

**THE POSITION OF SMALL COUNTRIES
TOWARDS INSTITUTIONAL REFORM:
FROM TYRANNY OF THE SMALL
TO DIRECTOIRE OF THE BIG?**

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ABSTRACT

Looking at the arithmetic, in May 2004 there will only be six large member states among 25. These six large states will, however, account for roughly three-quarters of Union's population. This is a different situation from the original European Communities for which the institutions were designed. The Convention, despite progress, faced unprecedented divisions over the balance of power as proposed in the draft Constitutional Treaty, provoking a split between large and small members. This paper tries to explore the stances taken by the small countries of the Union on issues that seem to be overwhelmingly fundamental to them – the question of the Council presidency and the question of the size, composition and legitimacy of the Commission. It concludes that the smaller countries have greater gains to make by coordinating their positions where their interests converge, so that the current 'tyranny of the Small' can avoid becoming a 'directoire of the Big'.

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*Rien n'est possible sans les hommes,
rien n'est durable sans les institutions. (Jean Monnet)*

The Convention, despite progress on many important issues, faced unprecedented divisions over some of the most fundamental questions of the balance of power in the EU of 25 or more members. The diverging stances have been presented as a clash between the smaller and larger member states of the Union. As we cannot naturally assume that the positions taken by the smaller countries are the same on all of the issues (nor can this be assumed for the larger countries), for those issues where there seem to be major disagreements – i.e. the institutional questions – this rule largely applies.

Looking at the arithmetic, in May 2004, there will only be six large member states (Poland included) out of 25. The large states will, however, account for roughly three-quarters of the Union's population. This is an entirely different situation from the original European Communities for which the institutions were designed. Although the respective major institutional players underwent some changes in the period, no major reshuffling of power took place. Since then, the number of small countries has increased and the effect will be highlighted even more after ten new countries join in May next year. That is why attempts are being made to redesign the institutions to suit a different Europe from the one we have known until recently.

The issue was recently exacerbated in the endgame politics of the Convention. On the one hand, the Praesidium and its chairman Valérie Giscard d'Estaing consistently refused to incorporate the proposals of the small countries or come up with a compromise solution until some changes occurred in the final stages. The Convention boss even acknowledged to some European media¹ that one should not naturally assume that the states are equal. This provoked an allergic reaction and counter-proposals from the vast majority of smaller countries in the Convention. The compromise of the Convention was presented by Mr Giscard to the European Council in Thessaloniki on 20 June 2003. Although the Convention managed to come up with one single proposal at the end, room was left for bargaining at the following IGC. There is a risk that the ambition of the Convention is going to be watered down and the EU is going to end up in a similar institutional muddle as it did after Nice.

This paper tries to explore the stances taken by the small countries of the Union on two issues that seem to be overwhelmingly fundamental to them – the question of the Council presidency and the question of the size, composition and legitimacy of the Commission.

Council presidency reform – Who will hold the sceptre?

Council reform seems to be one of the main issues addressed by the Convention where the cleavage between the smaller and larger EU member states (both current and candidates) clearly emerged.² While those advocating the current proposals in the draft Constitution creating the post of a permanent European Council chair (UK, France, Italy, Spain, Germany, Poland, Sweden and Denmark) argue with the need to increase the efficiency of the Council, the opponents emphasise the necessity of sticking to equality between members. On the other hand, all the states feel the need for some kind of

¹ See Spinant (2003).

² See Grevi and Hughes (2003).

Council reform, as it is one of the most unstable and vulnerable institutions.³ Taking into account its ever-changing composition, the Council – unlike the Commission or the European Parliament – is not vested with a clear-cut mandate, which makes it dependent on the current political situation in the individual member states.⁴

The Council is the EU institution most closely representing the intergovernmental element of the Union. The small countries by far do not have the same views of what role should be taken by this body – some tend to favour a stronger position of the Council (e.g. Estonia). Others like Belgium, the Netherlands or the Czech Republic are inclined to take a more balanced approach, with an equally strong role for the Commission and the European Parliament. But this is largely because of the current political representation – it is quite likely that if the opposition was in power in the Czech Republic, for example, the picture would look completely different and the country would find itself much more aligned with the British and Scandinavian positions. Over the question of the Council presidency, however, a small-large cleavage pattern is quite obvious.

The first observation we can make clearly is that an absolute majority of smaller member states insisted on the preservation of the status quo in terms of the current rotating presidency system or at least envisaged the preservation of some sort of rotation.⁵ Denmark and Sweden were the only notable exceptions, which may be explained by the fact that these countries have a tendency to favour an intergovernmental approach. The idea put forward in the draft Constitution envisages a different system of a permanent president or chair of the European Council for the period of two and half years, renewable once. Let us now explore the main concerns of the smaller countries.

Internal EU agenda-setting

The smaller member states viewed the rotating presidency as one of the main preconditions for keeping the balance between the big and the small countries. The presidency is one of the occasions where the smaller member states can clearly grasp the EU agenda and manage it. It also gives them an opportunity to give an additional impetus to development in the EU. The fact that a country is seen as the one running the EU, even though for a limited period, is important in the eyes of its own citizens.⁶ Especially if the presidency is generally considered to be a successful one, it helps to increase the overall popularity of the EU in a particular country. This point should not be underestimated, particularly in relation to the smaller newcomers as it can play an important role in the increased visibility of such a country in the European polity as well as in closer identification with the Union among its citizens.

On the other hand, the role of the presidency must not be overestimated either. Nowadays, the presiding country can add some of its priorities to the overall EU agenda, but to a large extent this is a self-driven process.⁷

It also inherently brings some dangers when a country comes up with an ambitious plan but its successors in the presidential capacity are not able to pursue it with as much vigour. Two recent examples of this situation are: the Finnish presidency that came up with the Tampere Scoreboard in Justice and Home Affairs or the Portuguese presidency that invented the Lisbon agenda. The outcomes of these ambitious plans have so far been quite limited. One of the reasons is that countries switching each half a year in EU leadership do not have enough courage or ambition to aggressively pursue these long-term goals but rather carry on by necessity. There is simply not enough time to negotiate any

³ See Durand (2001).

⁴ This idea was expressed by, for example, Gisela Stuart, Member of the Convention Presidium, at the Annual Conference of the European Institute in Sofia in November 2002.

⁵ See for example the Czech government non-paper on the institutional reform, available at www.mzv.cz/missionEU/convention.

⁶ See the speech by Slovenian Foreign Minister, Dr. Dimitrij Rupel, at the conference “After Copenhagen – the Larger and Closer Union”, Copenhagen, 24 March 2003, (retrieved from www.gov.si/mzz/govori/03032401.html).

⁷ See Hughes (2003).

substantial shifts forward. This could pose a potential problem for the overall dynamics of the EU integration process.

The role of the presidency can be crucial as that of a broker and deal facilitator between particular groups of countries within the EU on various issues. Nevertheless, as experience has shown many times, this is not always the case. Let us take a recent example of the Danish presidency. There is no doubt that for the Danes, finishing the enlargement negotiations with ten candidate countries was number one on the agenda. The role that the presidency played in making the final deal, however, was not crucial. It is doubtful whether it would have been possible to reach a deal in Copenhagen in the absence of the prior Franco-German agreement made in Brussels in October, which was the real driving force behind the deal.

Another fact that speaks against the six-month rotating presidency comes with the implications of the enlargement. If the current system is to be maintained, it would mean that each country would hold the presidency once in every 13 years. Given the limited time scope, no one can really hope that a country would be able to influence EU development in any substantive way. Also the symbolism becomes less important here as the country holding the presidency will be just one of many running the EU. Another argument against keeping the rotating presidency is the fact the politicians and the civil servants working during one presidency will be replaced more often than every 13 years. The institutional memory of the Council would then be shorter than the time-span of the rotating system after enlargement.

Why then are the smaller states so anxious about keeping the current system if most of the arguments speak against it? There are several explanations. The first is that the current system works and is highly predictable, albeit with many reservations. With a system of a permanent chair, no one can really say at the moment what would happen with the inter-institutional equilibrium. It is almost inevitable that an administrative apparatus would emerge around the president that could potentially rival the European Commission which is, as we explain later, thought to be the best friend of smaller countries. They usually support the Community method and would therefore like to see even the strategic direction emerging from the Commission rather than from the Council. This stance, however, leads to further questions of democratising, legitimising and perhaps even politicising the Commission for these tasks and whether the EU is moving more towards intergovernmental or supranational political finality. This issue is discussed later in the paper.

When we consider the legitimacy of streamlining the strategic direction the EU wants to have, we have to pose the same question in relation to the permanent Council chair. The position could potentially develop into a highly influential and powerful one. Will the president be accountable only to his or her counterparts in the European Council? That could be quite worrying as the EU leaders tend to behave very differently at the summits, often forgetting that they have their governments, parliaments and voters behind them. This lack of accountability is a serious concern. On the other hand, the point that is sometimes mentioned – that the Council chair will only listen to the large countries – does not have to worry the small ones so much. There will be more small countries than large ones, and thus more candidates for the Council chair emerging from this category.⁸ Furthermore, the newly proposed qualified majority voting (QMV) system would help to assure they cannot be outvoted by the ‘Big Six’ in the bid.

Role in the external relations of the Union

For the EU, the one thing that is often stressed is that the current system does not provide for enough continuity and efficiency in running the EU foreign policy and leads to an insufficient visibility of the EU in the world. That is probably true. Thus, the question is whether adopting the position of a permanent chair would make EU foreign policy more visible in the world as well as more efficient.

⁸ See Kohnstamm and Durand (2003); it is necessary to mention here, however, that the eventual draft of the Constitution does not stipulate the condition of the European Council chair being a former member of the Council, thus potentially limiting the scope of candidates from small countries.

The Convention President Valéry Giscard d'Estaing stressed that the recent Iraq crisis and the resulting deep divisions within Europe proved the necessity of having a permanent president. Draft Art. I-21, para. 2 of the Constitution goes along with this, stipulating: "the President of the European Council shall at his or her level and in that capacity ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the responsibilities of the Union Minister for Foreign Affairs".⁹ This could be interpreted in at least two ways. The first one is that the permanent president will, in fact, create the EU foreign policy. Yet it is highly doubtful that the EU heads of state and government will be able to confer this competence on a single person. The other interpretation is that the president will be, in the realm of foreign policy, just a spokesperson of the European Council (at the very best) and a broker between the heads of state on foreign policy issues (as in EU internal affairs). This may lead to some doubt as to what the role of the European foreign minister would be, which is discussed later in the paper. The proposal put forward by the Presidium in this respect is weak, because it does not come up with a more precise job description for the permanent president in the area of foreign policy, apart from this very broad and inconsistent formulation in the draft Art. I-21.

Given the virtual non-existence of a common EU stand on some of the crucial foreign and security policy issues, it is highly unlikely that the heads of state and government will manage to appoint a person who will be able to exercise a sufficient influence over them and speak for the EU in the international arena. Could such a person be a counterpart to Presidents Vladimir Putin or George W. Bush? Probably not, given that he or she could not make the European foreign policy, yet would be the sole European Council spokesperson. Even more importantly, he or she would not enjoy political legitimacy as strong as that of Mr Putin or Mr Bush, which will make it difficult for him or her to be on equal footing with them. The potential competition with the Commission president, who will be – whether we want it or not – vested with some sort of external representation powers, is also more than evident.

Most of the smaller countries are in favour of seeing a genuine, common position on many foreign policy issues. This is because for smaller countries it is easier to reach a common stand in the area of a foreign policy, as they generally do not have global interests but particular ones. But even with regard to their particular concerns, they hardly ever have enough structural power to push them through. Influencing issues through EU structures can be one of the ways of gaining this structural power. This can explain why some of the small countries would like to see a stronger role for the Commission in foreign policy. If not, they can at least rely on affecting the issues during their presidency. Undoubtedly the creation of a permanent Council chair would make such efforts by smaller states much more difficult to achieve.

European foreign minister – What relation to the Council president?

It is often stressed that one of the ways to make the foreign policy more efficient is to create a sort of permanent post for running the EU external relations that would replace the current 'troika' system. Small countries generally assume that this task could be performed by the double-hatted European foreign minister (EFM), and that is why they supported the initiative in the Convention. The only problem that remains is the possible encroachment on the position of the Council president.

The views on the institutional position of a European foreign minister, however, differ. Some countries would prefer to have this position based solely in the Commission (Finland, Belgium); others would prefer the EFM to be based in the Council (Estonia). The current proposal in Art. I-27 stipulates that the foreign minister will be appointed by the Council in concert with the Commission president, thus creating a double-hatted post as the foreign minister would also be one of the vice-presidents of the Commission.¹⁰ It seems that this could be a sensible compromise for smaller countries, the majority of whom do not favour shifting the external representation of the Union completely to the Council. Still, many questions remain open in the proposal. For instance, as a

⁹ See European Convention (Secretariat) (2003a).

¹⁰ Ibid.

member of the Commission, will the foreign minister also have to be approved by the European Parliament? Some may say no, as he or she will be representing the Council and the European Parliament does not have much say in the common foreign and security policy (CFSP). On the other hand, he or she will be responsible for the Union's external action in a much broader sense than the current High Representative, including the external relations falling within the Community pillar; thus scrutiny from the European Parliament would be logical. Yet to what extent will he or she be bound by the collegiality in the Commission?

With relation to the previous discussion, the post of the European foreign minister would not be entirely equal to heads of state and government, thus his or her influence in formulating and pronouncing on European foreign policy issues will be even more limited than that of the president. The current draft of the Constitution, however, states that he or she should conduct the Union's common foreign and security policy (Art. I-27 para. 1) and chair the Foreign Affairs Council (Art. I-23 para. 2).¹¹ The first part of this job description creates further confusion about the relationship between the foreign minister and the European Council chair. Some efficient division of powers between these two functions could still be envisaged – while the foreign minister would run EU foreign policy on a day-to-day basis, the European Council president would speak at the head of state level, i.e. as counterpart to Mr Bush or Mr Putin.

One must not forget, however, that the problem lies elsewhere. Neither the permanent European Council chair, nor the European foreign minister will be able to make much difference, unless the system of decision-making in CFSP is radically changed to QMV or at least some other more efficient form of constructive abstention. It may bring less confusion for the EU counterparts on the world stage but will hardly make in itself the EU foreign policy more efficient or visible in a wider world. But there are not enough countries that are ready to concede to this step at the moment, and certainly not all of the small ones.

The other important step – and not necessarily an easier one to make – is to try to identify genuine European foreign policy interests on which all of the 25 countries can agree upon (or at least not obstruct). Europe needs to find the lowest common denominator in foreign policy in areas where it can make difference, rather than try to be a global policeman while its foreign policy is still being shaped.¹² It is certain that such an interest can be found, most probably in the immediate environment of the Union. In the draft Constitution there is even a specific title on it (Title VIII), and thus we can presume it will receive 'privileged' treatment. The first EU-run corps in Bosnia and Macedonia is an example of this. In addition to the Balkans, other areas can be considered, such as the Southern Mediterranean, the Middle East, Ukraine and Russia.

Thus the permanent EU president is not much of an advantage to smaller countries, either in foreign policy or in internal business. It may bring some slight increase in continuity into the EU's external representation, but will not make much difference towards driving the EU strategically. Even those countries that support the permanent president do not have the same ideas about his/her job description – while the French would like to give him or her a strong role, potentially developing into the Union president, others such as the British or the Scandinavians (Denmark, Sweden) would rather like to see him or her as a representative figure.¹³ For the time being, the president is likely just to 'chair' European Council sessions.

It is surprising, that the small countries that are so very opposed to it do not come up with any strong and reasonably argued counterproposals, as most governments agree that the current system needs revision. The first really courageous initiative was tabled by the Benelux countries in their offer to agree to the permanent chair in return for the Commission president chairing the General Affairs Council (GAC).¹⁴ But this sounds like an attempt to make the sort of trade-off that we know about

¹¹ Ibid.

¹² See Everts (2002).

¹³ See Michalski and Hnise (2003).

¹⁴ See European Union (2002), A balanced institutional framework for an enlarged, more effective and more transparent Union, *Memorandum of the Benelux*.

from Nice. Many more innovative proposals could have been made by smaller countries opposing the permanent president, ranging from the double-hatting of the Council and Commission presidents to the redesign of the rotating presidency so that it is more effective, strategic-thinking and yet representative of different groups of countries in the Union and maintains their equal share in guiding the EU. These proposals have already appeared but they were not taken up or further elaborated upon by small countries. For instance, in one of the early stages of deliberations, the Czech government adopted the idea of having a double-hatted president, which was then turned to a team presidency and then to maintaining the status quo. Instead of this, the small countries allowed this point to be hijacked by the large ones.

Unfortunately, it is too late to argue this in the Convention. The only chance for the small countries is to make a strong push during the IGC. Given the fact that it will be run by a country whose government favours the current proposal, this may prove to be as difficult as it was with the president of the Convention.

European Commission reform

The size – Will everybody have his man or woman in Brussels?

Within a fragmented and relatively blurred inter-institutional framework, the Commission plays multiple roles (Art. 211, TEC), ranging from initiating the legislative process to ensuring respect for the Treaty and derived legislation, to enacting executive measures and to supervising policy implementation. Moreover, the Commission is essential for ensuring the overall consistency of policy developments at the European level and for the conciliation of divergent national and institutional interests. The effectiveness of the Commission in carrying out its core task largely depends on constructive relations with the other actors involved, namely the Council of the EU, the European Parliament ('the Holy Trinity') and national administrations.¹⁵

The importance of the debate on the role of the Commission in the future institutional architecture of the EU is more than relevant from the perspective of small countries. There are at least two arguments that speak in favour of this statement:

- The Nice negotiations resolved the question of the composition of the Commission only partially. It seemed to be a starting point for undertaking all other necessary institutional reforms, especially those concerning the intergovernmental Council and the European Parliament. During the negotiations, however, the reform of the Commission remained in the shadow of other Amsterdam leftovers, especially that of the redistribution of votes in the Council, to which all member and applicant states attached much greater importance.
- With the exceptions of Poland and Romania, all the candidate countries are small states. Thus, not only will the fifth enlargement almost double the membership of the Union, it will also, above all, increase the number of small states.

European integration has always included large and small members. The divergence of interests between them was a reality that the European Community has had to take into account since the beginning of the integration process and is a reality that the EU has to take into consideration as well.¹⁶ In order to understand why the composition of the Commission is so important for the small countries, it is important to review the circumstances under which it emerged as a very good ally of smaller member states in the Union.

To prevent the predominance of larger states over smaller ones, the 'founding fathers' of the European Coal and Steel Community had to comply with the demands of small states (Benelux) to create an additional, intergovernmental body next to the supranational High Authority, owing to the fear by the small states that the High Authority would merely protect the interests of larger ones. In addition, the

¹⁵ See Grevi (2001).

¹⁶ See Kohnstamm and Durand (2003).

voting arrangements in the Council were made in favour of small states to ease their concerns about joining their larger neighbours in the supranational community.

In the framework of the European Economic Community and Euratom, centrality in the institutional setting had been shifted from the Commission to the Council. Because of the enforcement of the majority voting principle in the Council,¹⁷ smaller states paradoxically realised their interests could be better pursued through a stronger role of the Commission and through the Community method.¹⁸ In the intermediate period, the Luxembourg compromise¹⁹ (since 1966) represented a side step in voting arrangements, and returned to unanimity voting, in which all states, small and large, had the opportunity to veto a decision and were thus placed on the equal footing. It is also in the context of the Luxembourg compromise (where the larger states were not worried about the impact of enlargement), that a change emerged in the relative voting power in the Council between smaller and larger states in favour of the former, especially through their ability to create a blocking minority.

The community method, on which the process of integration has been based since the Rome treaties, can be described as suitable for current and future small EU member states. The importance of this method is most obvious in relation to the core Commission's competence as an exclusive legislative initiator. According to the founding treaties, the Commission has the exclusive task of ensuring that legislative proposals are in the interest of the whole Community, which means in the interest of small and large states.²⁰ This task was assigned to the Commission as a necessary compensation for the enforcement of the majority voting principle in the Council,²¹ which, unsurprisingly has often led to the out-voting of some states. Furthermore, because of the weighted-voting in the Council, the probability of out-voting smaller states had been greater than that of the larger ones. To ensure that the process of integration would not be hampered by the dissatisfaction of out-voted states, it was necessary to create a mechanism through which the interests of all parties would be considered. As Temple Lang and Gallagher noted, "To make sure that the Commission would act in the interests of all, the Commission's independence and its composition, representing the whole Community, were guaranteed. All this was, and is, needed to make majority voting acceptable".²² This is the main reason why, according to the Community method, the Commission and not the European Parliament was given the competence of sole legislative initiator, as it would be considered more logical from the perspective of domestic political systems.

Strengthening the role of the Commission means reinforcing the Community method; while on the one hand this filters out the unilateral pursuit of national interests, on the other hand – which is equally important from the standpoint of candidate countries – it tends to generate solidarity-oriented outcomes. The Commission itself proposed some suggestions on how this method could be revived in

¹⁷ As Temple Lang and Gallagher (2002) have stated, "The founders of the Communities were convinced that if a veto is exercised on all issues by each member state, the Community would not work. Unanimity on every issue was not, therefore, a viable option. The Treaty of Rome, consequently, prescribed what had never been done before – majority voting in an international organisation."

¹⁸ As Temple Lang and Gallagher explained, "In the multinational environment, where the confidence of all parties must be gained and retained, the mediator body should be, and should be seen to be, representative of all the parties so that the special problems of each party can be taken into account. The Community method necessitates an independent and fully representative Commission with the sole right to propose legislation to be adopted by the Council and the Parliament. Only the Community method can ensure that the European Union remains acceptable in all the member states."

¹⁹ See Nugent (2001), p. 31.

²⁰ Temple Lang and Gallagher (2002) have pointed out that "[I]f this system is to work, two rules must be respected. The first is that the parties may only discuss proposals, which have been made by the mediator and not discuss competing proposals made by others; the second is that, although the mediator's proposal may be adopted by a majority, it may be amended only by the mediator or by a unanimous decision of the parties."

²¹ Temple Lang and Gallagher (2002) concluded that "[T]here is a link between the Commission's role as the single proposing body of European Community measures and majority voting".

²² See Temple Lang and Gallagher (2002).

the White paper on European Governance,²³ published in July 2001. These suggestions included, to mention just few: the simplification of legislative acts, the possibility to withdraw proposals in the event of inter-state bargaining, a strengthening of the executive role and the elimination of national committees in the comitology procedure. Obviously, all these proposals are aimed at enhancing the Commission's role.

The Commission is aware of the fact that under qualified majority voting in the Council it will be more difficult to find approval for its legislative initiatives. At the same time, it seems to be pressed between the influence of larger states and the aspirations of the European Parliament to strengthen its legislative role. Any limitation of the Commission's legislative competence that the European Parliament is striving for would lead to the increase of power of the larger states and would consequently ruin the established inter-institutional balance and weaken the Community method.²⁴

The other reason why the role of the Commission is so important lies in the so-called 'democratic deficit'. As Temple Lang and Gallagher have stated: "[T]he deficit in transparency and accountability in the EU does not lie with the Commission, but with the Council. The executive power in the EU has increased and parliamentary power decreased because Governments meet behind closed doors and make agreements on both constitutional matters and on legislation".²⁵ The feedback mechanism over the decisions they take with respect to European issues is quite limited. In many EU countries the Parliaments do not actually care too much about what their government is negotiating in Brussels (the notable exception being the Danish Folketinget). Notably the ministers are nominated by their governments and are not chosen by their national parliaments. Thus, for European issues they are accountable neither to their national parliaments nor to the European Parliament.

Thus, it is not surprising that small states in the future inter-institutional architecture advocate a strong Commission, capable of representing the general interests of the Union and above all able to counterbalance the power of larger states in the Council. From the perspective of the accession countries, the positive experience of the accession process so far should not be neglected. The Community method has facilitated enlargement and enabled accession countries to overcome political factors and bilateral prerequisites that are not directly connected with the enlargement process itself (such as the dispute on property restitution between Slovenia and Italy).²⁶ It is also a model that respects the sovereignty of newly established states.

Regarding this core competence of the Commission, it is thus necessary for all states to be represented in this organisation. The provisions of the Treaty of Nice for the time being take into account such a composition, but provide for a change when membership finally reaches 27. It concluded that when the number of member states reaches 27, the Commission will be reduced to less than the number of the member states – each member state will no longer have its own commissioner and thus the Commission will not be fully representative. The consequences of this shift could be serious: states not represented by a commissioner could claim not to be obliged to fulfil the decisions agreed by the Commission and this may have detrimental effects on the pace of further integration. As one expert observer has noted, "at any given time there could be several member states which [...] would not be represented in any sense in the Commission. They could be unwilling to accept what the Commission has proposed, or, more seriously, what the Commission may have done within the limits of the powers which the Commission itself is authorised to exercise".²⁷

²³ See European Commission (2001).

²⁴ Temple Lang and Gallagher (2002) noted that "The erosion of the Community method tends to favour the larger member states, which would gain influence from the move towards inter-governmentalism. The Commission was created primarily to safeguard the interests of the Union as a whole and to be thoroughly aware of minority interests so as to justify majority voting. Under the Treaty it was given a status that was and is unique in international law and practice. This was never explained in the EC/EU Treaties and the result is that many Europeans do not know why the Community was designed as it was."

²⁵ See Temple Lang and Gallagher (2002).

²⁶ See Brinar and Svetličič (1999).

²⁷ See Temple Lang and Gallagher (2002).

There are some alternatives to such a position, advocated mainly by the large states, because they all seek in some ways to ensure the preponderance of their position. The most widely advocated solutions are: rotation (which, according to some countries, should be limited only to smaller states); classification of portfolios according to their importance; and the hierarchy of commissioners (junior and senior). The latter two options both have the undeclared intention that the most important DGs and posts would remain in the hands of the larger states. None of these alternatives are satisfactory for the small states.

Despite the most obvious arguments by the proponents of the view that the Commission, as an independent and impartial body, does not need to be fully representative (one commissioner per member state) because it pursues the Community's interest and should not reflect national interests, the reality shows a rather different picture. We should distinguish between the Commission as a supranational organisation and its more intergovernmental nature, in which the commissioners act as a link between the Commission and the nation states. Despite the principle of their independence and impartiality, it is a tacit rule that commissioners do represent member states in the way that they observe and then mediate which legislative proposals are politically acceptable in their respective capitals and which ones are not. At the same time, they represent the channel of communication for the requirements of Commission to the member states. This makes preparing legislative drafts an indispensable part of the process.

A reasonable argument in favour of equal representation in the Commission stresses "a need for someone to personify 'the Union' in each member state and to convey a European message in the national media and in the respective national languages. Although a vision of the European interest cannot be the result of the addition of national interest, it is important that the institution possessing the monopoly of legislative initiative in the vast majority of policy areas is able to take national specifics and sensitivities into account. Having one commissioner per member state is, at least in theory, the best guarantee that this actually happens."²⁸ Greater consideration of national interests by the Commission was also demanded by member states themselves, which resulted, *inter alia*, in the incorporation of the comitology procedure regarding the single market legislation. The possibility of non-compliance with the Commission's decisions in the realm of its executive function, shared with the Council, and its legal function (as a guardian of the legal framework), is also highly probable under such system. Although it is true that in the executive and legal spheres the representation of all states is not as necessary as in the legislative sphere, it would nevertheless support its legitimacy.

The Commission has four quite distinct kinds of powers. Apart from its basic role as the independent and sole policy- and legislation-proposing institution, it also performs tasks that cannot be carried out by the Council or the Parliament: the power to negotiate international agreements on the basis of the mandate of the Council; the power to make decisions on the compatibility of state measures with Community law; and, the power to bring member states before the Court of Justice if they do not fulfil their obligations under the treaties. For these reasons, the Commission must stay equally independent of all the member states and must be fully representative of all of them. Only in that way can it fulfil its central roles of preparing measures in the interests of the whole Union, of safeguarding the *acquis communautaire* and of representing the Community/Union. These are much more important than its 'executive' role in the narrow sense.

Regardless of the fact that the strong position of small states to preserve their own commissioner is watered down by the present proposal of the draft Constitution, acceptance of this part of the Constitutional Treaty could have negative effects on the process of integration as such. Indeed it may contribute to the widening of the democratic deficit.

The election of the Commission president – decreasing the democratic gap but weakening the Commission?

As explained previously, the Commission is often referred to as being the best friend of the smaller member states, at least in theory. This is based on the assumption that the Commission, as a guardian

²⁸ See Kohnstamm and Durand (2003).

of the Community interest, would not take undue respect of interests other than the ones of the Union as a whole. It is beyond the scope of this paper to examine whether this is really the case, therefore this paper is based on the assumption that it is in the interest of the smaller member states to have a stronger role for the Commission. One way of clarifying the Commission's legitimacy, it is assumed, is by increasing the democratic legitimacy of the president of the Commission.²⁹

According to the present system, the European Council, acting by a qualified majority, nominates the person it intends to appoint as president of the Commission (Art. 214 TEC). The European Parliament then approves the nomination by an absolute majority (Art. 198 TEC). If a majority is not obtained, the procedure has to be repeated. The other members of the Commission are nominated by the Council, and then the Commission, as a body, is subject to a vote of approval by the European Parliament. After approval, the Council appoints the president and the other members of the Commission.

In the Convention proposal, the president of the Commission shall be elected by the European Parliament.³⁰ According to draft Art. I-26 of the proposal, the European Council, deciding by qualified majority, puts forward its candidate for the presidency of the Commission. When nominating a candidate, the European Council shall take into account the elections to the European Parliament. The nominated candidate shall then be elected by the Parliament by a majority of its members. If the majority support of the Parliament is not received, the European Council shall within one month put forward a new candidate. Furthermore, the president and the nominated commissioners, as a body, shall be approved by the European Parliament. Thus, two new elements are added in the proposal compared with the present system.

First, according to the proposal the European Parliament will elect the Commission president. Compared with the present system the proposal does not, in fact, change the position of the European Parliament since only one candidate is put forward to the Parliament. Thus no options, other than approval and non-approval, are open to the Parliament. An election usually means that there are several options, at least in democratic, multiparty systems. The Parliament can, of course, choose not to elect the candidate but this would only mean that another one-option election would be made within one month. So, instead of approving the nominated person, as is the case now, the European Parliament will elect the nominated person. Will this improve the democratic legitimacy of the president? Since the Parliament will not have any options, the proposal seems to be far from satisfactory in this regard. If the democratic legitimacy is supposed to be strengthened, the Parliament should at least be given a choice between several candidates. Nevertheless, the proposal changes the institutional balance symbolically, by explicitly stating that the European Parliament, and not the Council, elects the president of the Commission.³¹

Second, the proposal states that the European Council, when nominating the candidate, shall take into account the elections to the European Parliament. It is difficult to foresee what this will actually mean since no qualification is made regarding this in the proposal. It seems as if the European Council can, in fact, disregard the election to the European Parliament. Therefore the proposal does not imply any significant change of the nomination procedure or the legitimacy of the Commission president.

It should also be noted that the Commission would still be responsible to the Parliament according to the Convention proposal (Art. I-26 para. 3), which stipulates that the Parliament may pass a censure motion on the Commission. If such a motion is passed, the members of the Commission must all resign (see also Art. 201, TEC).

Is the proposal then in line with the interests of the smaller states? Some of the states did want the Parliament to elect the Commission president, for example Austria, Greece, France, Germany, Belgium, Bulgaria, the Czech Republic and the Netherlands. Others wanted to keep status quo, such as Sweden, Finland, Portugal, UK, Estonia and Spain. Ireland and Denmark supported the model of an

²⁹ See Coussens and Crum (2003), p. 8.

³⁰ See European Convention (Secretariat) (2003b).

³¹ See Palmer (2003).

electoral college to elect the president of the Commission. Slovakia supported the idea of a super-majority and Malta supported the idea of a congress of national parliamentarians to elect the president.³² Looking at the proposed amendments submitted by some of the representatives of the smaller states to the Convention, the positions were in some cases different.³³ For example, the Swedish representative suggested that the national parliaments and the European Parliament should elect the candidate. The Danish representatives suggested that an electoral college should elect the president out of a list of at least three candidates. The Irish representative also proposed that the national parliaments should be involved in the election process. The Cypriot and Portuguese representatives and some of the Finnish representatives proposed a list of at least three candidates to be put forward to the European Parliament. The Greek representatives proposed that the political groups of the European Parliament should put forward the candidates. The Slovakian representatives supported the proposal but suggested that a three-fifth majority of the votes in the Parliament should be required. As one can see, the member states were split regarding this issue. The dividing line, though, was not between small and large member states; instead it seems as if the division fell between traditionally so-called 'federalist' states and states favouring intergovernmental cooperation.

The election of the president by a majority in the European parliament has some drawbacks.³⁴ It is sometimes alleged that the election of the Commission president will lead to a greater politicisation of the Commission. This could be a problem, first because the Commission would not be able to exercise some of its strongly apolitical tasks as a purely administrative body (e.g. in competition policy), and second because it would depend more on the political composition of the European Parliament than it does now and hence could be more vulnerable to the possible motion of censure. The fears are, however, quite unfounded. The real politicisation would only come about if the political fractions in the European Parliament nominate their candidates. But this does not seem to be a very likely option as no one is strongly advocating it. Furthermore, it must be borne in mind that any system basically assumes that the Commission president will be elected in some concert between the European Council and the European Parliament and the composition of the Council does not necessarily have to correspond with that of the European Parliament.

Another problem with the proposed system is a low turnout in European elections, which cannot at the moment provide much more legitimacy for electing the Commission president. Yet it may be the election of the Commission president that will increase citizens' interest in the role of the European Parliament.³⁵ Supposing that the electorate will see the election of the Commission president as a natural outcome of the European Parliament elections, they will finally see it as fulfilling one of the main roles that any Parliament actually has – that of giving the mandate to the 'government'. The intergovernmentalists are likely to fear this step, as it would shift the system towards what could become a classical parliament-government relationship. This would further have to be accompanied by some measures that will make this procedure more visible, for instance, bringing the investiture of the new Commission upon the European Parliament elections.

Another option proposed by some states is the election of the Commission president by national parliaments or by an electoral college consisting of national and European parliamentarians. The system could be based on the population criteria, as reflected in the number of seats in the European Parliament, which would determine the share of the vote given to each national MP. In order to ensure a fair representation, the over-representation of smaller member states should be allowed. Such system would at the same time indirectly enhance the role of national parliaments. But if this is the case, it would very much weaken the role of the European Parliament. It would also create a slightly awkward situation if the Commission president or the Commission as a whole were to be elected by a body

³² See the national debates and positions on the Future of Europe compiled by the European Policy Institutes Network (EPIN) (available at <http://www.epin.org/national/index.html>).

³³ See European Convention (2003) regarding the proposed amendments to Article I-26.

³⁴ See Coussens and Crum (2003), pp. 13-14.

³⁵ See Palmer (2003).

different to the one who can censure it.³⁶ It should also be kept in mind that the legitimacy of the president of the Commission depends on other factors as well, such as the possibility for her or him to appoint the other members of the Commission.

Finally, a direct election of the Commission president could be an alternative. But this does not seem to be very attractive to the smaller states, since the results would be determined by more populous and thus larger states (which, needless to say, is a mere consequence of the democratic principle; one man or woman – one vote). Given the non-existence of a common European demos, it would be difficult to persuade the French or British to vote for a Finnish or Irish candidate. Another, different case could be presented if pan-European political parties come up with their candidates – which may help to overcome the national prism of the candidates. But this situation is still far from reality. The real challenge is to build an institutional balance reflecting both the democratic principles and the fact that the Union is a union of states. An interesting proposal made by the Convention in this regard is that in 2009, every member state will have one vote in the Council, according to draft Art. I-24.

Returning to the current proposal, if it is supposed that it is in the interest of small member states to have a strong Commission, then the democratic legitimacy of the Commission needs to be strengthened. One way of strengthening the democratic legitimacy would be to give the European Parliament the power to elect the president of the Commission as is suggested by the Convention. The proposal, though, does not in fact change the position of the European Parliament in this regard other than symbolically. The Parliament should at least be presented with several options or a list of candidates if the goal is to give the Parliament the power to elect the Commission president.

Even if it is not more than of a symbolic value to the Parliament, the current proposal may still be supported by a number of member states, small as well as large, since the dividing line between the member states regarding this issue seems to go between the so-called ‘federalists’ and intergovernmentalists. The more federalist-oriented states that are in favour of a strong Commission could be supporting the proposal from the Convention for two contradictory reasons – because the proposal states that the Parliament (at least in theory) elects the president of the Commission or because the proposal in fact does not strengthen the parliamentary control of the Commission and thus leaves the Commission independent. The intergovernmentally oriented states may also support the proposal because it would still leave the factual power of the election of the Commission president to the Council, when nominating the presidential candidate.

Conclusions

From what has been said, it seems that the smaller member states should not be very happy with the draft Constitution presented at the Thessaloniki summit with respect to the three major issues discussed – the permanent president of the European Council, the size and composition of the Commission and the election of the Commission president. The permanent Council chair, as suggested in the Praesidium proposal will not be much of an asset to the small members nor to the EU as a whole. There are also strong arguments in favour of equal representation of member states in the Commission rather than creating a two-tier system. With respect to the election of the Commission president, the stance of the small states is more divergent and seems to go more along pro-federalist versus intergovernmentalist patterns. Most small countries favour enhancing the democratic legitimacy of the Commission, but the current proposal is not likely to enhance the democratic legitimacy of the president.

If the smaller member states want to achieve any sensible shift forward in the power-sharing mechanisms of the future Union of 25+, they should advocate more ambitious and perhaps even more provocative proposals than they have done so far. The Convention tabled its proposal to the Thessaloniki European Council and its chairman, Valéry Giscard d’Estaing suggested that no substantial questions should be reopened at the IGC. This idea was well supported by some member states, notably France and Germany, who worked hard to reach a compromise on institutional questions. The only chance for the smaller states has been to prepare well for the IGC. Given the

³⁶ See Coussens and Crum (2003), pp. 16-17.

current distribution of power, they should perhaps coordinate their positions, as most of the points discussed are not issues where their interests would diverge dramatically. Despite the fact that some attempts to coordinate the positions of 'like-minded countries' constantly appear (e.g. the Prague meeting at the beginning of September), the small countries do not want this group to appear as an institutionalised or coordinated body. If, however, no coordinated position of the small countries appears, the whole battle is likely to end up at the horse-trading at the upcoming IGC. If the small countries do not succeed, they risk that the current 'tyranny of the Small' will become a 'directoire of the Big'.

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