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**Research Report**

## Scale back or forge ahead? Opportunities and risks associated with the Intergovernmental Conference on the European Constitution

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## Scale back or Forge ahead?

### Opportunities and risks associated with the Intergovernmental Conference on the European Constitution

*Andreas Maurer*

**On 4 October 2003 the heads of state and government and foreign ministers of all 25 existing and imminently acceding Member States of the European Union, European Commission President Romano Prodi and two representatives of the European Parliament opened the Intergovernmental Conference (IGC) convened in Rome to discuss the draft European Constitution. Just under nine weeks from that date, by mid-December, after a probable total of nine meetings, the Constitution will supposedly be adopted.**

The period elapsing between the official reception of the draft Constitution and the start of the IGC totalled three-and-a-half months. Bearing in mind the widely differing standpoints, the questions arising with regard to the IGC are as follows: firstly, whether the draft Constitution should undergo any substantial changes, and secondly, what consequences such changes might have for the EU's further development. It should be clear by now that all actors involved in the IGC are unhappy with some sections of the draft Constitution. Indeed, in Brussels more than 1,000 motions for amendments were tabled. It may also be safely assumed that no government has any serious interest in seeing the IGC fail. The alternative would be the Treaty of Nice, yet it was the style of the Nice IGC and the existence of that Treaty which triggered the Convention's formation in the first place. Finally, it is also clear

that the Italian EU Presidency is proposing to subject both the institutional and security policy chapters of the Constitution to review by the IGC. However, in addition to this, Italy, France, Germany, the Benelux countries and – since just recently – Denmark have all rejected the call to scale back the draft Constitutional Treaty considerably, pointing out that any Member State wishing to call into question the Convention's consensus on a particular issue will be responsible for reaching a fresh agreement.

Nonetheless, the IGC will have no choice but to word its answers to the questions raised by individual countries that are critical of the draft Constitutional Treaty in such a way that a consensus of the aforementioned type can be reached. It should be borne in mind here that those countries which failed to dispatch their foreign ministers to the Convention tend to regard

the draft Constitution as a 'basis to work on,' in stark contrast to those countries which delegated their foreign ministers to co-write the draft Constitution in the Convention and then duly signed it. The whole debate is characterised by different conceptions of what the Convention is and the basis for its legitimacy. Indeed, it is viewed either as a kind of 'sherpa' IGC, a constituent power, a parliamentary council or an open forum, and this divergence of views is logically also impacting on the IGC.

### **Positions adopted by the Member States**

The first meeting of foreign ministers ended in their reaching a broad consensus that the following issues should be explored:

1. The regular rotation of the EU Presidency (Council of Ministers). The Italian IGC Chair is focussing on the debate about Group or Team Presidencies alternating every two years. The issues to be raised here include both the duration of such presidencies and the number of Member States involved in them. Of course, an alternative would be for every specialist Council of Ministers to elect its own President independently.

2. The function and flexibility of the so-called Legislative Council in relation to the other Council formations. On this subject, the foreign ministers agreed that no independent Legislative Council should be formed. Instead, the individual Council meetings on specific topics will always serve as 'Legislative Councils' when they adopt legislative measures and public debates take place in that connection.

3. The status and role of the future EU foreign minister. The most controversial issue is the incumbent's position within the Commission, the real questions being these: firstly, whether they should also have voting rights in areas that have nothing to do with the CFSP, and secondly, whether a vote of no confidence in the Commission by

the European Parliament would also trigger the resignation of the EU foreign minister.

Furthermore, the parties to the negotiations asked questions about the following points:

- ▶ The definition of a 'qualified majority' in the Council of Ministers;
- ▶ the scope of qualified majority votes in the Council in the areas of foreign and security policy, justice and home affairs policy and the budget;
- ▶ the fine details of structured co-operation in security and defence policy;
- ▶ the composition and decision-making procedures of the Commission; and
- ▶ the minimum share of seats in the European Parliament.

So far two main lines of conflict have crystallized, though they are nothing new (in principle they have existed ever since the IGC on the Treaty of Amsterdam in 1996–1997). Consequently, the only somewhat surprising fact is that the number of protagonists advocating each position is growing.

On the one hand, 15 smaller and medium-sized countries find themselves head to head with the six EEC founding members, the United Kingdom and Denmark over the issue of the institutional organisation of the Union. For whilst the 'small countries,' which include the accession states, have been insisting since their meeting in Prague on 1 September 2003 that the rule stipulating that there shall be "one Commissioner with voting rights per country" should continue to apply in the European Commission, the founding Member States, the United Kingdom and Denmark are backing the Convention's proposal to reduce the number of Commissioners. The line of attack adopted by the 'smaller' countries with respect to retaining the traditional Community method is also reflected in the reservations expressed by Austria, the Czech Republic, Lithuania, Latvia, Finland and Estonia, which are opposed to the creation of the post of elected President of the European Council.

A second bone of contention pits the United Kingdom, Ireland, the Czech Republic, Slovenia and Malta against the rest. Here, the group headed up by the British government is insisting that unanimous voting remains the norm in the Council when dealing with issues to do with fiscal and justice policy, social security policy, foreign policy, security policy and defence policy, whereas other countries, led by Germany, Belgium and the Netherlands, want to see qualified majority voting extended to these areas as well.

Latvia, Poland, Sweden the Czech Republic and Hungary are sceptical about closer or structured co-operation between individual countries on defence policy. Since the Anglo-German-French summit, in principle the United Kingdom appears to be prepared to discuss this matter, though together with Spain it continues to clearly reject a scenario in which the EU would have military structures independent of NATO.

Another point to bear in mind in connection with ratification is the insertion of a reference to God in the preamble. Poland, Spain, Malta and Portugal are in favour of such an inclusion, but Belgium and France in particular are opposed to it.

Finally, in Germany rumblings in some federal states, the CDU/CSU and some influential ministries are starting to raise the spectre of broader opposition to EU reform, especially where the Commission's powers in the areas of economic, social, health, criminal justice and immigration policy are concerned.

### **Countries' relative clout in the Council**

There is a massive gulf between Spain and Poland, on the one hand, and the other countries with regard to the planned introduction of the so-called 'double majority' from 1 November 2009 in qualified majority votes taken in the Council (Article I-24). The principle of the double majority will make Germany's relative formative force

vis-à-vis the other 'big' countries in the Council more visible than in the past, since the size of the population will count as a direct factor alongside the respective country's single vote. Meanwhile, Poland and Spain reject the associated 'downgrading' of the weighted vote they would enjoy under the Treaty of Nice. When all is said and done, both countries are probably less concerned about maintaining their disproportional special status than about retaining their ability to veto structural and cohesion fund policies that are associated with major spending. The IGC should focus on this very connection, for both these areas of policy will only effectively switch from being subject to unanimous votes to the majority decision-making system in 2013.

A provisional compromise could entail raising the required quorum for such financially weighty policies from 60% to two thirds. Alternatively, the current system of vote weighting for these areas of policy could be retained, but at the same time slightly altered, to ensure that the required quorum of weighted votes is lowered from its present level of 74% to two thirds. That would leave Poland and Spain with their special status, but it would also become considerably easier to attain majorities in the areas of policy in question, as well as much more laborious to build blocking coalitions than under the rules set out in the Treaty of Nice.

### **Commission efficiency**

In preparation for EU enlargement, a Protocol was annexed to the Treaty of Nice, leaving the composition of the Commission up to a unanimous decision by the Council taken when the 27th Member State acceded to the Union. By contrast, the draft Constitution contains more precise provisions regarding the number of members of the Commission. As from the next-but-one term of office, from 2009 to 2013, the Commission is to consist of an 'inner circle' of 15 Commissioners (including the President of

the Commission and his deputy and future foreign minister), and an 'outer circle' of 10 Commissioners with no voting rights. The Commission's argument against this, albeit not one voiced explicitly, stresses the requirements with respect to guaranteeing the representativeness of the group of Commissioners. Accordingly, its view is that each Member State should have one Commissioner with voting rights. However, the focus here is not on representing the interests of the various Member States within the Commission, but rather on the right of every Member State to have its own equal (though mainly symbolic) representative, mother-tongue 'spokesperson' in the shape of its respective Commissioner. According to this point of view, Commissioners are not representatives of national interests, but rather preferred intermediaries between the authorities in Brussels and their countries of origin.

In actual fact, the two-tier model proposed by the Convention leads to a distinction being drawn between first-class and second-class members of the Commission. This undermines the principle of collegiality which is so vital if the European Executive is to function smoothly and retain its internal coherence. The fear in such a scenario would be that those countries not allowed to appoint a member of the Commission might tend to be more willing to block Commission proposals in the Council of Ministers. For this reason the Commission suggests that its commissioners should all retain equal rights. Nonetheless, a body comprising 25 Commissioners would have to adopt a decision-making procedure that was guaranteed to be viable in practice.

This should be done by decentralising decision-making procedures. If various groups of Commissioners were formed to deal with specific issues or areas, decisions taken by all 25 Commissioners would only be required in a few instances. In this connection the Commission points out that already in recent years a mere 3% (or thereabouts) of the 10,000 decisions it adopts takes each year have been adopted in an

oral procedure involving the full set of Commissioners during their weekly meetings. Far more decisions have resulted from written procedures, empowerment or delegation. In this way, even in an enlarged Commission, a reformed internal structure could impact positively on the Executive's efficiency and decision-making capability. It should be left up to the Commission President to decide on matters to do with size, structure, allocating duties and conciliation proceedings. The respective sections of the Commission could then take decisions independently on all matters except for the annual legislative programme, the draft EU budget, the Union's financial forecast and matters referred to the European Court of Justice. Only in contentious cases, when the President or another member of the Commission indicated the need for a vote across all sections, should the EU Executive's full membership debate the issue and take a vote.

Conspicuous in these proposals is the strengthening of the role of the Commission President beyond the scenario set out in the draft Constitution. However, in view of the containment of the Commission planned in the draft Constitution by formalising the European Council and its President, there can be little objection to this. In this respect, and bearing in mind the pressure being brought to bear by the 15 smaller countries to renegotiate the matter, the Commission's proposal seems worth considering. All the same, it does little to defuse the repeated criticism of an excessively large Commission. Even if the Commission's internal structure is improved, there seems some justification in worrying that it might suffer even worse organisational problems after enlargement. After all, it's worth reiterating that today, with just 20 Commissioners, it is already struggling to perform efficiently. A body comprising 25 – or even more – equal members with voting rights conceals greater dangers of inefficiency than a set-up boasting a leaner leadership.

If this criticism is accepted, then the

proposals made by the Convention on the composition of the Commission are definitely pointing in the right direction. However, the compromise solution put forward by the Convention entailing a freeze on the maximum number of Commissioners and the simultaneous introduction of different hierarchical categories appears inconsistent since it won't make the Commission any smaller and thereby facilitate its organisation, efficiency, visibility and collegiality. The biggest problem in this connection is the inadequate definition of the rights and obligations of the Commissioners with no voting rights.

Nonetheless, it may still be possible to find a 'middle way' for the IGC process. If the Commission is given the power to organise itself and also the capability to reform its mode of organisation, then for the period starting in 2009 it will be enough to stipulate just the maximum number of Commissioners, which will be a lower figure than the number of EU Member States. Since the Commission will continue to be appointed in conjunction with the Commission President, the Member States in the European Council and the European Parliament, there will be sufficient possibilities to put together a leading team in the Commission which can subsequently, throughout its term of office, be monitored more closely than in the past by Parliament. Alternatively the heads of the other EU agencies (e.g. Europol, Eurojust, or the European Environment Agency) could be involved in the overall 'package' of the procedure for selecting members of the Commission. After all, the selection criteria for these offices are also subject to the principle of equal rights, i.e. the symbolic representation of the Member States in the EU institutions. Consequently, if the negotiations about the total number of all leading EU bodies entrusted with specific powers were more candid, the problem caused by the symbolic measures concerning representation could be substantially defused.

If the IGC were to fail in these respects or renegotiate the institutional balance set out

in the Convention's draft Constitution, then many of the parties involved would feel defeated. Those actors with an interest in seeing a stronger Commission cannot want this to happen, for the alternative to the draft put forward by the Convention would be the Treaty of Nice, whose Protocol on the enlargement of the European Union merely provides for a unanimous decision by the Council on the future composition of the Commission in an EU with 27 Member States, with the Commission not being a party to that decision.

### **Paths to a qualified majority**

The declared aim of the Convention was to extend the number of qualified majority decisions taken in the Council. The objective was to weaken the blocking potential of individual Member States and thereby create the essential procedural prerequisites for deeper integration. All in all, the Convention did succeed in extending qualified majority voting, particularly in the areas of justice and home affairs policy. In addition, the transition clause added at the last minute by the Convention to Article I-24.4 of the draft Constitution also provides for the switch from unanimous decision-making to the qualified majority procedure following a unanimous vote to this effect by the European Council. These provisions do not go far enough in the eyes of the Commission, Parliament and also some Member States. The following policy areas are also supposed to be placed on a qualified majority footing: measures implementing foreign and security policy, provided they are negotiated at the instigation of the EU foreign minister; measures designed to combat discrimination; amendments to the laws governing European or local elections; and measures to do with financial co-operation with third countries. In other areas, by contrast, agreement on transition periods for the automatic introduction of majority decisions must only be reached in the respective treaty. These include measures in areas

such as family law and arrangements governing police co-operation. Since there are differently weighted groups in all these areas, it will hardly be worthwhile calling into question the compromise laboriously hammered out by the Convention.

The desirability of extending the majority voting principle to additional areas of policy is clearly at odds with the basic strategic notion that the draft drawn up by the Convention constitutes the best result that can be achieved through negotiations in terms of the interim result attainable at present. In this respect, the draft Constitution reflects a current provisional arrangement that should be viewed against the backdrop of the dynamic, ongoing development of European law. Those who advocate this view quite rightly fear that reopening the discussions about majority decision-making will effectively open Pandora's box, and may even result in a step back, compared with the compromise that has already been reached. If any country calls into question the 'package deal' put together by the Convention, all governments will clamour for what they want. Bearing in mind the short time available, the Italian Council Presidency should be intent on preventing this scenario at all costs. Nonetheless, it is essential that some thought be given as to how the purview of qualified majority voting can be extended. Realistically, the obvious way to achieve this would be to simplify the procedure for amending the Constitution.

### **Consequences**

In view of the widespread calls for amendments and because of the shortcomings of the draft Constitution drawn up by the Convention, it seems highly unlikely that it will be adopted. At present there are two conceivable scenarios:

1. The IGC will succeed in subjecting the Constitutional Treaty to a few material (but primarily linguistic and systematic) changes and thereafter adopting it. The risk would then lie with the Member States in

the context of the ratification process. Those countries whose parliaments or citizens refused to ratify it would ultimately be forced to leave the EU.

2. The IGC will fail, overwhelmed by a flood of proposed amendments. The draft Constitution would then not be adopted and the Treaty of Nice would remain in force. Those countries prepared to engage in integration could then enter into a process of closer co-operation outside the EU institutions and European treaties, along the lines established for Schengen.

There are several arguments in favour of the first option: Many countries would emerge as 'winners' if the draft Constitution was adopted in its current form. Undoubtedly not everyone's wishes were fulfilled by the work of the Convention. However, on the other hand, the EU institutions and governments and parliaments of the individual Member States can be said to have emerged as winners. For while the national parliaments have been given major supervisory powers, the European Parliament's supervisory, legislative and elective powers have been strengthened. Meanwhile, the Commission has gained further rights to take initiatives and also had its role as 'the guardian of Community law' consolidated. At the same time, the respective governments can rejoice at the bolstering of the European Council and the creation of the post of a European Council President, which will clearly boost their influence in Brussels. And yet, this is an extremely unstable situation, for it represents the compromise that can be reached at this point in time, on the basis of which the future development of the EU will have to be reviewed and reformed when the time is right.

Government representatives will have to be outwardly positively critical in the IGC, but at the same time inwardly prepared to compromise. The representatives of the European Parliament must ensure that the process doesn't end up being insufficiently transparent. This may result in public pressure that will not permit the Conference to

fail. In addition, if the Italian EU Presidency is to succeed in overcoming the controversial points in orchestrated discourse, the draft Constitution will be able to leave the IGC in its duly modified form.

In the more pessimistic second scenario, the differences of opinion in the points presented could not be overcome. The result would be a fresh debate on the EU institutions and the distribution of power, which would – in the best-case scenario – end in the kind of horse-trading that went on at the Nice Summit, and could end up reaffirming its rules. However, this would raise questions about institutional balance in the course of the EU's further development and in fact turn that development process upside down. The rules of the Treaty of Nice would no doubt then be applied – to the letter – primarily by the larger Member States in an open, confrontational manner, effectively forcing the Commission to co-ordinate every single legislative proposal in advance with Berlin, London and Paris. If even one of these three countries vetoed the proposal in question, the ongoing decision-making process in the Council would not have any prospect of success. Moreover, the Member States would try to impose themselves more directly, forcefully and aggressively on the Commission and Parliament. This would not discredit the method of the Convention as such, but it would mean that the high expectations of the Convention would have to be seriously scaled back. The biggest winners emerging from such a crisis would probably be third countries, whose interest in seeing deeper European integration is minimal and would be all in favour of the creation of distinct, rival groupings within the EU.

### **Constraints on further dynamism**

In the draft Constitution, amendments of the Constitution are made conditional on a unanimous decision by the governments in question and ratification by the respective national parliaments (see Article IV-7).

Bearing in mind the dynamic nature of the process of European integration, this hurdle seems too rigid, concealing as it does a real danger of paralysis in an EU consisting of 25 or even more Member States. Consequently, greater flexibility for future adjustments is required. The starting point here would be the Convention's agreed fragmentation of the Constitutional Treaty into four parts and the resulting criticism that even changes made to the operational part III would have to undergo the laborious ratification procedure. The Convention failed to push through proposals concerning the simplification of the procedure for reviewing the Constitution. Many Member States are genuinely fearful of allowing the possibility of all-too-rapid changes being made to the provisions set out in the Constitution, believing it to be a gateway to further attempted infringements on their sovereignty by the EU. In addition, British government representatives will attempt to further erode the transitional clause on the European Council's simple transformation of unanimous into qualified majority votes because the United Kingdom believes this would entail a risk of the Constitution being amended 'via the back door.' Consequently, there will be no choice but to stick to the stringent requirement of unanimous amendments and their confirmation via ratification procedures in *all* Member States for the first part of the Constitutional Treaty.

### **A way out of the dilemma**

The IGC will reach its climax at the November meeting of foreign ministers, by which time broad agreement should have been reached regarding the various requests for amendments to the draft Constitutional Treaty. One decisive factor for the success of the endeavour is the agreement of the actors involved on a joint future scenario for the enlarged Union. The familiar trio of more democracy, the ability to take effective action, and transparency is clearly not enough to inject fresh momentum into the



EU on the basis of the Constitutional Treaty. Neither can the desired scenario entail an attempt to adopt a Constitution that holds good for the *next 50 years*. The prospect of such an unchanging Constitution would only be acceptable if the EU was regarded as a Community rooted in shared, firmly established values.

But at heart the EU remains an economic and legal community. This state of affairs may gradually be extended to include functions such as a Community sharing the same security and social policy interests if the centripetal forces in foreign and security policy and social and economic policy generate demonstrably higher costs for the Member States than the pooling of such expenditure within a shared EU. In other words, only when the Member States find that going it alone in the aforementioned policy areas costs too much and is not associated with any benefits with a view to their respective national election campaigns will their governments be prepared to engage in closer integration.

If the developmental nature of the Union is recognised as a functionally determined Community of European citizens and countries, this paints a different picture as regards the timeframe for the validity of the Constitutional Treaty and also any resulting objectives with respect to its 'reformability.' This in turn can be reflected in the Constitutional Treaty by having the IGC draw a clear distinction between the virtually immutable principles of the first part and the constitutional provisions of its second part, on the one hand, and the institutional provisions and authorisation to take political action, on the other hand.

Consequently, one possible compromise for the IGC would consist of a substantial transfer of content from the first to the third part of the draft Constitution. The shifted content would be the provisions governing the post of the European Council President, the numerical composition of both the European Parliament and the Commission and the composition of the Council of Ministers, for these provisions are far too

detailed and can, in their present form, only apply to the next phase of the integration process. Such a move would also have to respect the wishes of the smaller and new Member States with regard to the composition of the Commission and the relativisation of the special role played by the President of the European Council. All provisions providing for unanimous decision-making in the Council or European Council should also be transferred to the third part of the draft Constitution. Unanswered questions about the sequence, duration and allocation of Council presidencies should also be set out in the third part of the Constitution as organisational tasks for the European Council. The conditions determining the environment for such authorisations to take effective action can change rapidly.

At the same time, it would make sense to provide for a super-qualified majority of 5/6 of the Member States and people in the IGC for the procedure for amending the third part. Furthermore, a threshold value that was lower than the sum of all Member States would have to be set for the entry into force of any amendments.

If this were done, the first part of the Constitutional Treaty would be purged of these technical details, and the third part could be more simply made the object of the verification of the institutional provisions at the heart of the present controversy. In any case, the new Member States and their citizens would then have ample time, until the start of the next term of office in 2009, to gather experience with the Union's new Constitution.

Insight into the dynamic character of the EU can only be gained over time on the basis of the 'application' of the Constitutional Treaty. Mechanisms designed to facilitate the review of the Treaty will clear the road ahead for the Union's dynamic character and therefore constitute a sensible alternative to the laborious scaling back and adoption of the Convention's compromise.

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