

**A DYNAMIC AND DEMOCRATIC EU OR  
MUDDLING THROUGH AGAIN?  
ASSESSING THE EU'S DRAFT CONSTITUTION**

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# A DYNAMIC AND DEMOCRATIC EU OR MUDDLING THROUGH AGAIN?

## ASSESSING THE EU'S DRAFT CONSTITUTION

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KIRSTY HUGHES\*

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### **Introduction**

The draft Constitution is on the table. Attention is moving towards the traditional intergovernmental game that will be played out at the intergovernmental conference (IGC) during autumn 2003 – and quite possibly into early 2004 (despite the intentions of the Italian presidency). Much of the structure and the detailed substance of the draft treaty will stay but the IGC will be far from a rubber-stamp exercise. Moreover, despite the pessimists' (or perhaps realists') view that the IGC will only make the draft Constitution worse, the governments do have an opportunity to improve and clarify many areas. Certainly a number of issues will still be hotly contested not least on the core institutional questions.

In many ways, the results of the Future of Europe Convention represent an important step forward. The operation of the Convention itself, through its relative openness, was a significant development. The existence of a single Constitutional Treaty is an important move in the right direction. The Convention also achieved considerable simplification in some areas, and some very important democratic steps were taken.

But the Convention has also thrown up a number of problems. Despite its openness, the core institutional debate was conducted largely behind closed doors and in considerable haste. It is far from clear that the procedures followed for the Convention's institutional work were even as good as, let alone better than, an IGC. In this respect the procedures deviated strongly from that followed for all other areas of the Convention's work. In some ways, the draft Constitutional Treaty introduces more complexity than more simplicity – particularly in the dual presidencies of Commission and European Council. Crucially, there are some big gaps on the democratic front, notably on the accountability of the executive.

The result of the Convention was a compromise and consequently it is not easy or necessarily advisable to try to identify winners and losers. Nevertheless, it is clear by looking at the three main institutions that the European Parliament has been strengthened in important ways. But the picture is much less clear for the Commission and Council, where turf-fighting and confusion looks likely to be one of the legacies of the changes proposed, with neither institution ending up substantially strengthened.

Many of the divides in the Convention were between larger and smaller countries as much as the inevitable conflict between intergovernmental and integrationist points of view. All sides can claim some successes. But the compromises that were necessary to balance these points of view have produced an outcome that, on the one hand, could function fairly well and represent a step forward but that could, on the other hand, equally result in institutional malfunctioning. Which of these two outcomes occurs will depend not only on the political personalities involved but also on relations between the institutions (and whether member

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states get involved in any of the ongoing battles that may develop between personalities or institutions).

Overall, the draft treaty is at least a substantial step forward from the inadequacies of the Nice Treaty. Its structure will act as the basic framework for the EU's politics and policies for many years to come – though revisions will certainly occur. But some of its central and messy compromises leave much uncertainty as to the future functioning of the enlarged EU.

### **1. The Convention process – pluses and minuses**

Overall, the Convention proved itself superior as a method for preparing treaty change compared with a stand-alone IGC. The openness of the proceedings and the inclusion of representatives of national parliaments, the European Parliament and the Commission all underpinned the deliberative approach that allowed a much more thorough and in-depth analysis of the issues. The very example of the Convention highlights the secrecy of IGC negotiations, adding to the pressure for much more openness about the forthcoming IGC.

The openness of the Convention did not translate into a wide public debate – partly because no priority of either time or funding was given to such a debate. Nonetheless, it did allow a much wider and informed discussion than previous IGCs. There was also greater access to the Convention among journalists, NGOs, unions, business, regional bodies, think-tanks, academics and others. National parliaments were in a position to engage deeply in the debates given not only the Convention's openness but also the presence of national MPs – though it does not seem in general that parliaments strongly exploited this opportunity. The simple principle of open access for any member of the public to the Convention debates is an important democratic principle in its own right.

For many of the major areas, such as simplification of legislation, foreign policy and freedom, security and justice, the Convention proceeded in clear stages allowing substantial time for analysis of the issues. First of all, there was an open plenary debate on the basis of detailed and well-prepared secretariat documents, followed by in-depth examination in a series of working group meetings, with another plenary session then examining the working group report. Only after this sequence of debates were draft treaty articles put forward.

This rather thorough process had a number of important weaknesses, however, and broke down entirely in the case of institutions. Despite working for over 16 months, the Convention only considered draft treaty articles in its final four months. Regardless of long debates over the treaty articles and thousands of written amendments, the first revised version of most of the articles (but even then not all) was only produced at the end of May. This timing left only two weeks to debate the revised version and to simultaneously deal with the heart of the institutional debate. After the presentation of the draft treaty to the Thessaloniki summit on 20 June, the Convention had two final sessions in July dealing with parts three and four of the treaty, which allowed for very limited debate and changes.

The consequence of this truncation and imbalance in the Convention's debates, with its serious limiting of the debates on key issues (institutional reform, the revised treaty articles, and parts three and four of the treaty), meant considerable power rested in the hands of the praesidium. The praesidium met in private and did not publish its minutes. Its own internal politics was not straightforward and the praesidium was not a cohesive collegiate group. It was dominated by Valéry Giscard d'Estaing, as Chairman, John Kerr as Head of Secretariat, and to a lesser extent, by the two Vice-Chairmen, Jean-Luc Dehaene and Giuliano Amato. The Convention certainly needed a steering group. But the excessive and secretive power of the praesidium, which in itself was not anyway representative, and particularly of Giscard

himself as the Chairman, is one central aspect of the Convention method that should be substantially revised before it is used for future treaty change.

## **2. The Convention approach to institutional issues**

In the core institutional debates, the Convention method as described above was put to one side – with remarkably little comment, protest or debate from Convention members. The institutional issues were seen, rightly, as the most divisive and were deliberately left until the end of the process by Giscard. No working groups were established on institutions or on democracy, on the grounds that all members of the Convention would want to participate in those debates and discussions. But in the event, the absence of working groups did not lead to longer detailed deliberation in the Convention plenary but just to an absence of that deliberation. Meanwhile, a considerable institutional debate was taking place outside the Convention, triggered in early 2002 by the UK and France, with their proposal for a permanent president of the European Council.

This parallel external debate, particularly among the member states, only converged with the Convention when it discussed institutional issues for the first time in January 2003.<sup>1</sup> The sharp, political debate revealed a striking split within the Convention between the larger countries on one side and the smaller countries, MEPs and Commission on the other. There was a striking contrast also between the excellent and lengthy documents the secretariat had produced for all other plenary debates and the very short, weak paper put forward for the January debate. Consequently, the Convention debate focused instead on the Franco-German paper on institutions produced two days earlier,<sup>2</sup> with the smaller countries criticising it sharply.

What happened after this debate is the most significant of all. The Convention did not move on to further, more detailed institutional discussions. Papers were not put forward by the praesidium setting out issues, questions and options for solutions (it appears that more detailed institutional papers were produced by the secretariat but not discussed even by the praesidium). Rather, in February 2003 the Convention moved on to discuss social and regional issues and the first draft treaty articles. At the end of February, Giscard announced that the draft institutional articles would be put to the Convention at the end of April – which is what indeed happened (after a stormy two-day praesidium meeting, halfway through which Giscard's personal proposals for institutions were leaked to *Le Monde*). By this stage it was very clear that the Convention's institutional debate was being curtailed and pre-empted. Some hoped that the overall timetable of the Convention could be extended – and Giscard seemed to be among those aiming to do this – a request that the member states rejected. While it was obvious that little time was being made available for the institutional debate, there was a striking absence of specific demands for more in-depth secretariat papers on the institutions and for more plenary sessions on the institutions before the draft treaty articles were produced.

A full discussion of the draft articles on the institutions only took place at the mid-May meeting of the Convention. The majority of the Convention members, notably still the smaller countries and the MEPs were extremely unhappy with the draft. But again, the Convention moved away from the institutional debate, with its end-of-May session receiving the first

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<sup>1</sup> For a description of the debate see Norman, P. (2003), "The Franco-German paper on the future of Europe: a Convention Postscript", Eurocomment Briefing Note.

<sup>2</sup> The Future of Europe Convention (2003), Contribution franco-allemande a la Convention européenne sur l'architecture institutionnelle de l'Union, CONV489/03, Brussels.

revision of the treaty articles (with the exception of the institutional articles). This session also focused, somewhat curiously at this late stage, on issues such as enhanced cooperation and economic governance. Proposals for revising the institutional articles were finally given in oral presentations on Friday, 6 June by Giscard and the two vice-presidents to the Convention, which was split into its four constituent groups – governments, national MPs, MEPs and Commission. Some but not all of these meetings were open. The actual draft text was not available until 10 June, just three days before the formal concluding session on Friday 13 June. The split between large and small countries was also overlaid in these last weeks with a different split between those who wanted to maintain key provisions of the Nice Treaty (led by Spain) and those who were ready to move beyond it.

So the crucial stages of the institutional debate were not only squeezed into a very short period of time (with an absence of either background papers or revised draft texts) but much of the bargaining took place behind closed doors and in corridors. Giscard himself has called for the IGC not to make significant changes to the draft and in particular to leave the institutional compromise as it is. But the way the institutional compromise was reached means Giscard's call has much less weight than it should have. Indeed, the fact that the Convention failed to follow an in-depth deliberative approach to institutions before bargaining places a large question mark against the value of the Convention method. This approach is also responsible for the fact that the institutional compromise is not obviously better than one that would have been achieved through an IGC. It is also responsible for the unfinished nature of some of the institutional proposals, not least with respect to the Council of Ministers.

### **3. The institutional compromise**

The institutional compromise that the Convention came to is built on a trade-off between the demands of larger and smaller countries, and between integrationists versus intergovernmentalists. These two sets of groups are not identical – smaller countries are not necessarily the more integrationist. While smaller countries may in general tend towards, for example, supporting a stronger Commission, most of these put greatest emphasis on retaining their right to have an individual Commissioner, something liable to weaken the Commission. Furthermore, in an EU of 25 or more, with 19 smaller countries and only six larger ones, the small members in many cases are more concerned to defend national sovereignty (for instance, their veto rights for instance) while the larger countries, even the UK, do not want to see initiatives they support easily blocked by one small country. Hence the UK supported QMV in asylum and immigration, but was blocked at the last moment by a German insistence on retaining its veto. Further complications came into the institutional debate as Spain and Poland in particular realised they would lose some voting power in the move to double majority voting, based on country and population – an issue that Spain is bound to raise again at the IGC.

The institutional debate and battle focused to an excessive degree on the so-called 'ABC proposal' (supported by Prime Minister Jose Maria Aznar, Prime Minister Tony Blair, President Jacques Chirac). The proposal called for a permanent president of the European Council (a proposal initially floated behind the scenes by the British, but first publicly launched by Jacques Chirac in March 2002). In the end, this proposal distracted attention from other important issues of reform around the Council of Ministers and also focused attention onto the balance of power between Commission and Council. The winner out of this debate was in fact the European Parliament. It has emerged with much stronger powers of co-decision, established as the normal legislative procedure, together with more budgetary control. It also has more powers in other areas such as trade, justice and home affairs, and a –

debatably – stronger role in electing the Commission president, together with the Convention method now enshrined in the draft treaty. The Convention studiously ignored issues such as the location of the Parliament. But it is the proposed reforms and compromises concerning the Commission and Council (both the European Council and Council of Ministers) that have the most potential to become problematic in the future functioning of the EU.

#### **4. Running the EU**

The enlarged EU will have three main public figureheads, according to the draft treaty: the European Council president, the European Commission president and the new EU foreign minister. There is potential here for rivalry between these three posts, most notably between the two presidents, and also between the European Council president and the EU foreign minister, as well as between the Commission and Council as institutions. Furthermore, since the European Council president is seen (rightly) as a core institutional demand of the big nations, then it is possible that the big and small nations will also intervene, if they can, in any ongoing turf fighting between the two presidents, particularly as the new president of the European Council attempts to define and establish his or her role. Such intervention may be the case even if, as now expected, the first European Council president comes from a smaller country.

The new European Council president is expected to prepare, chair and drive forward the work of the European Council. But the president is to prepare the Council's work and ensure its continuity "in cooperation with the president of the Commission and on the basis of the work of the General Affairs Council".<sup>3</sup> At the same time, under the description of the role of the Council of Ministers, it is the General Affairs Council that shall "in liaison with the Commission, prepare and ensure follow-up to, meetings of the European Council." Meanwhile, it is the Commission that will draft the EU's annual and multiannual programming. Furthermore, the Legislative and General Affairs Council will be chaired on a rotating basis and not by the new European Council president, as the UK at least had hoped. The draft treaty also does not rule out (as an early draft did) the future possibility of combining the two president posts, whether in a double-hatted way or as a single executive president as suggested among others by British MEP Andrew Duff and former Italian Prime Minister Lamberto Dini in the Convention.<sup>4</sup>

Some of this allocation of responsibilities is welcome, which was pushed for by the Benelux countries, among others, to limit and tie down the new Council president and to ensure a strong role still for the Commission. But it also leaves the door open for substantial confusion and turf-fighting over who does exactly what and over the hierarchy between the roles. Will the European Council president, for instance, be able to add to or amend the Commission's draft strategic programme and will he or she play the lead role in coordination and follow-up? The relative powers and roles of the two presidents in the end will depend to an important degree on what happens in practice, not least on the political personality and abilities of the first Council president relative to that of the Commission president.

There is also an open question with the end of the single rotating presidency system as to how the rotating chairs of the Council of Ministers will coordinate their work with each other and with the president of the European Council. Here again some countries, notably the UK,

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<sup>3</sup> The Future of Europe Convention (2003), *The Draft Treaty Establishing a Constitution for Europe*, CONV820/03 Brussels, 20 June 2003.

<sup>4</sup> Further arguments concerning the potential role of the new president are set out in "The Battle for Power in Europe – Will the Convention Get it Right?" Hughes, K. (2003), EPIN Working Paper No. 4, CEPS, Brussels.

would like to see the new Council president chairing some form of coordinating committee. The draft treaty says that the Legislative and General Affairs Council will ensure consistency in the Council of Ministers' work but this still leaves open the role that the new president may play. Many of these issues around the powers of the new president are highly likely to be debated again during the IGC. What is clear is that the move from a part-time role played by an acting prime minister to a full-time role is a strategic shift whose full impact will only become clear over time.

There is also scope for confusion, both inside and outside the EU, over external representation. While the European Council president will represent the EU concerning common foreign and security policy (CFSP) "without prejudice to the responsibilities of the Union Minister for Foreign Affairs", the Commission, with the exception of CFSP, "shall ensure the Union's external representation". Meanwhile the new EU foreign minister "shall conduct the Union's common foreign and security policy" and as vice-president of the Commission will also be responsible for "handling external relations and for coordinating other aspect of the Union's external action". Both the draft Constitution and the EU's new draft security strategy presented to Thessaloniki by Javier Solana, High Representative for CFSP, emphasise the importance of coordination across different aspects of external action. Whether this new division of labour will be conducive to such coordination is at best an open question.

With so much effort being expended on all sides to define the post of the new European president, reform of the Council of Ministers received less attention. Much of the argument about who should chair the different Council formations was also driven by attempts to expand or limit the new president's powers. With the exception of the Foreign Affairs Council, which will be chaired by the EU foreign minister, the other chairs will rotate on an equal basis but with a rotation length of at least one year. How this rotation procedure will work, whether for example, it will be on the basis of team presidencies of a fixed number of countries and whether a period longer than a year will be seen as preferable, is left open. All of these questions are to be left to the European Council. A longer team presidency, of say four countries over two and a half years, will further emphasise the question of coordination. Will the chair of the General Affairs Council coordinate the team or will the European Council president attempt to do so? Will this team end up as a rival to the Commission?

## **5. A more effective Commission?**

The question of the Commission's size received much greater attention in the Convention and in the institutional debates than the question of its accountability, or the election of the Commission president.

The proposal of a two-tier Commission is a rather unhappy compromise between two main positions. On the one hand are those who wanted a small Commission, seeing this as potentially more effective, providing stronger collective leadership and thus control over the administration. On the other hand are those who wanted to retain a large Commission with every member state having a commissioner. While this proposal does have the virtue of creating a small college of 15 commissioners, who will run the Commission and each have a single vote in the college, it leaves the role of the outer tier of non-voting commissioners unclear. With limited political powers and responsibilities, there is a serious risk that the outer tier of commissioners may be substantially more likely to focus on lobbying and promoting national issues than under the current system. This likelihood appears even stronger in the light of the determination of most of the smaller countries, not least the new member states, to retain a 'national' commissioner. Ironically, if the behaviour of some of the small countries

pushes in the direction of intergovernmentalising the Commission, it is the large countries that will resist this (given the lack of any weighting by size).

The principle of equal rotation between the two tiers is also potentially problematic. Over time it will tend to mean that there are two more or less fixed groups of countries rotating between the tiers, so the same countries are always working together. It is also unclear how the Commission president and the foreign affairs minister will relate to this principle of equal rotation, given their different roles and appointment methods. If equal rotation is only applied to the 13 other commissioners in the college, then once the Union reaches 27 members (which if it happens in 2007, it will be two years before these reforms come into practice, in 2009), there will be at least one country that will have to wait more than ten years for its turn.

A number of countries, both small and large, seemed to have second thoughts about this compromise proposal and its acceptability to their publics. It is likely to be discussed again at the IGC.

The election of the Commission president was seen by some, not least Germany, as a *quid pro quo* strengthening of the Commission in the face of the new European Council president. Indeed the Franco-German compromise on institutions revolved around France persuading Germany to accept the new president and Germany, in turn, persuading France to accept the election of a Commission president. But the election process is very weak and not a large step forward from the current position, given that it allows the European Council to have the key role of nominating one single candidate upon which the European Parliament can vote. German Foreign Minister Joschka Fischer did not make any attempts to lead demands in the Convention to strengthen this election process. His position perhaps reflected, at least in part, the differences between his and Chancellor Schroeder's views on European policy (a difference that seems to underpin Germany's relatively weak and low profile in the Convention).<sup>5</sup>

However, some argue, not least in the European Parliament, that it will be possible to use the European elections to put forward different presidential candidates, making the procedure much stronger and more politicised than it appears at first glance. Whether the European Council will, however, simply fall into line and nominate the candidate of the party with the largest number of votes is not necessarily very likely. Some potentially difficult conflicts between the Parliament and European Council may be opened up here. As it stands, the draft treaty represents a rather weak and inadequate step forward in the accountability of the executive powers of the Commission and is also an inadequate step forward in the political strengthening of the president and commissioners relative to the officials in the bureaucracy.

## **6. Democracy and Efficiency**

The strengthening of the European Parliament is welcome in both democracy and efficiency terms. But the institutional changes to Council and Commission discussed above are disappointing in democratic terms. Executive accountability and legitimacy have not been adequately strengthened. The so-called election of the Commission president barely deserves the description 'election'. Meanwhile, the new European Council president, is to be appointed (on a qualified majority decision) behind closed doors by the European Council and will similarly be accountable to the Council in private, with a very weak reporting obligation to the European Parliament. In the battle over the distribution of power between the two institutions, democracy and simplicity got left behind. Given the powers of the Commission,

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<sup>5</sup> France, Germany and the UK in the Convention: Common interests or pulling in different directions?" Guerot, U., K. Hughes, M. Lefebvre and T. Egenhoff (2003) EPIN Working Paper No. 7, CEPS, Brussels.

not least its right of initiative, this is a grave omission. The legitimacy of the new European Council president will be very weak. Given that the post is likely to be filled by a former prime minister, appointed behind closed doors, it seems unlikely this new post will have adequate credibility with his or her peers let alone with foreign leaders such as President George Bush and President Vladimir Putin.

But some important democratic steps forward have been taken. First and foremost is the opening up of the Council's legislative process. The proposal for a Legislative and General Affairs Council will ensure a vital and long overdue democratic opening up of EU legislation, though some find it disappointing that it continues to combine legislative and executive functions. This reform has the potential to have very powerful impacts on media reporting and domestic understanding of European politics and European power – television footage of ministers voting in Council will make it clear where EU legislation comes from. However, many member states and also individual ministers within governments are not happy with this proposal and its removal of legislation from the sectoral councils. If legislation stays within the individual sectoral councils after the IGC, then it will be crucial to ensure that the legislative side of their work is fully opened up and ensure that it is not a token effort as suggested at the Seville Council (which proposed opening up at the start and end of the process). Even if the Legislative and General Affairs Council goes through, this is not a complete move to a second chamber system. The power of unelected officials in Council working groups will remain. Nonetheless it is a powerful move in the right direction.

The new 'yellow card' system to give national parliaments a clear role in monitoring subsidiarity is also an important democratic step. The most important outcome here may be that the reform makes clear to domestic media and publics that their national parliament has full information and a potential role to play at the start of the process. If the yellow card system works, it will also encourage communication and cooperation across national parliaments.

There are other important initiatives too. The inclusion of the charter of fundamental rights in the treaty and the establishment of a single legal personality allowing accession to the European Convention on Human Rights are positive and important steps. The idea of citizens' initiatives, introduced into the draft treaty at a very late stage, is also potentially interesting and imaginative, though whether it survives the IGC has yet to be seen. The communitisation of the area of freedom, security and justice also potentially has efficiency and democracy effects. However, the focus of the discussion in the Convention was much more on increasing effectiveness in this area and there are concerns about inadequate balancing progress on civil liberties and democratic controls.

Much of the work on simplification impacts on both efficiency and democracy. Simplification of the legislative procedure, decision-making instruments and competences are all positive (though the breakdown of competences remains somewhat complex, with in fact seven different categories in the constitutional section, even though only three broad types of competences are named – exclusive, shared and supporting). The move to double majority voting and away from the complex system of individually weighted votes is an important move forward relative to Nice for efficiency and democracy. But it will be hotly contested again at the IGC.

The extension of areas covered by qualified majority voting and not unanimity is also an important move in terms of efficiency, but it remains to be seen how much survives the IGC. France already ensured retention of the veto over trade and cultural industries in the closing stages of the Convention, as Germany did over asylum and immigration. Meanwhile the

extremely minimal scope to introduce qualified majority voting in tax looks set to be vetoed by the UK and Ireland among others. The so-called '*passerelle*' clause that would allow the European Council to move to QMV at unanimity without treaty change is potentially powerful in allowing greater ease of change, though unanimity at 25 will be hard to achieve. This clause will also be contested at the IGC not least by the UK.

The existence of one single treaty and of a first constitutional section is also an important step in the right direction for both democracy and efficiency. The draft treaty can hardly be claimed to be easily accessible to the person in the street, but it is nonetheless more coherent, more consistent and more accessible than before. However, the failure to take more time over, and give priority to drafting the first constitutional section in an accessible and understandable style tends to reflect the continuing elitist nature of EU construction. While of course taking account of legal and political needs, a more serious commitment by the Convention to bringing the EU closer to its people would have been demonstrated if a substantial effort had been made to road test the language and presentation of the constitutional section. Nor does Giscard's preamble greatly help matters here – being overlong and hardly modern. Overall, much more powerful and thoughtful proposals on democracy could have been produced if a working group on democracy had been established.

The ratification of the treaty, after the IGC, also raises vital political questions about democratic acceptance of European citizens and not only states of the new Constitution. A number of countries have already indicated that they will hold referenda on the treaty, including France and Spain. Some, notably Ireland and Denmark, are constitutionally required to hold a referendum. The UK in particular has been put under pressure by both pro-Europeans and eurosceptics to hold a referendum. So far the government has resisted this pressure, arguing that the changes are not of sufficient constitutional importance. This position seems to reflect, however, more a fear of the ability of the government to win a referendum than a genuine view that the draft Constitutional Treaty really represents mere "tidying up" in the defensive words of the UK government representative on the Convention, Peter Hain.

The new treaty has to be ratified at unanimity and so any rejection among the 25 states will certainly cause a political crisis. Suggestions by some that it should be made clear to EU publics that if they vote 'no' they should then leave the EU are the opposite of democratic. It would after all be entirely democratic – and pro-European – to reject the draft Constitution on the grounds of inadequate democratic steps forward. To suggest a simple 'take-it-or-leave-it' option gives no respect to European democracy. The eventual political realities of ratification and any negotiation around a rejection will depend both on the number and the identity of countries that say 'no'. But to suggest continuing membership of the future EU requires a 'yes' vote, before any country has voted, is arrogant elitism of the type that the new Constitutional treaty is meant to move the EU away from.

## **7. Foreign and Security Policy**

Giving the EU a real voice in the world and strengthening its capacity as a global actor was one of the three main challenges posed by the Laeken declaration to the Convention. But in the event, the Convention's work on foreign policy and defence policy was strongly overshadowed by the Iraq crisis and the deep divisions provoked across the governments of the EU, both current and future members. This division drove home the point that institutional structures, and changes in those structures, cannot create a common foreign and security policy (CFSP) in the absence of a genuine political commitment and political will to build such a common policy.

Not only did Iraq demonstrate only too clearly the absence of that will to build a common policy, but it showed up very clearly the unwillingness, particularly of the larger member states, to discuss and manage their differences and to minimise damage from following different points of view. Indeed, in the years running up to the Iraq crisis, the EU's foreign ministers had precisely not discussed Iraq due to the ongoing differences of view between France and the UK. Not only did member states fail to even try to manage their differences, they in fact managed to maximise the negative fallout from their differences – with some help from the US (Secretary of Defence Donald Rumsfeld in particular). President Jacques Chirac has been rightly criticised for his insulting comments to the candidate countries over the positions they took. Equally damaging and inappropriate, though receiving less ongoing comment were the unprecedented blunt attacks made, not only by the British tabloids, but by Prime Minister Tony Blair and UK Foreign Minister Jack Straw directly against Jacques Chirac and Foreign Minister Dominique de Villepin. It was, moreover, the UK and Spain that led the moves towards the divisive 'diplomacy' of advertising European differences in the pages of the *Wall Street Journal*.

It was notable during the Iraq crisis that Javier Solana had little option but to keep his head down; he had no role. The Greek presidency did their best, appropriately calling an emergency summit, but to little avail. It must be open to considerable doubt whether a more permanent president of the European Council and an EU foreign minister instead of a high representative would have been in any stronger position to prevent or at least limit the damage from, the EU splits over Iraq. Rather, such splits would call into political question the value of both roles. Some suggest that the Iraq crisis may lead to a leap forward in the EU common foreign policy, citing the shift from the disastrous failures of EU policy in the Balkans in the early nineties to EU peacekeeping in Macedonia at the current time. But despite the current EU role in the western Balkans, it is not clear that the EU has the strategic ability and common will that would allow it to act more effectively in future in the face of such challenges as the break-up of the former Yugoslavia.

The Thessaloniki summit considered a draft security strategy from Javier Solana, which is an important step and identifies priorities in promoting multilateralism, establishing an effective wider-Europe strategy and tackling current threats from WMD, terrorism and failed states. But even with its near neighbours in wider Europe, the EU faces an authoritarian state in Belarus and a failing state in Moldova. It is unclear that it has the strategy or common political will to deal with these challenges let alone the larger global ones. And in terms of the transatlantic relationship, key differences still remain, in particular between France and the UK – with France calling for a multipolar world and the UK labelling this a dangerous strategy.

In the light of these challenges, the Convention's proposals inevitably appear rather limited. The main step in the draft Constitution on CFSP is the double-hatting of the new EU foreign minister, responsible to the Council for CFSP and at the same time with the role of vice president of the Commission, coordinating external action policies. The foreign minister will need to take forward and develop the EU's security strategy. But even if the partnership with the new European Council president is strong rather than competitive, this new post cannot take away the reluctance of member states especially the larger ones to cede national sovereignty on foreign policy issues and so to create a genuine substantive foreign policy for the foreign minister and president to implement.

The draft Constitution allows for member states to request that the foreign minister present the EU's position (when there is one) to the UN Security Council. The frequency with which this happens may be low. The draft Constitution also puts forward a list of eight broad goals

that define the aims of the Union's external action across all policy areas. But there is little real progress in improving coordination across the different areas of external action.

There are also important differences of view within the EU about the new foreign minister post. It was France that managed to persuade the UK that the double-hatted post was acceptable as long as the foreign minister was principally answerable to the Council not to the Commission. The UK is nonetheless concerned at the possibility of opening the door to Commission influence over CFSP. It is also likely to push for a different name for the new post – foreign minister sounding too governmental.

But there are in fact risks that go in the opposite direction. If foreign policy is decided in the Council and the foreign minister drives external action policy within the Commission, then Council decisions may impact strongly onto initiatives that theoretically come from the Commission. This impact could extend to policies such as transport and environment, as well as trade, aid and development. The creation and the location of the new external action services was also seen as very sensitive at the Convention, with many arguing that a new administrative institution must not be created.

The Convention debated at considerable length qualified majority voting (QMV) in CFSP, with a large number of Convention members arguing for its widespread use. France and Germany actually proposed using QMV in their joint institutional paper, although after the Iraq crisis France was considered to have gone somewhat lukewarm on the idea. But it is the UK in particular that is strongly opposed to any QMV in CFSP, even to the minor extensions in implementation that have been suggested. However, the possibility for enhanced cooperation in CFSP has been strengthened.

In some ways, more progress is considered to have been made in security and defence policy, with an extension of the Petersberg tasks, the establishment of a European Armaments Agency and the introduction of the possibility of enhanced cooperation in defence. However, it is not clear why the draft Constitution commits member states “progressively to improve their military capabilities”. This is a specific policy decision that may apply at a point in time but not indefinitely (let alone for the 50 years that Giscard hopes the draft Constitution will last for).

In an important step, enhanced cooperation in some forms is now to be allowed for in security and defence policy. Crisis management tasks may be attributed to a group of countries, so-called ‘structured cooperation’ may be established concerning capabilities and the possibility for closer cooperation on mutual defence is also proposed. But this is a controversial area and will be discussed again at the IGC. The UK in particular is nervous about ‘structured cooperation’ in defence and any possible competition with NATO, also strongly opposing a mutual defence clause. However, much less controversial is the very broad ‘solidarity clause’, placed under the freedom, security and justice heading that commits member states to mobilise all instruments to prevent or respond to terrorist threats within the EU.

But defence policy cannot in the end be separated from the need for a strong EU foreign policy to drive it. Despite the various proposals in the draft Constitution, the key question remains the – lack of – political will and commitment of the member states to build a genuine common foreign policy. In essence, the EU will move forward with a two-tier foreign policy: common policies and actions may develop over less controversial and lower-level issues, but member states will emphasise their national sovereignty and freedom of action in particular in major strategic areas and issues.

## **8. Conclusion**

The draft Constitutional treaty represents a large step forward relative to the Nice Treaty. But the more pertinent question is whether it has met the three main Laeken challenges of increasing democracy and bringing the EU closer to its people, improving efficiency to ensure effective operation of the enlarged EU, and strengthening the EU's role in the world. The draft treaty is a compromise and consequently it has made some steps to meeting these goals but much more remains to be done. Some steps forward on democracy in the draft treaty are matched by important gaps, particularly in accountability of the executive. Many steps on simplification and efficiency have been taken but whether they will cope adequately with the challenges of enlargement is more doubtful. On the EU's role in the world, the Convention was inevitably limited in its ambitions by the demonstration the member states and candidates gave over Iraq of the feasibility of a genuine common foreign policy.

In terms of some of the main institutional compromises, there has been some progress. The first, but very limited, steps to electing the Commission president have been taken and some steps have been taken towards creating a genuine small college of commissioners. But the election process needs substantial strengthening and the two-tier Commission risks intergovernmentalising the organisation. The creation of a permanent president of the European Council could be problematic, although the post has been substantially ring-fenced. Nonetheless, the institutional compromise does look, at least in part, like a recipe for ongoing turf fighting and confusion. And the IGC may not result in much improvement.

In many ways, the Convention has inevitably been working in the dark. How an EU of 25 or 27 or more members will work will only be seen in practice. The new treaty will not come into force until 2006 or 2007, with some of its provisions not operating until 2009 or later. And yet by 2010 or 2012, Croatia and Turkey could be members of the EU. By 2016 or 2017, within ten years of the introduction of the new treaty, many other countries from the western Balkans may have joined. And other eastern neighbours await, including Ukraine and Moldova who are looking for eventual membership. An EU heading towards 35 members or more is conceivable.

Already, with its jump in 2004 from 15 to 25 members, the EU enters a new era. The ten new members will not simply absorb the old culture and ways of the Union. The EU will develop politically in new ways. Many big questions remain to be answered: will the enlarged EU forge sufficient consensus and commitment across its diverse membership to be effective, dynamic and close to its many citizens; and will an EU of 27 or more find genuine strategic direction and strategic leadership? The Constitution cannot and does not provide the answer on strategic leadership in the enlarged EU. Some of its tools will contribute to finding the way ahead. The EU may develop in part through building a series of multiple cores with different groups of countries cooperating more intensively in different policy areas. But whether such flexibility will enhance the operation of the future EU or lead to growing frictions is an open question.

But many of these central future issues concern political interests, dynamics, interaction and dialogue that the Constitution cannot prescribe. As the EU moves into its new era, the Constitutional Treaty will settle for now most of the institutional issues and the focus will shift as it should and must onto the strategic and tactical politics and onto substantive policy-making in an EU of 25.

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