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EDITORIAL COMMENTS

Preparing for 2004. The Post-Nice process

Intergovernmental conferences for revision of the founding treaties have become a regular feature of the life of the European Union. Every four or five years the representatives of the Governments of the Member States assemble in order to try to reach agreement on issues which are vital to the harmonious development of the Union, but which they were not able to deal with decisively at a previous gathering. In the run-up to such conferences, the agenda is constantly growing because, apart from the unfinished business left over from the previous IGC, many other pressing matters habitually find their way to the conference table. And after the conclusion of such conferences widespread dissatisfaction is usually expressed, the results being assessed by many as too meagre or unworkable and barely sufficient to prevent the Community or the Union from backsliding and disintegrating. So it was in 1986 (Single European Act), in 1991 (Maastricht) and 1997 (Amsterdam). Nevertheless, seen in retrospect, each of these IGCs has contributed positively towards advancing the course of European integration and adapting the European edifice to new demands.

Like its predecessors, the Treaty of Nice, which was signed on 26 February 2001, has not received a great deal of applause.[1] A limited number of reforms have been decided, *inter alia* in respect of voting, enhanced cooperation, judicial architecture and the composition of Institutions. As usual there is much left for future negotiations among the Member States. To that end the Member States have appended a Declaration on the future of the Union to the Treaty of Nice (No. 23). This document optimistically and euphemistically underlines that with ratification of this treaty the EU will have completed the institutional changes necessary for the accession of new Member States. Now that this problem is thought to be more or less out of the way – although the no-vote in the Irish referendum demonstrates that it is hazardous to take

1. See Guest Editorial by Pescatore, "Nice – aftermath", 38 CML Rev., 265–271. The European Council meeting at Nice also saw the adoption of the EU Charter of Fundamental Rights, see "Editorial comments: The EU Charter of Fundamental Rights still under discussion", 38 CML Rev., 1–6.

ratification for granted – and since there is a widely held view that it is in no-one's interest to let enlargement lead to a weakened Union, the time has come to resume work toward the further constitutionalization of the treaties.

Declaration 23 asks the European Council to develop a formula for improving the democratic nature and the efficiency of the process that must produce treaty reforms in 2004. The Conference calls for a more thorough debate about the future of the European Union. In cooperation with the Commission and the European Parliament, the Swedish and Belgian presidencies will prepare appropriate initiatives. Wide-ranging discussions are encouraged with all interested parties such as representatives of national parliaments, of civil society, persons from political, economic and university circles etc. The candidate States will be associated with this process. A preliminary report on the requisite initiatives for pursuing this project will soon be drawn up for the European Council meeting in Göteborg (June 2001). Further details about the way in which this grand debate will be continued and structured are to be provided by the European Council, when it meets in Laeken/Brussels in December 2001. This second phase would then have to be completed in 2004, in order to allow the process to be concluded by the adoption of amendments to the treaties.

According to the Declaration the following questions (*inter alia*) should be addressed:
– the delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity;
– the status of the Charter of Fundamental rights proclaimed in Nice;
– simplification of the Treaties "with a view to making them clearer and better understood without changing their meaning";
– the role of national parliaments in the European architecture.
Moreover, the Conference recognizes the need to improve and to monitor the democratic legitimacy and transparency of the Union. The reason is the same as it was in the pre-Maastricht era: the Union and its institutions must be brought closer to the citizens of the Member States.

What can we expect from this great debate and the appointment with 2004?

Declaration 23 and the perceived need for a flurry of activities designed to involve European citizens in a great constitutional debate impart a strong sense of *déjà vu*. In a way this is not surprising because major themes such as the division of powers, transparency, democratic legitimacy and in general checks and balances, characteristically constitute key elements in the construction of a European entity. These elements have never been absent from the debate on European integration. However, considering the evolving nature of the European Union and the changing political environment, proposals in these areas have never been capable of receiving such political agreement as to satisfy long-term aspirations. As a result, efforts to include in the treaties

a legally adequate expression of such fundamental and constitutional principles have not been successful. Declaration 23 suggests that all this is going to change. That is a great expectation. However, there seems to be no compelling reason why this time the constitutional debate is going to produce a breakthrough.

The European Parliament appears to be rather optimistic. In their Draft Report of 22 March 2001 on the Treaty of Nice and the future of the EU,[2] Rapporteurs Vigo and Seguro of the Committee on Constitutional Affairs observe that the preparations for and negotiations on the Treaty of Nice have demonstrated that the intergovernmental method has outlived its usefulness for the purpose of revising the Treaties. The rapporteurs find that the Treaty of Nice marks the end of a progression that began in Maastricht and continued in Amsterdam, and that Declaration 23 opens a new constitutional development process. What is now needed, in their eyes, is an IGC which is more open, affords greater opportunities for the EP, the national parliaments and the Commission to have their say, and involves the citizens of the Member States and the applicant countries. Since proper preparation is crucial, the EP is ready to make a major effort to galvanise the public debate on the future of Europe. The debate should take place at both European and national levels, and several recommendations are made for organizing awareness campaigns and for setting up committees in the Member States and the applicant countries which must direct and foster the debate. As in Parliament's view the outcome of the next IGC will depend crucially on the preparations, a "drafting and proposals forum" will need to be formally established in 2002. This forum should be based on the method used by the Convention that elaborated the Charter of fundamental rights,[3] allowing substantial parliamentary participation. There is no doubt that these views of the Committee on Constitutional Affairs will be substantially endorsed by the plenary EP.

It is not difficult to find great merit in the EP's enthusiasm for activating the debate on the future of Europe. One cannot but have sympathy with its view that the intergovernmental model is no longer suitable for tackling the revision of the Treaties and that new avenues must be explored for the 2004 IGC. However, the rhetoric (in Declaration 23) should not be confused with reality, and the choice of a better method for preparing treaty amendments does not guarantee success in terms of (political) acceptability. The process, although or because it is to become more democratic and transparent, may produce a better quality of legal texts but it does not necessarily lead to greater support for transfer of powers to the European Union in every Member State. There is also the danger that the process, which should lead to amendments of

2. Document 2001/2022(INI); available via the Parliament's website www.europarl.eu.int.
3. See "Editorial comments" cited *supra* note 1.

an essentially institutional nature, is burdened by matters which are linked not so much to constitutional issues as to policy orientations, however momentous they may be. Hopefully, the final and no doubt arduous stages of the accession negotiations with applicant countries will not coincide with the decision-making on the crucial changes to the Union's institutional fabric. Clearly, self-restraint is necessary. The EP in its draft resolution[4] argues that the agenda for the debate should be unencumbered by restrictions of any kind. It proposes that as well as institutional matters, topics "such as employment, the eradication of exclusion, consumer health protection, and security at all levels should occupy a prominent place" on the agenda. We do not share this view. If the IGC 2004 is to be the moment for fundamental constitutional decisions to be taken, then it is quite probable that preparations for these decisions would suffer if the agenda were to be widened to include too vast a number of issues not directly related to the themes indicated above. A shopping list approach may prove to be counterproductive. In order to avoid the risk of disparate bargaining in the final stages of the new IGC and unpalatable trade-offs, negotiations on constitutional issues should preferably not take place alongside issues of a wholly different nature (e.g. financing of structural policies). The public discussion of policy content is important in itself, but should be kept separate.

The Commission, for its part, cannot be criticized for being unrealistic or for confusing form with content. It has correctly pointed out[5] that holding an open debate is not the same thing as preparing the forthcoming intergovernmental conference. In its view, the final political stage of the amendment process will be helped but not determined by the reflection phase. A key element in this reflection phase would be an arrangement along the lines of the formula which led to the drafting of the Charter of Fundamental rights. A body which brings together representatives of national governments and parliaments, the EP, the Commission and the Council, would have to heed the wide-ranging debate, act as a clearing house of information for all interested parties and would be expected to draw up a coherent and sustainable plan for reforming the treaties. After a general phase, from 2001 onwards, the debate will have to become increasingly specific as preparatory texts (e.g. the Laeken Declaration to be adopted in December 2001) or processes (e.g. discussions with national parliaments on their role in the European architecture) begin to produce more precise subject matter. What is needed especially is a campaign and a

4. Para 39. The draft resolution is part of the report of the Committee on Constitutional Affairs cited *supra* note 2.

5. Commission Communication on certain arrangements for the debate on the future of the European Union, COM(2001)178 final. Available via the Commission's website www.europa.eu.int.

large budget for the mobilization of public opinion through public opinion multipliers.

Meanwhile, the debate has been launched, and public authorities in most Member States appear to have taken steps to educate the population to become European constitutionalists. That is good, at least as long as public awareness of the importance of the debate is linked to the idea that the EU/EC is not a foreign entity but a form of government which belongs to all of us and that it is in our common interest to strive for solidarity and good government within a more perfect union. Furthermore, whatever the stage the forthcoming accessions may have reached at that time, the public debate must be in terms of the underlying goals of peace and prosperity for a Europe of 27 members. Whatever views one holds about Europe, the essential question is to determine which level of government is best suited to making public policies, given that we want such policies to be economically efficient, socially just and decided by institutional methods respectful of the requirements of democratic legitimacy and transparency. In this respect there is no difference between those who advocate a federal form for the European Union and those who are not prepared to surrender additional powers for the purpose of allowing the Union to move beyond the stage which it has reached now, i.e. a highly complex, multi-layered, sophisticated, innovative and dynamic form of international organization. In fact, in our opinion, it is not very likely that the time is ripe for this very original structure to undergo important changes in 2004. After all is said and done, the Intergovernmental Conference must decide on treaty reforms by unanimous vote and all national parliaments must approve the proposed amendments. This rigid amending formula entrenches the rôle of the Member States as "*Herren der Verträge*" and ensures that the system is not susceptible of radical changes. Under those circumstances, forms of enhanced cooperation or speculation about "vanguard" groups of States are inevitable. However, provided that a "conception d'ensemble" is shared by all Member States, a multi-speed approach to European integration under the umbrella of the European Union is clearly to be preferred to a neat but progress-inhibiting construction. In the short term, it may prove impossible to develop the Community method further or to agree on a more precise definition of the final form of the European construction. But this observation can not come as a surprise to those who remember the wise words said by Schuman in the celebrated declaration of 9 May 1950: "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity".