

A constitutional Treaty in search of its final authors

As could be gleaned from the final documents of the Irish presidency, the constitutional Treaty adopted by the IGC backtracks somewhat from the text produced by the European Convention. The United Kingdom's red lines dominated the proceedings in respect of social and fiscal policy. There is some compensation for the backtracking of the IGC: Member States participating in enhanced co-operation are offered the opportunity of using a "passerelle" mechanism to modify the procedures for adopting European acts. The draft Treaty also goes a little further than the text of the Convention in the social policy field. The institutional provisions and the definition of qualified majority voting have also undergone substantial changes. The "Treaty establishing a Constitution for Europe" is still only a draft: before coming into force it will have to overcome one last hurdle, the most difficult of all, namely ratification by the Member States. Several countries have already announced their intention to hold referendums. We report below on the main alterations made by the IGC to the draft Treaty that resulted from the work of the European Convention.

The "Intergovernmental Conference (IGC) has adopted the constitutional Treaty for Europe". These were the words of Irish Prime Minister Bertie Ahern on 18 June at the close of the IGC which met in the margins of the European Council meeting. This statement might never have been uttered. Therefore it is in itself good news for Europe, and the achievement was hailed on the evening of the Treaty's adoption by Commission President Romano Prodi, European Parliament President Pat Cox and the former Chairman of the European Convention, Valéry Giscard d'Estaing. Nonetheless, having received the green light from the heads of State or government, the Treaty is still "in search of its final authors": before coming into force it must still overcome one last hurdle, the most difficult of all, namely ratification by all twenty-five Member States of the European Union.

The Prime Ministers of Spain and Portugal have announced since 18 June that they will be holding referendums on the adoption of the Treaty. In France where champions and opponents of the constitutional Treaty clash with one another mainly in the main socialist opposition Party, President Jacques Chirac also pronounced himself in favour of holding a referendum. In the United Kingdom, the European Parliament election results were characterised by an upsurge of support for the

United Kingdom Independence Party (UKIP), a hitherto little known party whose only demand is for the UK to withdraw from the European Union (12 seats out of the 78 allocated to the UK). It appears possible at this stage that the referendum, to be held in 2005 or 2006, may concern both the constitutional Treaty and the euro (1).

The outcome

As could be gleaned from the final documents of the Irish presidency, the Treaty backtracks somewhat from the text produced by the Convention. The UK's red lines dominated the proceedings. As often happens in the context of an IGC, however, the UK position was merely the tree that concealed the forest. The backtracking related principally to limitations on the recourse to qualified majority voting (QMV) in respect of social security for migrant workers, or indeed its elimination (taxation).

In the institutional sphere, with the exception of the election of the European Council President by his/her peers, the amendments made to the main provisions drawn up by the Convention were fair ones.

Numbering of the Treaty establishing a Constitution for Europe

The final version of the constitutional Treaty available at the begin of August contains a system of continuous numbering in Arabic numerals preceded by a Roman numeral to emphasise the separation of the Constitution into four Parts (2). In addition to the amendments and new provisions introduced by the IGC, the group of legal experts repositioned certain articles. Consequently the presentation of the Treaty is somewhat different from that of the text published a year ago. The Protocols and Declarations are included in two separate Addenda to document CIG 87/04 (3).

The Preamble and initial articles

The quotation from Thucydides, defining democracy as being power in the hands of the greatest number, has been deleted on the grounds that it conflicts with the principle of equality among all Member States. The wording of the Preamble is modified only marginally, without the addition of a reference to God. Other modifications have been made in the initial articles of the Constitution, particularly in those on the values and objectives of the Union. The rights of persons belonging to minorities and equality between women and men are listed among the shared values of the Member States of the Union (4). The consequence of this will be that countries applying for accession will have to respect them (5) and that the rights resulting from Union membership may be suspended if they are not respected (6). At the request of the ECB and the Ecofin Ministers, price stability now appears among the objectives of the Union (7). It is also clearly stated that the Union respects the equality of Member States (8).

The article defining the competences of the Union has also been modified, in that the clause granting the Union "*competence to promote and coordinate the economic and employment policies of the Member States*" has been removed (9) (see below).

Institutional issues

Apart from the chairmanship of configurations of the Council, the definition of Union institutions was among the most hotly debated issues.

Qualified majority voting (QMV)

The principle behind the new definition of QMV - framed by procedures designed to prevent three large countries from forming a blocking minority on their own - has been maintained, but at the cost of introducing greater complexity. This system will be applied as from 1 November 2009 pursuant to Article 2 (1) of the Protocol on transitional provisions (10).

A qualified majority is defined as "at least 55% of the members of the Council comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union" (11). Austria and the Czech Republic demanded at the last moment that the qualified majority should comprise at least 15 Member States, which represents half the number of States plus two or a population threshold of 60% in the Union of 25 but will fall to 55% in a Union of 28.

A blocking minority "*must include at least four Council members, failing which the qualified majority shall be deemed attained*". The IGC finally gave up the idea of not taking abstentions into account when calculating the total number of Council members and the population. In that case the qualified majority would still have required 55% of the remaining Member States representing 65% of the population. The addition of a minimum number of States made this option impracticable.

The IGC drew up a draft Decision reintroducing a formula based on the Ioannina compromise whereby opposition to the adoption of an act by a qualified majority can be taken into account even if this opposition does not meet the necessary conditions to form a blocking minority. According to the draft Decision, which will be adopted on the day the Treaty enters into force, "*if members of the Council representing at least three-quarters of the level of population or at least three-quarters of the number of Member States necessary to constitute a blocking minority*" indicate their opposition, the Council shall "*do all in its power to reach, within a reasonable time ... a satisfactory solution to address the concerns raised by the members of the Council*" (12). This Decision will take effect on 1 November 2009 and will remain in force at least until 2014. Thereafter the Council may decide to repeal it.

When the Council is not acting on a proposal from the Commission or from the Union Minister for Foreign Affairs, "the qualified majority shall be defined as at least 72% of the members of the Council representing Member States comprising at least 65% of the population of the Union" (13). This applies in the field of Justice and Home Affairs (JHA) when the Council acts on an initiative from the Member States; in the field of the Common Foreign and Security Policy when it acts on its own initiative; in respect of economic and monetary policy when it acts on a recommendation from the Commission or the ECB; when it acts on the suspension of a Member State or withdrawal of a Member State from the Union and in various nominations.

The European Commission

The President of the European Commission will in future be proposed to the European Parliament by the European Council acting by a qualified majority and taking into account the result of the European elections (14). The principle of the President's "election" by the European Parliament by a majority of its members is maintained (Article I-27 (1)). The other members of the Commission "*shall be chosen on the ground of their general competence and European commitment and their independence shall be beyond doubt*" (15). With the other members of the Commission and the Minister for Foreign Affairs, he shall be subject to a vote of consent by the European Parliament (article I-27 (2)). Following this consent, the Commission is "appointed" by the European Council, acting by a qualified majority.

The IGC modified the composition of the European Commission (16). Till 2014 it will comprise one national of each Member State, including its President and the Minister for Foreign Affairs. As from 2019 the size of the Commission will be reduced: including its President and the Minister for Foreign Affairs, it will consist of a number of members corresponding to two thirds of the number of Member States, unless the European Council acting unanimously decides to alter this figure (Article I-25 (6)). Unfortunately the principle of equal rotation is maintained. It would have been preferable for the Treaty to allow more flexibility on this point. The draft Treaty is quite categorical on this point, whereas it would have been better to leave the door open to other ways of determining the size and composition of the European Commission.

Future President of the Commission and future Minister for Foreign Affairs

Following the positive outcome of the IGC, the Irish presidency also brought to a successful conclusion in late June the appointment of a successor to Romano Prodi as head of the European Commission. At the special meeting of Heads of State or Government in the Council, the Prime Minister of Portugal, Mr José Manuel Durão Barroso, was appointed President of the European Commission (17). His candidature was approved by the European Parliament at its inaugural session in July by 413 votes to 251, with 44 abstentions (18). Mr Javier Solana was granted a further five-year term of office as High Representative for the Common Foreign and Security Policy (CFSP). In the margins of this Council, the Heads of State or Government also adopted a declaration to the effect that Mr Solana will become the first European Union Minister for Foreign Affairs on the day the constitutional Treaty enters into force.

President of the European Council

The election of the European Council President by his/her peers was not called into question by the IGC (article I-22). The European Convention's idea of allowing scope for a merger of the posts of President of the European Council and of the Commission has also been maintained (19).

The Council

The IGC totally abandoned the Convention's proposals and established that the Council will in principle be presided over by groups of States. According to a draft Decision of the European Council, three Member States in rotation will chair the various configurations of the Council (with the exception of the Foreign Affairs Council, to be chaired by the Minister for Foreign Affairs) for a period of 18 months (20). In keeping with the agreement reached at the Seville European Council (June 2002) on the presentation of a joint programme by the current, past and future presidencies of the Council, the six-monthly presidency of the Council is maintained whilst taking into account the need for continuity in its proceedings. There is just one exception to the principle of six-monthly rotation: the President of the Euro Group is to be elected by the Ministers of the Member States whose currency is the euro for a period of two and a half years, by a majority of those Member States (21).

The Minister for Foreign Affairs

The creation of a post of Union Minister for Foreign Affairs, a major innovation, is maintained (Article I-28, ex I-27). The post will be created as soon as the constitutional Treaty enters into force, as proclaimed by the Heads of State or Government meeting in the Council to appoint the Prime Minister of Portugal, Mr José Manuel Durão Barroso, as President of the European Commission. On that occasion, Mr Javier Solana was granted a further five-year term of office as High Representative for the Common Foreign and Security Policy (CFSP). But in the margins of this Council, the Heads of State or Government also adopted a declaration to the effect that Mr Solana will become the first European Union Minister for Foreign Affairs on the day the constitutional Treaty enters into force. The mandate of the Spanish Commissioner will come to an end on the day of his appointment (22).

He will have a particular status within the Commission. Contrary to the other members of the Commission, the President cannot end the term of office of the Minister for Foreign Affairs. The European Council, with the agreement of the President of the Commission, shall appoint him or her and may end his or her term of office (23). He is bound by Commission procedures only in exercising his responsibilities within the Commission (24). Some amendments to the provisions on the Commission and on the rules applicable if the European Parliament votes in favour of censuring the Commission clarify the status of the Minister, who would be expected to resign from his Commission duties but whose duties within the Council would remain unchanged (25). This confirms that his attachment lies first and foremost with the Council.

He will be assisted by a European External Action Service, which "will comprise officials from the relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States" (26). Its organisation and operation will be determined by a European decision of the Council, and not by a European law as the Commission and the European Parliament had wished. The Council will act on a proposal from the Union Minister for Foreign Affairs after consulting the European Parliament and after obtaining the consent of the Commission.

A declaration (n°24) invites the Secretary-General of the Council, High Representative for the Common Foreign and Security Policy, the

Commission and the Member States should begin preparatory work on the European External Action Service, as soon as the Treaty establishing a Constitution for Europe is signed.

The Irish presidency removed the possibility, introduced by the Italian presidency, of voting by a qualified majority when the Council acts on a proposal from the Minister for Foreign Affairs. In line with the proposal made by the Convention, the Council will act by a qualified majority "*when adopting a European decision defining a Union action or position on a proposal which the Union Minister for Foreign Affairs has presented following a specific request to him or her from the European Council made on its own initiative or that of the Minister*" (27).

The European Parliament

The number of MEPs is set at 750 (a higher figure than the limit of 736 set by the European Convention) (article I-20 (2)). The IGC established that the maximum number of MEPs per Member State would be 96. This figure should make it possible to cap the number of MEPs in the eventuality that Turkey should accede to the Union, a development recognised in principle by the European Council. The minimum number of seats is raised to six (rather than 4 according to the draft Treaty produced by the European Convention).

"Passerelles" and simplified revision

For all the provisions of Part III, the European Council may unanimously decide to act by a qualified majority rather than by unanimity, and to adopt the ordinary legislative procedure rather than the special legislative procedure (28). The IGC introduced the possibility that a single national Parliament may oppose the adoption of the decision concerned, which in any event requires the consent of the European Parliament (given by a majority of its component members). Several delegations had asked in vain for the number of national Parliaments to be higher (a third), so that the assent of the European Parliament is not subject to the potential veto of one single national Parliament.

As concerns the "simplified" procedure for amending Part III on internal Union policies, the draft constitutional Treaty adopted by the European Convention made no innovations. Following proposals from the Italian presidency, the IGC incorporated a procedure for amending only the provisions of Title III of Part III on internal policies (29). The government of any

Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of these provisions. This solution avoids the need to convene an Intergovernmental Conference but does require a unanimous decision of the European Council after consulting the European Parliament and the Commission, as well as the European Central Bank in the case of institutional changes in the monetary area. Nor does it require the holding of a Convention. In order to be implemented, this decision also necessitates ratification by the Member States in accordance with their respective constitutional requirements. The IGC did not take up the change suggested by the Irish presidency, of granting the European Parliament a right of consent (30). Whereas the inclusion of this procedure is to be welcomed, the two major difficulties - preservation of the right of veto for any Member State and the need for amendments to be adopted by the Parliaments of all Member States - remain intact.

Budgetary provisions

The IGC altered the budgetary procedure in accordance with a proposal from the Irish presidency backed by the European Parliament. The timing of the procedure is changed but if the Conciliation Committee fails to reach agreement on a joint text, a new draft budget is put forward by the Commission (31).

Concerning the Union's own resources, the IGC laid down unanimity not only for determining the ceiling for own resources but also for the implementing measures (32). The Convention's text, requiring a qualified majority in respect of the implementing measures, was supported by only a few delegations (Belgium, France and Austria).

With regard to the multiannual financial framework, the IGC accepted the Irish presidency's solution. The draft Constitution maintains unanimity for the adoption of the financial framework, accompanied by a clause allowing the Council to decide unanimously to act by a qualified majority (33). The Netherlands delegation opposed the inclusion of a date for moving to a qualified majority - an idea backed by several delegations (Belgium, Germany, France, Luxembourg, Austria and the European Parliament) - and insisted on retaining this clause, which is rather impractical due to the preservation of the unanimity rule.

Economic governance

Generally speaking, the Convention did not come out in favour of "communitarising" economic governance. The idea of granting additional powers to the Commission and involving the European Parliament more closely in the decision-making process did not rally a consensus within the Convention. That body made only a few modifications giving more weight to the Commission, namely in respect of implementing the Broad Economic Policy Guidelines (if the economic policies of a Member State are not consistent with the Broad Economic Policy Guidelines, the Commission may address a warning directly to the Member State concerned) (34) and the procedure to be followed in the case of an excessive deficit (an opinion is addressed directly to the Member State concerned (35) and the right of the Commission to draft a proposal for a recommendation to a Member State in which an excessive deficit exists) (36). These provisions had been challenged in September 2003 by the informal Ecofin Council in Stresa, among others, and the same misgivings had been expressed by several delegations to the IGC (support from the Irish, Czech, Spanish and UK delegations) (37). Their demands were taken into account by the IGC (see below).

The Convention had in addition taken timid steps towards improving governance of the euro zone by enabling countries "whose currency is the euro" to adopt among themselves certain measures related to strengthening the co-ordination of their budgetary discipline and setting out economic policy guidelines for them while ensuring that they are compatible with those adopted for the whole of the Union (38). The admission of new Member States was excluded from decisions confined to Member States belonging to the euro zone. On this point the IGC made some headway (see below).

Following the suspension of the Stability and Growth Pact last November, ways of combining the need for budgetary discipline and the aims of the Lisbon strategy are being investigated. The suspension of the Stability Pact also had repercussions on the IGC, highlighting the primacy of the national level in respect of economic and budgetary policy co-ordination.

Economic and employment policy co-ordination

The IGC reworded Article I-12(3) (39) to read "the Member States shall co-ordinate their economic and employment policies within

arrangements as determined by Part III, which the Union shall have competence to provide", rather than as previously: "the Union shall co-ordinate the economic and social policies...". The same applies in Article I-15(1) (40): "The Member States shall co-ordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies". This form of words appears to imply that the Union is no longer competent to co-ordinate these areas. However, inasmuch as the Council is one of the three institutions comprising the institutional triangle of the European Union and adopts the acts defined by Part III, this change could be deemed purely symbolic.

Excessive deficits and the euro zone

The Foreign Affairs Ministers of four countries (Germany, Italy, Greece and Poland) felt that, in respect of the excessive deficit procedure, the Commission should retain only a right of recommendation, from which the Council could depart by a qualified majority "*given that the recommended measures relate to the field of national competence*" (41). Paradoxically, the possibility of the Council distancing itself from the Commission's proposal by a qualified majority vote was put forward as the best guarantee of national prerogative.

This position finally won the day. As compared with the European Convention's draft text, the Commission's role with regard to excessive deficits has been diminished (42). The only change to the present situation is that, as was proposed by the Convention, the Commission addresses an opinion to a Member State where an excessive deficit exists or may occur (43). At the next stage, as is currently the case, the Commission will merely have a right of recommendation (44) (and not, as provided for in the Convention text, a right of proposal which would in effect necessitate a unanimous vote in the Council to alter the content of a Commission proposal). As it is already the case in the current Treaty EC (45), the Council will be composed only by the Member States whose currency is the euro and without taking into account the vote of the

member of the Council representing the Member State concerned" (46). "Coercive means of remedying excessive deficits" (47) will, as at present (48), be adopted by the Ecofin Council comprising only those Member States whose currency is the euro, acting without taking into account the vote of the representative of the Member State concerned. Lastly, the IGC issued a Declaration reasserting its commitment to the Stability and Growth Pact (see also the chart on the judgment of the Court of Justice of the European Communities of last 13 July).

New members of the euro zone

The IGC did, on the other hand, make a significant improvement to the mechanism of economic and monetary union, by making the Commission and only the Member States belonging to the euro zone responsible for examining the compliance of countries with the conditions to be met in order to participate in the single currency (49). On the basis of a Commission proposal and within six months of receiving it, the Member States whose currency is the euro may deliberate among themselves and adopt a recommendation on admitting new countries to the euro zone prior to the adoption of a European decision by the Council.

The Council, composed of the Member States whose currency is the euro, adopts this recommendation acting by a majority of its members representing at least three fifths of the population of the countries whose currency is the euro. The final decision is taken by the Council (consisting of all the Member States of the Union apart from the State(s) concerned) on the basis of the recommendation from the euro zone countries. The European Parliament must be consulted. None of the ten new Member States currently participates in the single currency, but on 28 June, with a view to their future participation, Lithuania, Estonia and Slovenia joined the European exchange rate mechanism, in which Denmark also participates. These countries aspire to join the euro zone in January 2007.

ECJ Ruling on the suspension of the Stability and Growth Pact

On 25 November 2003, the Council held a vote on the recommendations presented by the Commission pursuant to Article 104(8) and (9) EC, and failed to reach the majority required. Germany, in the case of France and France in the case of Germany, and Italy and Luxembourg, successfully managed to constitute "blocking minorities". On the same day, the Council adopted conclusions whereby it decided to suspend the excessive deficit procedures against France and Germany, and sent them recommendations to correct their excessive deficits, taking account of both States' commitments.

In a long-awaited judgement, the European Court of Justice gave on 13 July 2004 its interpretation on the suspension of the Growth and Stability Pact following the action brought by the Commission on 27 January 2004 before the Court (50). This appeal concerned on the one hand the Council's failure to adopt the decisions recommended by the Commission and, on the other, the conclusions adopted in so far as those conclusions involve holding the excessive deficit procedure in abeyance, recourse to an instrument not envisaged by the Treaty (the adoption of conclusions) and modification of the recommendations decided on by the Council under Article 104(7) EC.

On the first point, the Court finds that "*failure by the Council to adopt the decisions recommended by the Commission does not constitute an act challengeable by an action for annulment and declares this part of the action to be inadmissible*". So, importantly, the Court states that the procedure can be suspended if the Council, when presented with the Commission recommendation, fails to achieve the majority required for adopting a decision.

On the second, the Court accepts that the action is admissible against the conclusions, on the ground that they are intended to have legal effects: they hold the ongoing excessive deficit procedures in abeyance and modify the recommendations previously adopted by the Council.

Another key point of the Judgment is that it does not recognise the political nature of the conclusions adopted by the Council. According to the Court, "*it follows from the wording and the broad logic of the system established by the Treaty that the Council cannot break free from the rules laid down by Article 104 EC and those which it set for itself in Regulation No 1467/97 (the regulation on speeding up and clarifying the implementation of the excessive deficit procedure) (51). Thus, it cannot have recourse to an alternative procedure, for example in order to adopt a measure which would not be the very decision envisaged at a given stage or which would be adopted in conditions different from those required by the applicable provisions*".

Another argument is procedural, "The Council's conclusions were not preceded by Commission recommendations seeking the adoption, on the basis of Article 104(7) EC, of Council recommendations different from those adopted previously". Furthermore, the recommendations contained in the conclusions were adopted in accordance with the voting rules prescribed for a decision to give notice (Article 109 (9) TEC), that is to say with only the Member States in the euro zone taking part in the vote (the vote of the Member State concerned being disregarded). And that had allowed the formation of "blocking minorities". These voting rules are different from those prescribed for the adoption of recommendations for correcting the excessive deficit (Article 109 (7)) which entails the involvement of all the Council Members, with the exception of the Member State concerned. So, according to the Court, the decision to adopt those Council recommendations "is therefore unlawful". Consequently, the Court "annuls the Council's conclusions of 25 November 2003 adopted in respect of the French Republic and the Federal Republic of Germany respectively, in so far as they contain a decision to hold the excessive deficit procedure in abeyance and a decision modifying the recommendations previously adopted by the Council under Article 104(7) EC". Both the Council and the Commission welcomed the clarification contained in the Judgment concerning their respective powers relating to the excessive deficit procedure. The situation prevailing at the moment is the same as before November 24, i.e. the Council recommendations adopted for Germany and for France remain the only legal text valid. The Court demonstrates the impossibility of applying the Pact if the Commission and the Member States do not operate in close cooperation. This necessitates that the rules are agreed by all parties, a further argument for those in favour of reforming the Pact.

External representation of the euro zone

Inspiring itself from current article 111 TEC, Article III-196 (1) provides that “the Council, on a proposal from the Commission, may adopt appropriate measures to ensure unified representation within the international financial institutions and conferences”. By adding a reference among the transitional provisions, the IGC clarified the fact that the States whose currency is the euro will adopt among themselves decisions on the external representation of the euro (European decisions establishing common positions on matters of particular interest for economic and monetary union within the competent international financial institutions and conferences (52) and measures to ensure unified representation within the international financial institutions and conferences (53).

The IGC was no more explicit than the Convention about what is meant by “unified representation”. Would it be the President of the Euro Group or the Commissioner responsible for economic and financial affairs? Since these issues were not settled by the Convention either, the physical representation of the euro zone in the international monetary system is still far from resolved.

Taxation

With regard to taxation, the IGC removed the possibility of deciding by a qualified majority on administrative co-operation or on combating tax fraud and tax evasion (54). It also deleted the Article III-63 (company taxation relating to administrative co-operation or combating tax fraud and tax evasion).

The social dimension

Few requests were made at the IGC for improvements in respect of social policy. The French, Belgian and Swedish delegations respectively proposed the following: an extension of enhanced majority voting for social and fiscal matters and the Tripartite Social Summit to be put on an institutional footing, the insertion of a horizontal social clause, and recognition of the right of trade unions to carry out “*solidarity actions from one Member State to another*” (55).

Social security

Whilst the draft Treaty maintains QMV in respect of social security for migrant workers (employed and self-employed and their dependants), it remains possible for a Member State to oppose a draft measure and request that the matter be referred to the European Council (the “emergency brake”) (56). This means that the procedure is suspended. The European Council then has a four-month period in which it may

- either refer the draft back to the Council, thereby ending the suspension of the procedure;
- or request the Commission to submit a new draft, in which case the act originally proposed is deemed not to have been adopted.

The social clause and the Tripartite Social Summit

The Italian presidency took up Belgium’s idea of incorporating a social clause. However, the wording of the text put forward in November differed from that submitted by Belgium during the Convention and reflected the decision not to align the language of Parts I and III of the draft constitutional Treaty.

The new article containing the social clause stipulates that “in defining and implementing the policies and actions referred to in this Part, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion and a high level of education, training and protection of human health” (57).

The article acknowledging the role of the social partners now contains an additional sentence recognising the contribution made by the Tripartite Social Summit for Growth and Employment to social dialogue (58).

Declaration on social policy

Only Belgium was opposed to the Declaration on social policy, in that it could imply that all the areas referred to in Article III-213 (59) constituted complementary measures (60).

The Charter of Fundamental Rights

At the Convention, the United Kingdom objected to incorporating the Charter of Fundamental Rights into the Constitution. Its representatives only agreed to the Charter’s inclusion following the addition of some new paragraphs on its scope and a sentence in the Preamble stating that “...*the*

Charter shall be interpreted by the courts of the Union and of the Member States with due regard for the explanations drawn up under the auspices of the Praesidium of the Convention which drafted the Charter". The addition of three new paragraphs in the article on the scope of the Charter (61) provoked an outcry from those who saw the paragraph drawing a distinction between rights and principles (62) as a means of limiting the Court's powers of control.

At the IGC, both the UK and the Netherlands wished to have further discussion of the Charter (63). They called for the addition in the Preamble of a reference to these explanations updated by the Praesidium of the European Convention (64), and for them to be published in section C of the Official Journal of the European Union.

The IGC added to the article on the scope of the guaranteed rights in a manner that reproduces almost verbatim the sentence added to the Preamble (65): *"The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States"*. These explanations updated by the European Convention are reproduced in Declaration No. 12, annexed to the Treaty (66). The reference is therefore redundant, but basically these technical explanations do not alter the content of the Charter. It remains to be seen to what extent the binding nature of the explanations on the Charter will limit the margin of interpretation of the Court of Justice and national courts.

Enhanced co-operation

As a consequence of the backtracking on progress made in the text produced by the European Convention, enhanced co-operation could move on from the theoretical stage to the practical. The IGC finally reintroduced the *"passerelle"* mechanism whereby the procedures for adopting legal acts may be modified in the context of enhanced co-operation: the participating countries may unanimously decide among themselves to have recourse to QMV or to the ordinary legislative procedure (67). The Council acts after consulting the European Parliament. There is a Declaration inviting future participants to indicate, when submitting their request, whether they intend to make use of this method. The exclusion from the mechanism of decisions in the military and defence spheres confirms - as if that were necessary - the intergovernmental nature of the future defence policy. This policy will be governed by a special form of enhanced co-operation known

as "structured co-operation". The mechanism does still apply to the Common Foreign and Security Policy.

As is evident in the case of judicial co-operation in criminal matters, it has become easier to trigger enhanced co-operation. In keeping with the formula used in respect of social security, the presidency has introduced "emergency brakes" into Articles III-270 and III-271. QMV is maintained in principle, but if a Member State considers that a decision conflicts with the fundamental principles of its legal system, it may request that the matter be referred to the European Council. The European Council then has four months either to refer the draft back to the Council, which must then decide by a qualified majority, or to request the Commission or the group of Member States from which the draft emanates to submit a new draft. If no decision has been reached after twelve months, a group comprising at least one third of Member States may engage in enhanced co-operation in this area, having first notified the European Parliament, the Council and the Commission.

Conclusion

V. Giscard d'Estaing and J.L. Dehaene have insisted that, after the amendments adopted by the IGC, the Treaty establishing a Constitution for Europe *"contains 90% of the proposals drawn up by the European Convention"*. The degree of complexity introduced into the definition of qualified majority voting and the reduction in its scope were probably the price to be paid for arriving at a "common accord" within the IGC. The agreement on the European Commission will enable the Union to function for ten years after the Constitution enters into force but will also test the operation of a Commission comprising one representative per Member State. Forthcoming enlargements will make the need for a slimmed-down Commission increasingly apparent. Thereafter, the equal rotation system could prove problematical. The blocking mechanism introduced into the Constitution (the "emergency brake") will result in instances of enhanced co-operation. This will substantially alter the functioning of the European Union, but the draft Constitution contains elements which ought to keep under control the inevitable differentiation of the Union. The Treaty establishing a Constitution for Europe will not have a life-span of 50 years, as the former Chairman of the European Convention had hoped. Future reforms will prove awkward. The draft Constitution contains a mechanism for simplified revision in the image of this draft Treaty establishing a Constitution for Europe which, from

a legal point of view, is still a Treaty in international law - although not entirely so, due to the incorporation procedures for its revision require unanimity on of the Charter of Fundamental Rights. But neither is it altogether a Constitution as yet, because the the part of the

Member States of the Union and ratification by all of its Member States.

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- 1 Bulletin quotidien Europe, 24 June 2004.
- 2 Treaty establishing a Constitution for Europe, IGC 87/04 of 6 August 2004.
- 3 Protocols and Annexes I and II annexed to the Treaty establishing a Constitution for Europe, CIG 87/04 ADD 1, 6 August 2004 and Declarations to be annexed to the Final Act of the Intergovernmental Conference and the Final Act, CIG 87/04 ADD 2, 6 August 2004.
- 4 Article I-2.
- 5 Article I-58 (ex I-57).
- 6 Article I-59 (ex I-58).
- 7 Article I-3.
- 8 Article I-5.
- 9 Article I-12 (3), ex I-11 (3).
- 10 Protocol No.34 on the transitional provisions relating to the institutions and bodies of the Union, CIG 87/04, ADD 1.
- 11 Article I-25 (1) (ex-I-24 (1)).
- 12 Declaration No.5 ad article I-25, CIG 87/04, ADD. 2.
- 13 Article I-25(2), ex I-24 (2).
- 14 Article I-27(1), ex I-26 (1).
- 15 Article I-26(4), , ex I-25 (4).
- 16 Article I-26, ex I-25.
- 17 2595th session of the Council - Heads of State or Government, Brussels, 29 June 2004.
- 18 711 voters, 3 invalid ballot papers. 664 votes were cast.
- 19 Cf. Article I-22(3) (formerly I-21).
- 20 Declaration on Article I-24 (7) concerning the European Council decision on the exercise of the Presidency of the Council, CIG 87/04, ADD. 2.
- 21 Protocols and Annexes I and II annexed to the Treaty establishing a Constitution for Europe, Protocol 12, CIG 87/04, add. 1.
- 22 Article 4, Protocol No.34, CIG 87/04, ADD 1.
- 23 Article I-28 (1) (ex I-27 (1)).
- 24 Article I-28 (3) (ex I-27 (3)).
- 25 Article III-340 (ex III-243).
- 26 Article III-296 (3). (ex III-197 and declaration on the creation of a European external action service, CONV 850/03 of 18 July 2003).
- 27 Article III-300 (2) (ex III-201(2)).
- 28 Article III-444 (1) and (2), ex IV-7a.
- 29 Article IV-445.
- 30 Commentary in Annex 39, CIG 73/04.
- 31 Article III-404 (8), ex III-310.
- 32 Article I-54, ex III-53.
- 33 Article I-55, ex-III-54.
- 34 Article III-71(4), CIG 50/04.
- 35 Article III-76(5), CIG 50/04
- 36 Article III-76(6) CIG 50/04.
- 37 Cf. document CIG 37/03, point 27.
- 38 Article III-88(1), doc CIG 50/04.
- 39 Ex I-11 (3)
- 40 Ex I-14 (1)
- 41 Bulletin quotidien Europe, 8724, 12 June 2004.
- 42 Article III-184, ex III-76(5)..
- 43 Article III-184 (5), ex III-76(5).
- 44 Article III-184 (6), ex III-76 (6).

- 45 Article 104 (6) TEC
- 46 Article III-184 (6), al.2, ex III-76 and Article III-197 (4).
- 47 Article III-184(9 and 10) and Article III-197(2b).
- 48 Article 104(9 and 11) and Article 122(3) TEC
- 49 Article III-198 (2), ex III-92.
- 50 Case C-27/04 Commission of the European Communities v Council of the European Union, 13 July 2004.
- 51 The Stability and Growth Pact consists of Council Regulation (EC) 1466/97 which aims to strengthen the surveillance of budgetary positions and the surveillance and coordination of economic policies; of Council Regulation (EC) No 1467/97 which aims to speed up and to clarify the implementation of the excessive deficit procedure ; and of the Resolution of the European Council of 17 June 1997 on the Stability and Growth Pact.
- 52 Article III-196 (1) (ex III-90(1)) and Article III-197 (2), i), (ex III-90 (2)).
- 53 Article III-196 (2) et Article III-197 (2), j), ex Article III-90(2).
- 54 Article III-171 does not contain anymore Article III-62 (2) of document CIG 50/03.
- 55 Cf. document CIG 37/03, points 15, 26 and 57.
- 56 Article III-136, ex III-21
- 57 New Article III-117.
- 58 Article I-48.
- 59 Ex III-107.
- 60 Declaration 18 on 'Article 213 (ex III-107), CIG 87/04, addendum 2 to document CIG 87/04, 6 August 2004.
- 61 Article II-112 (4), (5) and (6), ex II-52 (4), (5) and 6.
- 62 Article 112 (5), ex II-52(5).
- 63 CIG 37/03 point 13.
- 64 CONV 828/1/03 REV 1 of 18 July 2003.
- 65 Article III-112 new (7) (ex II-52).
- 66 Declaration 12 concerning the explanations relating to the Charter of Fundamental Rights, Declarations to be annexed to the Final Act of the Intergovernmental Conference and the Final Act, CIG 87/04, addendum 2 to document CIG 87/04, 6 August 2004.
- 67 Article III-422, ex III- 328.

Tomorrow Europe

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