

THE EUROPEAN CONVENTION

THE SECRETARIAT

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COVER NOTE

from Secretariat

to The Convention

Subject : Contribution by Mr Duff, member of the Convention :
 “How to bring the Constitution into force”

The Secretary-General of the Convention has received the contribution annexed hereto from Mr Duff, member of the Constitution.

HOW TO BRING THE CONSTITUTION INTO FORCE

One of the most difficult issues facing the Union is how to ensure that the new Constitution can enter into force.

The Convention is working under the well-known constraint of Article 48 of the Treaty on European Union, which provides that all changes of a constitutional nature must be agreed by all at an intergovernmental conference and then ratified by all member states according to their own constitutional requirements. This dual lock of unanimity is the highest possible threshold, and is largely unprecedented for international organisations, let alone unions of a federal type.¹

The treaty revision process has already been held to ransom twice in a Union of 15 member states, once by Denmark (Treaty of Maastricht) and once by Ireland (Treaty of Nice). Other referenda, such as France's 'petit oui' over Maastricht, have brought the Union close to paralysis. In a number of cases, notably the passage of the Maastricht Bill through the House of Commons by a majority of three, the ratification of EU Treaty amendment through national parliaments has also been too close for comfort.

Enlargement will not ease the problem. Malta and Slovakia have managed to secure their ratification of accession by the most slender of margins involving only a few thousand referendum votes. The prospect of achieving the simultaneous ratification of the Constitution in 25 member states cannot be rosy.

The Praesidium has recognised the problem in so far as they provide for an emergency meeting of the European Council if and when one member state refuses to ratify the Constitution. But a crisis meeting to wring hands is not a serious contingency plan. To call a meeting is not *in strictu sensu* a constitutional act.

¹ It has not always been so. Article 95 of the Treaty of Paris (1952) establishing the Coal and Steel Community allowed for treaty changes to be made if they secured, following a favourable opinion from the Court of Justice, a majority of three-quarters of the votes cast in the Parliament representing two-thirds of Members. There was no requirement for national ratification.

The Convention must therefore ask itself and the IGC the question about whether it is right that the opposition of a small minority of voters or parliamentarians in one or two member states - often acting for reasons only loosely connected with the politics of the European Union - should be sufficient to veto the constitutional reform required and supported by the rest of Europe.

Liberals in the Convention have proposed a number of changes designed to ease the passage of constitutional reform in the enlarged Union. These include proposals for the revision procedures of the future Constitution, and a form of associate membership for countries who cannot accept the Constitution. In this contribution we make a new proposal to help the Union to bring its Constitution into force.

1. Future revision of the Constitution

Let us first deal with how the future Constitution, once established, should be amended, because that arrangement sets the scene for how we tackle the more immediate 'Article 48' question of giving birth to the new Constitution in the first place.

For future revision, we propose that a member state, the European Parliament or the Commission would be able to ask the European Council to initiate a revision of the Constitution. The European Council, acting by a simple majority, would call a Convention - based on the current precedent - whose job it would be to formulate proposals, by consensus, for an intergovernmental conference (IGC). This IGC would agree on amendments to the core provisions of the Constitution - that is, Parts One and Two (the Charter) - by a majority of five-sixths of the governments (in other words, 21 out of 25 member states).

The European Parliament would then be asked to give its formal assent to the conclusions of the IGC, acting by a two-thirds majority of the votes cast, representing a majority of its Members.¹ The proposed installation of the European Parliament in the constituent process is important. As far as Parts One and Two is concerned, the role of the Parliament complements but does not replace national constitutional requirements. The revisions as agreed by the heads of government at the IGC and approved by MEPs would come into force before all member states had ratified them according to their national constitutional requirements. We have again proposed the trigger of five-sixths.

¹ The voting formula proposed here is the same as the Parliament already uses for solemn votes, such as the sanction of an errant member state (Rule 108 of the Parliament's current Rules of Procedure).

As far as Part Three is concerned - the policy chapters - a lighter ratification procedure is appropriate if the Union is to be able to respond efficiently to changing circumstances. Common policy must be more susceptible to revision than the entrenched constitutional articles. Although decision-making in the IGC will be the same for all parts of the Constitution, revisions to Part Three could be brought into force as soon as they have obtained the assent of the European Parliament acting according to the same high threshold.

We welcome the major changes made in the Praesidium's second draft of Part IV (CONV 728/03). Our proposal for the further revision of Article IV-6 (ex-Article F) is as follows:-

Article IV-6: Procedure for revising the *Constitution*

1. The government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of *the Constitution*. The national Parliaments of the Member States shall be notified of these proposals.
2. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments of the Member States, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The European Council may decide by a simple majority not to convene the Convention should the scope of the amendments not warrant this. In the latter case, the European Council shall define the terms of reference for the conference of representatives of the governments of the Member States.

The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to the conference of representatives of the governments of the Member States provided for in *paragraphs 2 bis and 2 ter*.

2 bis. As far as Parts One and Two of the Constitution are concerned, the conference shall decide by a five-sixths majority of the Member States. The amendments shall enter into force after ***having received the assent of the European Parliament acting by a two-thirds majority of the votes cast, representing a majority of its Members, and*** after being ratified by ***five-sixths of*** the Member States in accordance with their respective constitutional requirements.

2 ter. As far as Part Two of the Constitution is concerned, the conference shall decide by a five-sixths majority of the Member States. The amendments shall enter into force after ***having received the assent of the European Parliament acting by a two-thirds majority of the votes cast, representing a majority of its Members.***

2. Entry into force of the Constitution

The Constitution needs to stipulate the provisions for its own entry into force. In accordance with the spirit of our proposals for the future revision of the Constitution (Article IV-6), we had previously tabled a similar proposal to allow the Constitution to come into force having been ratified by only five-sixths of the member states.

We also proposed to create a form of associate membership of the Union in order to allow a recalcitrant member state, whose government or parliament or people in a referendum declined to accept the constitutional package negotiated at the IGC, to form a looser association with the Union (Article 46 bis).¹ The new partnership would encapsulate the essential economic obligations flowing from the possibly long-standing shared experience of the *acquis communautaire*, but would dissociate the country in question from the more federal ties of the political union.

¹ Article 46 bis: Associate membership

1. Any Member State may notify the Commission of its intention to become an associate member of the Union. The Union shall negotiate with that state and the Council shall conclude an agreement, acting by a qualified majority, after obtaining the assent of the European Parliament.
2. Associate members shall cooperate closely with the Union. They shall respect its values, principles and objectives.
3. Associate membership agreements will set out the modalities of the close cooperation, the scope of coordination and the reciprocal rights and obligations.

We note, however, that the Praesidium chooses not to accept this special category of associate member, but believes that its provisions for 'the Union and its immediate environment' (Article I-56) will suffice to permit a convenient and appropriate partnership in such circumstances.

By way of further compromise, and having seen the Praesidium's redraft (CONV 728/03), we now propose an additional revision of Article IV-7 (ex-Article G), as follows:-

Article IV-7: Adoption, ratification and entry into force of the *Constitution*

1. The *Constitution* shall be ratified by the High Contracting Parties in accordance with their respective constitutional requirements. The instruments of ratification shall be deposited with the Government of the Italian Republic.

2. The *Constitution* shall enter into force on ..., provided that all the instruments of ratification have been deposited, or, failing that, on the first day of the month following the deposit of the instrument of ratification by the last signatory State to take this step.

3. If, two years after the signature of the *Constitution*, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council *which shall call a conference of representatives of the governments of the Member States. This conference shall renegotiate only the provisions of this Article in order to enable the Constitution to enter into force. The conference shall consult the Commission and the Court of Justice.*

All Member States shall commit themselves to the conference in good faith, as well as to the ratification of any consequential amendment. A revised Article will enter into force on the first day of the month following its ratification by all Member States according to their constitutional requirements, after having received the assent of the European Parliament.

A genuine constitutionalisation of the Union requires such a step. The Constitution must establish a realistic contingency plan for the European Council when it convenes to consider the crisis. A new IGC, with a strictly defined mandate, may be the only feasible way to bypass the dual key national veto enshrined in Article 48 of the Treaty on European Union.