Common Market Law Review **39:** 1211–1215, 2002.

EDITORIAL COMMENTS

Giscard's constitutional outline

A text described as a "preliminary draft Constitutional Treaty" has been drawn up by the Praesidium of the Convention on the Future of Europe, and was formally presented to the plenary session of the Convention on 28–29 October 2002 by its President, Mr Valéry Giscard d'Estaing.[1] The text, which will hereinafter be called the Praesidium draft, received a guarded welcome from most Conventioneers. It consists for the time being only of a Table of Contents and a Summary Description, the latter taking the form of a series of telegraphic indications of the matters to which particular provisions will relate. Even at this early stage, however, it seems useful to comment on some aspects of the draft.

The Praesidium has opted for the model of a single Constitutional Treaty that would replace the present TEU and EC Treaty (the Euratom Treaty is ignored). The text has been designed to distinguish between the fundamental concepts, principles and mechanisms of the Union order, which are set out in Part One under the title "Constitutional Structure", and the legal bases of substantive policies which are found in Part Two, alongside more detailed institutional, procedural and budgetary provisions. It will be important, when flesh is put on the bones of the Praesidium draft, to avoid overloading Part One: for instance, the complex institutional choreography of co-decision or of the budgetary procedure is of interest only to those professionally concerned with the European Union, and belongs in Part Two of the Treaty.[2] Part One should be confined to the essential elements of the constitution and should be formulated in language which is reasonably accessible to the well-disposed general reader.

The Praesidium text does not come down clearly in favour of a designation for the entity which it proposes to furnish with a constitution. Four possible names are suggested in Article 1: "European Community", "European Union", "United States of Europe", "United Europe". However, there can surely be no doubt as to the eventual choice. "European Community" might have been a viable option, if the Maastricht Treaty had not established the Union as an over-arching structure linking the Communities to less integrated

1. See CONV 369/02.
2. From the summary description of the proposed content of, respectively, Art. 25 and Art. 40 of the Praesidium draft, it is unclear whether the intention is to set out the procedures in detail.

fields of common action: at this time of day, adoption of the name "European Community" would imply that the constitutional order as a whole was being communitarized, which we shall see is manifestly not the intention of the Praesidium. "United States of Europe" is unacceptable, not because it would be a red rag to eurosceptics (they are bound to find another reason, if not that one, for attacking any conceivable constitution), but because it would give a false impression of the Union, which is a unique polity composed – unlike the United States of America – of entities retaining the quality of States in the full legal and political sense. "Europe Unie" may sound all right, even perhaps inspiring, in French, but not necessarily in other languages: "United Europe", Mr Peter Hain has remarked, could be a football club. The only realistic possibility – and one which has the advantage of being internationally recognized – is "European Union".

Title II of the Praesidium draft is headed "Union Citizenship and Fundamental Rights" The juxtaposition, though commonly made, is unfortunate since, by definition, fundamental rights are an incident of individuals' humanity and not of their citizenship. The Convention is required by its remit to take a position on the legal effect of the Charter of fundamental rights which was proclaimed in Nice. Under Article 6 of the draft, three possibilities are noted: there could be a reference to the Charter, like that to the European Convention on Human Rights in the present Article 6 TEU; it could be stated that the Charter is an integral part of the Constitution with its full text being located elsewhere in the Treaty or annexed to it; or the full text could be incorporated under Title II. The last suggestion appears impractical since it would seriously unbalance the "constitutional structure" in Part One. It is worth noting that the Praesidium takes for granted that the Charter will not simply be passed over in silence.

On the division of competences between the Union and the Member States, the Praesidium text assumes that a number of broad political choices have already been made. Clearly, the Praesidium shares the general wisdom that it would not be feasible to draw up an exhaustive catalogue of Union competences, everything else being a no-go area. The familiar principles of conferred powers, of subsidiarity, and of proportionality are to be restated (in a harder-edged way, it may be hoped, than the formulations of the present Art. 5 EC); and the idea is accepted of establishing a system for monitoring subsidiarity and proportionality, involving national parliaments in this process, though the details of the mechanism are left for later. It would also be stated expressly that "any competence not conferred on the Union by the Constitution rests with the Member States". That principle will have to be formulated with care, so as to make clear that it is simply the corollary of the principle of

conferred powers: the powers of the Member States are derived from their own sovereignties, expressed through their national constitutions.[3]

Three categories of Union competence are to be defined: exclusive competence; shared competence, meaning that "as and when the Union takes action in these areas, the Member States may act only within the limits defined by the Union legislation"; and what may be termed "complementary competence", available in areas where "the Union supports or coordinates action by the Member States, but does not have competence to legislate".[4] The areas apparently regarded as falling in this last category are those of employment, public health, industry, culture, and education, vocational training and youth.[5] Since the areas of exclusive competence are bound to be listed exhaustively, it seems that shared competence must be taken to be the residual category, since otherwise we would be back to the bad idea of a fixed catalogue.

Wisely, no doubt, the Praesidium draft remains neutral for the moment on issues about which not only the Convention but – more to the point, perhaps – the governments of the Member States are known to be deeply divided. One such issue concerns the possible appointment from among former Heads of State or Government, of a President of the European Council who would serve for a term of years and have the task of overseeing the political agenda set by the European Council; another issue concerns possible modification of the rotating Council Presidency; and a third concerns the way of choosing the President of the Commission (perhaps by direct election, or election by the European Parliament). Those matters are referred to in, respectively, Article 15a, Article 17a and Article 18a – numbering designed, presumably, to be without prejudice as to whether in the event any provision may be included at all. The equally controversial matter of "the role and future rank of the High Representative for Common Foreign and Security Policy" is similarly left open by Article 41, to be determined in the light of the Convention's future work.

Perhaps the most original, and certainly the most troubling, feature of the Praesidium draft is the approach which has been adopted to the simplification of the Union's overall structure. This invites criticism from opposite ends of the European political spectrum.

On the one hand, while the existing pillar structure, expressed through the existence of the Communities and the Union as separate legal entities, would formally be abolished, it is evidently intended to preserve the differentiation between the constitutional arrangements applicable to the EC, and those applicable to the CFSP and to police and judicial cooperation in criminal

3. On all of this see Arts. 7 and 8.
4. See Arts. 9 to 12.
5. This indication is found in the list of areas of Union activity in Part two of the Praesidium text under point A5.

matters (PJCCM). This would be achieved by drawing a distinction between those areas in which the Union as such enjoys competence, and other areas in which "the Member States may define and pursue common policies, within the Union framework and according to specific rules". A comparison between the texts of Article 13 in the Table of Contents and in the Summary Description shows that the latter areas comprise the CFSP, defence and PJCCM. The distinction appears already in Article 1 of the Summary Description, where the Union is defined as "[a] Union of European States which, while retaining their national identities, closely coordinate their policies at the European level, and administer certain common competences on a federal basis". Similarly, in Article 2, which lists the general objectives of the Union, it is provided that these "shall be pursued by appropriate means, depending on whether competences are allocated wholly or partly to the Union, or exercised jointly by the Member States". This new way of conceptualizing the specificity of the arrangements applicable under what are presently the second and third pillars might be thought by some to be too crudely intergovernmental, indeed to represent a step backwards. In present theory and practice, it is the Union itself, and not the Member States, which is seen as acting internationally on CFSP matters. How, for instance, could the Agreements on the activities of the European Union Monitoring Missions in, respectively, Yugoslavia and the former Yugoslav Republic of Macedonia have been concluded in the name of the European Union, if in reality the Member States were exercising their own powers jointly?[6]

On the other hand, the proposed distinction between the exercise of competences belonging to the Union, and the joint exercise of competences belonging to the Member States, has not been carried through with sufficient clarity in other parts of the Praesidium text. For instance, in Title V of Part One, on "Implementation of Union Action", the articles relating to the implementing procedures for the CFSP, defence and the PJCCM follow directly after those relating to the different competences of the Union. In the same way, the Table of Contents shows the CFSP (though not defence) as just one Title in a section headed "External Action", which also includes Titles on commercial policy, development cooperation and the external aspects of general EC policies. The authors of the Praesidium draft may be underestimating the elements that presently differentiate the second and third pillars from the first pillar, and from each other. These are not confined to differences in the powers of the institutions and the procedures under which they are called upon to act, but extend to the whole organization of legal relations, including the operation

6. See, respectively, Council Decision 2001/352 of 9 April 2001, O.J. 2001, L 125/1; Council Decision 2001/682 of 30 Aug. 2001, O.J. 2001, L 241/1. See also "Editorial Comments: The European Union – A new international actor", 38 CML Rev., 825–828.

of the general principles of law, and of the principles of direct effect and primacy. If second pillar arrangements (and elements of the third pillar) are intended to retain their specificity under the new dispensation – as surely they must be – that intention ought to be made transparent.

A final point concerns the machinery for the transition to the new constitutional order. The Praesidium draft seems to contemplate the total repeal of the present Treaties, and their replacement by the Constitutional Treaty. This would entail the re-ratification – at considerable political risk – of large portions of text contained in the present Treaties, which are to be carried over with minimal amendment into the reorganized structure. It would be a better solution to adopt an Amending Treaty that would bolt the genuinely novel constitutional portion of the Treaty (Part One) onto renamed and amended chunks of the existing Treaties. Any elements of existing Union law which were not either amended or repealed would continue to apply, though in a different setting. Ratification would only be required for Part One itself, for the establishment of the new framework, for the incorporation into that framework of carried over texts, and for any amendments to those texts. A "clean" version of the consolidated Constitutional Treaty could be annexed to the Amending Treaty, and be given legal effect from the date of the entry into force of that Treaty. Once the Amending Treaty had done its work, it would, like Amsterdam, disappear from view, leaving the field to the consolidated text.

In sum, therefore, the Praesidium draft not only leaves several awkward questions unanswered but also raises some new ones, and the ensuing debate is certain to be lively. The tactic of initially publishing a draft outline is cleverly designed to set limits to that debate, without closing it down. Those outside the magic circle need to be on their guard, however, to make sure that agreement given at the stage when broad, and seemingly innocent, questions of form or of structure are being discussed does not have the effect of shutting out desirable options. As always, the devil will be in the detail.