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From the EU's Constitutional Convention to the Intergovernmental Conference

The Balance between Constitutional Principles and National Preferences

Andreas Maurer

The European Constitutional Convention has presented the product of its work. The "Draft Treaty Establishing a Constitution for Europe" contains four parts: Part I with 59 'founding' articles on the definition and objectives of the Union, its competencies, institutions, procedures and finances, part II with 54 articles incorporating the Charter on Fundamental Rights, part III, whose 342 articles establish the concrete provisions on the EU's institutional and procedural framework with regard to its specific policy areas, and part IV with 10 concluding articles on the procedure for revising the Constitution.

The Intergovernmental Conference thus enters the decisive phase of its work. By the time the final text for parts I and II was presented on June 20, 2003, a consensus on the central EU power issues was expected to have been found. The broader the consensus, the more unlikely it is that the Intergovernmental Conference (IGC) that follows will unravel the Convention's set of compromises.

Initially the Convention wanted to present the complete draft constitution for the EU at the European Council meeting in Thessaloniki. Given the amount of time remaining in June 2003, it was likely that the European Council would only approve the first and second part of the draft, provided there would be an agreement on *all* elements of the constitution. The Convention was then given another three weeks to discuss the third and fourth part of the constitution. With its 342 articles, this part represents the essential bridge between the first part of the constitution addressing the basic principles of the European Union and the

fourth part dealing with rules governing the approval and amendment processes and areas of jurisdiction. The meaning of the ground rules agreed upon in the first part isn't made clear until the third part. It is here that the concrete areas of application of the new legal framework for institutions, processes and competences is spelled out.

From Thessaloniki to the IGC 2004

The Intergovernmental Conference is not expected to begin until after Latvia's forthcoming referendum on joining the EU. That

means the conference would begin on September 20, 2003 at the earliest. At the preceding meeting in Thessaloniki on June 19–20, 2003, the European Council could agree on an official mandate for the IGC. But since some of the smaller EU states strongly favor taking a break to allow for more intensive debate in national parliaments on the results of the Convention and the Convention itself will take more time to work on the third part of the Constitution, it is quite possible that the heads of state and government will not decide on the future proceedings of the IGC until during the Italian presidency. As a consequence, it is doubtful that the process will go smoothly and will enable IGC to wrap up the work of the Convention in celebration, as was the case with the Charter on Fundamental Rights.

The second reading of the text of the draft constitution began on May 30–31, 2003. Given how those involved have been defending their positions since then, it is clear that the majority of Convention participants are in favor of putting off the IGC. At the end of May, a group of smaller and bigger states joined forces in their rejection of the Franco-German proposal on institutional reform presented in January 2003 as a possible compromise between the intergovernmental and community methods. The government representatives of Ireland, Denmark, Poland, Austria, Lithuania, Cyprus, Sweden, Spain and Great Britain have spoken out clearly against changing the rules for reforming the institutions that were agreed on in the Treaty of Nice. They also stress that the outcome of the Convention is simply a starting point and should not be understood as a basically unchangeable basis for the IGC. The position of these states makes it clear that the Franco-German approach of trying to capture the entire spectrum of interests on European integration in bilateral proposals has reached its limit with regard to the question of institutional power.

Mandate, Goals and Mid-term Record

Given the time left, all those involved in the Constitutional Convention have to consider the optimal distribution of checks and balances. What remains to be done?

The benchmarks for evaluating the draft constitution ought to be derived from the Laekan mandate to the Convention. All the participants agree on the objectives of the constitution in the abstract. The Convention is supposed to: (a) renew, but not provide the final basis for, the EU's foundation of basic rights, (b) create and democratize the EU's institutions, instruments and processes and (c) provide a simplified description of the decision-making structures that have developed over the last 50 years. We will now look at these objectives more closely in terms of the outcomes to date.

The ability to act and decision-making capacity

The decision-making structures within and between the European Parliament (EP), the Council and the Commission are to be simplified so that the larger EU is capable of making decisions within a reasonable time-frame. An improvement in the EU's ability to act is first and foremost to be arrived at through the decision-making process of the Council of Ministers. Among the successful interim results of the Convention is that the number of specific cases for which the authorization to act must be decided by a unanimous vote has been reduced from 82 to 78. Moreover, the use of qualified majority voting has been expanded from 137 to 177 policy areas (see table in the appendix, p. 8). Issues still requiring unanimity, however, will include not only foreign, security and defense policy, but also setting a multiannual financial framework, tax harmonization, combating discrimination, decisions regarding structural and cohesion funds, numerous areas of environmental policy, certain aspects of trade policy, cooperation on criminal and

family law, and determining the use of a European prosecutor.

There is still a lack of consensus on the suggested institutional reforms to improve the efficiency of the system of separate Councils for specific policy areas. The smaller states fear that a more hierarchical ordering of the Council system will weaken their position in the EU. Consequently, a compromise on these matters appears to only be possible if the larger states can provide convincing proof that the reforms reached under the treaty revisions are insufficient for strengthening the EU's ability to act. This has not yet been shown to be the case. The proponents of constitutional provisions for specific Council formations have thus far not answered the question why such reforms must be taken up at the constitutional level. This is the case, for example, with regard to the reforms to safeguard the continuity of the Presidency of the Council and to increase the coordination and the hierarchical ordering of the various councils. These reforms are already part of the Council's Rules of Procedure and are in part being implemented.

Democracy and transparency

The codecision procedure has thus far not slowed down the decision-making process. On the contrary, in those areas where the procedure is used, the speed with which decisions are reached has increased, largely due to the structures and procedural practices the European Parliament has instituted. The EP has thus shown that a more democratic decision-making process does not necessarily lead to a loss of ability to act. It should be considered a successful interim result of the Convention that the draft constitution extends the European Parliament's right of codecision from 45 to 84 areas. Among the areas included are almost all the individual decisions dealing with justice and home affairs, guidelines on agricultural and fisheries policy, some aspects of economic policy coordination

and the new policy areas of administrative cooperation.

The Praesidium's proposed process for electing the President of the Commission and the subsequent investiture of the Commission should generate democratic mobilization. The debate over whether the European Council had the right to propose candidates for the office of President of the Commission or whether the EP should name the President directly following European elections seems increasingly artificial. In either case, European parties, which include both the heads of government as well as representatives of opposition parties in the member states capable of governing, must agree on their leading candidates. These would then run for office during the parliamentary elections and the naming of the Commission. In theory, the European Council could ignore the parliamentary election results and designate a candidate from among the ranks of the losers in the European parliamentary elections. In this case, however, it would be up to Parliament to decide. If one assumes that even "euro-skeptic" states are not interested in seeing the EU block itself, the conflict over the right of designation quickly dissolves. Without a functioning Commission the EU would not even fulfill its basic role as a free trade zone. What is more decisive, then, is how national parties deal with the issue in concert with their European party counterparts. This is where the links between the heads of state and government on the one hand and European parliamentary fractions on the other are to be found. This sort of cooperation between Europe's national parties can hardly be constitutionally determined. Rather, it is dependant on national political conditions in the member states.

What has more likely had a negative impact on the democratic credentials of the EU as projected by the constitution, is the focus on the role of national parliaments in controlling the principle of subsidiarity, which the Praesidium, and above all by the Chairman of the Convention personally, has advocated. The picture that European

citizens get based on the nearly twelve months focus on the national parliaments is one of an EU that serves as a 26th state construct alongside the 25 other states. It is time to put an end to this fictional 26th state created by a principle of subsidiarity that makes the Commission directly accountable to the national parliaments. This would allow the governments of the member states to relieve themselves of all responsibility to their parliaments in the earlier phases of EU legislation. This vision of the EU the draft constitution seems to project ought to be avoided. It hurts the EU as a whole and is only useful to the states when they are constantly in the minority on Council decisions. If one assumes, however, that it is in no government's interest to always have to implement EU legislation against its will, it ought to be made clearer in the first part of the constitution that the EU represents the *intended* sum of all member states regulations.

Competence and responsibility

The Constitution is after all supposed to lend a profile to the EU. Taken literally, it may only have to do with the questions regarding the role of the President of the Commission, the creation of a European Foreign Minister or an elected Chair of the European Council. In reality, the expectations of this EU profile are much more amorphous. The EU is expected to become more transparent to those directly affected by European law and its decision-making processes and the results of negotiations within and between the different institutions easier to understand. Discussions on these matters to date have resulted in: (a) the rather successful, especially compared with the failure of the last IGC, introduction of a hierarchy of norms for EU legal acts according to uniform characteristics, (b) the call for transparency in the institutions which influence legislation, and (c) the division of competences between the EU and its member states, a matter that is basically no longer contested. However,

the emerging negative image of the EU as a foreign body, due to the constitutional passages on subsidiarity and the role of national parliaments, is in this regard strengthened by Article 9(2) of the draft constitution which provides a rehashed definition of the nature of the Union's competences. The competences of the EU are to be "conferred upon it by the Members States in the Constitution." This key statement on the relationship between the states and the Union stands in crass contradiction to the wording of Article 5 of the EC Treaty. According to Article 5, which is still valid, the legal basis of competences is the Treaty itself. Consequently, the European Court of Justice (ECJ) and national constitutional courts have both been of the opinion since the sixties that only the ECJ has jurisdiction over determining the legality of EU actions. The treaties of the EU alone provide the measures for this oversight. Had things been otherwise, the actions of the EU would constantly have had to confront the legal reservations of the member states. The Praesidium's attempt to turn back the clock to a theory wherein the states (and not the constitution) transfer competences to the EU relegates the authority and precedence of EU law to below that of the member states. Article 9(2) invites the dissipation of EU law and contains great risk in terms of the common market's ability to function and harms the general call for transparency. If 25 different legal traditions compete over the meaning of competences transferred to the EU, each interpreting the matter according to its own national interests, and the ECJ is no longer able to exercise its exclusive power to define the law, it will be unclear to EU citizens which law is applicable under what conditions.

Prerequisites of the Intergovernmental Conference

Given the legitimate need of the member states to review the final document, which in the end has grown to over 400 articles,

the participants and observes of the IGC should agree on a review process that fulfills the following functions:

Checking for coherency

Firstly, the various parts of the constitution should be carefully checked for coherency and agreement with the fundamental political aims of the European project. This review is called for insofar as the sum of the new rights enshrined in the constitution provides new opportunities for national parliaments and regional authorities to block European policy in the future. This only becomes clear after a complete review of all constitutional texts. For example, the combination of the right to enter objections for national parliaments and the Committee of the Regions and the maintenance of the right of Council members to be represented by ministers of regional bodies gives states with strong regions three ways to block legislation. Similarly in need of review are the constitutional passages dealing with legislative power. In the first part of the constitution, that right is granted to the European Parliament. That right is later spelled out in detail in the third part. The simplification in the first part should not lead to a situation whereby long-standing competences of the EP are then cut-back through a back door passage in the third part that approaches reducing the right of parliamentary control. At issue are the areas of foreign and security policy, justice and home affairs and economic policy coordination.

While reviewing the coherency of the draft constitution, the text should also be edited for redundancies.

Estimating the consequences for individual states

Secondly, all elements of the constitution should be reviewed to determine which member state procedures are in need of revision, or even need to be created outright, in order to successfully contribute to

European policymaking. This would involve the early sensitization of the affected players at the national level, namely governments, parliaments and ministerial administrations. In order to avoid a high level of frustration during the ratification phase, states ought to quickly create coordination structures to deal with the foreseeable consequences of the EU constitution. The necessary adaptations at the state level to the future legal and institutional structure of the EU should take place parallel to the IGC. To this end, the following changes in Germany should be made:

- ▶ Within the federal government procedural rules should be adapted to the emerging hierarchy of the Council formation in Brussels.
- ▶ The relationship of the federal government to the Bundestag and the Bundesrat should be changed to enable the implementation of the new parliamentary rights with regard to consultation, participation, veto and objection. At issue here are the Cooperation Laws and, where applicable, the “European Articles” of the Basic Law (23, 24, 28, 45, 50, 52 and 76).
- ▶ The relationship between both houses of parliament should be adapted to the new inter-parliamentary cooperation mechanisms of the EU in the form of non-binding agreements between the houses of parliament.
- ▶ The relationship between the committees of the Bundestag should be adapted to the early warning mechanism of a subsidiarity check. This function can hardly be accomplished by the EU committee alone.
- ▶ The relationship between the Bundesrat and the Länder governments should be adapted with regard to the Bundesrat’s procedural rules granting the right of state parliaments to enter objections.

Tapping the potential for negotiation

Thirdly, given the apparent residual dissent to the institutional parts of the EU draft constitution, it should be assumed that the Convention will simply present options on this issue that must then be negotiated at the IGC. The extent of the dissent can only be estimated at the moment. It appears that some states are likely to veto, a position that cannot be challenged given the overall objectives of the Convention, namely more democracy, efficiency and transparency. Spain's vehement insistence on maintaining the weighted voting rules that were last agreed on at Nice is based on the fear that changing to a system of double majority would jeopardize the country's status as one of the larger states. Britain's reservations about the introduction of qualified majority voting in the areas of foreign and security policy as well as social and tax policies are not merely negotiating tactics. They can't simply be swept aside by referring to the internal capacity to act of an EU that is expanding to 25 states and beyond. Realistically then, it is unavoidable to prepare a series of possible alternative solutions, above all for that part of the constitution dealing with institutional procedures. These should then be ranked in order of preference and drafted as back-up positions for the IGC.

The Core of the Institutional Structure

The Benelux countries have presented a joint proposal to reform the system of the Council of the European Union and the European Council. This foresees stable rules governing the chairmanship of the External Relations Council and increasing the tenure for the office of Chairperson of the General Affairs Council. The latter would be assumed by the President of the Commission. Were the General Affairs Council to remain a council that simply coordinated Europe's daily agenda in a non-binding fashion, there would be little to object to in the proposal. If, however, the General

Affairs Council were to be transformed into a legislative council with conciliation, synthesis or even arbitration functions, then the chairperson, who would be conceived as a another pole on the level of the Commission and Parliament, must be filled from the ranks of the member states' governments. In this case, the smaller states' interest in being able to have adequate voice would be met. The chairmanship would be filled by a group presidency which rotates among all the states every two years. A possible alternative would be to have the legislative council simply represent the same function as all the various council formations. That is to say, it would only act as a visible legislative Council if it turns to the debate and final adoption of legally binding acts. In this case, the work of coordination would fall to a separate Council. Its functions would consist of: (a) analyzing the European Commission's legislative program, (b) identifying Council formations to take a leadership and consultative role in legislative cases and (c) initiating internal Council arbitration procedures for resolving disputes between two council bodies. Since this Council body would only be active within the Council system, the constitution could leave open the question of chairmanship and thereby grant the Council the right of self-organization.

The controversial issue of creating an elected chair of the European Council includes the emerging compromise solution of strictly limiting the tasks of the European Council and thereby restricting the European Council's Chairperson's freedom to act. The purpose is to avoid competition between the Chair of the European Council and the Commission. This is something that particularly the smaller states fear, but it is also a concern of the Commission and the European Parliament. This leaves open the question of how the job description of the Chair will turn out and where in the constitution the Chair of the Council should even be mentioned. The two issues are interdependent: if the job of the

Council Chairperson is simply to prepare, lead and manage the meetings of this specific institution with its limited functions, then it is actually unnecessary to place its role on equal footing with the other articles governing institutions. Instead it would make sense to describe the tasks precisely in the third part of the constitution and to simply mention in the first part that the Council elects its own chairperson. Placing the Chairperson of the Council in the first part of the constitution would only be justifiable if the office had direct connections to other institutions.

Outlook for the IGC

There's no getting around the IGC. And that also means that the traditional negotiating models for this method of advancing EU law are also unavoidable. A key cause of the disaster of the last IGC in Nice (December 2000) was due to the fact that the French President adhered more to his state's national interests than to the stance dictated by his role as chair of the negotiations. For the 2003/2004 IGC it will be important to reduce the potential of this sort of conflict of interest from reoccurring. As in the case of previous IGCs, it is to be expected that the heads of state and government will above all wrangle over exceptions to previously agreed on rules. The third part of the constitution lends itself to this sort of situation with its detailed descriptions of EU policy areas. Already a number of national reports shed light on possible exceptions to the rules.

Nevertheless, the Convention still has the means to create a decisive counterweight to the IGC and influence the way negotiations are conducted. What's important is that the Convention agrees on as many precise regulations as possible. In this connection realistic ways for invalidating exceptions to the rules should be defined.

Thus it is also the Convention's job to identify those issues which should serve as a bridge between itself and the IGC. Given the number of those in the member states

who already seem skeptical or resistant to changing the status quo, it would be best if a list of those authorized to act were drawn up as soon as possible who in all probability will deviate from the principle of qualified majority voting in the Council or the standard legislative process of the Parliament vis-à-vis the Council. Then the approach used successfully in the case of the Single European Act of 1987 could serve as a model. This would entail establishing a timetable for switching eventually from unanimity to qualified majority voting or parliamentary consultation in the legislative process. Knowing that they will be in a minority in the foreseeable future, those states committed to the principle of unanimity could then use the remaining time to prepare to accept a compromise. This would enable them to save face in front of their national constituencies and give them the transition period to convince other states of their respective needs. A possible alternative would be to introduce a decision-making model based on special qualified majority instead of unanimity. This super qualified majority voting could, for example, consist of three-fourths of the states and their citizens. But even in this case, a phase-out process should be agreed on which ends with the implementation of double majority voting.

Decision-Making Process in the Council and EP According to the Draft Constitution of July 18, 2003 (CONV 850/03)

<i>Form of EP Participation</i>	<i>Unanimity</i>	<i>Qualified Majority</i>	<i>Simple Majority</i>	<i>Special Majorities</i>	<i>Rights of the EC Chair</i>	<i>Total</i>
Autonomous						
Right of Decision	2	3	0	0	0	5
Codecision	0	84	0	0	0	84
Approval / Assent	12	9	1	2	0	24
Consultation	25	22	3	0	0	50
Informed	6	10	0	0	2	18
No Participation	33	49	6	0	2	90
Total	78	177	10	2	4	271

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