que les accords conclus par les États membres seuls, notamment ceux qui résultent de l'application de l'article 293 CE.

(...) i) Dans tous les autres cas où une loi de l'Union ou un accord international lui attribue compétence.

Une disposition spécifique est consacrée à la procédure de renvoi préjudiciel qui contribue à garantir l'application uniforme du droit de l'Union par les juridictions des

différents États membres. Nous proposons de l'articuler en deux alinéas qui correspondent respectivement au renvoi en « appréciation de validité » et au renvoi en « interprétation » prévus à l'article 234 CE. Sans changements sur le fond, l'article 234 CE a été reformulé pour le rendre plus intelligible. Ainsi, au lieu de fonder sa formulation sur le caractère « suprême » ou non de la juridiction nationale de renvoi, nous avons préféré une distinction, plus pertinente dans la pratique, entre le renvoi en « appréciation de validité » et celui en « interprétation ». Pour adapter le texte actuel à la pratique de cette voie de droit, il convient de reconnaître dans le traité constitutionnel que le renvoi préjudiciel peut concerner tout le droit de l'Union sans reprendre la distinction qui est faite à l'article 234 points a), b) et c).

Le 1^{er} alinéa rend ainsi obligatoire le renvoi en « appréciation de validité » ce qui constitue la reprise d'un acquis jurisprudentiel bien établi⁵.

Lorsqu'une juridiction d'un des États membres estime qu'une disposition du droit de l'Union est invalide elle est tenue de surseoir à statuer et de demander à la Cour de justice de se prononcer sur cette question.

Le paragraphe 2 préserve la solution existante en droit positif (article 234 CE) concernant le renvoi en « interprétation » :

Lorsqu'une juridiction d'un des États membres estime qu'une disposition du droit de l'Union nécessite une interprétation, elle peut surseoir à statuer et demander à la Cour de justice de se prononcer sur cette question. Lorsqu'une telle question est soulevée dans une affaire pendante devant une juridiction nationale dont les décisions ne sont pas susceptibles d'un recours juridictionnel de droit interne, cette juridiction est tenue de saisir la Cour de justice.

La liste des compétences de la Cour de justice ne préjuge pas de la répartition de compétences entre les différentes juridictions de l'Union. Ainsi, le Tribunal de première instance, voire les chambres juridictionnelles, peuvent connaître des voies de droit en première instance, la Cour de justice pouvant être saisie d'un éventuel pourvoi. A notre avis, une limitation des compétences du TPI à certains types de recours ou de renvois ne s'impose pas dans le texte du traité constitutionnel.

5 CJCE, 22 octobre 1987, *Fotofrost*, aff. 314/95, Rec. 4199.

L'expérience démontre qu'une flexibilité certaine est nécessaire pour trouver un équilibre entre les compétences réciproques de la Cour et du TPI. Ainsi,

Certaines compétences de la Cour de justice prévues au présent article peuvent être exercées par le Tribunal de première instance ou par une chambre juridictionnelle. Les compétences respectives de la Cour de justice et du Tribunal de première instance sont fixées par le statut.

L'efficacité des décisions judiciaires dépend bien évidemment de leur autorité. Pour remplir sa mission, les décisions de la Cour et des autres juridictions de l'Union doivent être contraignantes à l'égard des autres institutions et organes de l'Union ainsi qu'à l'égard des autorités nationales des États membres. Les traités et le statut de la Cour actuels comportent des dispositions correspondantes dans le cadre des différentes voies de droit. L'introduction d'une disposition générale de ce type peut être justifiée en l'absence de clause générale visant à assurer la primauté du droit de l'Union sur les droits nationaux des États membres. Ainsi, nous proposons la clause suivante :

Les décisions de la Cour de justice, du Tribunal de première instance et des chambres juridictionnelles s'imposent aux pouvoirs publics et à toutes les autorités juridictionnelles et administratives de l'Union et de ses États membres.

4 – Statut et règlement de procédure

Un article à caractère accessoire complète l'ensemble des dispositions consacrées aux autorités judiciaires. Il définit la forme du statut des juridictions de l'Union et de leur règlement de procédure. Il correspond à l'actuel article 245 CE. La forme juridique des statuts reste à déterminer en fonction des instruments mis à disposition par le traité constitutionnel. Ce qui importe est la possibilité de les modifier sans utiliser la procédure de révision du traité constitutionnel. A la différence du texte actuel, nous proposons d'inclure le Parlement européen dans la procédure de révision des statuts ainsi que dans la procédure d'approbation des règlements des procédures de la Cour.

L'ensemble des articles consacrés aux institutions et organes judiciaires comprendrait donc quatre articles :

*Article (I)**INSTITUTIONS ET ORGANES JUDICIAIRES : MISSION, ORGANISATION**1. La Cour de justice assure le respect du droit de l'Union.*

La Cour de justice est assistée dans sa mission par le Tribunal de première instance et par les chambres juridictionnelles.

Dans le cadre de leurs compétences respectives, les juridictions nationales des États membres sont associées à la mission de la Cour de justice.

La Cour de justice, le Tribunal de première instance, les chambres juridictionnelles ainsi que les juridictions nationales des États membres sont tenus d'appliquer, dans le cadre de leurs compétences respectives, le droit de l'Union, y compris le droit international qui lie l'Union.

2. Les décisions rendues par le Tribunal de première instance peuvent faire l'objet d'un pourvoi devant la Cour de justice, limité aux questions de droit, dans les conditions et limites prévues par le statut.

Lorsque le Tribunal de première instance estime que l'affaire appelle une décision de principe susceptible d'affecter l'unité ou la cohérence du droit de l'Union, il peut renvoyer l'affaire devant la Cour de justice afin qu'elle statue.

3. La loi [organique?] peut créer des chambres juridictionnelles chargées de connaître en première instance de certaines catégories de recours formés dans des matières spécifiques⁶.

L'acte portant création d'une chambre juridictionnelle fixe les règles relatives à la composition de cette chambre et précise l'étendue des compétences qui lui sont conférées.

6 Ce paragraphe pourrait être formulé en décrivant la procédure de manière plus complète :

« Le Parlement européen conjointement avec le Conseil statuant conformément à l'article XX (codécision) sur proposition de la Cour de justice et après consultation de la Commission, ou sur proposition de la Commission et après consultation de la Cour de justice, peuvent créer des chambres juridictionnelles chargées de connaître en première instance de certaines catégories de recours formés dans des matières spécifiques ».

Les décisions des chambres juridictionnelles peuvent faire l'objet d'un pourvoi limité aux questions de droit ou d'un appel portant également sur les questions de fait, devant le Tribunal de première instance.

Article (2)

INSTITUTIONS ET ORGANES JUDICIAIRES : COMPOSITION, NOMINATION, FONCTIONNEMENT

1. La Cour de justice est composée des juges et des avocats généraux.

Le nombre de juges et d'avocats généraux ainsi que leurs rôles respectifs sont fixés par le statut. Le choix des membres de la Cour de justice doit, dans la mesure du possible, refléter la diversité des traditions juridiques de l'Union.

Les membres de la Cour de justice sont indépendants et ne sont soumis qu'au droit. Ils sont inamovibles. Ils ne peuvent être révoqués, pour les motifs et dans les conditions prévues par le statut, que par la Cour de justice elle-même.

2. Les juges et les avocats généraux sont choisis parmi des personnalités offrant toutes garanties d'indépendance et d'impartialité et possédant des compétences notoires. Pendant la durée de leur mandat ainsi que durant les trois années précédant leur entrée en fonction, ils ne peuvent appartenir ni au Parlement européen, ni à la Commission, ni aux Parlements et aux Gouvernements des États membres.

Le Parlement européen nomme les juges et les avocats généraux sur proposition du Conseil pour un mandat de six ans. Les juges et les avocats généraux sortants peuvent être nommés à nouveau. Un renouvellement partiel des juges et des avocats généraux a lieu tous les trois ans dans les conditions prévues par le statut.

3. La Cour de justice siège en formation collégiale, en conformité avec les règles prévues par le statut.

Les délibérations de la Cour de justice sont et restent secrètes. Ses décisions sont écrites et motivées.

4. Les dispositions du présent article, à l'exception du paragraphe 3, alinéa 1, s'appliquent au Tribunal de première instance.

5. L'acte portant création d'une chambre juridictionnelle fixe les règles relatives à la composition de cette chambre et précise l'étendue des compétences qui lui sont conférées.

*Article (3)**INSTITUTIONS ET ORGANES JUDICIAIRES : COMPÉTENCES*

1. La Cour de justice est compétente pour statuer, selon les conditions prévues par le statut :

a) Sur la légalité des actes adoptés par les institutions, organes ou autres organismes publics de l'Union et visant à produire des effets juridiques vis-à-vis des tiers.

[a bis) Sur le respect des droits fondamentaux garantis par la présente constitution dans l'action des institutions, organes ou autres organismes publics de l'Union.

a ter) Sur le respect du principe de subsidiarité par les institutions, organes ou autres organismes publics de l'Union.]

b) Sur le manquement d'une institution, organe ou autre organisme public de l'Union à son obligation d'adopter les actes qu'elle est tenue de prendre.

c) Sur le manquement d'un État membre à une des obligations qui lui incombent en vertu du droit de l'Union.

d) Sur les différends entre les États membres relatifs à l'objet de la présente constitution.

e) Sur la conformité des projets d'accords internationaux avec la présente constitution.

f) Sur les litiges résultant d'un contrat passé par l'Union ou pour son compte sauf si le contrat en cause s'y oppose.

g) Sur les litiges relatifs à la réparation des dommages causés par les autorités publiques de l'Union ou par ses agents dans l'exercice de leurs fonctions.

h) Sur les litiges entre l'Union et ses agents.

i) Dans tous les autres cas où une loi de l'Union ou un accord international lui attribue compétence.

2. Lorsqu'une juridiction d'un des États membres estime qu'une disposition du droit de l'Union est invalide elle est tenue de surseoir à statuer et de demander à la Cour de justice de se prononcer sur cette question.

Lorsqu'une juridiction d'un des États membres estime qu'une disposition du droit de l'Union nécessite une interprétation, elle peut surseoir à statuer et demander à la Cour de justice de se prononcer sur cette question. Lorsqu'une telle question est soulevée dans une affaire pendante devant une juridiction nationale dont les décisions ne sont pas susceptibles d'un recours juridictionnel de droit interne, cette juridiction est tenue de saisir la Cour de justice.

3. Certaines compétences de la Cour de justice prévues au présent article peuvent être exercées par le Tribunal de première instance ou par une chambre juridictionnelle. Les compétences respectives de la Cour de justice et du Tribunal de première instance sont fixées par le statut.

4. Les décisions de la Cour de justice, du Tribunal de première instance et des chambres juridictionnelles s'imposent aux pouvoirs publics et à toutes les autorités juridictionnelles et administratives de l'Union et de ses États membres.

Article (4)

INSTITUTIONS ET ORGANES JUDICIAIRES : STATUTS ET RÈGLEMENTS DE PROCÉDURE

Les statuts de la Cour de justice, du Tribunal de première instance et des chambres juridictionnelles sont fixés par un protocole séparé [ou par une loi organique].

La loi [organique?] peut modifier les dispositions du statut⁷.

La Cour de justice, le Tribunal de première instance et les chambres juridictionnelles établissent leur règlement de procédure. Ces règlements sont soumis à l'approbation du Parlement européen et du Conseil statuant conformément à l'article XX (codécision).

7 Cet alinéa pourrait être formulé en décrivant la procédure de manière plus complète :

« Le Parlement européen conjointement avec le Conseil statuant conformément à l'article XX (codécision) sur proposition de la Cour de justice et après consultation de la Commission, ou sur proposition de la Commission et après consultation de la Cour de justice, peuvent modifier les dispositions du statut ».

Designing Institutions for an Enlarging European Union

Helen Wallace

Firm agreement on a clear design for the institutions of the European Union (EU) is an attractive target for those keen on reform, and especially if the reform is to have a constitutional character. At a moment when the EU, designed originally for only six countries and in a very different context, is set to enlarge from 15 to 25 members, the notion that the institutional architecture should be reconfigured and consolidated around a stable and coherent set of principles has become a compelling focus of attention. In previous years reform has been incremental, zig-zag, and based on politically feasible compromises in diplomatic negotiations. The summoning of a more broadly based and more public Convention has increased expectations that this moment of reform should be much more ambitious. This time, it is argued, citizens can be rewarded with a set of institutions that are much easier to understand, much more susceptible to systematic scrutiny, and much more effective in their performance. This time the result might even be something that could be described as a 'European government'.

But is this target achievable? And if it is, would it be desirable? Would it lay to rest the controversies that have surrounded the political construction of the EU over the past 50 years? Would it deliver to the 'old' member states the reassurance that enlargement will not prejudice a fragile edifice? Would it also reassure those from the 'new' member states, set to join the Union in May 2004, that their interests and concerns will be guaranteed as full partners? These are difficult questions to answer, difficult partly because not all of the options for institutional reform have yet been fully articulated, but difficult also because the EU institutions are the objects of criticism for their uneven performance in dealing with their responsibilities under the existing institutional rules.

This essay explores the debate on institutional reform and on the possible options facing the Convention, as it assembles a series of propositions for the next Intergovernmental Conference (IGC), which will be charged with the negotiation of the definitive texts. This process of reform takes place against a background of factors that have influenced the institutional development of the EU thus far. Reformers seek to equip the EU better to address the challenges of enlargement and of policy reform, as well as to clarify the distribution of political responsibilities. Reformers also have to navigate in difficult waters between the tides of national politics in a diverse range of European countries, each with its own distinctive political model and political practices.

A couple of notes of caution are needed at the outset. First, this author at least does not subscribe to the view (widely propagated) that the enlarging EU faces gridlock unless radical institutional changes are introduced. The current system works, although it would certainly benefit from improvements to the ways that the institutions function. Indeed it may not help the cause of constructive reform to exaggerate the deficiencies in the current system; thus 'could do better' may be a more useful message about the starting point for reformers than the suggestion that the system may collapse in the absence of reform. Second, the notion that a clear institutional design can be settled once and for all may be a dangerous illusion. Most democratic political systems are actually quite complicated and subject to evolution over time. They appear simple and straightforward to the extent that a few clear principles convey the essence of what guides the system, and to the extent that the relevant body of citizens comprehends and endorses the guiding principles. Tidy designs on paper will not necessarily deliver this understanding in a context where the European process is itself a kind of experiment in transnational politics, and in which the policy activities of the Union are still predominantly in technical and economic domains.

1 – Some Background Factors

Some fifty years of developing the EU since the original experiment of the European Coal and Steel Community have produced an accretion of experience which conditions and frames the institutional choices.

(1) Continuous contest

European political integration has been characterised by an often sharp contest between alternative designs for the institutional architecture of the EU. The best

known dimension of this contest has been about where to locate the political character of the EU on a spectrum between a loosely intergovernmental system, enabling member states to cooperate as a consortium, and tight supranationalism, based on autonomous European institutions. Currently different institutional arrangements operate for different policy domains at different points across this spectrum. This variegated pattern does make the EU somewhat complex, since it is the product of compromises negotiated at different historical moments.

A second dimension of contestation has to do with the fact that individual European countries do not share a single political model. On the contrary the continent includes an array of different variants of liberal democracy: some unitary, some federal; some with active parliamentarianism, some less so; some with alternating single party governments, others accustomed to more complex coalitions; some with more sophisticated bureaucracies, others less so; and so on. There is no single shared paradigm from which to deduce a shared template of institutional design for a European government.

(2) Different ways of achieving reform

The way that the EU has developed institutionally has been the product of quite different ways of achieving reform. Ostensibly the most familiar has been through periodic IGCs, exercises in diplomatic negotiation among the representatives of member governments acting on behalf of member states, striking compromises and adding protocols and declarations to reassure doubters at home. For the most part the results of their work have been ratified by national parliaments, and in a few member states also dependent on assenting referenda, in the Danish and Irish cases sometimes with negative results. Referenda may be a necessary hurdle in more member states in the future, especially to endorse reforms presented as ‘constitutional’ in character.

In practice, however, many institutional developments have emerged by a quite different route, namely by evolution, by practice, and by experiments, in other words by a more organic process. The European legal system and the authority of the Court of Justice developed through jurisprudence and case law. The considerable authority of the European Commission was won through skilful policy entrepreneurship in some sectors, notably operating the competition rules, negotiating trade agreements, and regulating the single market. The Council acquired standing to act in some areas where treaty powers had not yet been formally attributed to the EU by steady attention to specific policy concerns, as in the case of environmental protection. Formal treaty changes have often followed organic evolution.

Moreover, the patterns of organic evolution and of explicit experimentation have pushed the EU institutions to operate in quite different ways across policy domains. Notable in this regard are two somewhat contrary developments. On the one hand, there has been something of a trend towards function-specific quasi-autonomous agencies—the European Central Bank, Europol, Eurojust, the European Medicines Evaluation Agency and so forth, each with a distinctive character. Member governments have indeed been willing to delegate significant policy or regulatory powers to a European body, but they have not done so by cumulative delegation to a single agency in the form of the Commission. On the other hand, we can see a more recent trend towards the development of institutional networks linking together national agencies and regulators, often now involving stakeholders from the private sector, with quite varied links to the formal institutional system. Thus if one maps the inherited and evolving institutional practice, this does not yield a single and uniform institutional template, not even in the area of collective market regulation, let alone in other policy areas where the competences of the Union are less clearly established.

(3) Multiple criteria for assessing institutional performance

Many different criteria are present in the discussion of institutional performance in the EU. Apart from the varied preferences as to the overall model (see 1.i above) other criteria are present in the debate. Formally on the table are criteria relating to improving transparency, effectiveness and accountability, easy words to write into a declaration, but much harder to turn into operating criteria, particularly for an institutional system that has to straddle the national and the transnational.

One route to systematic assessment is to use the techniques of institutional audit that have been developed as a tool for wider comparisons across political systems. Such techniques seek to escape from the idea that the EU is a unique construction and to submit it to similar tests that might be applied to other national, subnational or international institutions. This kind of approach finds considerable resonance with the business community where benchmarking techniques have become a pervasive tool. Indeed some European business leaders have already sought to inject this idea into the debate in the Convention, somewhat to the puzzlement of many of its members.

Another important contribution has come from political science analysis and studies of legitimacy. This literature makes a firm distinction between ‘input legitimacy’, as concerning who is involved or represented in an institutional system, and ‘output legitimacy’, derived from the outcomes or results of an institutional system in terms of their appropriateness or acceptability. It should be noted that most proposals for

treaty reform in the EU concern input legitimacy, while suggestions for ‘non-treaty reform’ and organic developments are more focused on the output side.

Analytical techniques and approaches notwithstanding, we should also bear in mind the relevance of how the EU impacts in a practical way on those who are directly touched by the workings of the institutions. Opinion surveys tell us that the EU institutional system is poorly understood and sometimes poorly esteemed by the public. Qualitative studies tell us that the outcomes of EU policy are often attributed not to the EU but to the local agency or employer through which the outcome is delivered (e.g. on gender equality employment practices). Anecdotal evidence provides a rather worrying picture of increasing criticism of programme and project management and delivery by EU institutions and agencies. Such criticisms make it harder to develop confidence in the institutions or to build support for investing more powers in a European government.

(4) Policy agreements and institutional innovation

The Convention is charged with making proposals both about the overall treaty framework and about the specifics of institutional reform. It has no remit to discuss policy content. Yet the history of institutional development in the EU has been one in which agreements on specific policy goals have provided the main leverage for institutional innovation. It was the desire to tackle international business behaviour, especially collusion, that allowed strong competition policy powers to be invested in the Commission. It was the goal of developing common legislation for the single market that enabled qualified majority voting rules in the Council to be routinised. It was the agreement to create a single currency that produced the decision to delegate to the European Central Bank. It was concerns about transnational crime that led to the formation of Europol. In the current context there is no obvious big new policy proposal on the table that looks likely in itself to leverage specific institutional innovation at the macro level, although there are strong policy-led pressures to consolidate the institutional arrangements for justice and home affairs. In addition there are many policy desiderata that might give rise to incremental adaptation of the institutions at the meso or micro levels. One such example is an apparently emerging willingness to extend the budgetary powers of the European Parliament to so-called ‘compulsory expenditure’ (mainly related in the past to guarantees for agricultural prices), and perhaps even some role as regards the revenue side of the budget.

(5) The illusion of institutional balance

‘Institutional balance’ is one of those phrases that has become embedded in the vocabulary of political and legal commentary on the EU. Giving the phrase clear meaning is another matter, especially in an institutional system that does not rest on a clear separation of powers. Broadly the phrase is intended to convey the impression that there is a reassuring symmetry among the respective powers and roles of the three main political institutions: the Council; the Commission; and the European Parliament. Each institution has its functions, although very different according to policy domains, and specified procedural rules for interacting with the other two. ‘Balance’ in practice rests on a kind of trilogue, in which the European Parliament has gained considerable ground over the past couple of decades, and in which neither the Council nor the Commission has been assigned primacy. Historically the phrase ‘institutional balance’ has been the first recourse of would-be reformers who hasten to reassure that their specific proposals would not radically transform institutional relationships and practices.

The phrase overlooks, or distracts from, some important changes that have taken place over the years. To take perhaps the clearest example – the European Council according to the existing treaties is somewhat outside the formal institutional architecture and not part of the ‘institutional balance’. Yet the interventions of the European Council in the work and the direction of the EU have become more and more pertinent and indeed the source of some of the most important policy innovations for handling both ‘domestic’ business and ‘foreign affairs’. Interestingly many of the reform propositions on the table currently recognise the extent to which the European Council has, by organic evolution, become a central element in the institutional system. Some proposals seek explicitly to strengthen the European Council, which surely would alter the institutional balance, while others seek to reduce its role in an effort to revert to a more classical view of the institutional trilogue.

2 – The Challenges Facing the EU

Critical to the case for adopting a new institutional design for the EU is the argument that it faces a particular constellation of challenges for which the inherited institutional arrangements are inadequate. These challenges revolve around four focuses of attention: enlargement; the requirements of policy reform; the performance of the European economy, given also monetary union; and claims for a

stronger EU role in foreign and security affairs, on the one hand, and justice and home affairs, on the other.

(1) Enlargement

This is generally the first reason cited for reviewing the institutions. More member states, more diverse member states, and more small (even micro) member states are widely viewed as in themselves both a necessary and a sufficient reason for upgrading the institutions to provide firmer collective decision rules. Here the central preoccupation seem to be fear of paralysis with more participants involved in each decision and especially fear of disproportionate influence being exercised by smaller countries and by 'immature' members. Some would therefore prefer to move away from a largely consensual process of decision-making towards a more majoritarian process, emphasising less the formal parity of member states and giving more weight to relative influence. The current controversies about the Iraqi situation can only fuel this concern.

Worries of this kind were the predominant concern of the IGC that led to the Treaty of Nice, which made some adjustments to the decision rules, while leaving some unfinished business. That debate already exposed considerable tensions around the big/small country issue, tensions that continue to be present and to be accentuated by fears among the older members of new and unpredictable new member states, as well as by fears among the new members that they risk being given some kind of second class status under a new constitutional settlement that would precede their accession to the EU. Such concerns give pride of place to early stages of decision-making and tend to neglect the relevance of the choice between consensual and majoritarian decision-making as quite different means of promoting compliance with the decisions taken. Consent to, or ownership of, decisions may be a critical factor in leveraging subsequent good behaviour and in promoting respect within countries for decisions that emerge from EU institutions.

A more practical dimension of enlargement has to do with where the day-to-day workload of enlarged membership will fall – here it seems rather clear that it will be the Courts and the Commission that will have exponential increases in workloads as a result of a larger membership, for which the relevant expanded resourcing will need to be found if these two institutions' performance is not to suffer.

(2) Policy reform

Many debates in the EU revolve around the arguments for and against reform of existing policies and policy instruments. In particular it is widely argued that the

common agricultural policy is in need of further and radical reform, although there is resistance also to this proposition. Similarly it is widely argued that there is a need to review the structural policies and spending programmes of the EU. A further and related concern is about what the policy capacity of the EU will or should be faced with more and poorer member states. In distributional policy areas such as these it is well documented that decision rules and decision practices have a big influence on outcomes. More claimants for constrained resources, combined with more countries reluctant to contribute revenue to the Union's budget, could make decision-making even more difficult than it already is on these kinds of policies. Thus here the issue is one of sequencing – policy reform first or different decision rules? Or both in tandem? The Convention method as such provides no handle on this issue.

(3) The performance of the European economy and of monetary union

More broadly there is rising concern about the performance of the EU as a system of governance (rather than government) and the capacity of the EU to deliver both a stable monetary regime and a growth dynamic for the European economy. While many of the factors that are relevant to this are to do with the economy itself and the behaviour of economic agents, institutions and the processes of governance also play a part. At least three different sets of issues arise.

First is the question of how to sustain monetary union and the surrounding envelope of macroeconomic and fiscal policies, in terms of both policy rules and regime membership. One complication is that not all EU members (even more after enlargement) are within the euro regime. It is in this field that the EU already has the elements of 'closer cooperation', thus a regime for monetary policy which separates one group of member states in the informal Eurogroup from other member states. There are strong pressures to make this informal separation more systematic and thus to formalise the inner Eurogroup Council with clear powers distinct from the role and powers of the Council which includes all member governments. The proposals from the ECB itself about how to adapt its own governing arrangements to enlargement are an indication of the issues to be resolved.

Another dimension has to do with whether and how the macroeconomic and fiscal policies of member states (especially those within the euro) might be more closely aligned. Here too proposals are circulating for institutional changes which in the Convention are labelled as relating to 'economic governance', but where the term 'economic government' is also present under especially French pressure. Much of this discussion is about how far the competences of the Union should extend into the macroeconomic and fiscal policy spheres to complement the single monetary policy.

But in addition there is an issue about which organ should be the political interlocutor of the European Central Bank as regards the setting and adapting of relevant policy guidelines to frame the implementation of the single monetary policy. Some would prefer this to be the Ecofin—or a revamped Eurogroup—formation of the Council, others would prefer it to be the Commission. Any resolution of this issue begs the prior question of whether and how the competences of the Union might be extended in these policy areas.

A second question is how to adapt the regulatory system of the EU for managing the single market to improve its effectiveness and reach (for example into financial services). In this context one concern is about how to improve the implementation and bite of collective regulation. Another concern is what is the most appropriate institutional methodology for regulation more broadly. One strong strand in the debate is the view that economic regulation is best done by clearly independent agencies, distanced as far as possible from capture by either economic agents or protectionist governments. This view rests its case partly on the experience of regulatory agencies in the US system of government. Here lies a very important set of issues relating to the profile and powers of the European Commission. A political and politicised Commission may not provide the most appropriate base for independent regulation. A choice in favour of making the Commission more political in terms of how the College is selected (an elected president and/or a slide towards members of a large College being seen as in some sense ‘representatives’ of member states) might damage the potential for the Commission to operate as an independent regulator. Hence one logical corollary could be to hive off the regulatory functions and the operation of competition policy by delegation to function-specific regulatory agencies, an independent European Competition Authority and so forth.

A third question is how most appropriately to address those European challenges in microeconomic and socioeconomic policy areas where powers remain primarily with the member states, but where various forms of cooperation, comparison and benchmarking across member states are supposed to be underway, notably under the Lisbon Strategy and the ‘open method of coordination’. Two very different views are present in the debate. One holds that the limited progress with the Lisbon Strategy suggests that the institutional envelope should be revisited to provide firmer decision rules and harder policy instruments. This might suggest a strong formalisation of the open method of coordination, in effect by introducing a tighter and hence less ‘open’ version, with more defined disciplines. The other view holds that the key to success with the Lisbon strategy is whether or not organic development can generate changes in behaviour by both public authorities and economic agents, using soft methods of persuasion and experimenting with different forms of cooperation and policy

innovation. This view implies only a light reference to the open method of coordination in the new treaty. The logic here would be that what should be promoted is a form of virtuous systems competition, with incentives for countries, or regions, or other stakeholders to ‘race to the top’.

More broadly as regards the performance of the European economy there is an underlying question about how far greater effectiveness requires stronger, tighter and more ‘centralised’ rules across the range from monetary and macroeconomic policies to microeconomic and socio-economic policies. In a period in which greater flexibility and adaptiveness are being advocated as sensible responses to the economic challenges, it is not obvious that centralised policies and uniform templates for a range of very diverse countries will provide appropriate solutions. A further dimension here is the way in which the relationships between public and private actors in the economy are in any case altering under the pressures of market liberalisation and globalisation, making public authority led policies and instruments less predominant, less sufficient or less effective, and as more diffuse patterns of market regulation become more common. The implication is that for functional reasons and in order to promote real compliance by both private and public actors new modes of governance are needed, and ones that can adapt flexibly to evolving contexts and requirements.

(4) New policy challenges

In two important policy areas there are calls currently for much stronger EU policies: namely, in foreign, security and defence policies, and in the field of justice and home affairs. In both cases the development of more active and strategic policies is often argued to depend on changes in decision rules and institutional arrangements. Within the Convention an important contribution has been made by efforts to replace the three pillar arrangements inherited from the Maastricht Treaty of European Union, and thereby to seek to bring these two areas within a unified and simplified set of institutional arrangements. The two policy areas are, however, somewhat different in character, both as regards the degrees of willingness of member states to operate more collectively, and as regards the kinds of decisions and potential instruments that would be appropriate.

Broadly as far as justice and home affairs are concerned there is a growing consensus that a good deal of the work of justice and home affairs should be brought within a more orthodox institutional structure, even potentially including systematic roles for the European Parliament and the Court of Justice, alongside the Council and the Commission. This has a clear logic in so far as the detailed execution of policy

would require rules-based and often legislative instruments, alongside some softer measures. There remain some differences of views among member states about how far Community competence should be extended and to which parts of the justice and home affairs agenda. The simplified structure might well provide a useful framework for resolving these differences and for allowing a pragmatic evolution over time which might overcome the arguments of the past about competing institutional approaches. Note that, if this is achieved, it will in part be the result of experience—and problems—with the current institutional practices and their limitations, thus institutional reform driven by changing policy preferences.

The case of foreign, security and defence policies is somewhat different. In this area there remain considerable differences of view among member states about how far and in which respects responsibilities should or could be collectivised. Some EU member states are also members of Nato, and, as the sharply contrasting reactions to the Iraqi situation have shown, the limits to European cohesion on strategic foreign policy issues are clearly evident. In these circumstances it is not easy to see the basis for a consensus on institutional changes as such for addressing the policy challenges facing Europeans. Nonetheless there is already an array of propositions in front of the Convention which seek to use institutional changes to leverage a more common set of policies.

3 – The Convention and Its Impact

The decision to pursue reform through the means of an experimental Convention has already changed the parameters of the discussion of the institutional issues in important ways. Necessarily, however, this experimental character makes it hard to predict the eventual outcomes. Some issues seem to have been settled by the Convention, while on others the hard debate has yet to come.

(1) The language of a constitution

One clear impact of the Convention has been to shift the language from ‘treaty reform’ to ‘constitutionalism’. The document being prepared by the Convention is widely accepted as the skeleton of a ‘constitutional treaty’. This has pushed the debate towards the language and ambitions of institutional design and away from organic evolution and experimentation. It has raised expectations that the outcome could be a settled institutional architecture which would resolve many of the old contests between competing models. It has brought into sharper focus the potential

goal of defining the basis for a 'European government' within a coherent and consistent framework.

(2) Simplification

The managers of the Convention have through the work of the Presidium and some of the key working groups made credible the idea of a much simplified treaty structure. On the one hand, there would be an overall set of institutional arrangements for the EU to apply in a broad sense across all the policy domains subject to EU competences. The confusions of the three pillar structure of Maastricht would be replaced by a unified framework. On the other hand, the more detailed procedures and instruments would be recategorised into a more straightforward series of options within a common and consistent terminology across policy domains. These would replace the inherited confusion of terms and arrangements, making the system more 'readable' for the citizen and the practitioner, and making clearer the choices of when and how to move from looser to tighter common disciplines in developing the policies of the Union. This exercise in simplification owes a great deal to the skilled and skilful work of Convention members and officials. In principle it should also lead to a clearer identification of the options for macro institutional change. The risk remains that this tidying up of procedures may in some instances close off the scope for valuable organic evolution.

(3) Uncertainties and constraints

However, some issues have not (yet) been resolved by the Convention. It has, as noted earlier, no remit to discuss policy reform or policy content as such, and hence it is unlikely to be a forum through which key policy choices can be resolved as a prelude to establishing clear institutional responsibilities. The sphere of common foreign, security and defence policies looks still to be one in which persistent divergences of view among governments (aggravated by the Iraqi issue) are likely to make it difficult to agree a clear institutional template.

These are also still early days for judging how far the next IGC will be bound by the conclusions of the Convention. Some of the protagonists in the Convention are likely also to be protagonists in the IGC, although only to the extent that the electoral cycles and domestic political circumstances in individual member states keep constant the incumbents. Moreover, as the Convention has come closer to addressing the difficult institutional issues, so we have seen some positions beginning to be more sharply articulated. We have yet to see fully articulated positions from the future member states on some of the core institutional issues and must expect that the

referenda to take place on their accession may have some spillovers into the eventual IGC. Thus, although the Convention has evidently shaped some parameters for reform, it has not yet elicited a consensus on key issues about where and how political authority should be allocated among the Union's institutions or between these and the institutions of the member states.

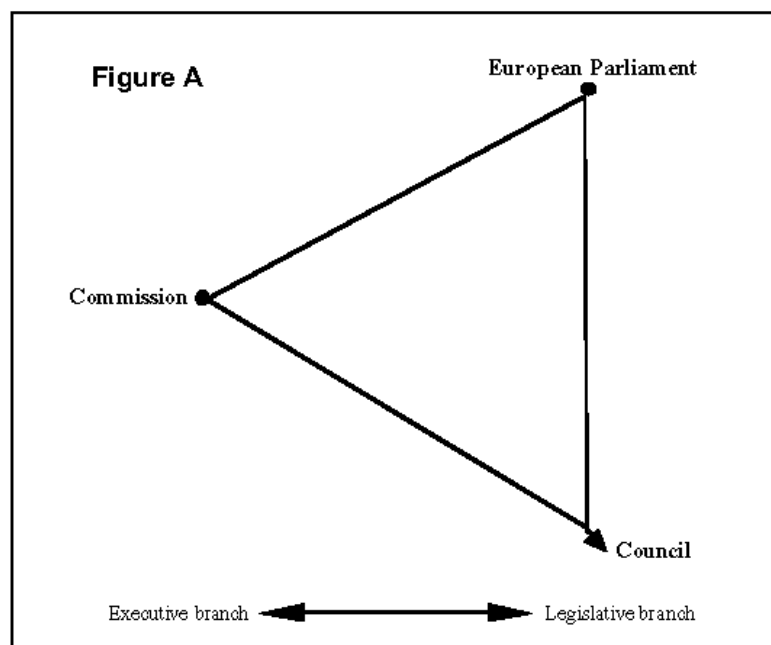
4 – The Institutional Options – Real and Imagined

The central goal of institutional designers is to produce a stable basis for what might then be called a 'European government', and to preempt the incrementalism and ambiguities that have marked the development of the Union so far. What does this imply? It suggests a clear definition of the executive and legislative branches of the system, to complement the already rather well defined legislative branch. It implies rather well specified principles to identify the respective powers of the Union's institutions, the connections between them, and the relative distribution of powers between Union and member state institutions. Two contrasting propositions are present in the debate, which echo the classical contest between a more supranational model and more of a consortium model (so-called intergovernmental). A new feature in the current discussion is the emphasis on 'presidentialism', somehow linked to the notion that a form of presidentialism offers some kind of combination of leadership capacity and clear political responsibility.

A. Proposition one – a Commission-led executive

Under this proposition the Commission would become the core executive of the Union, with two legislative interlocutors: on the one hand, the Council; and on the other, the European Parliament. The critical changes would be: an elected president of the Commission, most usually suggested as election by the European Parliament, although some make suggestions for forms of electoral college; some real autonomy of decision for the President over the membership of the college of commissioners; maybe a smaller college, with deliberately fewer members than the number of member states; maybe a stronger role for the European Parliament as the source of political authority for the Commission President; strong Commission powers across all policy domains, including, for example, in the field of economic and monetary union and that of foreign, security and defence policies, and logically a 'Secretary of the Union (Mrs CFSP)' based in the college; and with perhaps some streamlining of the work of the Council as a legislature, although nb the rotating presidency of the

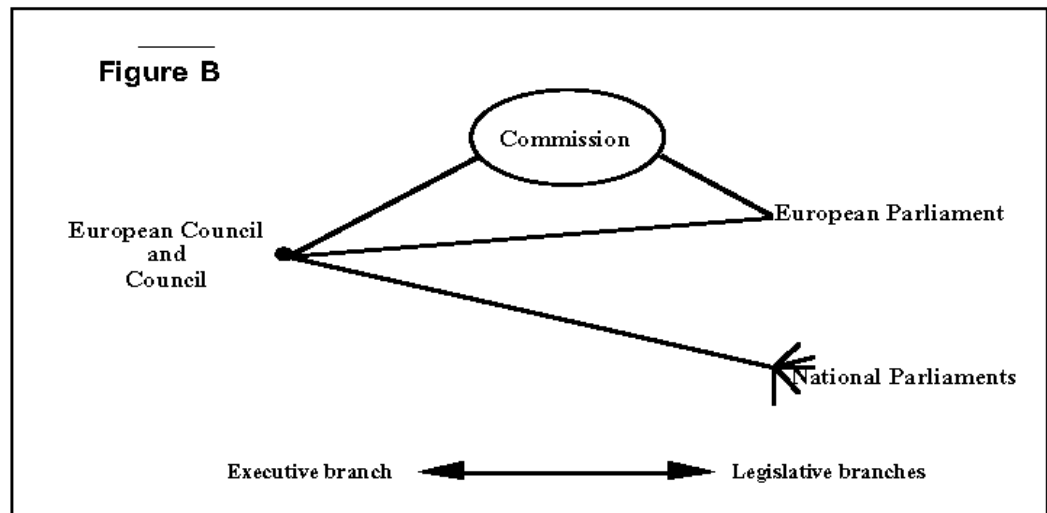
Council could rather easily be retained. This model represents the intended thrust of the Penelope text produced informally by the Commission. A schematic version of this proposition is shown in Figure A.



B. Proposition two: a (European) Council-led executive

The Council and the European Council would in combination form the core executive, with the European Council playing a more explicit and systematic role of collective leadership. The critical changes would be: some way of electing the president of the European Council; changes away from the current six-monthly rotation of the Council presidency to one or other of the several alternatives on the table designed to provide more continuity of management; a strengthening of the role of the High Representative of the Union (Mrs CFSP), but based in one or other way in the Council; logically a radical reform of the Council in order to give it more coherence and better coordination; but this proposal could coexist with a larger Commission college, containing 'nominees' from all member states. One version of this model is implied in particular in the 'ABC' proposal from José Aznar, Tony Blair and Jacques Chirac, advocating a five-year elected President of the European Council. The consequences for the Commission have not been fully spelled out, but

the implication is that it would have a follower rather than a leader role, the repository of delegated but not autonomous powers. The European Parliament would be one legislative branch with quite strong co-legislative powers but with weak accountability mechanisms. National parliaments would be weakly associated with Union legislation, but—on a diffuse basis, country by country—have potentially strong accountability mechanisms vis-à-vis their own governments. A schematic version of this proposition appears in Figure B.



As the rough figures above indicate, each of these propositions produces a very different version of the institutional trilogue, and a different ‘institutional balance’. Each has the merit of clarity. But neither will easily be able to command a widely based consensus. Hence many other variants hover in the debate and either combine elements of these two propositions or concentrate on medium range rather than overarching proposals.

C. Proposition three – a bicephalous executive

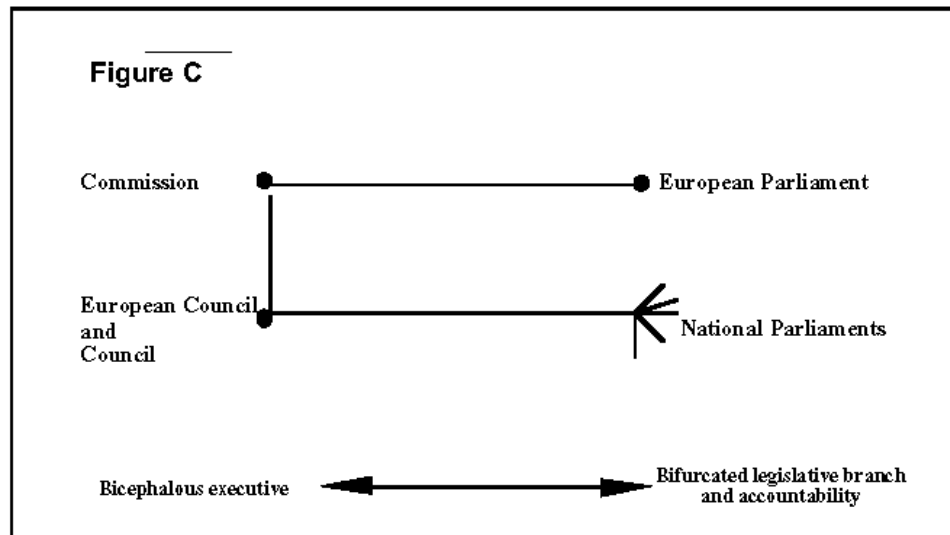
Currently the Union has in some senses a bicephalous executive, or at least a tandem between the Council and the Commission, with one institution more in the lead on some policy issues and the other on other issues. In other words, the inheritance is a mixed system, but one which allows for some movement to take place in the

allocation of primacy between these two institutions, either by evolution or by explicit decisions, and either at the level of overarching choices or at the level of practical functioning. In contrast the Franco-German proposal of January 2003 turns this pragmatic arrangement into a more formalised version, by claiming to ‘strengthen’ both the Commission and the European/Council, in particular by making both in some senses more presidential. Thus the Commission president would be elected by the European Parliament and the President of the European Council would be chosen by her peers probably for the same five-year term (although the European Council Presidency might be for two terms of two and a half years). In addition the Council of Ministers would be ‘strengthened’ to deal more effectively with foreign, security and defence policies, and for justice and home affairs, and a ‘European Minister’ would sit in both the Council and the Commission college to deal with the external policies of the Union. Also as a bridge between the double-headed executive there might be some ‘cross-chairing’ of Council meetings by relevant Commissioners, combined with perhaps elected chairs for some formations of the Council.

This proposition has two seductive features. First, it appears to give something significant to the advocates of both proposition one and proposition two. Second, it looks like a reassuring extension of the current tandem relationship between the Commission and the Council, albeit also reinforcing the strategic role of the European Council vis-à-vis the Council itself in its many specialist formations. However, the bicephalous proposition does not resolve the contest between the two more clear cut models—on the contrary a more presidential version of the contest might well make the tensions more acute. The proposition does not make clear to the citizen or the practitioner where the ultimate political authority lies, and hence neither ‘readability’ nor clear accountability is achieved. One further point – the presidentialism inherent in all three of these propositions not only requires talented and available individuals but also implies a kind of electoral competition and partisanship as an underpinning, but in the absence of well developed transnational parties. Some advocates indeed hope that this opportunity to elect might further spur the development of transnational parties beyond what has already been achieved within the European Parliament. So far so good perhaps, if there is only one elected president as under propositions one and two; maybe not so good if there are competing presidents as under proposition three.

In sum, this proposition does not produce a clear design, as Figure C below seeks to indicate. It is not obvious how either the European Parliament or national parliaments can exercise systematic scrutiny either of legislation or for accountability purposes. In spite of the attempt to include some bridging mechanisms, it is not evident how

this bicephalous approach would facilitate decisions about the reallocation of predominance between the two institutions, unless the decision were in effect reached to make a two (rather than three) pillar system, in which one executive body would predominate in some policy domains and the other for the rest.



D. In addition

The outline above of these three propositions concentrates on the alternative models for the executive branch of the Union. These are essentially based on different models for exercising political and policy leadership. To complete the picture one needs to add the parliamentary dimension and the functional implications. As far as the parliamentary dimension is concerned under all propositions we might well see a reinforcement of the powers of the European Parliament in terms of not only legislative powers but also as regards its roles in providing accountability at least vis-à-vis the Commission. Rather less clear is how the Parliament's standing might alter vis-à-vis the Council under any of the three propositions. One note of warning to give a more legislative character to some of the regulatory powers of the Union (by changes to comitology and extensions of co-decision) might make the regulatory process heavier and at an unhelpful distance from both national regulators and stakeholders. As far as national parliaments are concerned, on which there has been lengthy discussion in the Convention, it still seems hard to see a single template

working for all member states in such a way as to provide an even pattern of national accountability for—or interventions in—Union decision-making.

5 – Governance rather than Government?

If we move away from the idea that the role of the Convention is to provide a blueprint for a European government towards a focus on improving European ‘governance’, then the requirements for institutional reform change. The key questions become much more about how to achieve better performance, greater effectiveness, and more stringent accountability. Hence the questions also shift more to the output side and away from the input side of how the institutions operate. There is wide agreement that the performance of the system needs to be—and could be—enhanced, and also that many of the reforms that need to be made depend much less on treaty reform than on practical and management changes to enhance the capacities of all the Union’s institutions to carry out their tasks more effectively. It needs also to be borne in mind that as far as both citizens and practitioners are concerned the system as a whole is judged not only by its formal design but by its demonstrated and tangible results, i.e. output legitimacy. Moreover, to produce a beautiful design but not to produce better performance would be to risk troublesome disillusionment. In addition the evident tensions between larger and smaller member states and between older and newer member states need at all costs to be reduced and not accentuated.

The agenda for possible reforms of this kind includes both radical changes and more incremental options. Areas that need special attention include:

(1) Commission

One big prize would be radical overhaul of the College, in particular to reduce the size of the College, to prevent Commissioners from drifting into becoming proxy ‘representatives’ of the countries from which they come, and giving the College the responsibility and the opportunity to operate more cohesively and strategically. Below the level of the College the reform process needs to be driven forwards with real determination and with wide support, including from the member states. Among other things, for example, the Commission has much to contribute by sharpening up its approach to the Lisbon Strategy and by adapting the regulatory mechanisms for which it is responsible. It needs to build capacity for dealing with enlargement and for handling the many areas of external policy in which it is involved so that the Commission can indeed provide consistent and effective partnership for third

countries. To put it simply the Commission needs to be an absolutely best practice institution in all of the policy domains in which it works. This would surely be an outcome that would improve the Commission's chances of winning greater political and policy authority in the future.

(2) Council

The Council also needs radical overhaul. Far too many competing formations of the Council currently deal with Union policies and debates. This is also a subject of discussion, and indeed the Seville European Council of June 2002 has made some moves towards improvements. But these plans for a radical reduction in the number of Council formations need also to be driven forwards with determination. This author has long preferred a reduction to, say, five formations: External Affairs; Ecofin (with for monetary purposes a smaller Eurogroup); Competitiveness (internal market and Lisbon); another for dealing with issues relating to the individual (social affairs and justice and home affairs), and another for dealing with physical infrastructures and so forth (agriculture/rural, energy, transport etc). These need to be complemented by a coordinating Council, that would be put under real pressure to deliver greater coherence to the work of the Union. Within such a streamlined system there is a good deal of room for experimentation with different ways of organising the presidency. Absolutely critical is the need for other Councils to learn from the great relative success of Ecofin in gaining a coherent grip of its fields of policy. Generally the Council needs to be able to act more strategically and with clearer priorities, and with a much more disciplined approach to managing the legislative agenda.

(3) European Council

One answer to the evident need for more strategic management and a clearer setting of priorities is to improve the functioning of the European Council. Much can be done to improve the way that it works, to prepare meetings more sensibly, to take away from its agenda work that should go elsewhere, to engage heads of state or government more constructively in taking forward the work of the Union, and to connect the European Council better to the rest of the institutional system.¹ The

¹ de Schoutheete, Phillippe, and Wallace, Helen, 'The European Council', *Research and European Issues* No. 19, Notre Europe, Paris, September 2002.

record suggests that such improvements need not be seen as an encroachment of ‘intergovernmentalism’ into the system, since one of the most important contributions of the European Council in the past has been to set the pathways for the development of important new Union policies. The difficulty is making the follow through work—i.e. again a question of performance.

6 – In Conclusion

Here then are very different approaches to institutional reform. The ‘designer’ approach aims to provide an overarching and durable constitutional settlement, together with a clear allocation of responsibilities and roles to the political institutions of the Union. In the designer camp we can find both advocates of a strong supranational model and some advocates of a consortium model, which would leave more explicit responsibility to the member states, and with options as to what functions might periodically be allocated to Union agencies. The contrasting ‘evolutionary’ approach keeps more of the options open, and is more concerned with the governance and the performance of the Union’s institutional system. This would leave more to depend on the arguments for stronger Union powers to be won by results achieved and by the ingenuity of practice, just as it would keep flexibility for responding to changing policy demands and policy contexts, as well as alterations in the membership of the Union. These are real alternatives and should not be seen as ‘first best’ versus ‘second best’, but rather as contrasting pathways for the integration process in Europe. Essential to both approaches, however, is that the governing constitutional principles should be agreed, in order for the Union’s institutional system to be well anchored. Thus the simplified constitutional treaty proposed in the Convention can serve well both the designer and the evolutionary approach, as can the effort to find a single terminology for the procedures and the instruments of the Union.

Similarly both approaches would probably be served well if agreement could be reached on how to distinguish fundamental constitutional rules from more operational rules in terms of what kind of agreement would be needed to modify rules in the future, i.e. which would need unanimity and which could be settled by some form of majority decision. Two closing remarks, however, on this last point. First, the Union is unusual among transnational frameworks in already allowing forms of majority decision to occur and forms of supranationalism to prevail. Yet it does not follow that even more majoritarianism would be ‘progress’, given that the hybrid form of polity that the Union is still depends on active assent from the

member states in order to deliver both decisions to do things together and actions separately to implement those decisions. There is a delicate balance to be struck between, on the one hand, enough consensus and mutual tolerance to deliver continuing assent and, on the other hand, enough peer pressure to overcome recalcitrant minority views or counterproductive competition. Second, one of the successes of the old Union has been its achievement in providing an institutional framework which – most of the time and on most policy issues addressed in common – has kept all of the participating member states within a single and shared framework. This will be much harder in a larger Union, yet it is an achievement worth hanging on to if a core objective of enlargement is to increase the incentives for all member states, old and new, to exercise a form of joint ownership of the integration process.

Simplification of the Union's Instruments

Koen Lenaerts and
Marlies Desomer*

1 – Introduction

A rather underexposed issue in the debate on the future of the Union is the influence on different aspects of the perceived *democratic deficit* of the use made by the Union's institutions of the legal instruments at their disposal. In the course of several Treaty revisions and in daily practice new types of instruments have emerged, allowing the Union to react to new challenges in a flexible way. Many of these

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instruments are not defined in the Treaties in terms of their normative scope and judicial enforceability. Also, currently, there seems to be no link between the choice of legal instrument and the intensity of action by the Union. This situation has contributed to the perceived lack of *transparency* and *legal certainty* in the functioning of the Union. The lack of *democratic legitimacy* has further been criticised with respect to acts that are adopted and presented as “executive acts” although they reflect veritable basic policy choices. All this has nourished the feeling among the Member States and local entities, as well as among citizens, that, on the basis of certain Treaty provisions that permit the use of any instrument to exercise its competence, the Union has acquired “*carte blanche*” in several policy areas.

This perception clearly demonstrates the close ties between the question of a more precise delimitation of powers between the Union and the Member States and the concern for a constitutional specification of the instruments that the Union has at its disposal to exercise its powers. If a reorganisation of policy responsibilities between the Union and the Member States aims to align these with the expectations cherished by the citizens, this should, in our view, to a large extent take place at the level of the policy instruments put at the disposal—or not—of the Union. A well-considered choice by the authors of a Constitutional Treaty—and, within its framework, by the political institutions of the Union—of the appropriate policy instruments in each of the Union’s areas of competence could be a principal way for the institutions to enforce the ideas of *subsidiarity* and *proportionality* in the everyday operation of the Union. Meanwhile, enough *autonomy* and *flexibility* should be left for the Union’s institutions to determine freely the appropriate form of action to tackle the policy question at stake.

Democratic legitimacy and *transparency* require, in our view, the introduction of a clear hierarchy of norms, based on both the *content of the act* and the *type of procedure for adopting the act*. The debate on simplification of the Union’s instruments is therefore also particularly relevant for the horizontal division of policy responsibilities—the institutional balance—among the political institutions involved in day-to-day policy-making (European Parliament, Council and Commission). For that reason, reforming the Union’s set of legal instruments has to go hand in hand with a thorough reflection on the desired weight of the various institutions in the Union’s various decision-making settings, taking into account the interests they represent (e.g. the interests of the Member States, of the peoples of the Union) and the specific legitimacy they therefore deliver to the overall constitutional system.

It is clear that the task of simplification of the Union’s legal instruments is not politically neutral and is thus not an easy exercise, since it may affect both the

vertical and the horizontal distribution of policy responsibilities. Four ideas with respect to rationalising and simplifying the instruments¹ available to the Union will be developed in four sections of this paper, whereby different values and legal principles that come into play will be balanced against each other. **Firstly, *democratic legitimacy* and *transparency* require the introduction of a clear-cut distinction between legislative and executive acts.** Secondly, a simplification and rationalisation of the instruments by reference to the newly established categories of legislative and executive acts must further improve *transparency* and *legal certainty*. Thirdly, the relationship between the instruments and powers of the Union must be characterised by *flexibility*. Lastly, *proportionality and subsidiarity* must continue to be the guiding principle in the Union's day-to-day choice of policy instruments.

2 – Democratic Legitimacy and Transparency Require the Introduction of a Clear-cut Distinction between Legislative and Executive Acts

A. Issues at stake

Currently, the founding Treaties of the Union do not contain any indications for checking whether a measure adopted by the Union in the shape of one or another instrument is of a legislative or an executive nature. Neither the *type of instrument* (regulation, directive, decision, framework decision, etc.), nor the *identity of the author* of the measure (the Council acting alone, the Council and the European Parliament acting together, the Commission), nor the *level of detail* of the measure is a decisive criterion in this respect. The proposal to introduce an unambiguous distinction between legislative and executive acts is concerned with the necessity to identify, in a transparent way, the *procedure* that corresponds best—in terms of legitimacy and efficiency—to the legislative and executive functions of the

1 This contribution only deals with legally binding instruments. It does not cover parallel reflections concerning soft-law instruments. In our view, a reflection is however needed on the appropriate ways to better express the non-binding character of the norms belonging to this category and to indicate their intended effect.

institutions in the Union. In our view, such a cardinal distinction should therefore be the starting point of the debate on the simplification of the Union's legal instruments.²

B. Legislative acts: basic policy choices and co-decision between European Parliament and Council

The distinction between legislative and executive acts should, in our opinion, be based, not on the identity of the author of the act, but on the *type of procedure* for adopting the act and on the *content of the act*. The adoption procedure that corresponds best to the legislative function in the Union is the *co-decision procedure*, for it reflects best the democratic ideal of self-governance in the Union's multilevel polity: the interests of the Member States are being upheld in the Council, while the peoples of the Union are represented in the European Parliament. A second, content-based, criterion aims at guaranteeing that the legislative procedure is reserved for the adoption of those acts implying *basic policy choices*³. On the one hand, this requirement functions as a constitutional constraint on the delegation of rule-making activity to the executive—the Commission—and thus aims at the protection of the ideal of self-governance. On the other hand, this requirement corresponds to the need to preserve the time-consuming co-decision procedure for decisions with true political implications, encouraging the legislator to leave it to the executive to elaborate mere technical details or amend non-essential elements of legislation in fast-changing policy fields, like, for instance, the common agricultural policy. The “basic policy choice”-demarcation line between legislation and implementation is to be considered as a political principle guiding the Union legislator (European

2 For a radically different approach, see J.-C. Piris: “The “classic” instruments (regulation, directive, decision) would probably have to be retained so that they could continue to be used for regulatory and executive powers as well as for implementing powers. (...) [G]iven this complexity and the institutional balances underlying it, it is hard to argue that a given form of legal instrument should be associated always and exclusively with a particular adoption procedure.” J.-C. Piris, “Simplification of legislative procedures and instruments”, Working Document 6 of Convention Working Group IX, November 6, 2002, 23. According to Convention Member M. Vanhanen, legislative acts should only be defined by their content, and not by their adoption procedure (no exclusive link between legislative acts and the co-decision procedure: Working Document 24 of Convention Working Group IX, November 15, 2002, 4-6).

3 ECJ, December 17, 1970, *Köster*, 25/70, *E.C.R.* 1161, paragraph 6.

Parliament and Council) in its behaviour.⁴ As such, it can only be marginally scrutinised by the Court of Justice, in order to prevent excesses which harm the institutional balance.

Following these parameters, a legislative act is any act directly based on a Treaty provision, adopted in compliance with the co-decision procedure [Article 251 TEC] and expressing a basic policy choice. All acts adopted according to a different procedure are kinds of executive acts. For reasons of transparency, this definition should be inserted into a Constitutional Treaty.

To make it feasible at the IGC to successfully extend co-decision with the European Parliament to the adoption of all legislative acts by the Union⁵, the authors of the Treaty could decide to clarify in the Constitutional Treaty, (for instance in politically sensitive policy fields), what constitutes, in terms of material content, a basic policy choice (for instance, in the field of common agricultural policy), and what does not. This option should nevertheless be considered as only second best, since it opens up the possibility again to blur the newly established distinction for reasons that are not driven by concerns of democratic legitimacy and transparency. The exercise will moreover be encumbered by national sensitivities resulting from the fact that, in some Member States, certain matters concerned by the exercise are entrusted to the executive power, notwithstanding the fact that they require basic policy choices (for instance, in the field of common commercial policy).

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- 4 The “Penelope” Contribution to a Preliminary Draft Constitution of the European Union of 4 December 2002 ordered by Commission President R. Prodi contains an interesting attempt to specify what constitutes a basic policy choice. According to the draft, “[legislative acts] shall determine the fundamental principles, general orientation and essential aspects of the measures to be taken to that end. They shall determine the rights and obligations of persons and undertakings and the nature of the guarantees which they are to enjoy in all Member States” (Article 77(2) of the Draft). This document can be retrieved at the Union’s Futurum-website: http://europa.eu.int/futurum/index_en.htm.
- 5 For the same reason, the authors of the Treaty could consider subjecting certain particularly sensitive legislative matters to the requirement of obtaining, within the framework of the co-decision procedure, super-qualified majorities in both the Council and the European Parliament, for instance, for the use of the subsidiary competence provision Article 308 TEC.

C. Eliminating what are currently called “autonomous regulations”

Moreover, the authors of the Treaty are free to decide already to imply certain *basic policy*—and thus “legislative”—*choices in the Treaty itself* (so-called “*Traité-loi provisions*”), delegating the *execution* of these choices directly to the executive power. This technique should, however, be reserved for exceptional cases, since, again, misusing it to—in fact—allocate certain veritable political choices to the executive instead of the legislator for reasons that are not driven by concerns of democratic legitimacy and transparency would seriously put at risk the whole reform proposed earlier which aims exactly at enhancing these values.

The Chairman of the Convention’s Working Group IX on “Simplification”, Mr. G. Amato, has identified numerous cases of so-called “*autonomous regulations*” in the present Treaties, mandatory acts of general application that are adopted by the executive directly on the basis of a Treaty provision.⁶ These acts are often adopted by the Council alone (for instance, basic anti-dumping acts pursuant to Article 133(4) TEC) or by the Council after the consultation of the European Parliament (for instance, acts establishing common market organisations for certain agricultural products pursuant to Article 37(2) and (3) TEC), and sometimes by the Commission (for instance, certain directives as regards the position of public undertakings vis-à-vis European competition rules pursuant to Article 86(3) TEC).

As we have indicated above, it is undeniable that several such autonomous regulations still require *basic policy choices* to be made, justifying their subjection to the *co-decision procedure* and their classification in the category of *legislative acts*. As a result, it is necessary to identify, on the one hand, the autonomous regulations that involve such basic policy choices (for numerous examples of “autonomous regulations” which should, in our view, become legislation, see the Annex of this Chapter). These acts, which need to enjoy representative democratic legitimacy, should be adopted by the legislative power (European Parliament and Council) on the basis of the co-decision procedure and thus belong to the category of *legislative acts*. On the other hand, the autonomous regulations of a more technical nature do

6 Mr. Amato uses the notion “autonomous *legislation*”. See Working Document 10 of Convention Working Group IX on “Simplification” of October 24, 2002, “Examples relating to acts adopted directly on the basis of the Treaties by the Council, the Commission or the European Central Bank”.

not justify a direct intervention of the legislator (since this would overload the co-decision procedure). This may be so because the authors of the Treaty have decided to imply certain basic policy choices directly in specific Treaty provisions, only leaving room for mere implementation of these “legislative” choices. All these acts, which should also be identified, could thus suffice with an executive legitimacy and should clearly be subsumed under the category of *executive acts*, taking the form either of “delegated rule-making” or of “genuine” executive acts (see the Annex).

In short, *all* acts adopted directly on the basis of a Treaty provision, which imply *basic policy choices* and which are thus, in other words, *legislative in nature* should in the end be adopted by way of the *co-decision procedure* and be subsumed under the category of *legislative acts*. Exceptions, if considered at all, should be given a temporary status only.

D. Executive acts: introducing a distinction between “delegated rule-making” and “genuine executive acts”

Introduction

According to the principal distinction between legislative and executive acts established above, executive acts are all mandatory acts, whether general or individual in scope, that are adopted in accordance with a procedure other than the co-decision procedure. Executive acts have their legal basis in legislative acts or executive acts, or even directly in Treaty provisions, insofar as these already contain certain basic policy choices and directly confer implementing powers to the executive. It is evident that executive acts at all time need to comply with the—constitutional, legislative or executive—provisions they implement. Monitoring procedures are required that allow the legislator (European Parliament and Council) to effectuate control of such compliance and thus, ultimately, to put into practice the institutional balance as intended by the authors of the Treaty.

Assessment of the current implementation schemes at Union level

According to the third indent of Article 202 of the EC Treaty, the Council is to “confer on the *Commission*⁷, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down⁸ [and] may impose certain requirements in respect of the exercise of these powers”. The procedures in question must be “consonant with principles and rules to be laid down in advance by the Council”. In general, the Council imposes requirements on the Commission with a view to it carrying out its implementation function by means of a particular form of collaboration with a committee set up by the Council. Further, the *Council* may also, *in specific cases*, reserve the right to exercise implementing powers to *itself* [Article 202, third indent, TEC].⁹ Lastly, implementation is sometimes entrusted to *agencies*.

The picture that emerges from the current organisation of implementation procedures at Union level is, firstly, one of *fragmentation* and *opaqueness*. The Comitology Decision may have been a great step forward, in this respect, limiting the Council’s freedom to establish committees for controlling the Commission’s implementing role to three types of procedures—depending on whether the committees concerned have advisory, management or regulatory powers—and introducing (non-binding) substantive criteria for the choice of committee procedure.¹⁰ Still, what is currently lacking is a coherent and transparent constitutional framework for implementing procedures. The Comitology Decision is not concerned with the question *when, at all*, should the Commission have recourse to committee procedures, nor does it shed light on the “*specific cases*” in which the *Council*, pursuant to Article 202, third indent, TEC, may decide to implement legislative acts *itself*. What is more, a similar

7 It falls to the Community institutions to implement Community law only when that task has been expressly conferred upon them. Following Article 10 TEC, “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community”.

8 See as well Article 211, fourth indent, TEC.

9 Moreover, in some instances, the *Treaties* expressly reserve implementing powers to the Council (for instance, to implement through specific programmes the Union’s multiannual framework programme for research and technological development [Article 166(4) TEC], to implement agreements concluded between management and labour [Article 139(2) TEC] and numerous cases throughout the second and third pillar).

10 See Council Decision 1999/468 [1999] O.J. L184/23 laying down the procedures for the exercise of implementing powers conferred on the Commission.

framework establishing procedural guarantees and principles in case implementation is left to *agencies* is totally lacking.

In our view, **the authors of the Treaty should, first of all, establish in the Constitutional Treaty a *systematic set of procedural rules* regarding transparency, access to documents, hearing of scientific and technical expert committees, admissibility conditions for actions for annulment lodged against executive acts, etc. applicable to *all* implementing authorities. Further, *a standard implementation procedure* should be inscribed in the Constitutional Treaty¹¹, deviation from which would only be possible if a clear exception is foreseen in a specific legal basis provided in the Constitutional Treaty.**

Secondly, one notices an overall *preponderance of the Council* in the current implementation scheme(s), while this stands at odds with the fact that it is the Council itself—albeit often together with the European Parliament—which is the institution that defines and entrusts the implementing powers. Even though the comitology system is generally perceived as a control system permitting *the legislator* to check *ex ante* the compliance of executive acts with the legislative acts implementation of which they have envisaged¹², a substantive role for the European Parliament, the Council's co-legislator, is by and large denied. Indeed, where the Council itself undertakes implementation or makes it subject to a comitology procedure which may result in the power of implementation reverting to it (i.e. in the case of regulatory or management procedures), it is not possible for the European Parliament to exercise political control to the same extent. **The task of implementation should therefore be left as much as possible to the Commission,**

11 Alternatively, such standard implementation procedure could be adopted, possibly in the shape of a so-called “organic” or “institutional” act, by the Union legislator (European Parliament and Council) deciding in accordance with the co-decision procedure (possibly with super-qualified majorities), pursuant to a legal basis created to this end in the Constitutional Treaty.

12 For an opposing view, see the contribution by Convention Member G. Cisneros:
“Le Traité confère donc ces compétences au Conseil, non tant en sa qualité d'organe législatif mais en tant qu'institution au sein de laquelle les États membres sont directement représentés en qualité de responsables de l'application du droit communautaire. (...) Ce sont donc les États membres et non pas l'organe législatif qui, par le biais de leur participation aux Comités et au Conseil, contrôlent l'exercice de ces compétences.”

Working Document 5 of Convention Working Group IX, October 15, 2002, 2.

with both branches of the legislator playing an equal role in monitoring the executive.¹³

Proposal: a subdivision between acts of delegated rule-making and genuine executive acts

In our view, the exigencies of democratic legitimacy and accountability necessitate a subdivision within the broad category of executive acts between acts of “delegated rule-making” on the one hand, and “genuine” executive acts on the other.¹⁴ The distinction is based on the *content* of the act and has implications for the *legislative monitoring procedure*.¹⁵

Acts of “delegated rule-making” (or, more elegantly, “delegated acts”)¹⁶ would be executive acts adopted by the Commission on the basis of a broad implementing power, granted either in a legislative act or directly in a precise Treaty provision. Delegated acts substantively resemble legislative acts in that they often (but not always) adapt to technical progress non-basic provisions of legislative

13 The European Parliament sees *no* future role for the Council in implementation. See European Parliament Resolution A5-0425/2002 of December 17, 2002 on the typology of acts and the hierarchy of legislation in the European Union (Report by J.-L. Bourlanges, 2002/2140(INI)). In our view, if in the future the Council is still assigned a role in the implementation of legislation, which seems quite likely, an effective system of checks and balances requires clearly identifying when the Council acts in its legislative and when in its executive capacity. See, for instance, the address of Belgian Prime Minister G. Verhofstadt at the College of Europe, “Montesquieu and the European Union”, November 18, 2002, retrievable at the Union’s Futurum-website: <http://europa.eu.int/futurum/index_en.htm>.

For a more radical federal conception of the “European Executive Council” as a true European Government, see the Draft Treaty embodying the Statute of the European Community, retrievable at: <<http://www.let.leidenuniv.nl/history/rtg/res1/drafttreaty.htm>>.

14 For a highly similar distinction between three categories of acts—legislative acts, delegated acts and executive acts “proper”—on the basis of both content-related and procedural criteria, see Working Document 11 of Convention Working Group IX on “Simplification”, October 29, 2002, as well as CONV 424/02/REV1, Final Report of Convention Working Group IX on “Simplification”, November 29, 2002.

15 It is regrettable that Convention Working Group IX on “Simplification of instruments and procedures” has interpreted its mandate as not comprising the organisation of implementing procedures. See its Final Report, CONV 424/02, November 29, 2002, 12.

16 *Ibid.*, 10.

acts.¹⁷ At present, a mechanism allowing the legislator to delegate the power to modify a legislative act in certain technical or detailed respects, *while retaining a real power of control*, is lacking in the Union. It is, however, undesirable to imply the legislative power directly in the adoption of such acts, since this causes an overburdening of the co-decision procedure and prevents above all the European Parliament from concentrating on its primary constitutional function, namely the making of basic policy choices (the legislative function). Nor is it desirable, from the viewpoint of the European Parliament, to leave the power to adopt delegated acts to a regulatory or management procedure, which may result in *de facto* implementation by the Council.¹⁸ In our view, a ‘simple’ and balanced legislative call-back system¹⁹, as opposed to the complicated and biased comitology system, is required here.²⁰ In such a system, each branch of the legislator—or the legislator as a whole—would have a right to retrieve the power to legislate on the subject, to be exercised within a certain time limit, in case it considers that a Commission draft delegated act exceeds the delegation provided in the legislative act or touches upon major political sensitivities.²¹ Consequently, the Commission could be given a time span for adaptation of the proposed delegated act, or the legislator could decide to settle the matter itself by way of the co-decision procedure.²²

17 See as well Article 77(4) of the “Penelope” Contribution to a Preliminary Draft Constitution of the European Union of December 4, 2002 ordered by Commission President R. Prodi.

18 If it were decided to maintain a ‘heavy’ comitology system for delegated acts, this should at least be complemented with a strict control by the European Parliament, which could then take the form of a right of call-back.

19 The idea is that one who gives a mandate can withdraw that mandate. See, in that regard, the proposals for simplification of the adoption procedure for the European legal framework for financial services, better known as the “Lamfalussy method”. See as well CONV 424/02, Final Document of Convention Working Group IX on Simplification, November 29, 2002, 11.

20 The absence of comitology for this type of executive measure does not, of course, alter the Commission’s practice of consulting national administrations, experts and interested parties, often organised in the form of committees, before adopting its executive acts.

21 The European Parliament should be given an individual right of call-back when the implementation task is conferred upon the *executive* Council.

22 Alternatively, for instance, in policy fields where technical aspects of legislation need to be adapted very quickly to keep up with technological changes or the exigencies of fast-changing markets, a system could be envisaged whereby an unsuccessful call-back (since no agreement is reached in co-decision between the Council and the European Parliament on an alternative act) would have as effect that, after all, the Commission adopts the delegated act it had planned.

Where delegated rule-making powers are conferred upon the executive directly on the basis of a “legislative” Treaty provision, no monitoring procedures exist to allow for political control of the implementing activity.²³ This is a prominent reason to limit the number of such cases. A framework intervention of the legislator could be foreseen, which would reaffirm the conferring of the necessary implementing powers on the executive. The aim of this legislative intervention would be to establish the legislative right of call-back suggested above, allowing for political control over the conformity of these delegated acts with the Treaty provisions they seek to implement, and thus, ultimately, for preserving the institutional balance.

The residual category of “genuine” executive acts²⁴ comprises acts adopted by the executive on the basis of a provision of the Treaty, of a legislative act or of a delegated act.²⁵ They can be normative acts of a general scope that further shape the basic policy choices set out in the basic act, or “just” binding acts, whether addressed to a specific party²⁶ or not²⁷. Quite often, these executive acts will have a rather limited political impact and thus produce limited risk of disturbance of the institutional balance. In this case, these acts can be safely entrusted to the Commission alone²⁸, the Commission acting on the basis of a light comitology

23 This is considered less of a problem for the European Central Bank, which seems to enjoy a legitimacy of expertise.

24 “Implementing acts” in the wording of CONV 424/02, Final Document of Convention Working Group IX on Simplification, November 29, 2002 11.

25 For examples, see the annex to this text.

26 For instance, measures addressed to individual companies adopted by the Commission in the area of competition or control of state aid (see annex).

27 For instance, the setting up by the Council of high-level political committees composed of representatives of the Member States, which have to assist the legislator or the Council in sensitive policy fields by giving opinions and preparing discussions (the Political Committee in the field of the common foreign and security policy [Article 25 TEU], the Coordinating Committee in the field of police and judicial co-operation in criminal matters [Article 36 TEU], the Employment Committee [Article 130 TEC], etc.).

28 The Commission is generally held to account politically vis-à-vis the European Parliament for the way in which it fulfils its executive role. According to Mr. Panzano, Commission representative in Convention Working Group IX, a regular control of the Commission (or the Member States) by the legislature does not therefore appear justified to the extent that the implementation in question is of a purely executive nature and only applies the basic political

procedure (assistance by an advisory committee), the Council, the European Central Bank or (regulatory) agencies. Obviously, there may also be cases where the adoption of genuine executive acts does require some degree of political assessment—be it not of a “basic”, hence legislative, nature (for instance, in the sphere of common agricultural and common fisheries policy). In such cases, the current comitology system is still relevant, as is the possibility that the Council, in specific cases, reserves implementation to itself.²⁹

3 – A Simplification and Rationalisation of the Union's Instruments by Reference to the Newly Established Categories of Legislative and Executive Acts Should further Improve Transparency and Legal Certainty

A. Issues at stake

For reasons of transparency and legal certainty, in accordance with the suggestion contained in the Laeken Declaration, the number of legislative and executive instruments available to the Union should be *reduced*. In the light of the fundamental distinction between legislative and executive acts established above, a *simplification and rationalisation* of the instruments of the Union of both the first pillar (Community pillar) and the third pillar (police and judicial co-operation in criminal matters)³⁰ by reference to the two categories of acts is to be carried out. In this way,

... continued

choices already made at legislative level (Working Document 16 of Convention Working Group IX, November 7, 2002, 2).

- 29 The chance of the Council reserving the adoption of such executive acts to itself would however seriously decrease, since these acts will more often than is currently the case be based on a legislative act, adopted in co-decision, and it is not very likely that the European Parliament would agree with this scenario.
- 30 We will not deal with the Union's external action instruments. See S. Griller's chapter on external relations. We support his view that the Union requires *a specific set of instruments* for its future *common foreign and security policy*, in line with the current common positions and strategies and joint actions, to guarantee the visibility of the Union's policies vis-à-vis third countries. Opposite to what is presently the case, the Constitutional Treaty should expressly lay down the *binding nature* of these instruments, and subject them to *full judicial scrutiny*.

the permissible intensity of action by the Union in each (sub)matter in which it enjoys any competence could be specified. Furthermore, the remaining instruments should be carefully *defined* in the Constitutional Treaty as to their legal scope and judicial enforceability.³¹ Recourse to a variety of notions such as “measures”, “rules”, “provisions”, should thereby be avoided. Instead, the authors of the Treaty should confine themselves to a single notion—for instance, “measures”—when they want to give the Union’s institutions a freedom of choice in deciding the appropriate policy instrument. Lastly, the names of the instruments should expressly set out their legislative or executive nature.

Finally, the relationship between the various sources of Union law is not currently laid down expressly in the Treaties. It would be beneficial to transparency and legal certainty to establish clearly a hierarchy of norms in the Constitutional Treaty. The cardinal distinction between legislative and executive acts brings this within reach. This exercise may moreover lead to a reconsideration of the admissibility conditions for access to the Union judiciary.

B. Simplification and rationalisation of the Union’s first and third pillar instruments in the light of the fundamental distinction between legislation and implementation

Legislative acts

The category of “legislative acts” contains all acts which are directly based on a Treaty provision, express a basic policy choice and are adopted in co-decision by the Council and the European Parliament on a proposal from the Commission. **This first category can be further subdivided by reference to the *effects* of the measure in the internal legal orders of the Member States.**

A first subdivision of the legislative instruments would therefore consist of “*EU laws*”. **An “EU law” would be a Union act which is binding in its entirety and directly applicable in all Member States.** The current equivalents are “regulations”,

31 Furthermore, certain legal principles and notions that are fundamental in European law and that are crucial to individuals for the determination of their legal position could be explained in the Treaty, like “primacy of Community law” or “direct effect”.

“*sui generis* decisions”³² and third pillar “decisions”³³, to the extent that these acts contain basic policy choices. Indeed, also in the future, the Union should be able to adopt detailed rules that are directly applicable in the legal orders of the Member States, including in areas belonging to the Union’s non-exclusive powers (see *infra*).

As with Article 75 of the German Constitution, the exercise by the Union of certain non-exclusive powers could be subjected in the Constitutional Treaty to the restriction that the Union could only enact “*EU framework laws*”.³⁴ **The second subdivision of legislative instruments would then consist of *Union acts that have general application and are binding upon the Member States as to the result to be achieved, while they leave to the Member States the choice of form and methods to achieve that result*.** The efficiency of these norms relies on a legislative co-responsibility of the Union and the Member States. This approach is federalist in its essence, since it rests on the principle of loyal co-operation between the Union and its Member States, under supervision of the Commission and, in case of dispute, the Court of Justice. Both Community directives [Article 249 TEC] and third pillar framework decisions [Article 34 TEU]³⁵ fit the definition of “framework legislation” established above.

32 The Council often uses “decisions” (termed “*Beschluß*” in German and hence differing from the decision with individual scope meant in Article 249 TEC, which is termed “*Entscheidung*” in German) where it adopts an act on the basis of a Treaty provision which does not prescribe any particular instrument. Many of these *sui generis* decisions imply basic policy choices and are thus legislative in nature, justifying their subjection to the co-decision procedure. In the future, these acts should take the shape of an EU law (for instance, Council Decision 94/819/EC of December 6, 1994 establishing an action programme for the implementation of a European Community vocational training policy, [1994] O.J. L340/8, based on Article 150 TEC).

33 Article 34 TEU. In its Final Report of December 2, 2002, Convention Working Group X on “Freedom, Security and Justice” urges for a communautarisation of the “legislative” provisions of the third pillar and for a replacement of the current framework decisions, *decisions* and common positions “by regulations, directives and decisions (as currently foreseen in the EC Treaty) or their respective successors to be proposed by WG IX” (CONV 426/02, 2-8).

34 Since it would be very hard to give a uniform definition of the notion “framework legislation” that could be applied in diverse fields of non-exclusive competence where this is deemed desirable, the substantive scope of the Union’s power to enact framework legislation could be specified in the Constitutional Treaty as to each of these fields, as well as the scope of issues that are left to the Member States as executors of the framework legislation adopted by the Union.

35 See footnote 33.

In our view, the subdivision of “laws” and “framework laws” is sufficient. The proposal by some commentators to distinguish further, within the category of legislative acts, between “uniform laws”, “(minimal) harmonisation laws”, “programme laws”, “finance laws”, would add little to the suggested subdivision. It is further up to the legislator itself to specify, on a case by case basis, the subject-matter of the law or framework law concerned (for instance, “EU framework law on the harmonisation of...”, “EU law establishing a multi-annual framework programme in the field of...”).

Executive acts

It would be beneficial in terms of transparency if all executive acts, irrespective of whether they were adopted by the Commission, the Council or a (regulatory) agency, could be identified “at a single glance”, by their name. **As a designation for executive acts with a general scope of application the notion of “EU regulation”³⁶ could be reintroduced. The name of these norms could be specified further according to their delegated or “genuine” executive nature, thus becoming “EU delegated regulations” or “EU executive regulations”³⁷. The rest category, whether addressed to a specific party or not³⁸, could be designated “EU executive decisions”.**³⁹

36 This would conform to the national understanding of the notion “regulation”. However, this could give rise to confusion with the present use of the notion in Article 249 TEC since it is evident that the current “regulations” will survive for many years to come, as valid legal instruments adopted in the past, in legal literature and in the case-law of the Court of Justice. Therefore, the alternative term “decree” could be suggested.

37 “Implementing regulations” in the Final Report of Convention Working Group IX on “Simplification”, CONV 424/02 of November 29, 2002, 11-12.

38 “EU executive decisions” differ in this respect from the more limited definition of “addressed” decisions laid down in Article 249 TEC (*Entscheidung*-type). They cover some of the current *sui generis* decisions originated in practice (*Beschluß*-type), but to the extent that the latter are currently also used for acts that have a legislative nature, these should, in our view, in the future be subjected to the co-decision procedure and become EU (organic) laws (e.g. the Comitology Decision, the Own Resources Decision, etc.) (cf. *supra*). For an even wider concept of “decision”, see J.-C. Piris, “Simplification of legislative procedures and instruments”, Working Document 6 of Convention Working Group IX, November 6, 2002, 10.

39 For examples, see footnotes 26 and 27 and see annex.

C. A hierarchy of EU legal instruments and access to the Union judge

A hierarchy of EU legal instruments based on the degree of democratic legitimacy of the acts concerned

Currently, no express hierarchy of Community instruments is laid down in the EC Treaty. In practice this situation is a source of opacity and legal insecurity. **The content-based distinction between legislative and executive acts and the identification of legislative acts with the co-decision method allow us now to establish a clear hierarchy of Union instruments, based on the political impact and the degree of democratic legitimacy of the instruments concerned. In addition, the renaming of the instruments in accordance with the cardinal distinction between legislative and executive acts makes this newly established hierarchy transparent and comprehensible.** Consequently, at the top of the hierarchy there are the provisions of a constitutional nature (provisions of the Constitutional Treaty and so-called “EU organic laws”). Legislative acts (EU laws and framework laws), involving basic policy choices and adopted according to the co-decision procedure, take precedence over implementing measures (EU delegated regulations, executive regulations and executive decisions) based on them. Within the category of executive acts, acts of delegated rule-making (EU delegated regulations) take precedence over genuine executive acts, and among the genuine executive acts, EU executive regulations prevail over EU executive decisions. In addition, the principle common to all European legal orders as regards the relationship between similar provisions applies, namely that a later provision (*lex posterior*) prevails over an earlier one and a specific provision (*lex specialis*) over a more general one. At the bottom of the hierarchy, finally, the instruments lacking legally binding force are situated (e.g. recommendations, resolutions, communications).

A system of access to the Union judiciary based on the degree of democratic legitimacy of the challenged acts

The question arises whether the conditions for access to the Union judiciary for private parties should not be linked with the degree of democratic foundation of the contested Union act. In other words, **should the rigour of the admissibility conditions for actions for annulment lodged against a Union act with general scope of application not decrease depending on whether the act falls under the category of legislative acts or under one of the subcategories of executive acts?** The present jurisprudential distinction between, on the one hand, acts of a general scope and, on the other hand, acts that directly and individually concern the applicant

seems to be inspired by a concern not to overburden the European Courts, rather than by considerations of access to justice to challenge arbitrary or otherwise unlawful rule-making.

4 – The Relationship between the Powers and the Instruments of the Union Should Be Characterised by Flexibility

A. Issues at stake

For reasons of simplicity, some commentators have considered the establishment of a rigid connection between the types of Union powers (exclusive, shared and complementary powers) and the types of instruments at the disposal of the Union. In our view, this objective does not counterbalance the necessity not to put at risk the dynamism that has characterised the European integration process so far.⁴⁰ Therefore, **the establishment of overly stringent ties between the powers and the instruments of the Union should be avoided.**

B. Proposal

In the exercise of the powers it shares with the Member States, the Union should not be systematically confined to defining the general principles, leaving the adoption of all detailed legislation to the Member States.⁴¹ It is undeniable, for instance, that the Union is in the best position to regulate in detail—by means of EU laws, delegated regulations or executive regulations—the operation of the financial markets or the modes of control regarding concentrations with a Community dimension, since in these matters uniform application and legal certainty across the

40 This concern is also expressed in the Laeken Declaration.

41 For a different opinion, see W. Clement, Minister President of the German Land of North Rhine-Westphalia, “Shaping—not administering—a new Europe. Allocation of competences within the European Union after Nice.” Speech given at the Walter Hallstein-Institute for European Constitutional Law of the Humboldt University, Berlin, February 12, 2001; http://europa.eu.int/futurum/index_en.htm

Union are essential. Also **when pursuing objectives which reserve a mere supportive, complementary role for the Union, the Union should continue to be able to adopt binding instruments**, like, for instance, an EU law establishing a multi-annual framework programme in the field of research and technological development or an action scheme encouraging the mobility of students in the framework of the Socrates/Erasmus programme.⁴² Certain cases in which only EU framework laws should be permissible could, however, be specified in the Constitutional Treaty. Finally, **the exclusive nature of a Union power should not exclude the adoption of non-binding instruments if these appear sufficient to attain the determined objective.**

5 – Proportionality and Subsidiarity Should Continue to Be the Guiding Principles in the Union's Choice of Policy Instruments

A. Issues at stake

The specific nature of the Union's action may have a considerable broadening or limiting effect on the scope of the exercise by the Union of its powers and the impact thereof in the legal orders of the Member States. Recourse to non-binding recommendations where the enactment of an EU law or framework law would have been desirable—in policy areas where identical or sufficiently homogeneous rules in all Member States are deemed necessary—can foster the idea of an abstract European construction not capable of transcending national disparities. Conversely, the option for a binding instrument in a matter where a mere indicative “soft law” tool could have sufficed or the issuing of very detailed rules where framework rules would have been sufficient may further the impression of a technocratic Union, exceeding its powers to the detriment of the national or regional powers.⁴³

42 For a seemingly different view, see European Parliament Resolution A5-0133/2002 of May 16, 2002 on the division of powers between the European Union and the Member States, point 29 (Report by A. Lamassoure (2001/2024(INI))).

43 This is acknowledged in the Commission's White Paper on European Governance adopted on July 25, 2001 (COM (2001) 428) (retrievable at the EU website: http://europa.eu.int/comm/governance/white_paper/index_en.htm)

B. Proposal

In conformity with *the principle of subsidiarity*, the efficiency of the envisaged action should be the fundamental criterion when choosing the appropriate legislative instrument for action by the Union. Hence, this could require that, in certain fields belonging to the Union's core activities, the Union could have recourse to more coercive instruments than presently at its disposal with a view to realising, in line with citizen's expectations, the tasks assigned to it. For instance, in the field of the Union's common policies, a generalised possibility to adopt "EU laws" seems appropriate. Conversely, in other fields the efficiency of action by the Union could be served by a less systematic recourse to binding instruments and the reservation of a more prominent place for "soft law" instruments, like recommendations, and alternative forms of governance, like the (open) method of co-ordination⁴⁴, and co-regulation⁴⁵. Also, the introduction of the notion of "EU framework laws" in the Constitutional Treaty could shape a strategy of possible reorganisation of competence in the light of the subsidiarity principle, for instance in the policy matters flanking the integration of the internal market, such as social, environmental and cohesion policy. This would have the effect of guaranteeing the national parliaments the possibility of a veritable legislative contribution in these matters.

Further, *the principle of proportionality* has to guide the Union in giving preference, in all circumstances, to the least coercive and peremptory instrument sufficient to attain the pursued objective. In other words, the instrument prescribed in a specific area of competence should be considered as reflecting the maximum intensity of

44 Except for the forms of co-ordination currently laid down in the EC Treaty in the fields of economic policy and employment policy, the (*open*) method of co-ordination is applied in practice in relation to various aspects of social policy (pensions, public health, combating of poverty). See the Extraordinary European Council held in Lisbon on March 23-24, 2000 (Bull. EU 3-2000, I.1). Convention Working Group XI has investigated "what role could be given to the open method of coordination and what would be its place in the Constitutional Treaty" (CONV 421/02 of November 22, 2002, 2).

45 According to the Commission's definition, co-regulation combines binding legislative and regulatory action with actions taken by the actors most concerned, drawing on their practical expertise. The result aimed at is "wider ownership of the policies in question by involving those most affected by implementing rules in their preparation and enforcement". See the Commission's White Paper on European Governance, cited in footnote 43, 21.

the exercise by the Union of its attributed powers—disregarding the qualification of that power as exclusive or non-exclusive—and as not excluding the adoption of less stringent modes of action.⁴⁶ Thus, the principle of proportionality offers Member States, regional and local authorities, economic sectors and citizens protection against the imposition by the Union of all sorts of requirements and obligations disproportionate to the objective invoked to sustain the action concerned.

46 In accordance with Protocol (No. 7) on the application of the principles of subsidiarity and proportionality, annexed by the Treaty of Amsterdam to the EC Treaty, [1997] *O.J.* C340/105.

ANNEX:**Some Illustrations of the Proposal to Introduce a Clear-cut Distinction between Legislative and Executive Acts Based on the Content and the Democratic Legitimacy of the Act Concerned⁴⁷*****Competition and state aid***

Article 83 TEC serves as a legal basis for the adoption by the Council, acting by qualified majority on a proposal from the Commission and after consulting the European Parliament, of acts that are to give effect to the principles and rules on competition set out in Articles 81 and 82 TEC.⁴⁸ The regulation by which the Council empowers the Commission to adopt a block exemption regulation in the field of competition law is such an act.⁴⁹ In the future, this act could either be considered as “*legislative*” and be adopted in compliance with the co-decision procedure (taking the form of an EU law), or be regarded as “*delegated*” (taking the form of a delegated regulation) since it only puts into effect the “legislative” options expressed in the Treaty itself. As we have explained above, the first option is preferable from the viewpoint of democratic legitimacy and accountability, since such intervention by the legislator would allow for a legislative call-back in case the executive exceeds the substantive competition rules laid down in Articles 81 and 82 TEC. In both cases, however, the implementing act determining the block exemption adopted by the Commission would be a “*delegated act*” (taking the form of a delegated regulation), and the acts with individual application, for instance withdrawing the benefit of a block exemption, would be “*genuine*” *executive acts* (executive decisions).

47 The inspiration for these illustrations is derived from the list of “Examples relating to acts adopted directly on the basis of the Treaties by the Council, the Commission or the European Central Bank”, Working Document 10 of Convention Working Group IX on “Simplification”, October 24, 2002.

48 For instance, Regulation 17: First Regulation implementing Articles 85 and 86 (now Articles 81 and 82) of the EC Treaty, [1959-1962] O.J. Spec. Ed. 87; Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] O.J. L1/1.

49 See, amongst others, Regulation 19/65 [1965-1966] O.J. Spec. Ed. 36 on application of Article 85(3) (now Article 81(3)) of the EC Treaty to certain categories of agreements and concerted practices.

A similar cascade reasoning applies to the acts adopted by the Council directly on the basis of Article 89 TEC concerning the application of the substantive rules on state aid laid down in Articles 87 and 88 TEC (which should in the future be subjected to the *co-decision procedure* and take the form of *EU laws*)⁵⁰, which authorise the Commission to adopt acts (in the future, *delegated regulations*) granting block exemptions, which in turn may contain a legal basis for further Commission action in individual cases (in the future, *executive decisions*).

Common agricultural policy

At the 2000 Nice Intergovernmental Conference, the Commission launched an interesting proposal to submit, in the field of the common agricultural policy, those rules currently adopted by the Council (on a proposal from the Commission and after consulting the European Parliament) on the basis of Article 37(2) TEC that concern "*fundamental policy choices*" to the *co-decision procedure* (these rules would then become EU laws or framework laws). To distinguish fundamental from non-fundamental policy choices, the Commission looks at the general political importance of the measure for the overall approach of the policy field, its budgetary implications and its multiannual character.⁵¹ The thousands of agricultural acts that are presently adopted by the Commission or the Council on the basis of a limited number of acts containing the fundamental policy choices would get the status of "*delegated acts*" or "*genuine*" *executive acts*, depending on the degree of political discretion they involve.

Combating discrimination and citizens' right to vote and to stand as a candidate at municipal and European Parliament elections

On the basis of Article 13 TEC, the Council (acting unanimously on a proposal from the Commission and after consulting the European Parliament) may take action to

50 Council Regulation 994/98 [1998] O.J. L142/1 on the application of Articles 92 and 93 (now Articles 87 and 88) of the EC Treaty to certain categories of horizontal state aid.

51 See Working Document 10 of Convention Working Group IX on "Simplification" of October 24, 2002, "Examples relating to acts adopted directly on the basis of the Treaties by the Council, the Commission or the European Central Bank", 3-4.

combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. This is a plain example of autonomous regulation which should unambiguously become *legislation* (EU framework laws) and should thus be subjected to the co-decision procedure, since taking such action involves veritable basic policy choices. Since this policy field is sensitive to the Member States, which is clear from the unanimity voting requirement in the Council, it could be considered to impose special voting requirements on the Council and/or the European Parliament (super-qualified majority voting). A similar reasoning applies to Article 19(1) TEC on the adoption by the Council of arrangements organising Union citizens' right to vote and to stand at municipal and European Parliament elections.

Structural Funds and Cohesion Fund

Today, it is the Council who decides, acting unanimously on a proposal from the Commission and after obtaining the assent of the European Parliament⁵², on the setting up of Structural Funds and a Cohesion Fund and on their tasks, priority objectives and organisation. Yet, this is a typical *legislative matter*, since these Funds may highly influence political priorities in the field of the Union's common agricultural policy, social policy, environmental policy and transport policy and have large budgetary implications. The institutional balance requirement necessitates the subordination of this matter to the co-decision procedure.

Application of competition rules to public undertakings

On the basis of Article 86(3), the Commission currently adopts directives addressed to all the Member States and individual decisions addressed to the Member States individually, for example on the transparency of financial relations between the Member States and their public undertakings. The directives are to a large extent concerned with true legislative matters, for instance in the case of the liberalisation of the telecommunication market, and should therefore be subjected to the *co-*

52 Ironically, some of what the Treaty calls "*implementing* decisions" related to specific Funds are currently adopted by co-decision (see Articles 148 and 162 TEC, respectively on the European Social Fund and the European Regional Development Fund).

decision procedure (and take the shape of EU framework laws). For the more technical and financial aspects of the subject, the legislator could decide to delegate certain matters to the Commission, which then adopts “*delegated regulations*”. The decisions addressed to the Member States individually, which currently find their legal basis directly in the EC Treaty, should in the future be based on the basic legislative acts and the delegated regulations mentioned above, in order to allow for the necessary accountability (and would be called *executive decisions*).

External Relations

Stefan Griller

1 – Premises and Introductory Remarks

The purpose of this contribution is to consider broadly the current European debate on the future Constitution of the European Union, and eventually to provide a critique and offer possible solutions, rather than to develop a genuine concept of external relations modelled on solutions imaginable in an ideal world.

The discussion is based on the assumption that there will be a merger of the EU and the Communities, and consequently one legal personality: the EU. Yet specific provisions for Foreign Policy are likely to be maintained, depending on the scope of the (desirable) integration of what is now the second pillar into the first pillar.

Wherever appropriate, this contribution tries to reflect on and to respond to the developments in the European Convention until February 2003, especially as expressed in the proposals of the Praesidium on a Preliminary draft Constitutional Treaty (CONV 369/02) and on Draft Articles 1 – 16 of the Constitutional Treaty (CONV 528/03), as well as in the results of the Working Groups, most notably those of WG III on Legal Personality (CONV 305/02), WG V on Complementary Competences (CONV 375/02), WG VII on External Action (CONV 459/02), WG VIII on Defence (CONV 461/02), and WG IX on Simplification (CONV 424/02). It goes without saying that other documents are also considered, such as the contribution of the Commission “For the European Union. Peace, Freedom, Security” (COM (2002) 728 final), even if references are scarce. The goal of providing for a short and readable contribution inevitably entails refraining from a comprehensive analysis of any of these proposals or of the academic debate on the subject.

2 – Competences and Consistency

A. Starting point

The scope of external EC competences is controversial, mostly on the grounds of the jurisprudence developed over the decades. Furthermore, the status of the CFSP in terms of competences is an open question, as is the relation between external EC and EU competences respectively.

B. Reform options and proposals

(1) External competences should be consolidated, in principle according to the jurisprudence of the ECJ. At the same time, the level of complexity should be reduced as far as possible. This could be achieved by differentiating between exclusive, concurring¹ and supporting competence.

Exclusive competence would exist for trade in goods,² monetary policy within the EMU, and economic sanctions.³ It is submitted that it would be consistent to clarify already at this stage—and not (only) in Part Two of the Treaty—that all these competences include the conclusion of international agreements. In addition, and in principle in accordance with the proposal of the Convention Praesidium, the so-

1 This term is preferred in this contribution to that of “shared” competence, mainly for reasons of clarity; the term “shared competence” is currently used in Article 133(6) ECT, capturing a different situation, namely where a joint effort between the Member States and the Community is obligatory in order to take action.

2 Encompassing all aspects currently coming under the Common Commercial Policy (CCP), and including Customs Union. The only difference would be for those small portions of trade in services and intellectual property rights which, according to the ECJ, are currently also covered by the CCP – see Opinion 1/94, *WTO*, [1994] ECR, I-5267, paras. 43-47 and 71; these portions would fall under concurring competence.

3 This clause is necessary since sanctions on the ground of *exclusive* competence should, for the sake of consolidation, not only be possible (as today) in the fields of goods *and services*, but also with regard to capital movement (currently Article 60 ECT) and the movement of persons (currently divided between the first and the third pillar).

called ERTA-principle as developed by the ECJ should be made explicit.⁴ *Concurring competences* would capture measures facilitating the attainment of one of the (primarily internal) objectives of other competences of the Union.⁵ This would comprise not only the disputed fields of trade in services and trade related aspects of intellectual property rights, but in principle all external aspects of internal competences, including both autonomous measures and the conclusion of international agreements. It would not, however, constitute a competence,⁶ since its existence would be contingent on the promotion of the objectives of other competences. Competences would cover customs cooperation and development cooperation as well as respective international agreements.

4 See Article 11(2) of CONV 528/03. The premise is that the ERTA-principle—including the notion of pre-emption of Member States’ action—could be coined in a clause on exclusive competence; argued e.g. also in *Weiler*, *The Constitution of Europe* (1999) 172-174.

Compare in this respect also the latest rulings on the so-called open skies agreements concluded between the USA and Austria, Belgium, Denmark, Finland, Germany, Luxembourg, Sweden, and the UK, respectively. According to the Court—all of these cases date from 5 Nov 2002, see e.g. Case C-475/98, *Commission/Austria ('open skies' agreement)*, nyr, para 90-101 –, exclusive EC competence arises, “where the international commitments fall within the scope of the common rules (*AETR* judgment, paragraph 30), or in any event within an area which is already largely covered by such rules (Opinion 2/91, paragraph 25). In the latter case, the Court has held that Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules (Opinion 2/91, paragraphs 25 and 26)” (para 97); “whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries” (para 98); “where the Community has achieved complete harmonisation in a given area” (para 99). “On the other hand, any distortions in the flow of services in the internal market which might arise from bilateral ‘open skies’ agreements concluded by Member States with non-member countries do not in themselves affect the common rules adopted in that area and are thus not capable of establishing an external competence of the Community.” (para 100).

5 The latter could be done in orientation towards *Dashwood’s* so called “true construction principle” – compare *Dashwood, A.*, *The Attribution of External Relations Competence*, in *Dashwood, A./Hillion, C.* (eds.) *The General Law of E.C. External Relations*, London 2000, 115-138, at 136-138; see also *Griller/Gamharter*, *External Trade: Is There a Path Through the Maze of Competences?*, in *Griller/Weidel* (eds), *External Economic Relations and Foreign Policy in the European Union*, Vienna – New York 2002, 65-112, at 78-81.

6 By contrast, this is probably what WG VII, CONV 459/02, at p. 4 had in mind when it proposed that the Union should be competent “to conclude agreements dealing with issues falling under its internal competences”. Politically, such a parallel competence has always been controversial.

For reasons of consolidation and consistency the proposal is to make CFSP a concurring (shared) competence of the EU.⁷ This would reflect the fact that both the Union and the Member States have the power to act, but that the Member States would be bound by measures adopted by the Union.⁸ That would not obstruct the determination of specific features of CFSP - in terms of substance, instruments, procedures, or organs - to be spelt out in details elsewhere in the Treaty. One of these specificities might be an exclusion of direct effect and supremacy of CFSP measures, if this should be desired. CFSP measures might thus not be applicable in, but be binding upon each Member State, while direct effect would be excluded.⁹ Nevertheless, the Union would have the competence to enact law binding on the Member States.

The competence clauses resulting from these proposals are comparably short and are presented at the end of this paper.

(2) What is currently the overlap between the CFSP and external competences based on provisions in the “first pillar” would become even more evident than today, if the Union and the Community were to be merged into one legal personality. Consequently, a provision securing the “primacy” of what is now Community law—today spread over the TEU¹⁰—is indispensable, as long as organs, procedures and legal instruments differ between the more supranational external policies of the future Union and the more intergovernmental CFSP. To omit such a provision would enhance the imminent danger that intergovernmental mechanisms would be favoured instead of supranational ones, thereby undermining the problem solving capacity of the latter. Such a “primacy provision” should also reflect the primarily instrumental

7 The same could be done regarding PJC. In this case, external aspects would be captured by draft Article ER 1(2)(c) at the end of this paper.

8 There is no categorical difference to the notion of shared competence as expressed in Article 10(2) of CONV 528/03.

9 Quite similar to framework decisions under the current Article 34(2)(c) TEU.

10 In the provisions on consistency of external activities and on safeguarding the *acquis communautaire*, esp. Articles 1, 2, 3 and 47 TEU. Compare for this and the following *Weidel*, Regulation or Common Position – The Impact of the Pillar Construction on the Union’s External Policy, in *Griller/Weidel* (eds), *External Economic Relations and Foreign Policy in the European Union*, Vienna – New York 2002, 24-64.

approach of the ECJ regarding the delimitation of CFSP and CCP,¹¹ according to which the political dimension of a measure does not bring it outside the CCP. This could be done in the way proposed at the end of this paper.

(3) The proposal of the Praesidium of the European Convention is to bring the entire Common Commercial Policy including services and intellectual property rights under competence.¹² This idea is likely to reactivate all reservations against a more or less tacit expansion of exclusive EU competences to services and intellectual property rights. The point of such concerns is that as a result of expanding the CCP in this manner, Member States would no longer be competent to regulate services and intellectual property rights with regard to nationals of third countries. In this respect, national legislation would only be allowed on the basis of a specific EU authorization. This would seriously curtail Member States' competences in those fields. Moreover, it is most likely that the Union would have to use its internal concurring competence regarding services or intellectual property whenever it

11 See Case C-83/94, *Leifer*, [1995] ECR, I-3231; Case C-70/94, *Werner*, [1995] ECR, I-3189, para 10: "a measure ... whose effect is to prevent or restrict the export of certain products, cannot be treated as falling outside the scope of the common commercial policy on the ground that it has foreign and security objectives"; Case C-124/95, *Centro-Com*, [1997] ECR, I-81, para 30: "even where measures ... have been adopted in the exercise of national competence in matters of foreign and security policy, they must respect the Community rules adopted under the common commercial policy."

12 Article 11(1) CONV 528/03. It is reported that according to "the conclusions of Mr Dehaene's Group" Article 133(6) ECT "should be deleted" (at p. 17). However, somewhat in contrast to this report and especially to the proposed Article 11(1), what can be found in CONV 459/02 is "a high degree of support ... in favour of the use of QMV in all areas of commercial policy, including services and intellectual property..." (at p. 26). There is no proposal to bring services and intellectual property under the *exclusive* competence of the Union. It must be stressed that after Nice the conclusion of agreements (autonomous measures are not covered) in the fields of trade in services and trade related aspects of intellectual property rights has more than one aspect. First, such agreements come under the CCP, albeit on the basis of *concurring competence* (see Article 133(5) last subpara.). Second, there is partly a requirement of unanimity (Article 133(5) second subpara.). Third, several areas come under "shared competence" meaning that such agreements have to be concluded jointly by the Community and the Member States (Article 133(6)), which entails an exceptional notion of "shared competence", and may be seen as a specific requirement of "unanimity". Bringing services and intellectual property under QMV would require termination of the second and the third peculiarity (unanimity and the mentioned "shared" competence). It would not necessarily mean bringing those fields under *exclusive* competence.

regulated external aspects on the grounds of its exclusive competence. For it would not make much sense to regulate external trade in services and trade related aspects of intellectual property rights, but leave the matter internally, i.e. from the perspective of the internal market, for the Member States. Currently, by contrast, and in the absence of secondary legislation, Member States remain in principle free to legislate with regard to third country nationals. It must also be observed that the divergence between internal and external competences resulting from the Praesidium's proposal is puzzling, not to say imbalanced: while internally, services and intellectual property as a part of the internal market come under Article 12(4) and consequently under concurring competence (what is now called "shared" competence)¹³, externally they would come under exclusive competence.

The proposal is furthermore problematic insofar as it leaves the question open whether the expansion of the CCP should embrace services in general and intellectual property rights only, or should also cover direct investments, or other external aspects of the internal market, e.g. environmental protection, or specific services such as transport services.¹⁴ Moreover, it has to be said that the scope of the proposed Article 11(2) trying to coin the ERTA-jurisprudence of the ECJ would be rather limited, since the conclusion of most international agreements would come under the exclusive competence of Article 11(1).

Against this background, it is submitted that a comprehensive but external competence in all fields except external trade in goods, monetary policy within the EMU and economic sanctions would not only avoid triggering the aforementioned concerns but would at the same time fit better into the overall concept of exclusive,

13 However, it has to be said that this would, to a certain extent, be different with regard to the *exclusive (!)* competence to "ensure the free movement of persons, goods, services and capital, and establish competition rules, within the internal market" – Article 11(1) of CONV 528/03. This highly problematic proposal would bring *at least* the harmonization of national laws under the exclusive competence of the Union, and would consequently entail a massive expansion of this competence category. Although not the focus of this contribution, it shall be stated that no convincing reasons for this proposal are in sight. It would even entail the absurd consequence that the legality of agreements on double taxation between the Member States as well as the (co-ordinated) repeal of national legislation restricting the four freedoms could be questioned.

14 It is unclear whether the enumeration of specific fields of services in Article 12(4)—esp. transport, social policy, environment, public health—is meant to exclude also the *trade related aspects* of these services from exclusive competence under Article 11(1).

concurring (shared) and supporting competences as proposed by the Praesidium and the Working Groups. It would provide for a flexible use of such a competence according to the actual needs, e.g. with regard to the negotiations of the GATS in the WTO, especially if it is combined with the establishment of QMV as a general rule. At the same time, it would respect the concerns of several Member States that the transfer of services and intellectual property rights to exclusive competence would threaten their capacity to act in the international arena, and thus undermine an essential element of their position as states under international law.

(4) The Convention Praesidium proposes not to include the CFSP in the category of concurring (shared) competences, but to create a distinct competence category “to define and implement a common foreign and security policy, including the progressive framing of a common defence policy”¹⁵. A reason for this irregularity is not provided. It is only stated that the separate paragraphs given to CFSP and to the coordination of Member States’ economic policies “reflect the specific nature of the Union’s competences in those areas”¹⁶. Specific features of the CFSP in terms of organs, substance, instruments and procedures shall not be denied. However, this is in itself no convincing reason to leave the *category* of the competence in the dark. Since the Praesidium nevertheless enumerates the CFSP within title III of the draft (“The Union’s competences”) and in Article 10 (“Categories of competence”), the insinuation is that the CFSP is, in terms of competences, categorically different from what is, in the same article, defined as exclusive, shared, coordinating or supporting competence. Nevertheless it would still be a competence. It is submitted that this is a flawed concept. If the characteristic of shared competence—which in this piece is called “concurring” competence—is that the Union and the Member States “shall have the power to legislate and adopt legally binding acts”, and that the “Member States shall exercise their competence only if and to the extent that the Union has not exercised its”¹⁷, this is what would be the situation for the CFSP as well. Once again, this would by no means preclude specifying, as for other concurring competences,

¹⁵ Article 10(4) of CONV 528/03.

¹⁶ Explanatory Note to CONV 528/03, at p. 16. WG VII, CONV 495/02, at p. 15 was of the opinion “that there is no need to set down a list which powers the Union should have in the field of CFSP”.

¹⁷ This is the definition provided for in Article 10(2) of CONV 528/03.

peculiarities for the CFSP which could to a certain extent preserve its intergovernmental character, if this should be desired.

Leaving open the competence category of the CFSP would be deficient in more than one respect. First, it would not meet the guiding principle of the competence reform: “greater transparency and a higher level of clarity”.¹⁸ Second, this would be an open invitation for the ECJ and for academia to invent a categorical difference in the nature of the competence compared to all the other competences, a difference which has so far not been revealed, whose existence would yet be imperative if the proposed differentiation is not abandoned.

(5) In the proposal submitted by the Convention Praesidium, no specific external competences are enumerated among the *supporting measures*.¹⁹ This is to be understood in the light of the Praesidium’s view that supporting measures should not “entail harmonisation of Member States’ laws or regulations”²⁰ or, to use the words of Working Group V, that supporting measures should be of “low intensity” without the transfer of “legislative competence to the Union”²¹. As a consequence, the proposal is to shift customs cooperation and development cooperation, currently seen as complementary competences, and undoubtedly including the right to enact directives and regulations, over to concurring competences (currently called shared competences).²²

The author is not fully convinced by that proposal. To entrust the Union in the fields of supporting measures with the right to pass “(l)egally binding acts”²³, but to prohibit at the same time the harmonisation of Member States’ laws or regulations might entail serious difficulties. If a decision²⁴ is binding it might very well entail the necessity, in one or the other Member State, to amend national legislation. The dividing line between binding decisions and harmonising legislation might thus be

18 WG V, 375/03, at p. 2.

19 Article 15 of CONV 528/03.

20 Article 15(4) of CONV 528/03.

21 WG V, CONV 357/02, at p. 3.

22 WG V, CONV 375/02, at p. 9.

23 Article 15(4) CONV 528/03.

24 This is the binding act envisaged by WG V, CONV 375/02, at p. 4.

more than blurred. An alternative could be not principally to exclude harmonising measures—of course this could still be stipulated with regard to specific cases –, but to impose a specific constraint: In addition to the respect of the general principles of subsidiarity and proportionality, supporting measures harmonising national laws and regulations would only be allowed if national legislative competence is respected to the fullest extent possible. The principle of as included in that of loyal cooperation²⁵ would, with regard to supporting measures, require ensuring that the main portion of legislative discretion remains with the Member States. Thus categorisation as a supporting measure might be seen as an ex-ante specification of the principles of subsidiarity, proportionality and loyalty with regard to the respective fields. It is to be admitted, though, that such a concept entails another problem: that the dividing line between concurring (shared) and supporting competences remains blurred.

In this alternative view, customs cooperation, development cooperation as well as the respective treaty making capacity could remain among the supporting competences, as is proposed at the end of this paper. If the sketched concept of supporting measures is rejected in favour of the exclusion of harmonisation capacity, then the shift of the aforementioned field to concurring (shared) competences, as proposed by the Praesidium, appears to be consistent. However, it has to be added that in this case consistency would also require excluding, in all areas of supporting competence, the conclusion of international agreements entailing the harmonisation of laws.

3 – Foreign and Security Policy – Substance, Instruments, Procedures, Organs

A. Starting point

“The Union's external policy ... goes beyond the traditional diplomatic and military aspects and stretches to areas such as justice and police matters, the environment, trade and customs affairs, development and external representation of the euro zone. Our aim must be to integrate these different areas and make all the resources

²⁵ Article 8(5) of CONV 528/03.

available work together well.”²⁶ Even if it is agreed upon that the CFSP objectives of a measure do not preclude its adoption under EC policies (above), the goal of consistency²⁷ is more or less jeopardized by the divergence of actors, instruments and procedures.

B. Reform options and proposals

(1) A radical step to improve consistency would be the not only of the pillar structure, but also *of the differences between the pillars in terms of organs, instruments and procedures*. In this case, there would no longer be any need for specific CFSP provisions. This option is being left aside as utopian in the short run. Nevertheless, it must be stressed that as long as “respecting and building upon the *acquis communautaire*” (Article 3 TEU) is accepted not only as existing law but also as a guiding principle for future reforms, such reforms should at least point in the direction of *integrating CFSP and PJC into the first pillar structures*, meaning an extension of supranational mechanisms—especially including qualified majority voting—at the expense of intergovernmentalism, but not vice versa. Relatively timid steps in this direction have already been taken in Amsterdam and in Nice. At the same time, the decision making procedures *within* the CFSP could be made more efficient, thereby realising an old objective.²⁸

It must be underlined that an eventual principal objection, drawing on the claim of a categorical difference between economic and political aspects of external policy, appears to be untenable. Experience shows that both dimensions of external policy are inextricably linked. This makes the current division artificial and burdensome.²⁹

26 Communication from the Commission, A Project for the European Union, COM(2002) 247 final, 22 May 2002, at p. 12. See also, COM(2002) 728 final, at p. 11 seq. To the same end, see the discussion paper provided by the Praesidium of the European Convention of 3 July 2002, EU External Action, CONV 161/02, and WG VII, CONV 459/02, at p. 4 et seqq.

27 Article 3 TEU.

28 See only European Council, Turin 29 March 1996, SN 100/96, no. 2; European Parliament, Resolution from 17 May 1995, PE 190.441, no. 29.

29 For this and the following compare *Griller/Weidel*, External Economic Relations and Foreign Policy in the European Union, in *Griller/Weidel* (eds), External Economic Relations and Foreign Policy in the European Union, Vienna – New York 2002, 5-22.

(2) How could the integration of CFSP mechanisms and the so-called Community method be promoted in the medium and long run? A recent proposal suggests a three-stage plan similar to the approach taken with regard to European Monetary Union (EMU). The final stage would include the establishment of a “genuine specific political authority”, a far-reaching political Union.³⁰

The radical nature of such a concept could of course be reduced by upholding, not only at a transitory but even at a final stage, differences (within the Union) of the organs and procedures involved, admitting at the same time that every such difference may again be the cause for incoherence. The search is for a *better* balance between the need for consistency and the need for differentiation. The following deliberations point to some selected options for such a differentiation, even if the author tends to favour the harmonisation of organs, instruments and procedures for all external future Union policies in the long run. It should also be stated at the outset that for the limited purposes of this contribution emphasis is put on those aspects which would have to be primarily included in the First Part of an eventual Constitutional Treaty. Therefore, a more detailed discussion of policy objectives for the CFSP or for external action in general³¹ or of “updating” the Petersberg tasks,³² is omitted, even if the possibility cannot be completely excluded that these issues will partly be dealt with in the First Part of the Constitutional Treaty.³³

(3) *Decision taking* in the field of CFSP is expected to be made more efficient, as well as more consistent with other Union policies.³⁴ The text-book answer to the question of how this could be achieved to the fullest extent possible is to introduce

30 Contribution from *Alain Lamassoure* to the European Convention, CONV 46/02 of 14 May 2002. Compare also the more cautious contribution by *Elmar Brok* to the Convention, WG VII on External Action, Wdoc 2, 24 Sept 2002. See also Article 45 of the “Constitution of the European Union” by the EPC (17 Sept 2002).

31 As proposed by WG VII, CONV 459/02, at p. 2 et seq.

32 As proposed by WG IX, CONV 461/02, at p. 16.

33 Arguable Articles 29 and 30 of the Praesidium draft Constitutional Treaty, CONV 369/02, could be the place for these aspects. However, according to the Praesidium draft Articles 1-16, CONV 528/03, the specific objectives pursued by the various policies of the Union are to be found in Part Two of the Treaty (p. 12), as will be the case for the exact definition, and the extent of each area (p. 15).

34 WG VII, CONV 459/02, at p. 23.

QMV as a rule and to harmonise procedures and organs between the various external policy fields. This answer is short and yet crucial: Since the divergence of views on international politics will not fade away in the near or in the distant future, unanimity will more or less inevitably from time to time cause inactivity of the Union resulting from the veto right of each Member State, and consequently lead to the deplorable picture of conflicting and competing individual foreign policies. Examples from the recent past can be provided in abundance. As a result, QMV is imperative in order significantly to promote efficient decision taking.³⁵ Similarly, the more decision making procedures and organs differ between various Union policy fields, the more likely is a situation of incoherence and quarrels about the choice of the correct legal basis to be used in a concrete instance.

What should be avoided, by contrast, is to feed the illusion that the efficiency and consistency of external activities could be sufficiently enhanced by a purely organisational reform as envisaged by the proposed merger of the Commissioner for external relations and the High Representative for the foreign and security policy (HR)³⁶.

Yet, given the reluctance of several Member States to accept further curtailment of their political sovereignty in the field of external relations, among the intergovernmental features of the future CFSP that would uphold it and distinguish it from other external policies might be the following:

- ✓ QMV as a rule for the enactment of CFSP measures including international agreements, but eventually combined with the option of constructive abstention,³⁷ leaving the abstaining Member State unbound,³⁸

35 It is, with due respect, a weak argument to point to the fact that QMV had been established for policy areas based on legislation and harmonisation of laws, if intended to support the view that CFSP efficiency could very well emerge without the introduction of QMV – see WG VII, CONV 459/02, at p. 24.

36 To be discussed below.

37 Currently Article 23(1) TEU, but only available for unanimous decision taking. Technically speaking, constructive abstention in the case of QMV would mean a negative vote combined with a formal declaration of the reasons; the result would be that the outvoted Member State would not be obliged to apply the decision.

38 It could even be contemplated to combine this, or alternatively: to combine “regular” QMV with the right to refer a controversial matter to the European Council to be decided upon unanimously –

- ✓ Unanimity for the introduction of a common defence policy;³⁹ eventually also for all decisions having military or defence implications;⁴⁰
- ✓ The European Parliament could be fully involved—i.e. the co-decision procedure would apply—in the enactment of general guidelines and common strategies, and in the conclusion of international agreements with a comparable legislative function. Common positions, joint actions and decisions could be made subject to parliamentary review ex-post. The measure could be repealed by parliamentary decision and consequently only be replaced by a measure adopted under the co-decision procedure;⁴¹
- ✓ The creation of a joint initiative to be put forward by the Commission and the High Representative could indeed enhance coherence;⁴² in general, sharing the right of initiative between the Commission and the Member States might be considered.

This enumeration is not meant to be exhaustive. However, the implicit conclusion - that the author regards further exceptions as even more difficult to argue - is intended. This is true e.g. for the current restriction of excluding matters which have military and defence implications from enhanced cooperation.⁴³ While it might be premature to include a general collective defence clause in the Treaty, it was rightly observed that this could be imaginable in the framework of enhanced cooperation between several of the Member States.⁴⁴ Another example is the legal scrutiny of CFSP measures by the ECJ. Accepting the rule of law as a fundamental principle in this field as well can only mean that judicial review of CFSP measures should be possible.⁴⁵

... continued

currently Article 23(2) TEU; the idea to uphold this mechanism is mentioned in WG VII, CONV 305/02, at p. 24.

39 Currently Article 17(1) TEU.

40 Currently Article 23(2) TEU.

41 This would to a certain extent resemble what WG IX is proposing as the “right of call-back” regarding delegated acts (CONV 424/02, at p. 11).

42 WG VII, CONV 459/02, at p. 25.

43 Article 27b TEU. Compare also the criticism reported in WG VIII, CONV 461/02, at p. 19.

44 WG VIII, CONV 461/02, at p. 21 et seq.

45 To the same end: WG III, CONV 305/02, at p. 12 et seq.

(4) The merger of *organisational structures* between what are now the first and the second pillars, especially the proposed merger of the function of the Commissioner for External Relations and of the High Representative for the foreign and security policy,⁴⁶ - i.e. by eventually creating a personal union between the two different posts in the form of a “European External Representative”⁴⁷ or a “European Minister for Foreign Affairs”,⁴⁸ - only makes sense on the grounds of a far-reaching approximation of the substantive provisions on powers and procedures. As long as this element is lacking, the proposal is, in essence, a purely organizational reform without touching on the aforementioned, more difficult, issues.

It is contended that the “double hat solution” without any approximation and clarification of decision taking in “economic” and “foreign policy” matters would increase the confusion, rather than bring it to an end.⁴⁹ A sound and workable solution in the field of external relations cannot be achieved by merging functions or posts, while leaving the underlying concepts untouched.

To illustrate this: A “sanction” against a third country can be introduced in several ways. One would be to adopt a CFSP instrument and implement it under what is now Article 301 TEC. This would require—in principle—unanimous decision taking under Article 15 TEU. Another option would be to suspend an existing (e.g. free trade) agreement, in principle by qualified majority under Article 300 TEC. Let us

46 Discussed in WG VII, CONV 459/02, at p. 16-23. Compare also COM(2002) 247 final, at 14; *Everts*, *Shaping a credible EU foreign policy* (2002) 7, 52.

Clearly the discussed proposal has to be evaluated against the greater background of institutional reform in general. The above text only aims at highlighting several of its important facets more or less in isolation.

47 WG VII, CONV 459/02, at p. 20 et seq. The representative “would receive direct mandates from and be accountable to the Council for issues relating to CFSP, and at the same time be a full member of the Commission ...”

48 WG VII, CONV 459/02, at p. 22; also mentioned in the Convention Plenary, CONV 508/03, at p. 4. The proposal runs to place this minister “under the direct authority of the President of the European Council” and to “combine the functions for HR and Relex Commissioner”. “He/she would chair the external action Council.”

49 A similar objection is to be raised against the proposal to simply establish a new Foreign Affairs Council—among others also proposed by *Everts* (2002) at 53. As long as the varying competences are not clarified, an organisational reform alone will bring no progress. Suffice it to say that even today it is the same Council which is acting on the grounds of the TEC and of the TEU.

assume that a qualified majority of Member States would support sanctions, a strong minority would oppose. A Commissioner who is at the same time the High Representative for CFSP would have the choice, but also the burden of differing responsibilities. Consequently, the “double hat solution” would merely produce “fair weather consistency”. In cases of conflict, the Commissioner/HR would be torn apart between the different procedures and instruments. It would be easy to add a whole bunch of similar examples.

Moreover, it also has to be said—and this would hold true even if the approximation of procedures and instruments took place—that the merger at issue would imply an unprecedented fusion of policy determination and policy execution at EU level. If the new Commissioner/High Representative were to unify all powers currently divided between the two posts, this would amount to bringing policy determination and execution partly into one hand.⁵⁰ Accountability would be blurred if the concrete person is to be chosen by joint agreement by the President designate of the Commission and by the Council at Heads of State and Government level, but should at the same time perform its tasks under the authority of the President of the Commission.⁵¹ If it is true that the Union currently and in the future should respect the principle of the separation of powers,⁵² this fusion of powers raises grave concerns.

Consequences would be even more staggering if the new functionary were to “run” EU external policy and be “answerable” to the Council. The role of the foreign ministers would thus be changed from policy determination to policy control, while policy determination would be a matter for the new organ. This would, in effect, create an additional layer in remoteness from and accountability to the electorate.

Weighing the desired advantages against the disadvantages the overall conclusion is that this merger should be avoided. Instead, reflections on a better division of

50 The High Representative is an *assistant* to the Council (Article 26 TEU) and not a special executive organ with a different status compared to that of the Commission.

51 This is what the Commission is proposing: COM(2002) 247 final, at 14. But the situation is similar with regard to the “European External Relations Representative” (WG VII, CONV 459/02, at p. 20 et seq.).

52 Currently this can be inferred to a certain extent from the ECJ’s jurisprudence on the institutional balance within the Community, starting with Case 70/88, *European Parliament/Council*, [1990] ECR, I-2041, esp. para. 25.

competences for policy determination, policy execution and policy control between the EC, the EU, and the Member States should be the primary task of a reform, and it should be addressed explicitly, and in terms of scope of competences. The direction should be to (gradually) bring foreign policy further under supranational structures, accepting the safeguard of the *acquis communautaire*, including the functioning of the Community method as the guiding principle.

If this were to happen, then one could make the Commissioner for external relations responsible to initiate and to implement foreign and security policy action, but on the grounds of guidance (policy determination) to be decided upon by the Council and the EP. In the long run, this would rather suggest the elimination of the post of the High Representative.⁵³

(5) The reform of legal instruments in the CFSP has to be integrated into the more general effort of restructuring in this field.⁵⁴

It might be controversial whether the specific second pillar instruments should be maintained. This is not self evident on the premise that in principle instruments under Articles 13 and 14 TEU are also *binding decisions under Union law* on the Member States; even more so if legal scrutiny by the ECJ were extended to CFSP measures. Consequently it would, after a merger of the pillars, be imaginable to “open” up traditional first pillar instruments (especially directives and decisions) to the enactment of CFSP-instruments. The proposal of WG IX⁵⁵ to limit the legally binding instruments of the Union to EU laws, EU framework laws, and decisions and to replace common strategies, joint actions and common positions by “CFSP decision” follows this way of thinking.

CFSP measures often have a double nature: They are binding on the Member States, but are at the same time also addressed to third countries. In order to make this

53 This would come near the proposal of a “full merger of the function of the HR into the Commission” (WG VII, CONV 459/02, at p. 20). However, it has to be stressed that this would be on the grounds of policy determination to be decided upon by the Council and the EP.

54 Compare WG IX, CONV 424/02.

For the following see also *Lenaerts/Desormer*, Bricks for a Constitutional Treaty of the European Union: values, objectives and means, ELRev 2002, 377 (397-306), *von Bogdandy/Bast/Arndt*, Handlungsformen im Unionsrecht, ZaöRV 62 (2002) 77 (esp. at 113 f, 155 f).

55 CONV 424/02, at p. 5 et seq.

specific feature more visible, one might contemplate embedding, e.g., a common position or a common strategy in a directive (a future EU framework law). The Council could, e.g., enact an EU framework law on a common position. Thereby, the double nature of such acts would probably be more transparent. In substance, this would not be very different from the proposal put forward by WG VII to enact CFSP decisions, which might be further specified.

It is furthermore true that CFSP measures are often under the constraint of prompt response to international developments, and that CFSP is not a policy area that is advanced primarily by legislation.⁵⁶ However, this cannot be accepted as a fundamental argument against any legislation in the field. It can only support the plea for a cautious use of legislative instruments. Apart from this, one might contemplate accepting a wider margin of discretion than in other policy areas for the Council and the Commission to act even in the absence of a fundamental policy choice being laid down in advance by the “legislator”—which should in principle be the Council together with the European Parliament. A limiting (control) mechanism could be combined with a “right of call-back” for the EP⁵⁷. It is to be reminded in this context that even now the Council may authorise the Political and Security Committee to “take the lead” in a crisis management operation.⁵⁸ It might be appropriate in this context and in order to enhance flexibility to empower the HR, as has been proposed, to take the necessary decisions under the authority of the Council.⁵⁹

(6) Financing the CFSP comes under the general budget of the Communities.⁶⁰ While CFSP administrative expenditure is charged to the EC budget for the institution to which such expenditure falls, CFSP budget was established to finance operational activities. Management of CFSP expenditure is the responsibility of the Commission. The CFSP budget is on average some 30-40 million euros per year (less than 1% of the total external relations budget). Obviously this is totally insufficient and should be revised. This issue, which could be settled without a treaty

⁵⁶ WG VII, CONV 459/02, at p. 23 et seq.

⁵⁷ See above near fn 41.

⁵⁸ Article 25 TEU.

⁵⁹ WG VIII, CONV 461/02, at p. 17.

⁶⁰ Compare the note provided by the Praesidium of the European Convention of 3 July 2002, EU External Action, CONV 161/02, para 24; and also WG VII, CONV 459/02, at p. 28 et seq.

reform, is closely linked to that of the exclusion of operations having military or defence implications from the mechanism referred to; the related expenditures are charged to the Member States in accordance with the gross national product scale.⁶¹ A stronger congruence between decision making capacity and financial responsibility would be desirable, also from the point of view of accountability.⁶² Consequently, the Treaty should provide for the option to finance all CFSP activities from the Union budget. Clearly, rapid action requires rapid availability of resources, which should be foreseen by the Treaty.

4 – Conclusion of International Agreements and Representation in International Organisations

A. Starting point

Article 300 TEC on the conclusion of international agreements is complex and fragmented. It also includes specific restrictions on the involvement of the EP (CCP, cases which internally come under co-decision or co-operation).

Article 24 TEU provides for specific provisions for the conclusion of agreements in the CSFP and PJC.

The representation in International Organisations differs between the Union and the Communities (Articles 18 and 19 TEU, Articles 302 – 304 TEC).

B. Reform options and proposals

(1) Article 300 TEC should be simplified. The stated exceptions within the first pillar (esp. for the CCP) should be eliminated.⁶³ The European Parliament should

⁶¹ Article 28 TEU.

⁶² This is also what the EP is proposing: see Report on the progress in implementing the Common Foreign and Security Policy (2002/2010(INI), A5-0296/2002, 11 Sept 2002, (rapporteur: *Elmar Brok*) para 23.

⁶³ As contemplated by WG VII, CONV 459/02, at p. 30.

fully participate in the conclusion of agreements in all those fields where it has to give its assent for the adoption of internal legislation, as well as for an eventual transfer of decision-making capacity to international bodies. Association agreements can be included in what is now Article 300. The same is valid for agreements in the fields of CFSP and PJC. Eventual specificities for the latter—not being proposed here⁶⁴—should be spelt out in this Article.

(2) A single provision for the conclusion of international agreements would avoid aggravating the difficulties resulting from eventually differing voting requirements in different policy fields. However, such difficulties could not be completely avoided, as long as such differences continue to exist. With regard to agreements falling within both the CFSP (or PJC) and other Union competences—what is currently called “cross-pillar-mixity”⁶⁵—it must be said first that this should not prevent, according to what can now be called the “primacy” of EC law over CFSP law, their conclusion solely under “non CFSP competences”⁶⁶, and consequently application of the voting requirements established for these policies. Entrusting the Council with the task of deciding on the legal basis to be chosen according to the “main object of the agreement”⁶⁷ would not help very much: Should it decide according to the voting requirements of the “non CFSP” or the

... continued

The specific situation for the EMU (Article 111 TEC) is not addressed here. Suffice it to say that specific arrangements for the EMU appear to be justified – compare *Dutzler*, EMU and the Representation of the Community in International Organisations, in *Griller/Weidel* (eds), *External Economic Relations and Foreign Policy in the European Union*, Vienna – New York 2002, 445-484.

64 A single provision is obviously also preferred by WG VII, CONV 459/02, at p. 30. Somewhat contrasting is the final report of WG III on Legal Personality, WG III 16, CONV 305/02, 1 Oct 2002, paras. 22-34.

It should be clear that specificities could result from the material CFSP provisions, insofar as the reformed Article 300 differentiates between cases according to voting requirements and involvement of the EP in decision taking.

65 Compare WG VII, CONV 459/02, at p. 30.

66 See above near fn 11. Arguably, this could even allow for the adoption of a “non CFSP provision” in cases where foreign policy elements prevail, and even if conflicting with an earlier CFSP measure. The obligation of consistency would in such a situation rather require the rectification of the CFSP measure.

67 WG VII, CONV 459/02, at p. 30.

CFSP provision? It should be added that, given the inextricable link between economic and political aspects of a matter, such a provision would also entail the danger of bringing what are now Community policies under the (assumedly) more intergovernmental mechanisms of the CFSP. It goes without saying that eventually and additionally upholding important procedural differences for the conclusion of CFSP agreements would bring a further step away from the “Community method” all those matters currently coming under Community competence, as soon as the Council decided to conclude a CFSP agreement. Furthermore, it should be kept in mind that within the Union the legal force of such CFSP agreements would be similar to that of CFSP instruments in general, which would again entail a tendency away from direct effect and supremacy. As a consequence, upholding the “primacy” of the *acquis communautaire*—including the Community method for further developments—appears to be a much more promising route in order to avoid insurmountable “pillar” conflicts than the proposed competence decision clause for the Council.

Second and notwithstanding the aforementioned “primacy issue”, the Council would still be entitled to act on the grounds of the CFSP provisions as long as it respected existing Union legislation based on other competences.⁶⁸ However, the merger of the pillars could in this respect activate the jurisprudence of the ECJ on the correct use of competence clauses within what is now the first pillar. This means—not only, but *also* for the conclusion of agreements—that every overlap exceeding incidental features would in principle necessitate basing the measure at issue on all of the relevant competence clauses.⁶⁹ If this would—mainly for contradictory procedural requirements (e.g. excluding the approval of the EP in the field of CFSP, but not in other fields)—not be possible, the measure would have to be based on the provision it is primarily related to.⁷⁰ Thus the result could eventually be that merging the pillars

68 This would only be different if one would, in accordance with some commentators, interpret the ECJ in Case C-170/96, *Airport Transit*, [1998] ECR, I-2763 to the end that EC competences are “exclusive” in relation to EU competences—and/or if the Court would (through respective drafting) be invited to draw such a conclusion for the relation between future “CFSP law” and other provisions—compare above fn 66.

69 Case 300/89, *Titanium Dioxide*, [1991] ECR, I-2867, para. 17.

70 Esp. Case C-155/91, *Commission of the European Communities v Council of the European Communities (Waste Directive)*, [1993] ECR, I-939, para. 20.

would impede using CFSP instruments including specific CFSP agreements for measures with a prevailing affinity to other Union competences.

A proposal for a revised version of Article 300 ECT reflecting the above discussion—opting for a uniform provision encompassing CFSP and other policies—is submitted at the end of this contribution.

(3) Regarding the representation in International Organisations, the Treaty should explicitly provide for the option to speak with one voice.⁷¹ This should *ex lege* be the case whenever a matter comes under the Union's exclusive competence, as is the current practice within the CCP. However, it should also be possible in cases where the Union has concurring or supporting competence to take external action, according to the respective procedural conditions. Consequently, whenever it comes to representation (including decision taking) in International Organisations, it would be possible to authorise the Commission—or exceptionally, with regard to political organisations in the field of CFSP like the UN, a Member State—to express the opinion of the Union, including the eventual casting of a vote in the course of decision taking. Such an authorisation could be combined with certain conditions to be adopted under the same procedural rules.⁷²

In many instances, the Union competence is unlikely to cover the entire scope of competences of the International Organisation in question. In such a situation, it would be necessary that the Member States remain represented side by side with the Union. In these cases an obligation to coordinate would also apply.⁷³ But even where the Union is or can be accepted as a member of another International Organisation, the question of whether or not the Member States' membership should then be replaced by a single Union membership is not automatically to be answered in the

71 Compare also WG III CONV 305/02, 1 Oct 2002, at p. 11 et seq; WG VII, CONV 459/02, at p. 31 et seq. See for the following also *Dutzler*, The Representation of the EU and the Member States in International Organisations – General Aspects, in *Griller/Weidel* (eds), *External Economic Relations and Foreign Policy in the European Union*, Vienna – New York 2002, 151-190.

Again, the arrangement for the EMU is not treated in this piece. Compare in this respect *Dutzler* (above fn 63).

72 Compare for the limited issue of Treaty amendments the current Article 300(4) TEU.

73 Compare esp. Opinion 1/94, *WTO*, [1994] ECR, I-5267, paras. 106-109. However, this obligation presumably would not include a categorical obligation to reach a common position, but rather a duty to undertake serious efforts to that end.

affirmative.⁷⁴ As long as the competences of the International Organisation accepting the Union as a member are not fully covered by *exclusive* competences of the Union, membership of the Union Member States would have to be secured at least for those cases where the effort to reach a coordinated position should fail. A more pragmatic aspect is that it might not be in the interest of the Union as a whole to press for a single vote as long as internal coordination can lead to a single voice.

Moreover, membership in several International Organisations is open solely for states, not for International Organisations. Correspondingly, in all of these cases, it would be for the Member States to represent the Union and themselves. With regard to such instances, e.g. in CFSP matters but also beyond, the Member States should be explicitly obliged to act on behalf of the Union. Their conduct on the international stage could nevertheless be bound by coordinating decisions according to the internal division of competences within the Union.

5 – Draft Treaty Provisions⁷⁵

A. Union competences

The following passages would have to be inserted into the respective articles in an eventual chapter on competences.⁷⁶

Article ER (= External Relations) 1

“1. The EU has exclusive competence in ...

(a) external trade in goods,⁷⁷

⁷⁴ See also WG VII, CONV 459/02, at p. 32.

⁷⁵ Proposals are submitted only in those cases where the author felt that a draft text might add value to the “prose discussion” of the different issues. All proposals are mentioned and explained in the above text. However, limited space led to the decision not to explicitly comment on every legally important textual detail of the drafts.

⁷⁶ Compare e.g. Articles 11, 12, 14 and 15 CONV 528/03.

⁷⁷ Trans-frontier supply of services and the prohibition of the release into free circulation of counterfeit goods—which according to the ECJ currently come under Article 133 TEC (Opinion 1/94, *WTO*, 1994 ECR, I-5267)—would be captured by the concurring competence of Article ER 1(2)(c).

- (b) monetary policy with regard to members of the EMU,*
- (c) urgent actions to interrupt or reduce economic relations with third countries,*
- (d) the conclusion of agreements in the fields mentioned under lit a – c,*
- (e) external measures including the conclusion of agreements which might affect common rules other than those mentioned under lit a – c, or are, in the absence of such rules, indispensable for the attainment of one of the objectives of the Union.*

2. The EU has concurring competence in ...

- (a) common foreign and security policy,*
- (b) international transport,*
- (c) external measures including the conclusion of agreements facilitating the attainment of the objectives of concurring competences of the Union.⁷⁸*

...

3. The EU has supporting competence in...

- (a) development cooperation,*
- (b) economic, financial and technical cooperation with third countries,*
- (c) customs cooperation,*
- (d) external measures including the conclusion of agreements facilitating the attainment of the objectives of supporting competences of the Union.”*

Article ER 2:

“Foreign and security policy objectives of a measure do not affect its adoption in the framework of other Union policies. By way of derogation, economic sanctions have to be adopted on the grounds of a common foreign and security measure.

78 If such a provision is inserted it could at the same time be contemplated to repeal provision currently explicitly providing for external action—esp Art 174 para 4 TEC (environment)—under the assumption that these would become superfluous.

Furthermore, such a provision could make superfluous the complicated Article 133 paras 5-7 TEC as inserted by the Treaty of Nice.

The Union shall ensure the consistency of its external activities as a whole in the context of its external relations including its common foreign and security policy. The Council and the Commission shall be responsible for ensuring such consistency and shall cooperate to this end. They shall ensure the implementation of these policies, each in accordance with its respective powers.”

B. Conclusion of agreements

This provision would have to be included in a chapter on the Union’s legal instruments.⁷⁹

Article ER 3: Conclusion of Agreements

“1. The conclusion of agreements between the Union and one or more States or international organisations, the authorization for negotiations, and the signing, which may be accompanied by a decision on provisional application before entry into force, shall be decided on by the Council, acting by a qualified majority on a proposal from the Commission. The Council shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of internal rules including autonomous external measures.

The Commission shall conduct negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it.

2. Agreements establishing a specific institutional framework including association agreements, agreements having important budgetary implications for the Union and agreements covering a field where internal rules (including autonomous external measures) require the approval of the European Parliament shall be concluded after the approval of the European Parliament has been obtained. The same procedure applies for the suspension of such agreements.

⁷⁹ Compare e.g. Title V of CONV 369/02 (where international agreements are currently not mentioned).

The Council shall conclude and suspend all other agreements not covered by the previous subparagraph after consulting the European Parliament.

The Council and the European Parliament may, in an urgent situation, agree upon a time-limit for the approval and for the opinion.

3. When concluding an agreement, the Council or the Council and the European Parliament respectively may, by way of derogation from paragraph 2, authorise the Commission to approve modifications on behalf of the Community where the agreement provides for them to be adopted by a simplified procedure or by a body set up by the agreement; it may attach specific conditions to such authorisation.

4. When the Council envisages concluding an agreement which calls for amendments to this Treaty, the amendments must first be adopted in accordance with the procedure laid down in (Article xy of this Treaty [on Treaty amendments]).

5. The European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with [Article xy of this Treaty (on Treaty amendments)].

6. Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States. ”

Freedom, Security and Justice

Neil Walker

1 – Introduction

It is a background theme of this contribution that in the domain of Freedom, Security and Justice (FSJ)—embracing both Title IV of the EC Treaty and Title VI of the EU Treaty—policy questions and constitutional questions are particularly closely linked. The reasons for this are explored in due course, but the existence of such a close linkage poses problems for anyone seeking to engage in a 'constitutional' debate in this area. It is, in short, difficult to make or to evaluate constitutional proposals without also taking a strong stance on the direction and content of the policy debate. Yet it is still a task worth attempting, since precisely because policy questions are so much to the fore in this area, there is a danger that the constitutional values which are implicated in particular policy choices are lost sight of or relegated to secondary considerations. Accordingly, in contextualizing and addressing the options for the future development of the Area of Freedom, Security and Justice (FSJ) under consideration in the Convention on the Future of Europe, this contribution seeks to stress the importance of core constitutional questions and of the values which guide our answers to these questions, and the necessity of understanding different policy options in the light of these questions and values.¹

1 The present contribution does not deal with matters such as flexibility and international agreements which, although relevant to FSJ and dealt with in the Working Party Report, have

The contribution begins by setting the constitutional context—looking at the underlying issues and tensions which have framed the current debate. It then proceeds to offer an evaluation of some of the proposal presently on the table—in particular those made by Working Group X on ‘Freedom, Security and Justice’ in December 2002,² and to suggest some guidelines and to make a modest number of concrete suggestions for any final constitutional text.

2 – Setting the Constitutional Context

One way of illuminating the present debate is to outline a number of oppositions, or at least tensions, between different tendencies that have characterized the development of FSJ to date, and which remain manifest in the issues before the Convention today. While they are introduced separately, it should become clear that the oppositions or tensions in question are in some respects closely related, and that the broadest tension—between policy effectiveness and efficiency on the one hand and accountability on the other—is in a sense a cumulation of all the others.

A. *Proactive or reactive?*

One striking characteristic of the development of Justice and Home Affairs (JHA) has been the extent to which it has taken the form of a *reaction* to current events or to secular trends, *or at least has been presented in these terms*. If we look at the fragmented history of developments in police and criminal justice co-operation and in co-operation in immigration and related matters before the Treaty of Maastricht, we see a series of developments that respond to or purport to respond to external threats or dangers. To name but a few of the more prominent strands; from 1976 onwards the Trevi policing network was justified as a response to developments in international terrorism and, later, in transnational organized crime in drugs and elsewhere; from 1986 onwards the Working Group on Immigration was justified as a response to migration trends from a politically destabilizing East and an

... continued

broader implications for the constitutional project and are addressed in other contributions to this volume.

2 Final Report, Brussels, 2 December 2002, CONV 426/02.

economically impoverished South; and from 1989 onwards a Co-ordinator's Group of civil servants began to prepare an integrated programme of JHA 'compensatory measures' in response to the more immediate 'threat' posed by the dismantling of border restrictions under the 1992 Single Market Programme. One can see a similar pattern of threat and response in the major institutional developments of the 1990s. – the development of a Third Pillar bringing JHA matters under the official embrace of the European Treaty structure in 1991; the important developments 'communitarizing' aspects of the Third Pillar at Amsterdam in 1997; the launching of the ambitious Tampere policy programme in the Area of Freedom, Security and Justice in 1999; even the more modest institutional changes of Nice in 2001. In each case, the development of institutional strength and policy capacity in FSJ was preceded, accompanied and endorsed by a policy attitude and language that sought to address or contain threats to the security of the European Union. The latest and largest security threat to mobilize development in FSJ is of course, the destruction of the Twin Towers at the World Trade Center, New York on September 11th 2001, but the policy response to this must be seen as merely the most vivid example of a trend rather than as a radical departure.

Of course, the language of threat and reaction to some extent has an objectively valid basis in FSJ. The very idea of internal security as a public good implies the containment within acceptable limits of risks and threats generated in the wider social environment. Its concern with the wider social environment and the diverse range of dangers which it might produce means that security policy is bound to deal with matters which are in significant respects (although by no means entirely) beyond the control and prediction of the policy-maker—much more so, indeed, than in any other areas of EU policy with the exception of defence (which, of course, is also concerned with security, in this case from *external* rather than *internal* threats). Security policy, then, must be sensitive to 'events', and no sensible security policy can be blind to gradual or sudden environmental changes. Yet reaction is not the whole story. Security policy is not *compelled* by external events, even if the representation of certain events through a security framework can create or reinforce a sense that these events pose such a fundamental and urgent challenge to the existing social and political fabric that they must be responded to immediately and decisively and in a manner that is 'self-evident'.

Choices must, nevertheless, be made and many factors inform these choices. These should include not only instrumental considerations—the best means to produce an agreed set of 'security' objectives, but also the proper balance between security and other objectives, in particular 'freedom' and 'justice'—since as we shall see, while it would be wrong to assume that a zero-sum trade-off has to be made between these

various values, it would be equally wrong to assume the opposite position that these objective are always necessarily cumulative and mutually supporting. Yet, as a matter of observation, the making of the choices in question has by no means always been a matter of the sober assessment of the relative utility of different instruments, still less of the considered appraisal of the relative priority of different values. Partly, this has to do with the (already noted) tendency of the 'security' imperative to dominate the agenda. In addition, other factors have come into play, such as national and supranational professional and bureaucratic interests, the opportunism of national politicians in playing on popular fears and priorities, and, perhaps of greatest prominence, the broader polity-building agenda and debate within the EU.

These broader considerations can lead to developments which have a significantly *proactive* quality, where the policy and institutional agenda associated with internal security is mobilized in a quite novel way as part of a broader strategy. For example, Chancellor Kohl's strong sponsorship of the Europol idea prior to the Maastricht Treaty was not unconnected to the desire of one of the most Europhile members to develop an audaciously 'state-like' conception of the EU at the pre-Maastricht highpoint of integrationist self-confidence. Equally, we cannot understand the extensive scale and ambitious claims of the Tampere initiative apart from an appreciation of the growing desire in many EU policy circles to find a new 'big idea' to mobilize support for the European Union at a point when the founding ideals of the Union—peace and prosperity—had lost some of their earlier freshness (if not their relevance) and public opinion was becoming increasingly ambivalent about the legitimacy of increasing integration.

B. Dynamic or blocked?

Both the pressure to react to events and the way in which FSJ has been invoked within proactive initiatives help to account for the highly dynamic nature of the development of the area of FSJ since its origins at Maastricht. The cement embedding the Maastricht Third Pillar had barely solidified when the foundations were dug up again at Amsterdam and "Visa, Asylum, Immigration and other Policies Related to Free Movement of Persons" was resituated in the First Pillar (Arts. 61-69 EC), leaving only a title on 'Provisions on Police and Judicial Co-operation in Criminal Matters' in a streamlined and itself much 'communitarized' Third Pillar (Arts. 29-42 TEU). Nice, too, saw significant changes, notably in the launching of Eurojust, only months after Amsterdam had been implemented, and as we shall see, this restless institutional dynamic shows no signs of abating in the present constitutional debate.

Beneath the institutional dynamic, we may observe an equally urgent policy dynamic, an "abundant incrementalism"³ which by the late 1990s meant that Justice and Home Affairs had become one of the busiest areas of policy initiative, even before the new impetus provided at Tampere. For example, by 1997 Justice and Home Affairs had become easily the largest single area for which the Council Secretariat serviced meetings, amounting to a third of the meetings convened and over 40 per cent of the papers circulated,⁴ and the figures for legislative or quasi-legislative initiatives and for institutional modification and proliferation have been just as remarkable.

One consequence of this has been precisely the close interlinking of the policy and the institutional, the instrumental and the structural, commented on in the introduction, and the tendency for constitutional questions to be driven by, even obscured by, short-term political agendas. Indeed, the very fact that the present Convention picked out FSJ as one of only four (alongside defence, economic governance and social Europe) Working Groups focussing upon a policy area rather than a general legal or institutional question (as with the other seven Working Groups) suggests its awareness of the 'constitutional deficit' in this area. The danger remains, however, that the cure simply compounds the illness. For all that its Final Report does take constitutional questions seriously, much of the debate within and around the Working Group, and indeed the tone of many of its conclusions, suggest that for many the Convention has merely provided another opportunity to adapt the institutional framework to the burgeoning needs of the policy agenda rather than an occasion to reflect on what a lasting constitutional structure for FSJ might look like. Clearly, this is a delicate and complex question. Even more pronouncedly than in other areas, in the still relatively new area of FSJ the EU remains a polity-in progress rather than a mature structure, and it is unavoidable that much of the building of the constitutional ship should take place while it is sailing in fast-flowing policy waters. Nevertheless, the appropriate balance between policy dynamism and constitutional reflection remains a concern, and the need to stress the latter a continuing priority for the Convention.

3 See M. Den Boer, "The European Convention and Its Implications for Justice and Home Affairs Co-operation" (unpublished paper, 2003).

4 M. Den Boer and W. Wallace, "Justice and Home Affairs" in H. Wallace and W. Wallace *Policy-Making in the European Union* (Oxford: OUP, 2000) 493, at 503.

However, it would be inaccurate to see the history of FSJ as one of remorseless integration. Alongside the record of expansion, there have been many examples of frustration and blocked ambition. Each institutional initiative has left some parties disappointed with its modesty, each new initiative (as in Amsterdam) has been preceded by a critique of the ineffectiveness of the old, and each *résumé* of progress (as in the Tampere mid-term report by the Belgian presidency in 2001),⁵ has produced an indictment of the conditions impeding progress. Why has this been the case?

C. Supranational or intergovernmental?

The history, and indeed pre-history, of recognition of FSJ within the Treaty structure has been marked by an ideological faultline between intergovernmental and supranational positions. In the most basic terms, adherents of an intergovernmental approach have stressed the continuing priority of national authority within the FSJ structure, while adherents of a supranational approach have stressed the importance of transferring a significant measure of authority to the European supranational framework itself. The basic reason for this division is straightforward. The longstanding macro-political distinction between those who are more or less reluctant to cede ‘sovereign’ authority to the European level tends to be reinforced and highlighted in a policy area—internal security—which is a traditional preserve of the state, and, indeed, which many would see as part of the core and indispensable *raison d’être* of the state.

Of course, the reality is much more complicated than this simple opposition would suggest. First, some of the more Eurosceptic states, such as the United Kingdom, have been amongst the most enthusiastic sponsors of JHA co-operation, even if such enthusiasm tends to be couched in terms of the *defence* rather than the *pooling* of national sovereignty, and have been prepared to countenance a fairly extensive measure of institutional integration on that basis. Secondly, what counts as ‘intergovernmental’ rather than ‘supranational’ in institutional terms cannot be reduced to a single metric. Rather, it is a multi-faceted affair, and we must look to a number of different indices or measures to gain an overall picture of the degree of

5 European Council, 6 December 2001, Council Doc. 14926/01. Discussed in J. Monar, “Justice and Home Affairs” (2002) 40 *Journal of Common Market Studies* 121.

integration of any particular policy sector. These indices cover the whole range of incidents of the exercise of legal authority, including right of initiative (national or Commission), procedure for adoption (with or without significant input from the more 'European' institutions of Commission or Parliament; with or without the unanimous consent of national executive representatives; with or without the influence of national Parliaments), location of competence (extent of European law-making or policy-making jurisdiction, exclusive or otherwise), intensity of measures adopted (whether compulsory or advisory, facilitative or prescriptive, directly or indirectly effective in national law), mode of implementation (whether through national or supranational administrative channels) justiciability (susceptibility to adjudication by the European Court of Justice) and forms of *post factum* oversight (monitoring, evaluation or even quasi-adjudication by national or supranational bodies—such as the European Parliament and the European Ombudsman). Given this multi-faceted picture, there is much scope for an uneven institutional pattern, more or less intergovernmental or supranational depending upon the index in question. Thirdly, and reflecting both the complexities of national bargaining positions and the broad scope for variation within and between different indices, the fairly sharp distinction between 'intergovernmental' and 'supranational' Pillars did not in any event survive the reform of the Maastricht Treaty at Amsterdam, and all aspects of FSJ are now more or less 'communitarized'.

Yet the intergovernmental/supranational opposition remains a defining characteristic of this policy field, even if it is better viewed in terms of variable points on a spectrum rather than a simple dichotomy. The intergovernmental 'purity' of the original Maastricht settlement with its association of predominantly national initiative, restricted supranational competence, soft(er) law, state-centred implementation, absence of justiciability and paucity of European oversight may be long gone, but the fault-line, however blurred and jagged, is still present. It is this variable intergovernmental brake indeed, that in significant measure accounts for the uneven development of FSJ and for the conviction of some participants and commentators that, notwithstanding the remarkable early vigour of this policy domain, the development of a properly rounded supranational capacity has been repeatedly blocked. That this tension remains palpable may be seen in some of the compromises and disagreements emerging from the Final Report of the Working Group. It may be seen in the complex compromise over the right of initiative, and in the balancing of an enhanced role for the Commission in the current Third Pillar with the endorsement of the Council's role in the adoption of multi-annual strategic programmes; in the fine distinctions drawn over which areas of police and criminal justice co-operation should or should not move to the qualified majority and co-

decision procedure; in continuing sensitivities about the extent of supranational competence, notably over the question of the creation of a European Public Prosecutor; in the proviso that, even within the context of the adoption of a uniform framework of legal instruments, some matters which bear directly on the rights of the individual such as approximation of substantive criminal law should nevertheless remain incapable of adoption by the only instrument (the 'regulation' or its successor) which would ensure uniform and direct applicability; in the complex double-strategy for improving implementation, both by rationalizing and enhancing operational collaboration in the Council and through the nationally staffed bodies of Europol and Eurojust, and by strengthening the Commission's hand in the context of mutual evaluation procedures and the extension of Art. 211 EC implementing measures to the Third Pillar; in the continuing reluctance of some to extend the jurisdiction of the Court of Justice to the question of the validity or proportionality of law enforcement operations (which remain state-centred at the point of delivery), even though such operations may threaten important individual freedoms; and in the increased involvement of both national and European Parliaments in oversight.

Some of these proposals are looked at in more detail in due course. The immediate point, however, is to stress the resilience of tension between competing visions of the role of the states and the European centre in the development of FSJ as a factor conditioning its constitutionalization.

D. Legislative or executive?

Like any polity, the European Union requires and possesses both legislative and executive capacity, even if its division of powers is more complex than most national polities—a feature exacerbated by the fact that in the overall European system of 'multi-level governance' legislative and executive dimensions of the one policy process often take place at different sites and levels of governance. It remains the case, however, that, as typically in national systems, the way in which the overall constitutional order of the EU is conceived—by insiders and outsiders alike, and, indeed, built into the reflexive constitutional logic of the system itself—remains *legislation-centred*. The key measure of Union competence, for example, is legislative. The key basis for the demarcation and discussion of the relationship between EU 'supremacy' and national 'sovereignty' is legislative power. The key trigger for identifying and elaborating different legal frameworks to channel and regulate the various stages of the policy cycle (both policy-making and policy accountability) in different policy sectors—and, so it follows, the key axis around which the ideological debate between intergovernmental and supranational positions

is played out—is the *legislative* act. Indeed, and of most immediate relevance, this is mirrored in the organizing premise of the Pillar structure itself, with its distinction between a central edifice in which the various legal incidents of *legislation* are more maturely communitarized than in the two outside columns.

The diagnosis of the EU legal order as legislation-centred is not meant as a general criticism. It is difficult to imagine how a constitutional logic firmly embedded in the idea of the rule of *law* could operate otherwise. However, it does mean that to the extent that a particular area of policy departs from the legislation-centred norm, there is a danger that the constitutional treatment of that area may not be fully appreciative of its distinctive texture.

While there are many areas of FSJ in which legislation is at the centre of the policy agenda, particularly in Title IV of the EC Treaty,⁶ in police and criminal justice co-operation this is less evidently the case. Clearly, the provisions for approximation of substantive criminal law and compatibility of procedural measures are legislation-centred, but just as if not more significant a thrust in the residual Third Pillar is towards executive action, whether co-operation between existing national executive and operational⁷ agencies or the development of new Europe-wide agencies such as Europol and Eurojust. The reasons for this distinctive policy texture are complex.

6 Which, therefore, fits well in constitutional terms with the legislation-centred logic of the First Pillar EC Treaty. Indeed, the structural similarity of policy-making in this area to other EC matters is one of the reasons why its incorporation did not meet strong resistance at the time of the Treaty of Amsterdam.

7 For these purposes i.e. (distinction from legislation) 'executive' and 'operational' do not themselves require to be distinguished, both referring to the post-legislative (or in some cases non-legislation-based) phase of policy application and implementation. In fact, it is difficult to develop any meaningful distinction between 'executive' and 'operational', and the use of this terminology often obscures rather than illuminates. On the one hand, 'executive' is often used to characterize the phase of 'high' governmental activity, and 'operational' to characterize the phase of 'low' bureaucratic or policy-professional activity. On the other hand, 'executive' may be used to denote the availability of coercive legal instruments, as in the idea that the 'executive powers' of the police are those of search, seizure, detention and arrest, and this clearly refers not to high political activity, but to the final point of application of 'operational' powers. In this regard, it is somewhat unfortunate that the Working Group chose as one of its "golden rules" the distinction between 'legislative' and 'operational' tasks without close definition of what was meant by 'operational', although, as noted in the main text, the general thinking behind this distinction is constitutionally helpful.

They have to do both with the way in which state sovereignist sensibilities have been most jealous of the legislation-centred indices of national authority and so have been more permissive and less vigilant of other aspects of policy co-operation, and with the fact that by their very nature, those dimensions of internal security policy which are concerned with primary law enforcement—namely police and prosecution—involve tasks of an executive character.

What this means, however, is that, notwithstanding state sovereignist concerns about the Europeanization of internal security, we are arguably witnessing a degree of executive (as opposed to legislative) penetration of national systems and challenge to statist prerogatives, through new agencies and other systems and instruments of co-operation which have compulsory consequences for both the national governments involved and the individual citizens affected, that is perhaps unmatched in any other area of integration. In constitutional terms, the danger arises that a legislation-centred perspective will fail fully to appreciate this development, and its various implications for the individual (to affected citizens) and collective (to democratically accountable bodies) accountability of such new agencies and mechanisms. In this regard, the emphasis in the Working Group Report on the importance of a separation between "legislative" and "operational" tasks, with each requiring their own distinctive constitutional treatment, shows a welcome awareness of the constitutional distinctiveness of the Third Pillar. However, it remains the case that there is a legacy of relative neglect here which is not easily overcome and that, in their novel peculiarity, the constitutional questions which arise in controlling an emerging transnational security executive that is not closely confined by legislative instruments are particularly difficult to answer.

E. Accountability or effectiveness?

Everyone, it seems, is agreed that *the* major constitutional challenge facing the AFSJ, and the one in terms of which other more particular challenges may be framed, is the achievement of an appropriate balance between an effective and efficient policy capacity on the one hand and an appropriate system of individual and collective accountability on the other (which accountability measures may be aptly

conceptualized in terms of security's flanking values of "freedom" and "justice").⁸ In one sense this is a negative consensus. It has long been a mantra of discussion of FSJ that the latest institutional structure remains obstinately deficient in terms both of the efficiency and effectiveness of decision-making procedures and of their accountability. These complaints were voiced before the Treaty of Amsterdam, again before the Treaty of Nice, and are commonplace in and around the Convention. Yet there are also positive features to this consensus. A first is that there is consensus at all, albeit pitched at an extremely high level of abstraction. A second is that the consensus suggests that the relationship between efficiency and accountability is not zero-sum, but is in at least some measure mutually supportive and so cumulative. In general terms it may be asserted with some confidence that one characteristic of a less complex, diverse and cumbersome, and therefore more efficient, institutional structure may be greater transparency and comprehensibility, and for that reason it may also be more amenable to collective and individual accountability. Likewise, it is persuasive that a structure emphasizing protection of individual rights and facilitation of collective voice and monitoring may increase public support for FSJ measures, so making their efficient and effective implementation more likely.

Yet virtue is not so easily achieved. Against this general consensus, there remains a great deal of disagreement and uncertainty as to how the (potentially) positive-sum relationship between efficient and accountability should be articulated. Even if it is commonly affirmed that *in general* the relationship between efficiency and accountability is positive-sum, there remain many *particular* areas of tension and trade-off, whether between police information-gathering and data protection, between efficient co-operation between criminal justice agencies and the rights of suspects and accused to be protected by rigorous (or at least familiar) procedural and evidential standards, between efficient immigration controls and the rights of asylum-seekers to due consideration of their case, or, more generally, between free movement and reasonable standards of anticipatory and reactive security. And if it is difficult to resolve these particular tensions, it is all the more so to draft a design that achieves an optimal reconciliation across the board.

8 For a recent restatement, see H. Grabbe, "Justice and Home Affairs: Faster Decisions, Secure Rights" Centre for European Reform Policy Brief, October 2002.

What is more, three features of the constitutional background already set out exacerbate the genuine philosophical and political difficulties of achieving an optimal balance between sometimes divergent goods. First, the potency of security talk and weight and urgency of security interests is such that there is an enduring danger that positions stressing an efficient capacity to achieve 'security' objectives and respond to 'security' threats without undue interference with 'security' expertise or unwarranted delay in mobilizing policy-making or operational capacity will prevail, and that accountability be treated as an afterthought. Secondly, the intergovernmental/supranational fault-line tends to cut across and interfere with considerations of optimal balance. In the belief, or at least the rhetoric, of some parties, any encroachment on national security sovereignty necessarily entails a diminution of effective decision-making and an attenuation of the links between people and polity that are crucial to viable forms of accountability. For others, regardless of national sensitivities, the new European scale of internal security politics implies that a co-ordinated and effective policy capacity must be uniformly European and suitably tailored accountability mechanisms be pitched at the same level.⁹ For all that the development of the AFSJ has seen a gradual softening of this opposition and the emergence of a more nuanced approach, important macro-political differences remain and complicate the balancing process. Finally, in addition to these broader political considerations, the unavoidable emphasis upon executive co-operation in some areas of European internal security policy raises some constitutionally unfamiliar and unusually acute problems of balance.

3 – Constitutional Proposals

With these considerations in mind, let us turn to the work of the Convention. This section of the essay follows the order of the Praesidium's Preliminary Draft

9 For example, this seems to be the working assumption of the Joint Submissions by The Standing Committee of Experts on International, Immigration, Refugee and Criminal Law; The Immigration Law Practitioners Association, Statewatch and the European Council of Refugees and Exiles. To Working Group X, D. Curtin and S. Peers (eds.) Utrecht and London, 14 November 2002 <<http://www.statewatch.org/>>. This document is full of good arguments and useful suggestions for increased accountability, but there is insufficient investigation of the viability of the premise of increasing 'communitarization' on which much of the framework depends (including a European Public Prosecutor, European Police Force and European Criminal Court).

Constitutional Treaty (hereinafter PDCT) of October 28th, commenting on the various provisions relevant to FSJ with particular reference to the Working Group Final Report. But first, some preliminary observations may help put these comments in perspective.

Two minimum forms of consensus have been written into the PDCT, each with implications for the treatment of FSJ. To begin with, there is a broad *structural* consensus that First and Third Pillar FSJ provisions be brought under a common general legal framework in a single (Constitutional) treaty with a single general institutional structure for an entity with a single legal personality.¹⁰ This, of course, does not imply agreement that FSJ be comprehensively 'communitarized'. Rather, there should be a single legal template which necessarily starts from the premise of uniformity, with the burden of specification resting on those areas of the text, including those dealing with FSJ, which will depart from the uniform 'First Pillar' template. The advantage of this approach to a constitutional debate¹¹ is that the burden of specification is also a burden of *justification*, and so the case for different treatment of some FSJ areas has to be made rather than simply taken for granted.

There is also a degree of *formal* consensus about what belongs in the Constitutional Treaty. In acknowledgement that FSJ has over its first decade come to form an integral part of EU policy capacity, there has in the current exercise been no serious attempt to exclude these parts of the FSJ still found in the EU Treaty's Third Pillar from the new constitutional framework, or even, as in earlier efforts at consolidation or quasi-constitutionalization, to include the EU Treaty provisions only through a minimalist reference to objectives together with incorporation of more substantive provisions in a Special Protocol.¹² Rejection of minimalism, indeed, is already implicit in the *structural* commitment to a common legal framework. Equally, however, an undifferentiated and broadly inclusionary text is also rejected in favour

10 The idea of a common general legal framework was also included in the Working Group X Report as one of its two "golden rules" or founding premises.

11 Aside from the much-trumpeted advantage of simplification, although it is a moot point whether a text based upon a single template or Pillar with complicated exceptions is more accessible than one based upon multiple templates.

12 As in the Florence Basic Treaty Project of May 2000: Robert Schuman Centre for Advanced Studies of the EUI, *A Basic Treaty for the European Union. A Study of the Reorganisation of the Treaties*, http://europa.eu.int/comm/archives/igc2000/offdoc/discussiondocs/index_en.htm.

of a two-tier text where matters of Constitutional Structure in Part One possess privileged constitutional status vis-à-vis Union Policies and their Implementation in Part Two.¹³ This rejection of both minimalism and maximalism rests upon a common assumption that for the Constitutional Treaty to perform its function of distinguishing a set of norms as worthy of special constitutional status and of presenting these as a package capable of effective communication to a wider audience, that package must be of a particular size—neither so restrictive as to exclude key norms or render them unduly abstract, nor so expansive as to dilute the distinctiveness of what is included or to jeopardize the prospect of its effective communication. While of some agenda-setting value, this formal agreement to limit Part One means that controversial choices will be deferred rather than avoided. In this respect, the statement under Part Two of the Preliminary Draft that its specification of ‘legal bases’ will follow from the specification of types of competence (Part I, Title III) and acts and procedures (Part I, Title V) in a manner requiring only ‘technical amendments’ of existing Treaty provisions appears optimistic, not least as regards FSJ where the merging of the Third Pillar into a single legal framework whose ‘default’ basis is the First Pillar will demand reconceptualization of the legal bases of the areas merged. In turn, this substantial reconceptualization will require the renewal of much of the substantive legal corpus of FSJ on the basis of the instruments associated with these new legal bases. In what follows, the focus is naturally on Part One of the Treaty, but the important and inextricable elements of Part Two cannot be ignored.

A. Article 2 – values of the Union

The list in the PDCT mentions ‘human dignity, fundamental rights, democracy, the rule of law, tolerance, respect for obligations and for international law’ but not ‘solidarity’. This omission seems anomalous, both because ‘solidarity’ is already mentioned in Article 1 EC and Article 2 EU, and because one of the purposes of the Constitutional Treaty is to nurture a sense of the Union as a community of attachment in which interests are held and aspirations are developed in common. Moreover, in the FSJ domain, there are particular reasons for stressing solidarity on account of the importance of burden-sharing in asylum policy and the importance of mutual trust in the development of common executive capacity in matters such as

13 Although the forms that such privileging should take remain unspecified and controversial.

policing and common borders protection. **The addition of 'solidarity' to the catalogue of fundamental values would appear to be justified on these grounds**¹⁴

B. Article 3 – objectives

The inclusion amongst the list of objectives of the 'creation of an area of liberty, security and justice' closely tracks existing provisions in the preamble and Articles 2 and 29 EU, and in Article 61 EC. It also reflects the fact that 'freedom, security and justice' has become an important mobilizing idea for the Union since the special Tampere summit of October 1999, serving both as umbrella for policy-making and as a rhetorical headline justifying the role of the Union to internal and external audiences. Yet some unease has been expressed about the prominence accorded to FSJ after Tampere. Arguably, it is too narrow to serve as a defining value for a Union historically and currently committed to a much wider set of social and economic objectives. An obvious response is that 'freedom, security and justice' finds its place as only one of a set of objectives in Article 2. Yet this does not meet all possible objections. First, the territorial fixity of the phrase—'an area of'—perhaps gives encouragement to the 'Fortress Europe' mentality—to the notion that the concern of the Union is only with 'freedom, security and justice' *within* its borders and that the promotion of freedom, security and justice beyond the EU borders is (a) none of the EU's concern, and (b) that it may even be a condition of providing freedom, security and justice internally that a *cordon sanitaire* be established around the Union to ensure that those 'foreign' influences which might undermine or prejudice freedom, security and justice be excluded. Not only would this be an undesirably insular attitude, but it tends to obscure or marginalise those many areas of existing FSJ policy which are already concerned to look beyond the Union in the co-ordination and development of policy (from readmission agreements to the development of training, development, information exchange and operational co-ordination arrangements with non EU internal security facilities). Secondly, the phrase 'an area of' does rather support the idea that this may be *the* central objective of the Union. It suggests itself not merely as one objective amongst many, but as a way of actually *defining* the Union, and certainly the phrase is often used in this way.

14 See the similar suggestion by Robert Badinter, alternate member of the Convention, in Art. 4 of his draft Constitution (CONV 317/02: Contrib 105) 30 September 2002.

These concerns could be met by amending the objective to remove the phrase 'an area of', reading instead simply 'maintenance and development of freedom, security and justice.'

C. Title III – Union competences and actions

The skeletal outline of this Title of the PDCT is confusing—indeed perhaps confused. In a series of Articles (9-13) it seeks to set out the categories of Union competence and to specify in general terms which policy capacities fall into what categories. The confusion—or at least the complexity—arises from the fact that the categories in question set out to achieve a number of different objectives simultaneously, concerned not only with location of competence (EU-exclusive, shared or state-exclusive) but also with the more or less closely linked questions of pre-emption and intensity of legal measure. One consequence of collapsing these various considerations into a single set of distinctions is that the category for which all or most of FSJ is clearly intended,¹⁵ namely shared competence under Art. 11, is defined in terms that suggest the pre-emptive effect of Union legislation (... as and when the Union takes action in these areas, the Member States may act only within the limits defined by the Union legislation). While relatively uncontroversial for the Title IV EC measures, this precept may be more sensitive in the Third Pillar. One way of addressing these sensitivities is to ensure **(i) closer specification of the heads of FSJ competence in Part Two of the Constitutional Treaty along the lines suggested in the Final Report of Working Group X¹⁶ and (ii) to allow national Parliaments a politically pre-emptive and judicially reactive role with regard to the "subsidiarity early warning mechanism" suggested by Working Group 1 (subsidiarity) and endorsed by Working Groups IV (national Parliaments) and X.**

15 We may deduce this from the outline of Part Two which includes “Visas, Asylum and Immigration and other policies related to the movement of persons” (as a sub-head of Internal Market) and “Policy on police matters and against crime” (as the only head of Internal Security) under the category of Policies and Internal Action, which in turn is distinguished from the category of Areas Where the Union May Take Supporting Action, which latter clearly dovetails with supplementary competence under Art. 12 of the PDCT.

16 See the careful discussion in Section A (Legislative Procedures) of the Working Group Report, which propose only modest changes and marginal additions to the detailed legal bases of FSJ, drawing for the most part on the existing Title IV EV and Title VI TEU provisions.

The indicative Table of Contents for the PDCT also suggests scope for recognition of "policy on police matter and crime" under Art. 13 of the Draft Constitutional Treaty, which deals with 'non-legislative' common policies. The constitutional implications of this are mixed. On the one hand, it is important that there is due constitutional recognition of 'non-legislative' measures (which, under the rubric of 'common positions', 'recommendations' and 'resolutions,' continue to be popular and to some extent necessary in those Third Pillar areas of law enforcement policy-making and co-operation where binding provisions are inappropriate or premature and where individuals rights are not directly affected) so as, for example, to allow specification of procedures for making such measures, or to permit where possible the application of measures on 'participation' (Art. 34 PDCT) and 'publicity' (Art.36 PDCT) of proceedings. On the other hand, it is important that Third Pillar measures which *could* be defined and presented as legislative measures (Conventions, Framework Decisions and Decisions, as reformulated as Regulations/EU laws and Directives/EU Framework Laws in accordance with the recommendations on the assimilation of instruments by Working Group IX on Simplification as part of the project of a common general legal framework) are not strategically 'defined down' as non-legislative measures so as to avoid the stricter procedures for making and monitoring which may apply to legislative measures. There is no easy resolution of this tension. However, to the extent that non-legislative measures also attract compulsory formative and monitoring procedures the tension becomes less acute. In order to facilitate this, however, **further attempts have to be made to rationalize non-legislative measures within a unitary framework.** As matters stand, Working Group IX wants to retain the term 'decision' for a (wider than previously defined) category of 'non-legislative' acts, and 'recommendations' and 'opinions' for other non-binding instruments. Where this leaves 'common positions', and, indeed, 'recommendations' and 'resolutions' under the Third Pillar remains unclear, and it is important that reasonable constitutional control of these measures is not forsaken in the name of continuing flexibility.

D. Title IV – Union institutions

Under Article 15 of the PDCT, the tasks of the *European Council* are defined. This may be an appropriate context within which the recommendation of Working Group X that, in order to balance the increase powers of initiative of the Commission and to lend broader political coherence to FSJ policy planning, **a periodical duty/power be vested in the European Council to develop a multi-annual strategic programme** should be included.

(1) Article 17 treats the formation and duties of the *Council*. Of particular importance here in the light of the executive-orientation of the Third Pillar is the division between the legislative tasks of the Council and its other executive/operational tasks. The Report of Working Group X calls for a refocusing of the work of a streamlined Art. 36 (EU) Committee structure towards the management of operational collaboration and away from the Council's legislative work. The Report suggests **the appointment of a new High Official to chair the Art. 36 Committee**, and this may be recommended as an initiative which promises to enhance both effectiveness and efficiency and accountability. Ideally, the new office would co-ordinate the spectrum of police and security matters, including relations between Third Pillar organizations such as Europol and Eurojust, as well as creating a focal point for internal accountability (to the Art. 36 Committee) and for external accountability (to the European Parliament and, perhaps, national Parliaments).

(2) Alongside an enhanced role in operational co-operation and in law-making (see below), the *European Parliament* (to be established under Art.16) should have its existing right to be informed by the Commission and by the Council and to make recommendations to and ask questions of the Council in Third Pillar matters (Art.39 EU) specifically endorsed under Art.16. Given the increasing role of the Commission in the Third Pillar (see below), **an additional right should be vested in the European Parliament to make recommendations and ask questions of the Commission.**

(3) Under Article 19 the powers of the *Commission* are set out. Two key questions in this regard concern the Commission's right of initiative and its role in implementation. At present the Commission shares the right of initiative with Member States under Title IV (Art.67 EC) during the transitional phase but will gain sole right of initiative thereafter, while the right of initiative is shared between Commission and Member States without time limitation under the Third Pillar (Art.34 EU). In response to the frequently voiced complaint that the Member State initiative leads to lack of coherence and encourages "grandstanding" by Member States holding the Presidency, one proposal would be to abolish the Member State initiative completely—a suggestion made more palatable in political terms by the proposal for the assumption by the equally 'intergovernmental' European Council of the capacity to draw up multi-annual programmes. In addition, a compromise allowing some residual influence to remain with individual Member States would be **to require some higher numerical threshold of support before a Member State**

initiative could be taken, or even to generalize across FSJ the post-transitional provision in Art. 67 EC that Member States, while losing any direct right of initiative, should retain a right to make requests to the Commission that the latter should take an initiative and to have such requests examined. As regards the question of implementation, the increasing *de facto* involvement of the Commission in implementation not just in Title IV but in Third Pillar matters, together with the general problem of inefficient national implementation of Third Pillar measures, has led Working Group X to make the persuasive suggestions that **the Commission's Art. 211 EC powers of implementation within a newly constitutionalized framework of Comitology be extended to the Third Pillar, as should its Art. 226-228 EC powers of administrative and judicial enforcement in the case of national infringement.** As well as seeking to promote better problem-solving, both the Comitology system, and at a more concrete level the existing Commission co-ordinated system of 'mutual evaluation' of national implementing authorities¹⁷—whose extended application in the Third Pillar (together with a duty to provide reports to both national and European Parliaments) is also encouraged by the Working Party Report—also respond to the need to provide an appropriate balance between national and supranational authorities in the face of abiding macro-political sensitivities about the location of ultimate authority. Indeed, it is both a novel attraction, but also a novel complexity of procedures such as Comitology and the OMC-style mutual evaluation system, that they involve an implementation methodology which is not properly viewed as a 'top-down' exercise in which any particular institution has the final word. Some of these procedural questions may be addressed in more detail in Art. 31 of the PDCT which deals specifically with “implementing procedures for policies on police matters and against crime.”

(4) The role of the *European Court of Justice* (and the Court of First Instance) is addressed in Art.20. The deficiencies of ECJ jurisdiction in the Third Pillar are notorious, in particular the 'opt-in' procedure *re* preliminary references, the lack of a Commission initiative in infringement procedures (as in Art.226 EC) and the

17 Mutual evaluation may indeed be seen as a species of, or at least as bearing a family resemblance to the increasingly fashionable Open Method of Co-ordination (OMC), a method of horizontal policy making and evaluation which has already been the basis for initiatives in asylum and immigration law under Title IV EC. Working Group IX (Simplification) has recommended an explicit constitutional basis for OMC.

inability of the ECJ to review the validity or proportionality of operations carried out by national Law Enforcement Agencies—even where they are operating within an institutional framework established under the Third Pillar (Art. 35 EU). In Title IV EC, too, ECJ jurisdiction is notably limited, with the preliminary reference procedure only available before last instance courts (Art. 68 EC). There appears to be no valid reason consistent with the uniform application of the rule of law in the protection of individual rights and in the equal enforcement of state responsibilities why judicial control should be subject to rules of flexibility or otherwise remain deficient in the area of FSJ. To argue so is simply to confuse (whether ingenuously or disingenuously) the question of the proper balance of national and supranational authority with the question of the proper legal control of those matters that are in various modes already allocated to supranational authority. Here, at least, there is no good reason for the accountability of a burgeoning transnational executive to be compromised by the enduring intergovernmental/supranational fault-line. **So the suggestion of the Working Group Report that the general system of jurisdiction of the ECJ (i.e. preliminary rulings, infringement procedures and judicial review of institutional acts) be applicable across all FSJ matters, including operational matters bearing upon fundamental rights of the individual, should be endorsed.** Furthermore, given the vulnerability of individual rights to executive encroachment in this area, there is a perhaps stronger case to be made in FSJ than in any other domain, particularly in the light of the probable constitutional incorporation of the Charter of Fundamental Rights, **for introducing a less restrictive locus standi for individuals before the Court of Justice in (Article 230 EC-type) judicial review actions**¹⁸

(5) Not being Union Institutions, *national Parliaments* find no mention in Title IV of the PDCT, yet as Working Group IV (national Parliaments) has recommended, there is a strong case to be made for the constitutional recognition of national Parliaments as vital contributors to the effectiveness and accountability of the broader ‘multi-level governance’ framework within which the EU is situated. Just as there are compelling arguments of constitutional principle for granting the ECJ a

18 See the similar proposal in Gráinne de Búrca’s chapter in the present volume. As she notes, Working Group II (Charter of Fundamental Rights) declined to make a recommendation on this matter, suggesting that the Working Group on FSJ, *inter alias*, might provide a more appropriate forum. In the event, Working Group X likewise declined to take up the challenge.

strong oversight role in FSJ to which its being an unambiguously *supranational* body offers no relevant objection, so too there are compelling arguments of constitutional and democratic principle for granting domestic Parliaments (acting individually, but where the pooling of knowledge and authority may be appropriate and expedient, also collectively) a strong pre-legislative and *ex post* monitoring role to which their being unambiguously *national* bodies offers no relevant objection. That is to say, the involvement of national Parliaments promises a net gain in democratic accountability without giving rise to any legitimate concern that the supranational policy capacity of FSJ is thereby compromised. We have already noted the possible role of national Parliaments in the subsidiarity early warning mechanism and in the receipt of mutual evaluation reports, and, as the Working Group has suggested, it is possible to imagine **a broader oversight role for national Parliaments, with the new transnational executive agencies reporting to each domestic assembly, and, indeed, for national Parliaments also to act as a counterweight to national executive dominance by contributing to the European Council's multi-annual strategic programmes.**

E. Title V – implementation of Union action

It has been noted that there are advantages of simplicity and transparency in providing a single set of instruments for all Union policy areas (Art. 24 PDCT), including the Third Pillar, even though work remains to be done to produce an effective assimilation of the 'softer' non-legislative instruments. Fears that any such constitutional exercise will produce corresponding disadvantages in terms of a rigid uniformity of policy methodologies across different fields appear unfounded, as there is no necessary relationship between the form of instrument chosen and other key legal incidents. In particular, the one instrument can be accompanied by different law-making procedures, and these differences—to be specified under Art. 25—will remain important within FSJ. QMV and co-decision may be substantially accepted as the emerging norm in Title IV EC, yet, as the Final Report of the Working Group indicated, there are many areas of the Third Pillar where the balance of political forces suggests that, Enlargement notwithstanding, unanimity—or at least a *super*-qualified majority rule if the plenary Convention balks at the retention, however residual, of unanimity—should continue to prevail (e.g. creation of new bodies with executive powers, the approximation of criminal law where there is no clear cross-border dimension, rules on action by transnational law enforcement authorities). Indeed, it is arguable that the price of the emerging accord on matters of competence (with notable exceptions such as the European Public Prosecutor and a common

European Border Guard Unit) is the continuation of a differentiated approach to law-making procedures, with many parties only prepared to countenance the grant of Union competence in particular areas if the unanimity (or super-qualified majority) safeguard remains in place. For this reason, and also because the constitutional difficulties associated with holding transnational executive bodies accountable are so profound, **any attempt to introduce QMV as the uniform norm in FSJ should be resisted and, in particular, legislative initiative which would sufficiently augment transnational executive capacity should, under various detailed heads, continue to be subject to the unanimity (or super-qualified majority) brake.**

F. Title VI – the democratic life of the Union

Given the constitutional tensions elaborated earlier, it is not surprising that FSJ has been the site of particularly fierce struggle in recent years not only over questions of individual rights and accountability but also over questions of collective voice and monitoring. While the general principle of ‘participatory democracy’ contained in Art. 34 of the PDCT is to be welcomed, in the absence of specified procedures it amounts to little more than moral exhortation. Furthermore, factors such as expertise, efficiency and timeliness of action, and necessary confidentiality of sensitive information—all important considerations in FSJ—set prudent limits to participatory democracy in this area. While we should, nevertheless, not neglect the potential for pre-legislative involvement of a wide range of public actors through national and European Parliaments and through Comitology and mutual evaluation procedures, effective democratic control and responsiveness will perforce remain largely dependent upon the capacity of the *demos*, whether in the institutional form of Parliaments, Ombudsmen etc., or in the form of the public at large, to hold the governing bodies in this area to retrospective account for their actions. To this end, the establishment in Art. 36 of the PDCT of the principle that the legislative debates not only of the European Parliament but also of the Council should take place in public is to be welcomed. More generally, if information is the lifeblood of effective accountability, **the current principle of public access to documents held by the main institutions—Council, Commission and European Parliament—should be**

extended to all bodies and agencies created under the EU, including the various executive bodies emerging under the FSJ banner¹⁹

¹⁹ See further, Curtin and Peers, note 9 above.

Flexibility in a ‘Reorganised’ and ‘Simplified’ Treaty

Jo Shaw¹

1 – Introduction

This paper considers whether, and under what conditions, certain aspects of flexibility should, or should not, be included in the New Constitutional Treaty for the European Union and in particular in Part One of the Treaty (following the model set up by the Praesidium’s Preliminary Draft Constitutional Treaty²). The questions it asks are the following:

A. What should be done with the **enhanced cooperation provisions** included in the EC and EU treaties by the Treaty of Amsterdam, and amended by the Treaty of Nice? The principal features of these provisions are that they are enabling clauses enshrined in the treaties allowing groups of Member States under certain substantive and procedural conditions to borrow the EU institutional system to achieve objectives and to undertake tasks defined by the Treaties which could not be achieved or undertaken by applying the normal institutional rules governing that particular objective/task. These provisions extend to all three existing ‘pillars’ in

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2 CONV 369/02, 28 October 2002.

different ways and under different conditions, with the most limited arrangements applying to Common Foreign and Security Policy, with the exclusion of 'matters having military or defence implications' (Article 27c TEU). The second pillar also contains the enhanced cooperation-esque possibility of constructive abstention (Article 23(1) TEU).

B. What types of opt-out or derogation arrangements should survive under the new constitutional regime, and in particular should these be guaranteed or referenced in the NCT? In particular:

- ✓ what happens to the present arrangements for derogations and non-involvement of certain Member States in respect of the provisions governing Economic and Monetary Union under Title VII of Part Three of the EC Treaty? and
- ✓ what happens to the various special arrangements for Schengen/free movement of persons/police and judicial cooperation matters under the Protocols that apply in different ways to the UK, Ireland and Denmark?

These latter arrangements unconditionally accord a blanket authorisation to the cooperating Member States to borrow the institutional framework of the EU. In addition, they protect the non-participants from the effects of EC/EU law in different ways depending upon the nature of the opt-out and make various provisions for opting-in. The Schengen arrangements are protected from intrusion from the general enhanced cooperation provisions by Article 43(j) TEU, but there remains the possibility of using those provisions in the future to allow ad hoc enhanced cooperation within the field of justice and home affairs, whether under Title IV of Part Three of the EC Treaty, or under Title VI of the TEU.

C. Should the NCT, and in particular Part One of the Treaty, (a) permit implicitly or (b) refer explicitly to the possibility of Member States of the EU concluding amongst themselves and outside the institutional framework of the EU **international agreements**, even in respect of matters falling within the general scope of the EC/EU objectives in relation to integration? Member States do use so-called 'partial' agreements, which are those concluded between a limited group of Member States (with or without the participation of third states) and 'parallel' agreements, which are those concluded between *all* the states that are members of the European Union at the time when the agreement is signed. These agreements may also involve the participation of third states.

There are various Treaty authorisations for partial and parallel agreements, although the Member States may also proceed completely outside the Treaty framework—most famously in the case of Schengen. Within the Treaties we find:

- ✓ Article 306 EC on the Benelux (partial);
- ✓ Article 34(2)(d) TEU on the use of conventions to achieve Third Pillar policy objectives (partial and parallel – depending upon the operation of the Schengen opt-outs)
- ✓ Article 293 EC allowing the conclusion of conventions between the Member States in certain named areas of cooperation (e.g. mutual recognition and enforcement of judgements) (parallel – all Member States have always participated).

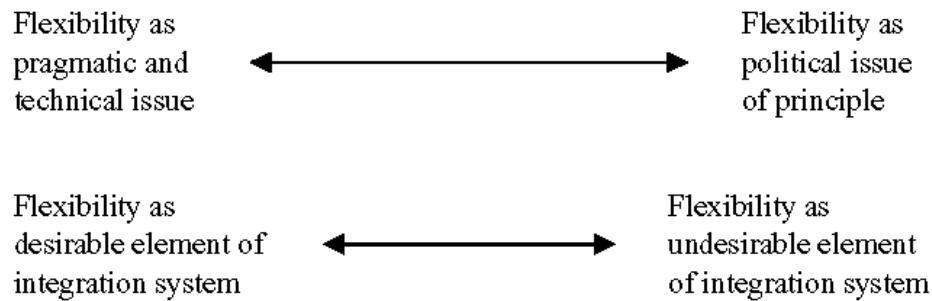
Parallel agreements involve, not territorial differentiation, but *instrumental differentiation*. Both partial and parallel agreements could, in principle, challenge various aspects of the EC/EU legal order, such as interinstitutional balance or the obligations of Member States under the Treaties.³

2 – Views on Flexibility

Views about flexibility in the European Union divide up along a number of axes. This is partly because the term itself seems to offer something to everyone who looks for the European Union to offer value-added in the area of policy-making, and it is easy to say that one prefers flexibility to rigidity.

3 De Witte has written most extensively on these cases of 'old-fashioned flexibility'. See B. de Witte, 'Old-fashioned Flexibility: International Agreements between Member States of the European Union', in G. de Búrca and J. Scott (eds.), *Constitutional Change in the EU*, Oxford: Hart Publishing, 2000 and B. de Witte, 'Chameleonic Member States: Differentiation by means of partial and parallel international agreements', in B. de Witte, D. Hanf and E. Vos (eds.), *The Many Faces of Differentiation in EU Law*, Antwerp, etc.: Intersentia, 2001.

The two main axes are:



One view is that the issues addressed in this paper are essentially pragmatic and technical questions about making the EU work better by avoiding blockages in the decision-making process, bridging differences between the Member States using differentiated legal mechanisms, and encouraging the Member States to work within, or as close as possible to, the legal regime of the Union when cooperating amongst themselves. These pragmatic efficiency questions are likely to grow with Enlargement as the Union becomes more diverse. That school of thought would tend to focus attention on the potential of the enhanced cooperation clauses to regulate diversity in a ways which respects the rights of participants and non-participants alike, and is principled in the sense that any usages of these provisions must adhere to the objectives of the Union. Ad hoc derogations, on the other hand, are too arbitrary, and should be eliminated as far as possible. The use of parallel or partial agreements within international law is, on that view, a temporary phenomenon, as such arrangements will all be gradually sucked into the Union legal system, even if they involve third states (e.g. as happened with Schengen). A corollary of this view is that most questions about flexibility can safely be 'left to the lawyers'

Viewing flexibility as political, and looking at it from the point of view of principle can have various dimensions. A 'political' view might focus on the particularly hard cases of flexibility such as foreign, security and defence policy, where vast diversity in the interests and capacities of the Member States means that institutionalised flexible arrangements are simultaneously an obvious way to proceed, as the proceedings of the Working Groups VII and VIII on External Action and Defence made clear, but the very intensity of the interests held equally means that it is

difficult to agree upon fixed forms of flexibility, especially if Member States fear this may override sovereignty.⁴ This fear was made clear by the discussions in Plenary on 20 December 2002 on the reports issued by these two Groups.⁵

A view on the 'principle' of flexibility might focus on whether it fits with, or rubs against, the general objectives of constitutionalisation. There is a view which suggests that the essence of a constitution is not only simplicity and clarity, but also a unity of purpose, and that the very idea of the flexible constitution is a contradiction in terms. There is no need for those responsible for framing the Union's constitutional structure to be restricted by such ideas. Many national constitutions are highly flexible, and put in place not only territorially differentiated arrangements (e.g. in respect of regional diversity within states) but also flexible legal mechanisms which can allow political responses to legal challenges, such as the UK's political solution to the question as to whether judges should be allowed to strike down national laws if they are in breach of the European Convention on Human Rights. A flexible constitution can be one which is tolerant of diversity, not with a view to eliminating it over time, but with a view to embedding it as a constructive element in the political structure itself.

It is worth emphasising that the pragmatism/principle and desirable/undesirable axes do not simply map on to each other. It is possible to welcome flexible arrangements into the EU legal and political system for reasons of both pragmatism and principle, and likewise to oppose them for similar reasons. One of the reasons for this is that flexibility is a normative principle of governance. That is, it engages with the question of how things ought to be done. Of course, people will quite reasonably disagree with each other about such matters, and will wish—in a forum such as the Convention—to deliberate amongst themselves about their disagreements. What this does suggest, though, is that most aspects of flexibility are not simply issues to be left to the lawyers, especially if the process of renewing the EU constitutional order is not one to be conducted solely *à droit constant*, but allows for the possibility of improving upon what has gone before.

4 See Final Report of Working Group VII on External Action, CONV 459/02, WG VII 17, 16 December 2002; Final Report of Working Group VIII on Defence, CONV 461/02, WG VIII 22, 16 December 2002.

5 Summary Report on the Plenary Session, Brussels, 20 December 2002, CONV 473/02, 23 December 2002.

3 – Debates in the Convention thus far

Flexibility has not been explicitly debated in the Convention so far. It featured in the discussions of Working Groups VII and VIII, in a limited way, although the debates were ultimately rather inconclusive. The PDCT suggests that enhanced cooperation will appear in Part One of the NCT, offering a skeleton provision for discussion:

Thus Article 32 ‘should establish:

- ✓ The conditions for undertaking *enhanced cooperation* within the framework of the Treaty;
- ✓ If necessary, areas of the Treaty excluded from enhanced cooperation;
- ✓ The principle of applying the relevant provisions of the Treaty in adopting the acts necessary for implementing enhanced cooperation;
- ✓ The obligations of states participating in enhanced cooperation, and of those not so participating’.

The PDCT does not mention the other cases of flexibility at issue here: derogations and the use of parallel or partial agreements under international law by the Member States, although provision is made for Protocols to be annexed to the Treaty and this may be where, for example, the Schengen arrangements would be found.

The PDCT approach is not the only one of the table, and of course the text is so far an empty vessel and needs to be fleshed out. It is interesting to draw comparisons with the approaches suggested by the Commission (in official and unofficial guises) and in various constitutional texts which have already been brought to the attention of Convention members.

The Commission’s first Communication to the Convention (*A Project for the European Union*⁶) was rather hostile to the whole question of flexibility—for reasons of principle. It argued that the enhanced cooperation provisions offer merely theoretical answers to the problems of diversity, that certain derogations are real sources of complexity and that it is time for a critical reappraisal of all derogations.

Although the second Communication on Institutional Architecture rather surprisingly does not discuss this question, the so-called Feasibility Study (codename: Penelope)

6 COM(2002) 247 of 22 May 2002, published in September 2002 as a Convention document: CONV 229/02

does have a set of concrete suggestions to deal with the question. It proposes a different structure for the EU's new constitutional framework which would exclude the enhanced cooperation arrangements, but would include an explicit power on the part of Member States to conclude arrangements amongst themselves, but without borrowing the institutions and procedures of the Union:

‘The Member States may establish closer cooperation between themselves in so far as the objectives of such cooperation cannot be attained under the Constitution’ (Article 5(2) Feasibility Study Constitution).

This is a ‘Benelux-type’ arrangement. The Study suggests dispensing with the existing enhanced cooperation arrangements from the constitutional framework for reasons related to the abandonment of the unanimity requirement for constitutional amendments, the generalisation of qualified majority voting, and the possibility of adequate secondary arrangements for three current cases of variable geometry (EMU, Schengen and defence).

The majority, but by no means all, of the constitutional texts and reflections submitted for the attention of the Convention do pick up the enhanced cooperation provisions, and many stick closely to the combined Amsterdam/Nice *acquis* – perhaps in the spirit of simplification without, as far as possible, altering the meaning of the texts too much.

In the texts of the European political parties, flexibility receives a wide variety of types of treatment. The *PES position paper* contains a simple statement without amplification or justification that the enhanced cooperation provisions should be retained, but it contains no discussion of opt-outs and derogations such as those for EMU or Schengen.⁷ For the European People's Party, the *EPP Congress Document: A Constitution for a Strong Europe* makes general reference to the value of unity in diversity, but contains no specific discussion or mention of the enhanced cooperation provisions or other cases of flexibility.⁸ However, like the PES document, this is a general position statement and not a set of draft proposals. More details can be found

⁷ Contribution from the PES Members of the Convention, ‘Priorities for Europe’, CONV 392/02, CONTRIB 137, 8 November 2002, p3.

⁸ Document adopted by the EPP Congress in Estoril, Portugal, 18 October 2002; available at http://www.eppe.org/archive/Constitution_EN_1992.asp.

in the Frascati/Brok draft.⁹ This attempts to follow the framework provided by the PDCT, in the endeavour to ensure that the Convention produces as its final output a workable constitutional text based on (a) the *acquis communautaire*, (b) the work of the Convention itself and (c) the inputs it has received from outside. Articles 98-100 present the preconditions for enhanced cooperation (somewhat slimmed down compared to Nice), rules on decision-making and financing, and the principles of openness and consistency of activities.

Other constitutional texts reveal no consensus on the treatment of enhanced cooperation and flexibility generally. The draft model constitution for a Federal Union of Europe prepared by Andrew Duff MEP makes no mention of enhanced cooperation, or indeed flexibility.¹⁰ The draft sponsored by the European Policy Centre and the Institut Royal des Relations Internationales in Belgium¹¹ provides for a minimal solution with a simple enabling clause, which forms the last clause in Section 1 (Powers of the Union) of Title II (Missions of the European Union). No provision is made for Schengen or euro-based derogations in the draft. The UK's 'Dashwood draft'¹² treats enhanced cooperation as a separate Part Three of the Constitutional Treaty, comprising Title VII of the TEU, 'as amended' (amendments not specified). The draft does not discuss the fate of the various Schengen related protocols. Other drafts proceed similarly, including the Italian draft sponsored by the MEP Elena Paciotti draft,¹³ the draft prepared by Robert Badinter, French Senator and alternate member of the Convention,¹⁴ and so-called Fribourg Draft of a European Constitution.¹⁵ Each of these drafts leans heavily upon the existing Treaty *acquis*. A draft prepared by Jo Leinen MEP approaches the matter a little differently. Enhanced cooperation is classed as an 'instrument' of the EU. It appears under

9 Contribution by Mr Elmar Brok, Member of the Convention, 'The Constitution of the European Union', CONV 325/1/02, REV 1, CONTRIB 111, 6 December 2002.

10 CONV 234/02, CONTRIB 82, 3 September 2002.

11 See <http://www.theepc.be>, follow links to *Challenge Europe* Journal.

12 CONV 345/1/02, REV 1, CONTRIB 122, 16 October 2002.

13 CONV 335/02, CONTRIB 117, 19 November 2002; text prepared by the European Observatory of the Fondazione Basso.

14 CONV 317/02, CONTRIB 105, 30 September 2002.

15 Available on the Federal Trust website: http://www.fedtrust.co.uk/eu_constitution, follow links to Study Group and Background Material.

Article 70 alongside the Union's laws, regulations, decisions and the coordination of the policies of the Member States. Further details are provided under Article 76 in the same title, which details also the features of the other instruments.¹⁶

The primary conclusion to be drawn from this survey of the more general texts is that there is considerable variation in approach. From that very variety some provisional conclusions can be drawn. Specifically, uncertainty about where enhanced cooperation 'belongs' doubtless reflects the continued uncertainty about what it is actually for.

4 – Flexibility in a 'Constitutional' Text

Should any of the three forms of flexibility on which this paper focuses be included anywhere in the NCT, and in particular in Part One? Should a document of a constitutional type reflect the possibilities for flexibility within the system, or should it concentrate only on broad lines of unity, uniformity and general principle, within which exceptional derogations or special systems for flexibility have no part? These issues, it could be argued, are not matters of constitutional principle, as such, but rather belong in a second policy-oriented part of the treaties / legal-constitutional edifice of the EU, attached to the specific fields where they might arise.

Reflecting this general question, some specific questions arise about the three different categories of flexibility:

A. Enhanced cooperation

One ground for removal of enhanced cooperation could be that it has yet to be used and is indeed never that likely to be used given the restrictiveness of the conditions. So what point is there to retaining it anywhere in the Treaty framework? Treaty provisions should reflect reality not hypothetical scenarios. In favour of retention in the Treaty structure overall speaks the argument that considerable effort on the part of officials at the national and EU levels has gone into the drafting of the provisions—during successive IGCs of 1996-97 and 2000—and that such

¹⁶ Document available on <http://www.europa-web.de/europa/03euinf/08VERFAS/leinendr.htm>, dated 24 October 2002.

endeavours are not and should not be fundamentally purposeless. Usage of the provisions has at least been mooted, or perhaps better threatened, most plausibly in relation to Italy's initial reluctance to come into line over the Arrest Warrant measure. Consequently the provisions can be seen in the context of a set of bargaining and trade-off scenarios, principally centering around the relationships between the Member States.

B. Opt-out/derogation arrangements

It would amount to a major political decision to remove the derogation arrangements for EMU and Schengen from the EU legal/political order on the occasion of the conclusion of the anticipated NCT, and such a decision is highly unlikely to be taken. It is probably unworkable at present with EMU because to do so could have the effect of challenging the basis of what has been achieved in Euroland in terms of the creation of a single currency. Reference in Part One, given there is no equivalent reference at present in either the EC Treaty or the Treaty on European Union, seems an unnecessary complication, and it would be best to stick with the *status quo* of a system for derogation and variable geometry built into the detailed provisions. On the other hand, if the decision is taken to enumerate forms of competence by reference to categories such as 'exclusive' and 'shared' in Part One, whether in relation to internal or external competences, then it will be necessary to enter a rider to the effect that competence in relation to the euro is only exclusive for those Member States which have currently subscribed to the currency. Turning to Schengen, it needs to be recognised that, for a variety of reasons, the UK, Ireland and Denmark would not relinquish their derogations easily. However, the inclusion of the derogations in the Part One of the NCT itself seems unnecessary; it should suffice to provide for those derogations (as is already in effect the case for EMU) either in Part Two, or to retain a set of protocols, as is the case for Schengen, etc. The only question is whether this is fundamentally dishonest: would it mislead the ordinary citizen reading about the constitutional structure of the European Union if no mention were made of the existence of these provisions?

C. International agreements between Member States of the EU

It is, of course, possible that the NCT could explicitly *prohibit* the conclusion of international agreements between the Member States (some or all of them) outwith the institutional framework of the EU. Such a prohibition could only apply to agreements falling within the substantive scope of the EU's attributed

powers—assuming the principle of attribution will be carried over to the era of the NCT. That is a very unlikely scenario. It is only relatively recently that the idea that the EU might represent an *all-encompassing* framework for organising relations between European states has gained any currency. It remains a very contested idea. Even so, there has not been an explosion in the use of either partial or parallel agreements. Generally, Member States have demonstrated a trend towards preferring cooperation within rather than without the framework of EU law. These points suggest that this is a phenomenon to be tolerated, constitutionally speaking, but not necessarily given explicit constitutional provision.

5 – What Should be Included in the New Constitutional Treaty?

Enhanced cooperation in particular should be included in the NCT. It reflects a general principle of flexibility which the EU should embrace rather than reject—although it might help, of course, if some degree of common understanding about what it means could evolve within the EU's governance institutions, as well as within the Member States. The fragmentation risk associated by some with the Amsterdam innovations has not materialised; on the contrary despite the paucity of usage, even in relation to *plausible threats* to make use of enhanced cooperation as part of a wider bargaining process, the provisions are more likely to be cohesive than destructive of the *acquis communautaire*. The provisions on enhanced cooperation are the primary focus of attention in the rest of this paper.

The opt-outs are also likely to remain an element of EU law, but they reflect case-by-case (political) contingencies rather than general principles of constitutional order. Consequently, their place is in a second part of the Treaty—as would be obvious assuming the existing arrangements for Economic and Monetary Union were carried on for the future, and as would likewise seem sensible in relation to the various opt-outs for the UK, Ireland and Denmark (as well as associated opt-in arrangements) in relation to Justice and Home Affairs matters. However, the interaction—if any—between these derogation arrangements and the enhanced cooperation provisions might be a matter for Part One of the NCT, especially if it were to contain some codifications of the underlying federal-like constitutional principles which the Court of Justice has elaborated in relation to the EC Treaty in particular (e.g. explicit recognition of the primacy of EU law).

Likewise, it seems implausible that flexibility in the form of international agreements between the Member States will cease and there are no compelling reasons of constitutional principle to suggest that it should, but again it probably does not need

be recognised as such in the NCT. The underlying principles of EU law (supremacy, loyalty, etc.) would govern the relationship between such measures and the general edifice of EU law.

This is of course in some respects a bizarre conclusion, involving the exclusion of that which is actually used by way of flexibility mechanisms from Part One of the future NCT and the inclusion of that which is not used. Considerations of constitutional aesthetics and constitutional respectability could be used to drive the argument here, and these seem to speak in favour of focusing the constitutional question on enhanced cooperation as both a facilitator of flexible arrangements in the future and an expression of the general principle of flexibility.

6 – Questions Raised by the Inclusion of Enhanced Cooperation in the New Constitutional Treaty

The following questions are the focus of the remains of this paper:

- ✓ Where should enhanced cooperation appear in Part One – on its own in a separate Title or Section, or in conjunction with other provisions? If so, which ones?
- ✓ Should the provisions be basically the same as the Nice *acquis* or should further amendments be introduced above and beyond what would be strictly necessary to fit the provisions to the changed legal scenario of new legal edifice for the European Union (whatever the entity is called) based on a single legal personality for the EU?
- ✓ Should Part One contain a simple single statement of the principle of enhanced cooperation, or should more elaborated provisions be included? If the former, how should it be formulated?
- ✓ If more elaborated provisions are included in Part One, what elements might be included and what might be confined to the second part of the Treaties?

7 – Location of the Enhanced Cooperation Cooperations

Deciding where enhanced cooperation should be located is associated with deciding what it is for. The main possibilities in terms of location are the following:

- a) **Preamble/principles/missions:** this approach could be said to be supported by the fact that the present Article 11 EC, containing the principles for the use of enhanced cooperation under the EC Treaty, is located amongst 'principles' in Part One of that Treaty, right after the Member States' obligation of loyal cooperation (Article 10 EC).
- b) **Competences/missions:** the draft prepared for the EPC inserts enhanced cooperation—as a bare principle—amongst a list it containing most of the basic principles of competence attribution.
- c) **Instruments and procedures:** this is the solution adopted in the PDCT. Enhanced cooperation appears after an outline listing of the key principles for 'implementation of Union action' in Title V of Part One. That means that it is separated from the principles governing Union competences and actions (Title III). In a similar way, the Leinen draft adopts the approach of treating enhanced cooperation as an instrument of the EU.
- d) **Separate chapter, title or part:** this option is chosen by quite a number of influential drafts prepared by academics or similar, such as the Frascati draft, the Hain/Dashwood draft, the Paciotti draft, the Badinter draft, and the Freiburg draft. This largely reflects the status quo in the TEU/ECT, and allows a faithful reflection of the *acquis*. The disadvantage of including enhanced cooperation in a separate title, especially if it were included on its own in Part One as a bare principle leaving other conditions to be set out in Part Two, would be that it might appear that enhanced cooperation is itself a separate and free-standing means of achieving Union objectives, independent of the specific policy activities which the Union is mandated to engage in with a view to achieving its objectives.
- e) **Final provisions:** none of the published drafts locate enhanced cooperation amongst the final provisions.

It is important that if enhanced cooperation is to be included in the Basic Treaty, then it must be fully anchored or mainstreamed into the groundwork of the Union, not treated as an outlier. In that sense, the solution suggested by the PDCT seems a preferable solution for the NCT rather than preserving the *status quo* of treating enhanced cooperation as a separate subject, presumed not to be capable of assimilation to other topics covered by the Treaty. Of course, the solution is not all or nothing: it would be possible to adopt a variety of combinations. For example, a) + d), a) + c) and c) + d) are all possible combinations which could effect the desired objective of 'integrating' enhanced cooperation.

8 – The Nice *Acquis* or Changed?

Nice was widely evaluated as an ‘improvement’ upon Amsterdam, in the sense of providing more probably workable provisions. On the other hand, it still contains controversies, e.g. surrounding the role of the European Parliament, the future reduction in the proportion of Member States to trigger enhanced cooperation with the fixing of the minimum number of participants at eight, and the exclusion of security and defence matters from enhanced cooperation arrangements in the CFSP domain. These specifics of balance, focus and scope are not the only areas in which the Convention’s debate could result in changes to the Nice *acquis*. As the following section shows, the existing provisions could be reorganised a little more clearly in such a way as to permit a rational division of provisions between Part One and Part Two.

9 – A Range of Simplified Enhanced Cooperation Clauses

Whatever is included in Part One, it should be sufficient to clarify for the citizen what enhanced cooperation is for (e.g. the EPC draft does not go far enough to do that), but without cluttering the constitutional text with unnecessary detail. It may not be necessary to include all the elements suggested by Article 32 of the PDCT. The following section summarises what a system of enhanced cooperation actually needs to work, and what aspects should be included in Part One.

A. *Enabling clause*

Constitutional empowerment is needed to allow the detailed legal bases contained in Part Two of the treaty to be used by fewer than all of the Member States. It would be essential to include such a Clause in Part One.

B. *Definitional clause*

Constitutional communication would be fostered by a definitional clause, in which the basic meaning of enhanced cooperation as an expression of flexibility is put forward. Article 43(a) TEU, treated as a *condition* of the valid use of the enhanced cooperation clauses, is the closest the existing treaties come to a definition, and could usefully be taken as the basis. Enhanced cooperation must be:

‘aimed at furthering the objectives of the Union and of the Community, at protecting and serving their interests and at reinforcing their process of integration...’

This could be combined with respect for the *acquis*, encouragement to as many states as possible to participate, the restriction of enhanced cooperation to a case of last resort, and the obligation on the Commission and the Council to ensure the consistency of activities. These are the general foundational principles of enhanced cooperation. The additional clauses in the current pillar two and pillar three arrangements which specify the purposes of enhanced cooperation in the cases of CFSP and PJC could be dispensed with, once the objectives of the Union are generalised under the NCT.

C. Conditions clause

In this Clause the legal conditions, some of which would undoubtedly be justiciable, at least at the instance of Member States and institutions, would be set out. According to the current TEU provisions, enhanced cooperation activities must:

- ✓ respect the Treaties and the single institutional framework of the Union;
- ✓ remain within the limits of the powers conferred by the Treaties on the Community and the Union;
- ✓ not undermine the internal market or economic and social cohesion;
- ✓ not constitute a barrier to or discrimination in trade between the Member State and not distort competition between them;
- ✓ involve a minimum of eight Member States;
- ✓ not affect the provisions of the Protocol integrating the Schengen *acquis* into the framework of the European Union; and
- ✓ be open to all the Member States.

The threshold of participating Member States would seem to be the most controversial condition, and raises questions about what, for example, the principle of democracy might require.

Given the inapplicability of many of the general conditions in the area of CFSP, there are additional substantive conditions for enhanced cooperation in that field (Article 27a TEU) requiring respect for:

- ✓ the principles, objectives, general guidelines and consistency of the common foreign and security policy and the decisions taken within the framework of that policy;
- ✓ the powers of the European Community; and
- ✓ the consistency between all the Union's policies and its external activities.

However, in practice these 'conditions' are more to do with the definition and purpose of enhanced cooperation. They could therefore be dispensed with, or combined in the definitional clause.

Clauses a) and b) are a minimum for Part One of the NCT. It may be useful also to include Clause c).

D. Exclusions clause

- ✓ The most important exclusion is that enhanced cooperation should not be possible within areas which fall within the exclusive competence of the Union.
- ✓ It is also conceivable that the defence exclusion will be continued under the new constitutional settlement.

In the interests of constitutional clarity, the exclusions clause is a candidate for inclusion in Part One.

E. Institutional arrangements clause

The basic principle is the 'borrowing' of the institutions and legal mechanisms of the Union to allow the participating Member States to achieve their objectives. Many of these are relatively technical questions elaborated at present in Article 44(1) TEU, and these could usefully be reserved for Part Two.

F. Consequences clause

This would encompass the rights and obligations of participating and non-participating Member States, the obligation on non-participants not to impede the implementation of enhanced cooperation arrangements, and the exclusion of any acts from the Union *acquis*. Again, it should be located in Part Two.

G. Triggering and implementation clauses

In close association with the institutional arrangements clause are those on triggering and implementation, including budgetary matters, which raise particular difficulties where not all Member States are involved. Implementation also encompasses the arrangements for non-participants to opt-in at a later stage, which is established as a principle in the Conditions Clause. While it would be wrong to conceive of these clauses as purely technical, since they would encompass the very important question of European Parliamentary participation in both triggering and implementation, it would be more appropriate to include these in Part Two. Another controversial question would be that of the 'emergency brake', largely removed from the realm of enhanced cooperation by the Treaty of Nice, but still applicable by default in the realm of CFSP. There is no case to extend its use. These clauses are likely to be differentiated across policy areas, to create appropriate arrangements for CFSP, and perhaps also for police and judicial cooperation in criminal matters.

10 – Conclusions

The paper concentrates on whether a limited number of aspects of the overall 'flexibility question' should be included in any new constitutional treaty likely to emerge from the combined Convention/IGC reform process. The discussion is limited to the enhanced cooperation provisions of the TEU and the enhanced cooperation Treaty, the existing types of opt-outs and derogations in favour of particular Member States, and the use by the Member States of international agreements outside the institutional framework of the EU. It leaves aside other wider questions about flexibility. As a general assumption, the paper accepts a positive synergy between the principles of flexibility and constitutionalism. Moreover, it views flexibility as a normative principle of governance. This means that resolving the where, what and how of flexibility in the NCT cannot ever be a merely technical question. On the contrary, it is a highly political question, in every sense. Furthermore, the paper has tried to be politically realistic about issues such as the derogations for EMU and Schengen.

Article 32 of the PDCT, although a skeleton provision, offers important and authoritative guidance about the 'thinking' of the influential actors within the Convention on the question of whether to include enhanced cooperation, and if so in what form and to what extent. Other texts also provide (inconclusive) guidance on how the enhanced cooperation provisions in particular might find a home in any

NCT, and stronger messages can be expected as and when the Member States decide to submit concrete constitutional suggestions to the Convention.

Enhanced cooperation should be included in Part One of the NCT. It reflects a general principle of flexibility which the EU should embrace rather than reject. The opt-outs are also likely to remain an element of EU law, but they reflect case-by-case (political) contingencies rather than general principles of constitutional order. Consequently, their place is in a second part of the Treaty or in protocols/organic laws. There are no compelling reasons of constitutional principle to suggest that cooperation between the Member States via the medium of international law should cease, but again this form of flexibility should probably not be recognised as such in the NCT, and especially not in Part One.

Assuming enhanced cooperation is included in Part One, then it needs to be fully mainstreamed within the Union system, and not treated as an outlier. The solution suggested by the PDCT of incorporating enhanced cooperation into the activities, policies and instruments of the Union within Part One seems the best. This is better than preserving the TEU *status quo* of treating enhanced cooperation as a separate subject, presumed not to be capable of assimilation to other topics covered by the Treaty. The Nice *acquis* is a starting point for deciding what should go in the enhanced cooperation provisions, but it could be clarified and simplified, particularly with reference to what is included in Part One and what is included in Part Two. The most controversial questions which the Convention must decide upon are:

- ✓ Can enhanced cooperation successfully be defined?
- ✓ Should eight Member States remain the minimum threshold?
- ✓ Should defence continue to be excluded from the sphere of enhanced cooperation?
- ✓ What is the appropriate role for the European Parliament in the triggering and implementation arrangements?

Part One should include the following clauses:

- ✓ **An enabling clause;**
- ✓ **A definition clause;**
- ✓ **(Possibly) a conditions clause; and**
- ✓ **An exclusions clause**

Part Two should include the following clauses:

- ✓ **An institutional arrangements clause;**
- ✓ **A consequences clause; and**
- ✓ **(Differentiated) triggering and implementation clauses for the various policy areas.**

Entry into Force and Revision

Bruno de Witte

International *treaties* habitually end with a section called ‘final provisions’, and so do national *constitutions*. Therefore, also the hybrid *constitutional treaty* that might emerge from the Convention and the subsequent IGC is likely to have a final chapter or section called ‘final provisions’. Such a section will contain a number of rules that apply horizontally, that is, to the treaty or constitution as a whole rather than to any of its specific parts. These horizontal rules will include two sets of rules that are of crucial importance for the operation of the instrument as a whole: the rules on how the document (whether a treaty or constitution) will *enter into force*, and the rules on how the text of the document can be *revised* in the future. The questions of *entry into force* and *revision* are, by far, the most politically controversial aspects of the final provisions and also raise some intricate technical legal problems. This paper will essentially be devoted to these two questions. However, in a first section, I will make some comments on the more general question of the place and role of final provisions.

1 – The Place and Content of Final Provisions in a Reorganized Treaty Text

The overall approach of the Preliminary draft Constitutional Treaty of 28 October 2002 presented by the Convention’s Praesidium (hereafter: PDCT), is to divide the proposed *Treaty establishing a Constitution for Europe* into a Part One of only 46 articles entitled ‘Constitutional Structure’, followed by a Part Two of unspecified

length on ‘Union policies and their implementation’.¹ This subdivision has practical consequences for the way the final provisions are dealt with: the subject matter that, today, is found in the final provisions of the EU and EC Treaty is also being divided over the two Parts. Questions relating to membership are hived off from the other ‘final’ provisions and put in a concluding Title X of Part One, containing four articles: Article 43 defining substantive conditions of membership, Article 44 defining the procedure for accession, Article 45 on suspension of membership, and Article 46 on withdrawal. The other final provisions, including weighty matters such as entry into force and revision, are put in a final *Part Three of the Constitutional Treaty* – which will eventually be a long distance away from its ‘fundamental’ Part One (since Part Two is likely to be much longer than Part One).

The Praesidium’s choice of having a short separate Part Three makes sense: because the provisions of Part Three are ‘horizontal’ provisions referring to the content of both Part One and Two, it is logical to list them separately from both these main Parts. However, this separation reduces the legibility of the constitutional part, by removing some of the essential bones from the skeleton and putting them next to it. The absence from Part One of the *revision clause* is particularly awkward, not only because of its intrinsic importance, but because it is closely tied to the question of membership. It is not a coincidence that, today, Articles 48 (membership) and 49 EU (revision) follow one after the other. Indeed, the accession of a new member state inevitably implies also an amendment of the existing Treaties, and the procedure of Article 49 (accession) can therefore be seen as a special form of Treaty revision alongside the general revision procedure of Article 48. Withdrawal from membership of the EU, which the Praesidium’s Draft proposes to recognise, would similarly lead to a revision of the existing Treaties. If one adopts the proposed structure of the Constitutional Treaty, the specific Treaty amendments linked to changes of membership would be recognised to be of fundamental importance, through their inclusion in Part One, whereas the general revision procedure would be ‘relegated’ to the final Part Three.

1 In the mean time, the Convention has been considering the option of devoting a separate Part Two to the text of the Charter of Fundamental Rights (see discussion of this option in the essay by G. de Búrca in this collection), so that the ‘Policies’ would become Part Three. However, I will refer in this paper to ‘Part One’ and ‘Part Two’ in the sense given to these expressions by the PDCT of October 2002.

For this reason, I think that **one should include the revision procedure(s) in Part One, rather than (as proposed in the Preliminary Draft) in Part Three.** This would be an unusual presentation, because revision or amendment clauses are normally included among the final clauses of a treaty, but it would be justified by the need to emphasize the central constitutional importance of the question of how the Constitutional Treaty will be allowed to develop in the future.

The final provisions chapter of the Constitutional Treaty could be short or long, depending on what one decides to include in that chapter rather than in the other treaty chapters. The EC Treaty and EU Treaty offer two contrasting models in this respect. The *EC Treaty* has a Part Six called ‘General and Final Provisions’ with no less than 32 Articles (Art. 281 to 312), and two further ‘Final Provisions’: Art. 313 (ratification and entry into force), and Art. 314 (authentic languages). The very long Part Six combines some traditional final clauses with a large number of provisions that did not fit easily anywhere else and were therefore thrown together in a kind of *pot pourri*. It includes, for instance, various external relations provisions (among which is the crucial Article 300), the ‘systems of property ownership’ clause (Article 295), and the residual competence clause of Article 308. The *EU Treaty* has a much shorter section entitled ‘Final Provisions’, which is of a more traditional kind. It contains eight Articles (Art. 46 to 53) that deal with: powers of the ECJ, relation with the EC Treaty, amendments, accession, repeal of earlier treaties or parts of treaties, duration, ratification and entry into force, authentic languages.

Most of the drafts that have been circulated, and indeed the PDCT, follow the second model. For the purpose of drawing up a relatively short constitutional treaty, this EU Treaty model is clearly preferable. One should avoid making of the last section a receptacle for disparate and unconnected provisions. For instance, it seems clear that provisions on *decision-making in external relations*, corresponding to the present Articles 300 and 301 EC, should be included in the External Relations sections of Parts One or Two; that *Article 308 EC* (if kept) should go to a new Competences section in Part One, and that provisions on the *powers of the Court* (Article 46 EU) should be included in the Chapter on the institutions or a special Chapter on judicial protection. The regime of *closer cooperation* could conceivably be included in the final provisions (as is the case with the present Articles 293 and 306 EC), but it would better fit elsewhere.²

2 See the contribution of J. Shaw to this collection.

For a number of other subjects, a choice must be made between allocating them to a first chapter of the Treaty dealing with ‘principles and objectives’, or to the ‘final provisions’. This is the case for instance for the provision attributing legal personality, and for a possible provision (if its inclusion is considered to be wise!) on the relation between EU law and national law. The mechanism of suspension of membership rights based on the present Article 7 EU is also a dubious case. If one emphasizes the substantive nature of the values protected by the mechanism, it fits where it is now, namely in the first chapter of the Treaty; if, on the contrary, one puts the emphasis on the most far-reaching consequence of the mechanism, namely a suspension of membership rights, then it would fit better at the end, together with the provisions on acquisition and loss of membership—as is done with the PDCT in its Article 45. On balance, I submit that the provisions on legal personality, on primacy (if included at all) and on ‘sanctions’ would all fit better elsewhere than in the final provisions.

This would leave for inclusion among the final provisions in ‘Part Three’ only the following matters, which are in fact the ones listed in the PDCT (Articles x to x + 6):

- ✓ repeal of existing Treaties;
- ✓ territorial scope;
- ✓ legal status of annexed Protocols (as such separate Protocols are likely to remain anyway);
- ✓ adoption, ratification and entry into force of the constitutional treaty;
- ✓ duration;
- ✓ languages in which the Treaty is drawn up.

As indicated above, the procedure for revision of the constitutional treaty (Article x + 3 of the PDCT) should preferably not be left here, but be transferred to a ‘Membership and Revision’ Title in Part One.

2 – Entry into Force of the Constitutional Treaty

As the work of the Convention progresses, and as the Intergovernmental Conference that will follow the Convention is coming closer, political attention has been drawn to the conditions under which this constitutional treaty will be able to enter in force and effectively fulfil the grand ambition of replacing the existing wordy and complicated Treaties with a reorganized and improved fundamental document.

The Convention and the ensuing IGC are a gigantic leap of faith in this respect. In view of the enormous difficulties of reaching an agreement on the very modest agenda of the Treaty of Nice, the expectation that first the Convention and then the IGC will now reach a consensus on a much broader and more ambitious constitutional agenda is startling. Indeed, the entry into force of the Constitutional Treaty is, at first sight, subject to the same rigid legal conditions as the Treaties of Maastricht, Amsterdam and Nice. As the future Treaty (whether it is called a constitutional treaty or not) will necessarily be an amendment of the existing EC and EU Treaties, the revision procedure described in Article 48 EU applies. In accordance with Article 48, the new Treaty will only enter into force if approved by *all* the member state governments in the framework of an IGC, and if ratified by *all* states according to their constitutional requirements.

It has recently become clear that ‘all states’ will not mean just fifteen states (as previously with the Treaty of Amsterdam and the Treaty of Nice), but up to twenty-five states, depending on how many candidate states will eventually decide to join the European Union. So much was made clear by the Conclusions of the European Council of Copenhagen, in December 2002, which specified that ‘the new Member States will participate fully in the next Intergovernmental Conference’ and that ‘the new Treaty will be signed after accession.’³ Thus, the Constitutional Treaty will be signed only after 1 May 2004, assuming that this target date for accession will indeed be respected (which presupposes that all the *present* member states will have ratified the accession treaty before then). It will be signed by all the states that will be part of the EU at that moment in time, that is, possibly twenty-five states, or less than that number if one or more of the *candidate* countries fail to ratify the accession treaty. In any case, prior to 1 May 2004, all ten candidate countries will fully participate in the negotiation phase of the IGC without being as yet members of the EU, following a precedent set by the participation of Spain and Portugal in the IGC that was put in place in 1985. That IGC led to the adoption of the Single European Act, which was signed in early 1986, after Spain and Portugal had become (on 1 January 1986) members of the European Communities.

3 Copenhagen European Council of 12 and 13 December 2002, Presidency Conclusions, paragraph 8.

The opening up of the IGC to the candidate countries means that the entry into force of the Constitutional Treaty will, normally speaking, require the agreement of up to 25 national governments and, subsequently, 25 individual ratifications in accordance with national constitutional requirements. This, obviously, multiplies the possibility of an *accident de parcours* comparable to, or worse than, what happened with the Treaty of Maastricht in Denmark and with the Treaty of Nice in Ireland. Indeed, the question of what would happen if all member state governments approve a revision treaty, but one of the countries is unable to ratify it, arose already for the Maastricht Treaty, after the first Danish referendum, and for the Nice Treaty, after the first Irish referendum. In neither of these two cases did the other member states, or the EU institutions, officially argue that the other member states could go ahead without the recalcitrant state. They managed to find a solution which enabled these two countries eventually to approve the revision treaty in a second referendum, so that the EU legal rules for entry into force were entirely respected.

This time around, the argument that the majority of states should be able to go ahead with a Treaty revision even in the absence of some countries' ratification is being openly made. Whether it is because of the large increase of national 'veto players' after accession, or because the ambitious nature of the Constitutional Treaty seems likely to cause greater parliamentary or popular opposition in one or other country, the fact is that we have witnessed, very recently, a remarkably powerful current of opinion advocating a circumvention of the rigid amendment rules fixed by Article 48 EU Treaty. One of the expressions of this unorthodox view was an editorial comment of Ferdinando Riccardi in *Bulletin Quotidien Europe* of 29 October, in which he wrote that the Convention must affirm that 'the constitutional treaty will not need the ratification of all Member states to take effect between countries having approved it, as long as the latter represent a very high percentage (yet to be defined) of the total.' He added: 'It is indeed unthinkable that future Europe's essential project, and two years of negotiations, can end up in the "dustbin of history" because at the last hour the Parliament of a small country changes its mind, or because the Labour Party returns to power in Malta (...)'.

Riccardi's is not an isolated voice. The Draft Constitution presented by the European Policy Centre stipulates, in its Article 77, that it would enter into force if supported 'by three quarters of the Member States of the Union representing 75% of the

population according to their own constitutional requirements.’⁴ This view is also shared by some central actors of the European constitutional debate. Giscard d’Estaing himself was quoted (by the *Financial Times*, 11 November 2002, p.4) as agreeing with it and offered a tentative justification: ‘The probability is that of 25 or 27 member states [after EU enlargement] 23 would accept [the constitution] and two or three will refuse. (...) We have to abrogate the treaties that exist. If a country says that it does not like the new treaty, there’s no existing structure for them to cling to, they cannot seek refuge in the old agreement.’ So, in his view, the enactment of an ambitious constitutional treaty would be some kind of *refoundation* of the project of European integration rather than a *revision* of the existing Treaties.

References to this question can also be found in recent documents of the European Parliament and the European Commission. In the *European Parliament*, a motion for a resolution presented by rapporteur Jean-Louis Bourlanges proposed the following new rule, which is similar to what was proposed in the EPC Draft Constitution:

‘The ratification procedure should be revised with a view to ensuring that a small minority cannot block the ratification of the future constitutional treaty—for example, ratification could be secured by a dual qualified majority comprising at least three-quarters of the Member States representing at least three-quarters of the Union population—even if, in return, specific forms of cooperation must be negotiated with any Member State which does not ratify the Treaty.’⁵

However, this particular paragraph of the motion for a resolution was deleted by a vote of the plenary in its December 2002 session, and the resolution as adopted by the European Parliament does not refer at all to the question of entry into force of the Constitutional Treaty.⁶ This event shows that, even within the pro-integrationist European Parliament, the ‘refoundation theory’ meets with strong opposition.

4 <http://www.theepc.be/Word/EUconst.doc>.

5 *Report on the typology of acts and the hierarchy of legislation in the European Union* (rapporteur: Jean-Louis Bourlanges) of 3 December 2002, Motion for a resolution, point 5.

6 Amendment tabled by S.-Y. Kaufmann MEP and adopted by 266 in favour, 236 against and 4 abstentions (see *Agence Europe* 19 December 2002, p. 4).

As for the *European Commission*, its most recent official contribution to the Convention simply argues that entry into force is ‘a matter to be studied in depth’.⁷ However, the accompanying Draft Constitution of the same day (commonly known as ‘Penelope’)—which emanates from the Commission but is emphatically presented as *not* being the Commission’s official opinion—makes an elaborate proposal to facilitate the entry into force of the Constitutional Treaty.⁸ Indeed, this is certainly the most sophisticated construction ever made in order to circumvent the unanimity rule for Treaty revision. The Penelope document proposes that the adoption of the ‘Treaty on the Constitution’ (as they call it) be accompanied by the simultaneous adoption of a separate short treaty called *Agreement on the Entry into Force of the Treaty on the Constitution of the European Union*. The sole purpose of this additional agreement would be to facilitate the entry into force of the Constitutional Treaty. The additional agreement, although adopted at the same time, would be ratified first, so that it could pave the way for the Constitutional Treaty. That Treaty would only enter into force one year after the additional agreement. The purpose of this delay is to allow each single member state, when ratifying the additional agreement, to express a choice between either accepting the content of the Constitutional Treaty, or (while not accepting it) leaving the European Union if the Treaty is accepted by three-quarters of the member states. If, at the end of the transitional year, it appears that at least three-quarters of the states have indeed made the positive statement of acceptance, then the Constitutional Treaty enters into force between them and the other states comply with their earlier commitment of leaving the EU, while starting negotiations with the EU on the organisation of their future relations.

However, the rub with this ‘gentle exit strategy’ is that, as the Penelope study accepts, the preliminary agreement should itself be agreed upon and ratified by all member states before it can enter into force and effectively replace the current revision procedure of Article 48 EU. It seems quite likely, though, that a member state opposed to the *content* of the Constitutional Treaty will also refuse to ratify an agreement that is designed to facilitate the *entry into force* of that Constitutional

⁷ European Commission, *For the European Union – Peace, Freedom and Solidarity. Communication of the Commission on the Institutional Architecture*, COM(2002) 728 of 5 December 2002, at p. 22.

⁸ *Penelope* can be found on: http://europa.eu.int/futurum/documents/offtext/const051202_en.pdf

Treaty, particularly if that could imply that it would be ‘kicked out’ of the European Union. Therefore, the Penelope group also included a last resort clause: if by a given date, the preliminary agreement has been ratified by at least five-sixths of the member states (so, presumably, 21 out of 25 states), then it will enter into force for all, disregarding the normal ‘overall ratification’ rule. So, when all is said, the Penelope Study *does* affirm the need to adopt the ‘constitutional rupture’ approach, that is, the right for the overwhelming majority of states to move ahead with a Constitutional Treaty even against the opposition of up to four countries.⁹

As this plan was presented only very recently, it has not been widely discussed yet. In a first reaction, a commentator in *The Economist* described it as ‘an extraordinary plan to kick awkward members out of the European Union.’¹⁰ The editor of *Bulletin Quotidien Europe* reacted, predictably, in a different way. Mr Riccardi congratulated the authors of the Penelope study and urged the Convention to address this issue as soon as possible so ‘that the Convention avoids continually being subject to blackmail from countries that reject the progress desired by Member States by threatening that their national parliaments won’t ratify the particular motion being voted on.’¹¹

So, what can one say about this *stratégie de la rupture*? In *political* terms, there is certainly much to say both for and against it. Let me just note that one might turn the central argument around: it is precisely because, this time, we may not have an ordinary treaty revision but an ‘essential project’ marking ‘a new beginning’, that the participation and agreement of *all* the member states seems to be of vital importance. From a *legal* point of view, anyway, the refoundation approach promoted by this plan is quite problematic, for the following reasons.

9 The Penelope document argues (at p. XII) that insertion of this ‘last resort’ clause would itself require the agreement, at the time of *signature* (as opposed to ratification) of all the governments and would therefore be a departure from Article 48 that would be compatible with international law (because all states would agree to substitute one revision rule by another). But, apart from the fact that overall agreement to include such a clause seems politically very unlikely, the replacement of Article 48 through an agreement between *governments* (without national parliamentary approval) would be in clear violation of the constitutional law of most member states.

10 Charlemagne, ‘The Perils of Penelope’, *The Economist*, 14 December 2002, p. 32.

11 F. Riccardi, ‘A Look Behind the News’, *Bulletin Quotidien Europe*, 11 December 2002, p. 3-4.

The Vienna Convention on the Law of Treaties allows for some of the parties to a treaty to decide to modify that treaty among themselves without the participation of the other original state parties (a so-called *inter se* modification). Yet, this is only allowed if that modification does not affect the rights that the non-participating states draw from the original treaty. This can never be the case for the treaty to be adopted by the IGC of 2004. The adoption of a Constitutional Treaty will unavoidably affect and modify the existing rights of all the EU members. Therefore, under the current rules of Article 48 EU, all the member states must give their agreement to the changes. It does not help to say that the enactment of an ambitious reform should not be seen as a continuation of the existing treaties, but as a wholly new beginning. Legally speaking, there can be no *tabula rasa*. There is an obvious logical flaw in Giscard d'Estaing's phrase (quoted above) that 'if a country says that it does not like the new treaty, there's no existing structure for them to cling to, they cannot seek refuge in the old agreement.' It is exactly the contrary: if a country says 'no' to the new treaty, the old treaty remains in force and there is no new structure which the 'yes' countries could adhere to. As for the sophisticated construction proposed in the Penelope study, it only works if all states are willing to 'play the game', but if one or more states decide that, after all, they prefer the existing Treaties to the proposed Constitutional Treaty, they are legally entitled to stick to that view and prevent the others from moving ahead.

For this reason, I consider the Penelope plan to contain a provision (the 'last resort' clause) which is illegal from the point of view of current EU law (Article 48 EU) and cannot be justified under general international law either. It should therefore not be adopted. **Instead, the Constitutional Treaty could have an entry-into-force clause consisting of a first sentence stating (in accordance with the text of Article 48 EU) that:**

'This treaty shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements',

followed by a second sentence that would seek to facilitate entry into force by words of the following kind:

'As soon as five-sixths of the member states have ratified this Treaty, these states may decide by common accord to open negotiations with the remaining member states in order to agree upon any other terms on which this Treaty will enter into force. All states shall seek, in a spirit of sincere cooperation, to bring such negotiations to a mutually acceptable conclusion.'

A procedural arrangement of this kind could achieve part of the aims of the Penelope proposal, but in a legally more orthodox way. It could be used by the five-sixths majority to put pressure on the others either to join them in approving the Constitutional Treaty, or to accept to let them go ahead with the Constitutional Treaty while settling for a status of associated member, on terms to be agreed in common. The proposal to add this supplementary clause in the entry-into-force article raises the question of whether it is permissible at all, for the drafters of the Constitutional Treaty, to provide for *alternative* or *additional* requirements for entry into force beyond what is now stated in the last sentence of Article 48 EU. In my view, the answer is yes. In the same way as Article 48 EU does not exclude recourse to the preliminary mechanism of the Convention, it can be argued that it does not *exclude* either the enactment of supplementary rules for entry into force, as long as no country is forced to agree to its entry into force outside its normal constitutional rules. Therefore, the Convention could also propose other conditions for the entry into force of the Constitutional Treaty such as, for instance, the requirement that the Treaty should be resubmitted to the Convention for approval *after* the IGC, or the requirement that the Treaty should be approved by a Europe-wide popular referendum taking place on the same day in all member states (in addition, I repeat, to the individual requirements for ratification imposed by the constitution of each member state).

3 – Revision Clause(s)

Even though the constitutional treaty can hardly change the ‘rules of the game’ as far as its own entry into force is concerned (as I argued in the previous section), it may well change the rules as far as future revisions of the constitutional treaty are concerned, by replacing the current revision clause of Article 48.

In many states, a revision of the Constitution is a solemn event which, due to the rigidity of the revision procedure, occurs only rarely. One of the most extreme examples is the Constitution of the United States which has hardly been modified in the course of the past century. Similarly, the UN Charter (which is called, by many authors, the ‘constitution’ of the world community) seems almost impossible to revise. However, it would be wrong either to hope or to expect that the future European Constitution will be similarly stable in time. In the European Union, constitutional change in the form of revision and accession Treaties has, so far, been very frequent. In the past twelve years, there has been, in effect, a semi-permanent revision process, whereby one revision already contained the seeds of the next one.

The last one, the Treaty of Nice, again contained a Declaration by which the member states committed themselves to having another IGC in 2004, and to have preparatory debates which, as we know, turned into the current Convention-led constitution-making process.

When taking a general view of this past decade, one can say that the revision of the European treaties has ceased to be an incidental occurrence devoted to technical adjustments and has, instead, become an ongoing concern of the member states and the EU institutions, which involves important policy choices about the institutional architecture and basic values of Europe and, indirectly, about the political future of each member state. It would be wrong to think that the present discussion in the Convention, and the IGC of 2004, will put an end to this ongoing concern. The Constitutional Treaty may well mark an important new stage of the European integration process, but not its end-stage.

This means that one needs to give serious consideration to a reform of the ‘rules of change’ as currently laid down in Article 48 EU. The current rules have formed the object of two broad kinds of criticism. The *first criticism* is the fact that revision is entrusted to an intergovernmental conference which, in practice, has meant diplomatic negotiations happening behind semi-closed doors, with little public debate, and culminating in ugly and ineffectual horse-trading at the final European Council summit. The Nice IGC highlighted all these negative aspects, to the extent that even the governments themselves, the prime players in this process, became convinced of the need for change. The *second criticism* is the fact, already mentioned in the previous section of this paper, that treaty revisions need an overall consensus among all member state delegations, followed by individual ratification by each state. At the summits of Maastricht, Amsterdam and Nice, last-minute failure threatened, and the accord on revision was achieved each time at the cost of postponing or sidelining some of the more contentious issues, and even then the Treaties of Maastricht and Nice were almost derailed at the subsequent stage of national ratifications. In a future European Union with an even larger membership, this cumbersome mechanism may become altogether untenable. Even assuming that the Constitutional Treaty itself safely overcomes all the hurdles (see discussion in the previous section), it will not be carved in stone for many future generations to come. Since it will not be the final political settlement in the European integration process, the Constitution must create a realistic perspective of continuing the process of gradual change that has marked the European Union so far.

To these two criticisms of the current revision procedure, two main responses have emerged: the response to the closed nature of the Treaty revision process is, of

course, the *Convention method*; whereas the response to the rigidity of the current revision process is the idea of *setting in place two different procedures* for Treaty revision: a rigid procedure for the very basic provisions, and a more flexible provision for the rest. Both these responses are attractive, but their precise contours need to be spelled out. In the following pages, I will try to contribute to doing this.¹²

A. The Convention method

The undoubted attraction of the Convention method lies in the way it broadens participation in the constitutional conversation and thereby allows a public *débat d'idées*, and also, more specifically, in the way that it provides a meaningful opportunity for the European Parliament and for national parliaments to directly influence the drafting of the European constitutional text, in contrast with the essentially passive, or potentially negative, role devoted to them in the traditional IGC regime.

The Convention Working Group on national parliaments proposed in its final report that ‘the method of the Convention should be formalised in a future Constitutional Treaty, as a preparatory mechanism for future Treaty changes.’¹³ The term ‘preparatory mechanism’ is rather timid. Others have, more radically, proposed that the power of making constitutional changes should be entrusted to a Convention composed in ways similar to the present Convention alongside, or instead of, an intergovernmental conference. One might mention, for instance, the procedure indicated in the revision clause (Article 101) of the Penelope document. It is composed of three steps (apart from the national ratification stage which comes at the very end): as a first step, the European Council declares, by a simple majority of its members, that one or more provisions of the Constitutional Treaty require revision; as a second step, a Convention is convened (composed like the present Convention) which may adopt a *recommendation for revision* by a majority of three-quarters; the third step is the *adoption* of the recommendation by the European Council. In this

12 Much of the inspiration of what follows comes from the report of the European University Institute of July 2000: *Reforming the Treaties’ Amendment Procedures. Second Report on the Reorganisation of the European Union Treaties* submitted to the European Commission on 31 July 2000, http://europa.eu.int/comm/archives/igc2000/offdoc/discussiondocs/index_en.htm.

13 CONV 353/02 of 22 October 2002, p. 15.

way, the Convention is allowed to determine the content of the changes, but the final decision of whether or not to go ahead with them is left with the governments of the member states. I agree with this mechanism, except on one point: rather than in the European Council (an EU institution), the revision should be adopted in a meeting of representatives of the governments (who could, in fact, be the members of the European Council themselves), so as to preserve the treaty nature of the Constitutional Treaty.

B. Differentiation between revision procedures

The Laeken Declaration poses the question whether there should be a ‘distinction between the amendment and ratification procedures for the basic treaty and for the other treaty provisions’. Putting the question seems to presuppose a positive answer. Indeed, making this distinction was one of the prime motives for undertaking the reorganisation project, as one can see very clearly, for instance, in the Dehaene/Weizsäcker/Simon report of 1999.¹⁴ There is no trace of such a distinction in the Convention Praesidium’s ‘skeleton’ of October 2002, which simply refers in Article x + 3, in the singular, to ‘Procedure for revision of the constitutional treaty’, but many of the draft constitutional documents that were circulated in recent months propose to make that distinction. If a distinction between amendment procedures is made, then all of them must arguably be mentioned in Part One; indeed, the amendment procedure(s) applicable to Part Two is of equally fundamental constitutional importance as the amendment procedure applicable to Part One provisions.

Let us assume, for the sake of simplicity, that there will be one rigid amendment procedure for a Part One of the Constitutional Treaty dealing with the institutional structure and fundamental values, and a less rigid amendment procedure for a Part Two dealing with the policies (though one could also envisage a less straightforward distinction). In which way, and to which extent, could these procedures be differentiated?

14 Von Weizsäcker, Dehaene and Simon, *The Institutional Implications of Enlargement*, report to the Commission of 18 October 1999, http://europa.eu.int/igc2000/repoct99_en.pdf, at p. 12-13.

If one considers how the amendment procedure for Part Two could be made less cumbersome than the current procedure of Article 48 EU, then there seem to be two different, but possibly cumulative, ways:

- a) Adopting a model of ‘autonomous revision’, i.e. revision decided by the EU institutions *without the need for ratification of the amendments by the individual national parliaments*.
- b) *Abandoning the requirement that all states should approve the changes* and replace this rule by some sort of yet to be invented ‘superqualified majority’.

Regarding the first way, one may note that the EC Treaty, already today, provides for some cases of simplified change in which the decision-making on amendment is entrusted to the EU institutions (usually, the Council acting unanimously) rather than an intergovernmental conference. However, this existing model should not be extended to the whole of Part Two. It has, in my view, a formal and a substantive defect. The formal defect is that, by providing for a modification of a *Treaty* rule by means of an *unilateral act of an EU institution*, it creates some uncertainty about the legal status of the newly amended rule: is the new rule still *primary Treaty law* or has it become *secondary EU law* and, if the latter is the case, how does this particular type of secondary law relate to the rest of secondary EU law? In order to avoid this uncertainty, **the amendment could be enacted by means of a ‘Decision of the representatives of the member states’**, i.e. the same physical persons that also compose the Council but operating with a different hat: acting under international law to conclude an international treaty in simplified form, rather than acting in the framework of the EU institution called Council.

The second, substantive, defect of the presently existing mechanism of ‘autonomous’ revision is that it does not directly involve either the European or the national parliaments. This exclusion could not be justified in a future simplified revision procedure. So, the Decision of the representatives of the member states, mentioned above, should either receive the assent of the European Parliament or provide for the prior formal consultation of national parliaments (to compensate for the fact that they will abandon their individual right of approval for changes of this part of the Treaty). One could also **combine both levels of parliamentary representation by simply convening a Convention that would have the task of adopting a recommendation for revision addressed to the governments**. I do not think that the convening of a Convention would be too cumbersome a mechanism for changes of Part Two. It would concentrate the minds on the importance of the act and create some time for reflection.

The second way in which greater flexibility could be created is, of course, to remove—as far as Part Two of the Treaty is concerned—the requirement that amendments must be approved by *all* the member states. This requirement could be replaced by a superqualified majority of, say, three-quarters of the states representing at least three-quarters of the population of the Union. Combining this with the ‘autonomous’ procedure described above, *a flexible revision rule for ‘Part Two’ could be worded as follows:*

‘Amendments of provisions [other than of Part One] of this Treaty will be made on the basis of a proposal adopted by a Convention acting by a majority of two-thirds of its members. This proposal will be adopted by means of a Decision of the representatives of the governments of the member states, acting by a majority of three-quarters of the states, provided these states represent at least three-quarters of the total population of the Union. The amendment will enter into force on the date specified in the Decision.’

The development of a two-track system of Constitutional Treaty amendment does not mean that ‘Part One’ should remain subject to the present heavy procedure of consensus among *all* governments (preceded by a Convention), combined with the requirement of ratification by *all* member states. Most of the draft constitutions that have been circulated so far stick to the requirement of the common accord between all states, and their unanimous ratification, for changes of the essential constitutional provisions.¹⁵ I wonder whether this should remain the case in the future. The reasons that led to the current speculations about allowing for a less-than-unanimous *approval and ratification* of the Constitutional Treaty (as discussed in the previous section of this essay) will occur again and again in a future Union of 25 or more states. The rigidity of the present rule of Article 48 EU may well become untenable. I therefore approve of the proposal made in the Penelope document that amendments of ‘Part One’ could be approved by a very heavy five-sixth majority of states (rather than all of them) followed by ratification under the constitutional rules of five-sixth

¹⁵ E.g. the Hain/Dashwood draft, Article 25. But see the EPC/F. Dehousse draft, Article 76: amendments adopted if approved and ratified by a majority of 75% of the member states representing 75% of the population.

of the states (rather than all).¹⁶ This does not necessarily mean that one should allow in the future for a small minority of states to be flatly overruled in decisions on revision of the fundamental elements of the Constitution. One should rather try to devise a mechanism allowing for the partial opt-out of unwilling member states from future revisions agreed by the very vast majority (if such an opt-out is practically possible, which would depend on the nature of the revised norms), or for their withdrawal from the Union.

Finally, if two sets of amendment rules are introduced, it will be necessary to avoid amendments adopted under the more flexible revision procedure that could indirectly modify the more heavily entrenched provisions of the constitutional treaty. One way of achieving this would be to make it compulsory to consult the European Court of Justice before any amendment of the constitutional treaty is undertaken, so that the Court can decide whether the envisaged amendment is truly one that can be made under the flexible rules.

In the previous pages, I have only dealt with some of the central issues raised by a possible modification of the current revision procedure. However, the Convention and the IGC should also discuss (if time allows!) the introduction of further reforms of the ‘rules of change’, such as providing for the direct involvement of the European citizens, either by **creating a right of constitutional initiative**, i.e. the possibility for a group of EU citizens to initiate a Treaty amendment procedure on a given matter, or by **requiring the direct popular approval, by means of a Europe-wide referendum, of constitutional changes, or at least of changes made to Part One of the Constitution**. The latter innovation would require a solution to the very delicate question of the conditions of approval of constitutional changes by means of a European referendum: would an overall (possibly qualified) majority across Europe be sufficient, or would there have to be a majority in all, or almost all, member states separately? As things stand, the proposition that a constitutional change could be enacted even against the declared wishes of a majority of voters in a particular group of states, would raise serious opposition. Therefore, it may be wiser for the *present* Convention not to include any provisions for a ‘constitutional referendum’ when drafting its rules on revision.

¹⁶ Penelope document, p. 29 (Article 101 of the draft). See already the EUI report *Reforming the Treaties’ Amendment Procedures*, cit.

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