

GUEST EDITORIAL: THE INTERGOVERNMENTAL CONFERENCE

For over twenty-five years, Member States were happy to live with the Treaty of Rome as it had been drafted in 1957. But then, at Fontainebleau in June 1984, the European Council appointed a committee for institutional affairs, chaired by James Dooge, to consider treaty changes. This led, a year later in Milan, to a majority vote in the European Council calling, much to the surprise and irritation of Mrs. Thatcher, the intergovernmental conference which was to produce the Single European Act. Since the decision in Fontainebleau, sixteen years have elapsed and we have spent more than fourteen of them either preparing successive intergovernmental conference, or negotiating in this framework or ratifying the resulting treaties.¹ One of the most telling examples occurred last year: five weeks after the Amsterdam Treaty entered into force on 1 May, the Cologne European Council decided, on 4 June, to launch a new conference. Negotiating treaty changes is clearly an addictive process in the European Union.

The negotiation which is presently being pursued finds its origin in a protocol on institutional reform annexed, by the Treaty of Amsterdam, to the European treaties (protocol number 11 in the Final Act of the conference). That protocol prescribed a double-trigger mechanism:

- at the time of the first enlargement the composition of the Commission and the reweighting of votes in the Council should be settled in a way acceptable to all Member States;
- a comprehensive institutional reform should be undertaken before the membership of the Union exceeds twenty.

The protocol was qualified by a declaration by Belgium, France and Italy, which the Final Act took note of (declaration number 6), saying that a significant extension of majority voting should be part of the first institutional

1. The process initiated at Fontainebleau in 1984 led to the Single European Act that came into force in July 1987. In June 1988 the Hanover European Council asked Jacques Delors to chair a group on Economic and Monetary Union, which led to the Maastricht Treaty, which came into force in Nov. 1993. In June 1994 the European Council at Corfu appointed a reflection group chaired by Carlos Westendorp to prepare a new conference, which led to the Treaty of Amsterdam, which came into force in May 1999. In June 1999 the Cologne European Council called a new intergovernmental conference. This leaves only nineteen months in sixteen years free from treaty-linked activities.

negotiation. Both protocol and declaration were based on the undisputed fact that the negotiation leading to the Amsterdam treaty had not adequately dealt with the substantial strengthening of the institutional framework necessary in the perspective of enlargement. The Madrid European Council in December 1995 had requested the conference “to bring the Union into line with today’s realities and tomorrow’s requirements.” That had not occurred.

Faced with this situation some considered that the new conference should deal exclusively with the leftovers from Amsterdam: a narrow institutional reform. Others underlined general weaknesses and faultlines in the institutional framework, highlighted by the resignation of the Santer Commission. They stressed the complexity of managing an enlarged Union and advocated a much broader agenda: the comprehensive institutional reform mentioned by Article 2 of the Amsterdam protocol.

Moreover, in a discreet way at the time of the Amsterdam Treaty,² and more forcefully as time went by, voices outside, or in the margins of, government circles were heard to say that the basic problems of the European Union, with or without enlargement, were not only institutional in nature. They underlined the growing indifference, sometimes even hostility, in public opinion. They stressed the need for simplicity, transparency and a clearer view of ultimate aims and objectives, in order to regain public support. Implicitly the argument was that institutional reform should be part of a larger constitutional debate, a horrendous thought for some, and an inescapable challenge for others.

Those three schools of thought are still with us today: arguments in and around the IGC are about a narrow institutional reform, as opposed to a comprehensive institutional reform or a broader approach going beyond institutional reform. These points need to be kept in mind when assessing the present state of affairs in the intergovernmental conference, which is the purpose of this editorial. Judgement on any ongoing process is obviously dependent on the level of expectations as to the final result.

The narrow institutional reform

The Cologne European Council indicated in June 1999 that the brief of the forthcoming conference would cover the size and composition of the Commission, weighting of votes in the Council and possible extension of qualified majority voting. Those are the leftovers from Amsterdam which, everybody agrees,³ absolutely need to be settled in the conference. The conclusions left

2. See, for instance, chapter 10 in de Schoutheete, *Une Europe pour Tous* (Paris, Odile Jacob, published Sept. 1997). At that time, in France, both Giscard and Delors had formulated concepts, which they were later to elaborate.

3. The Spanish delegation initially suggested that there were only two leftovers and that majority voting, mentioned by three delegations in a unilateral declaration, was not binding on

a slight opening by stating that “other necessary amendments arising in connection with the above issues” could also be discussed. At the end of the year heads of government meeting in Helsinki maintained this position, but made the opening slightly larger by saying that the Presidency “may propose additional issues to be taken on the agenda.”

The arguments in favour of a narrow agenda are not particularly strong. It is said that a broader brief would prolong the conference and put at risk the accession negotiation process. Apart from the fact that dates for accession are vague and distant, a point about which candidates rightly complain, the underlying assumption is one which most professional negotiators would reject. It is simply not true that, in multilateral negotiations, a broader agenda is a source of added difficulty and delay. Quite to the contrary, a broad agenda frequently allows each participant to find some source of satisfaction in the final result, whereas a narrow agenda leaves a clear picture of winners and losers. That, of course, is why delicate Community negotiations regularly come in global packages: Delors I and II, Agenda 2000. When confronted with the obvious need for comprehensive reform in the long term, a need explicitly recognized by the Amsterdam protocol, advocates of the narrow agenda reply that this can happen at a later, more suitable, date. The question as to when such a date could come about, given that the Union will be in a permanent negotiating process with candidate countries for the next decade or more, is left unanswered.

The fact is that the real arguments in favour of this solution are linked not to the substance but to internal political considerations in various Member States. A broader agenda is likely to include institutional issues leading to a divisive debate, in France for instance or in Britain. That debate could easily extend, in Germany or Spain, to the rationale, the consequences and the cost of enlargement, questions which have not been publicly discussed in any depth, and which could lead to unpleasant exchanges. It could get mixed up with electoral timetables. It might compel some governments to hold referendums, in Ireland or Denmark for instance, which they would prefer to avoid.

Europe is about politics and it is natural that internal political considerations should permeate the European debate. Those who have participated in the decision-making process in the Union know very well that this is a daily occurrence. Yet the issues facing us are strategic ones: how to handle a broad enlargement, how to reform a creaking institutional system, how to regain public support and dynamism. Experience shows that countries which, individually or as a group, avoid or postpone strategic decisions, for reasons

the others, but in practice the concept of three leftovers, including majority voting, was rapidly accepted.

of political expediency or electoral tactics, generally have to pay a high cost later.

Whatever the merits of the case it is interesting to assess whether the development of the IGC so far has been positive from the point of view of those favouring a narrow agenda. The answer must clearly be: No. The presidency report submitted to the European Council in Feira⁴ indicates no progress on any of the three core issues. In fact the situation seems practically identical to that which prevailed in the last weeks of the Amsterdam negotiation three years ago.

On voting rights some Member States are in favour of a double majority system (population + Member States) while others prefer to increase the voting weight of the bigger Member States. The tables presented in annex to the presidency report are updated versions of documents which were already circulated in the Amsterdam negotiation.

The Commission has made an imaginative proposal on the number of its members, based on a rotation system.⁵ But the practically unanimous conviction of negotiators is that we will end up with as many Commissioners as Member States, which was already the predictable outcome three years ago.

It is said that a little more flexibility is to be found on the question of majority voting, but that flexibility is mainly apparent on minor points, like the rules of procedure of the Court of First Instance. The fact that members of the Court of Auditors, or even the Secretary General of the Council, could be appointed by a qualified majority has no real impact on the decision-making capacity of the Union. On matters which are relevant to that capacity (some elements of taxation, social affairs, environment, external relations), Member States are as far away from an agreement as they were at the beginning of the conference.

This is not to say that the conference is likely to fail. It has always been tacitly understood that an intergovernmental conference cannot be allowed to fail, because its failure would reflect on the European Council and its members. Tough negotiations will take place in the last weeks of the conference, and those negotiations will produce a result. Whether that result will be adequate is another matter. Today the only thing that can safely be said is that it is not yet in sight.

4. Document CONFER 4750/00 of 14 June 2000

5. Document COM(2000) 34 of 26 Jan. 2000, p. 13.

The broader institutional reform

The first push towards a broader agenda was given by the group of three wise men, appointed by Romano Prodi to consider the institutional implications of enlargement.⁶ In the institutional field *stricto sensu* the report which they delivered in October 1999 made two suggestions:

- that alongside the three leftovers from Amsterdam, a number of questions relating to other institutions (Parliament, Court of Justice, Court of First Instance, Court of Auditors, Economic and Social Committee, Committee of the Regions, European Public Prosecutor etc.) needed to be dealt with;
- that the clauses on closer co-operation, resulting from the Treaty of Amsterdam, needed to be revisited in order to make them more operational.

On the first point there was little opposition. It seemed a matter of common sense to make use of the intergovernmental conference to settle potential problems resulting from enlargement in all institutions. The matter was not explicitly mentioned in European Council conclusions but in fact the conference has, from the very beginning, considered these side issues. For the Court of justice a special group of “Friends of the Presidency” was set up. The presidency report to the European Council in Feira notes a large measure of agreement on some of these questions.

Closer co-operation was from the beginning a far more controversial matter. The suggestion made by the Dehaene report was picked up by a Benelux memorandum in December and by the Commission’s opinion in January. But discussions at the Helsinki European Council indicated considerable opposition. The majority view seemed to be that it was premature, and potentially dangerous and divisive, to reopen a debate which had been settled with difficulty in the Amsterdam treaty negotiation. With time however views changed. Discussions both within and outside the conference brought several governments, including France and Germany, to the conclusion that it would be useful to revisit this matter. The Feira European Council, last June, specifically asked the conference to include enhanced co-operation in its agenda.

The argument that seems to have had most weight is one that was already formulated in the report of the three wise men. In the absence of operational clauses in the treaty “Member States will tend to co-operate outside the Union (Schengen) or outside the institutional framework of the Union (Euro 11).” The choice is between unregulated co-operation outside the treaty or regulated but workable co-operation inside the treaty. Several Member States, including some that do not expect to participate in such co-operation, have come to the conclusion that the latter solution is in their best interest.

6. Jean Luc Dehaene, Richard von Weizsäcker, David Simon: “The Institutional Implications of Enlargement: Report to the European Commission”. 18 October 1999.

This, of course, does not mean that agreement will be easy to find. The question of the veto, which now permits one Member State to prevent others from moving forward, the extension of closer co-operation to the second pillar, the required minimum number of participants are all issues of high political sensitivity. They will not be easy to settle.

Nevertheless those who recommended a broader agenda in the IGC have some cause for satisfaction in the present state of the conference. They have provoked discussion on a series of minor issues and on one major one, flexibility, which seemed quite out of reach a few months ago.

Beyond the institutional debate

It is interesting to note that the first indication that the European debate should go beyond strictly institutional questions was given by the European Council itself when it requested that “fundamental rights applicable at Union level should be consolidated in a Charter” (Cologne, June 1999). This was to occur in the same time span as the intergovernmental conference, and the question of the integration of the Charter in the treaty was left open. Indirect impact on the conference was inevitable. The Dehaene report linked this decision to the question of the legitimacy and relevance of European institutions.

Even more fascinating was the “body” (which has since called itself a “convention”) called upon to draft this Charter. Composed of representatives of governments, national parliaments and the European Parliament, its creation was hailed as a major breakthrough in democratic decision making. A number of people think that it should be a model for future treaty revisions. Yet no indication was given as to how it was to decide. Could a majority of parliamentary delegates outvote government representatives? In practice the convention initiated its work on the basis of consensus. But, of course, the limits of consensus in an assembly of 62 persons are rapidly apparent. At the time of writing, the solution to this problem is not obvious. The fact remains that the decision to draft a Charter of human rights specific to the Union is a significant step that goes beyond the reform of the institutions.

Something similar can be said about the proposal to reorganize the treaty texts with a view of regrouping essential elements in a short basic treaty. Here the prime mover was the group of wise men chaired by the former Belgian Prime Minister, Jean-Luc Dehaene. The suggestion was linked to the objective of simplicity and clarity in European affairs, and to the possibility of introducing simplified procedures for treaty amendments. A proposal drafted, at the request of President Prodi, by the European University Institute in Florence has been on the table since mid May. The drafting group was instructed not to depart from the existing legal situation and the result is therefore not relevant

to institutional reform as such, but it has considerable relevance in the more distant perspective of the future of the European Union.

Another initiative finds its origin in the concern of the German *Länder* over potential encroachment by European decisions on their devolved powers. This leads them to request a delimitation of competence (*kompetenz abgrenzung*) between the European level and the national and regional level, similar to that which exists in the German basic law. This request was already put forward in the Amsterdam negotiation and rejected by most participants. Several countries considered, at the time that this exercise was so complex that it would be practically impossible to carry out. Others were afraid that a codification of competences would block desirable future developments in European affairs. Today the insistence of the *Länder* has grown and has been relayed at the federal level, for instance in the speech by Joschka Fischer at the Humboldt University on 12 May. Resistance has diminished, perhaps because more people have come to realize that the present level of Community competence is about right and is not likely to increase. However difficult the exercise may be, it now seems probable that it will be engaged in the not too distant future. Again it has no link to institutional reform as such, but it has a quasi-constitutional character.

Indeed the word “constitution”, which had been completely banned from official statements for more than a decade, has recently made a remarkable comeback. Foreign minister Fischer, in his speech on 12 May, speaks of a “constitutional treaty”. President Chirac, a few weeks later in the Bundestag speaks of a “European Constitution”. These statements, and many others coming from unofficial sources, are frequently ambiguous or vague, difficult to interpret, but they do indicate that the long term structure and objectives (*finalités* in French) of European integration are an acceptable object of debate. This was certainly not the case some years ago.

Finally there is defence. Since the Franco-British summit meeting at Saint Malo in 1998 remarkable progress has been made on security matters in the Union. Who would have thought, when the Treaty of Amsterdam was being negotiated, that four star generals would soon be seen in the corridors of the Council going from meeting to meeting? That regular conversations would be organized between the Secretary General of NATO and the Secretary General of the Council? That the latter would be double-hatted as Secretary general of the Western European Union? That he would take the floor in a UN Security Council debate on the Balkans? These developments are intergovernmental in character. Nevertheless they will have considerable impact on the future development of European affairs. Legal experts say that they need not be reflected in treaty texts: existing language is sufficiently broad and vague to accommodate these and many other initiatives. Whether it is politically

advisable to set the Union down that course without any form of parliamentary approval is another matter.

Conclusion

The conclusion which can be drawn from this analysis of the present state of affairs in and around the intergovernmental conference is something of a paradox. On the core institutional issues identified by the European Council in Cologne a year ago, very little progress has been made, even if this does not mean that the conference is likely to fail. The advocates of a larger institutional agenda have scored a number of points on minor issues, and a major breakthrough on one: flexibility or closer co-operation. But those who insinuated that European governments would need to debate issues going beyond institutional reform have even more reasons to be satisfied. Basic values, transparency of legal texts and institutional structures, clarity of aims and ambitions including in the field of defence and security, are all constitutional points. They are now very much on the agenda.

Discussion of these issues is likely to be pursued beyond the European Council in Nice at the end of this year. This confirms the addictive nature of the negotiating process. But the essential concern should not be the timing but the manner in which these questions are handled. The European Union has reached its present level of development basically through the working of an original institutional structure, more than through intergovernmental co-operation. Progress in essential fields has been based on freely accepted legal obligations, controlled by that institutional structure, more than on "soft law" or political commitments. Co-operation and various non-binding undertakings have, of course, played a role in the gradual development of the complex network that best describes the real nature of the European Union. But that role has been subordinate to the central working of the institutions. That is why institutional reform is important. If those essential lessons are ignored, the legitimate optimism generated by some recent developments may yet prove to be an illusion.

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