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EDITORIAL COMMENTS

The sixteen articles: On the way to a European Constitution

1. The Convention process

It is too early to tell the outcome, but it seemed to us that it might be useful, at this interim stage, to reflect on the work of the Convention on the Future of Europe, focusing in particular on the draft Articles 1 to 16. The Convention has been at work now for more that one year, fulfilling its mandate under the Laeken Declaration, itself prefigured in the Nice Treaty Declaration, of writing a Constitution for the Union. The first draft text of note to emerge from the Convention was the "Preliminary draft Constitutional Treaty" drawn up by the Praesidium, issued on 28 October 2002.[1] This draft, hereinafter referred to as the October draft, contained a table of contents and a summary description – in essence, a skeleton setting out the matters which should be dealt with in fuller detail later.

On 6 February 2003, the Praesidium issued a further draft, containing a draft of Articles 1 to 16 (Titles I–III) and an Explanatory Note (hereinafter referred to as the February draft).[2] The draft Articles generally correspond to the skeleton and summary description given in the October draft, and reflect the reports of the Working Groups on Legal Personality, the Charter, Economic Governance, Complementary Competences, the Principle of Subsidiarity and External Action. The draft Articles 1–16 are still in unfinished form and indeed have been the subject of 1040 almost instantaneous amendments, but they photograph the thinking of the Praesidium, and probably that of a large number of the members of the Convention. Whether they reflect the group in a consensus fashion, remains to be seen at the time of writing. This is an important point: it is clear that the Convention will have to issue a document which is approved unanimously – or, if that is impossible, in any event, that it meets the approbation of Representatives of all the Member States and the

1. CONV 369/02. See "Editorial comments: Giscard's constitutional outline", 39 CML Rev., 1211–1215.
2. CONV 528/03.

Accession States. Inevitably, the Convention in this sense has taken on some of the characteristics of an Intergovernmental Conference.

These comments will not focus on the Convention process as such, but a few points do need to be made as regards that process. First, the Convention is a strikingly transparent process, as the documents are freely available, including on the internet. Members of the public have been able to attend plenary sessions and meetings of working groups. Moreover, civil society has had an input, partly through submissions made to the Convention and Working Groups directly, and partly through the parallel national exercises taking place in the Member States, which are intended to feed into the process at national level. Additionally, the presence of members of the national parliaments – a considerable number when one counts the very active alternate members who are entitled to participate – is particularly important: in many cases they do not simply reflect their national governments" policy. The presence of the representatives of the Candidate States is an indispensable input if the eventual text is to meet with the approval of these countries. However, the strongest criticism to be made is that the process has been somewhat shaped by the tight grip exercised by the Praesidium – and by the Presidency in particular. As even other members of the Praesidium have allegedly been somewhat sidelined, the same is said to be true *a fortiori* with ordinary members. Certainly, the publication of the February draft has led to a very intense level of criticism by the ordinary members. However, this does not appear as yet to have led to change in the working methods of the Convention. The criteria for composition of certain groups, for example, the reflection group on the Court, has also not been wholly transparent. Finally, as is known, the work of the Convention will have to be submitted to the European Council and then to an IGC. It will then have to be ratified. It appears to be a rather long drawn out process.

2. Name and structure of the draft Treaty

The February text, like the October one, refers to a "Treaty establishing a Constitution for Europe". Elsewhere, it refers to "the Constitutional Treaty" and the "Constitution". This terminology can either be considered to be elegant – or a fudge. It is elegant in so far as it is deliberately ambiguous: it combines the elements of a Constitution and a Treaty. However, if Europe is indeed to have a Constitution, then it would gain immensely in terms of legitimacy and transparency by acknowledging this fact openly, by calling the basic document "The Constitution of Europe" or some such name. This would send a powerful symbolic message to Member States, their Parliaments and courts, and to the outside world, but above all to the citizens of the EU. It would declare unambiguously the creation of a new polity – in this context,

Union citizenship and the legal personality of the Union would underpin this new stage in the development of the Union. Very likely, this message would also have consequences for the relationship between the Community Courts and national courts – faced by a Union with its own Constitution, and a Constitutional Court charged to interpret it (presumably the ECJ), national constitutional and supreme courts would probably recognize much more clearly the legitimacy of the ECJ to decide constitutional issues. In this way, some supremacy issues would be overcome.

The relationship between the Constitution itself and the Treaty in which it is contained also needs to be examined and considered. This raises a basic question: which is the fundamental text – the Treaty or the Constitution? If it is the former, then one recognizes the public international law nature of the EU and the primary role of the Member States. If it is the latter, one is clearly sending a message that the Union derives its legitimacy from a Constitution – one to which all its citizens could subscribe. That legitimacy ultimately would repose on the assent or consent of citizens, however expressed. Although approval of the Constitution by the citizens would obviously give a very high level of popular legitimacy, approval of the text by the national constitutional arrangements for EU/EC Treaty amendments in the Member States which do not provide for popular approval may provide formal legitimacy – although not in such symbolic terms (that said, it is acknowledged that a popular vote is not necessary for legitimacy – one need only look at the German example for that). Finally, if this concept of the Constitution as the basic document were to prevail, there would presumably be consequences also for the Member States and their relationship with the Union.

On the other hand, there is a feeling that the basic document must be a Treaty because the EU must continue to be a Union of States based on a Treaty.[3] There needs to be a balance between those who prefer a federal approach and those who support a more intergovernmental model, and between larger and smaller Member States. These complicated issues make clear statements on the respective roles of the Union and the States and the relationship between the Constitution and the Treaty difficult, though no less desirable.

In terms of structure, the constitutional Treaty will replace the present Union and Community Treaties. However, some ring-fencing appears to be envisaged as in the case of CFSP and the coordination of the Member States economic policies.[4] The Constitutional Treaty is to contain a Preamble, and three parts – Constitutional Structure, Union Policies and General/Final Provision.

3. See speech of Mr Rasmussen, College of Europe, Natolin, Poland, 26 Feb. 2003: www.statsministeriet.dk/Index/dokumenter.asp?o=2&n=0&d=1405&s=1

4. See Explanatory Note: Arts. 10(3) and (4).

3. Comments on the various provisions

3.1 Definition and objectives of the Union: Establishment of the Union

Article 1(1) of the February draft provides: "Reflecting the will of the peoples and the States of Europe to build a common future, this Constitution establishes a Union [entitled . . .], within which the policies of the Member States shall be coordinated, and which shall administer certain common competences on a federal basis". This is a considerable change with respect to the October draft, which focused on the role of the States to the exclusion of the peoples. The inclusion of peoples recalls the unique nature of the European integration process, precisely underlined by the ECJ in *Van Gend en Loos*[5] when it seized on the mention of the word "peoples" in the Preamble to the original Treaty to characterize the EEC as a new legal order with special characteristics, of concern not only to the Member States but also to their citizens.

The reference in the draft to a common future is inspired: it is not, as one might think, a departure from the "values discourse". Part of the values discourse is, of course, based on the assumption of a shared past – but the heroic nature of the European enterprise also reflects a commitment to a shared common future. That is implicit in the formation of the European demos: facing and planning for the future together.

Much ink has been and will continue to be spilled on the naming of the entity: the "European Union" seems the only sensible option at this stage, as the other choices offered appear dated or misleading.

The reference to the administration of certain common competences on a federal basis has clearly been seen as provocative by many in the UK. The problem with the use of the word "federal" in this context is that, in the UK at least, this conveys a different set of impressions from those raised in, for example, Germany. Insofar as the terminology is intended to convey the sense of a dividing line – certain policies of the Member States are to be coordinated whereas other are to be administered on a federal basis – this is in itself a recognition that the Member States retain (limited) sovereignty in some areas. This could be underlined in a number of ways, possibly in the competences section in Title II – less desirable – or more elegantly, in Title I itself, by the insertion of an Article describing the role of the Member States in the integration process, and clarifying that they are simultaneously sovereign in some areas and subject to federal control in others. This might, though it is doubtful, assuage concern in the UK. However, on reflection, the whole terminology of federalism has to some extent a dated ring in this context as

5. [1963] ECR 1.

current political discourse tends to speak of "shared sovereignty" rather than of the construction of a federal power to which Member States must submit.

The draft text also provides that the Union shall respect the national identities of its Member States. This statement probably needs to be enhanced to emphasize the fundamental role of the States in the new polity and indeed to recognize diversity.

Finally, in this context, the February draft states that the Union shall be open to "all European States whose people share the same values, respect them and are committed to promoting them together". This is a felicitous advance on the October text which again referred only to States. Here we have a happy recall of the text of the original preamble to the Treaty which precisely invited "the other peoples of Europe who share their ideal to join in their efforts".

The remit of the three paragraphs of Article 1 is to emphasize the mixed nature of the Union, bringing together States and peoples in a historic endeavour, and according to each a special role. This will subsequently have to be translated into political terms by way of representation of these actors in the institutions of the Union.

3.2 The Union's values

According to Article 2 of the February draft, the Union is "founded on the values of respect for human dignity, liberty, democracy, the rule of law and respect for human rights, values which are common to the Member States. Its aim is a society at peace, through the practice of tolerance, justice and solidarity". The second sentence is particularly deft. However, despite appearances, it appears that tolerance, justice and solidarity are not declared to be values of the Union. This is surely a pity. Most Union citizens would probably agree that the "European model" which has emerged so far is one of an exceptionally tolerant society (at least in theory), welcoming diversity, whether this results from different faiths, ethnicities, sexual orientation etc., and with a distinctly "European" understanding of the notion of justice (e.g. opposition to the death penalty, to torture) as well as the idea of social solidarity. In mentioning tolerance, perhaps mention could also be made of the heterogeneous nature of European society and the determination to establish a tolerant society respectful of different faiths and ethnic origin. Moreover, the fight against racism and xenophobia could have been recalled here. The Treaty could generally have been more specific as to the different forms of tolerance which are envisaged – some of the matters contained in Article 13 EC could have been a useful starter in this respect.

In fact, one of the striking features of attempting to pin down the values of the Union is how difficult it is to reach consensus. One might have expected to find a notion of social justice included here, for example, as part of the

Union's values, but apparently it is considered too "political" or too elastic a concept. It is however included in Article 3, outlining the Union's objectives. It will be interesting to see if this mention of social justice survives the drafting process. The Final Report of Working Group XI on Social Europe considered that social justice, solidarity and equality, including in particular equality between men and women, should be included in the list of values of the Union in Article 2.

The difficulties in finding agreement on the Union's values are highlighted in the Explanatory Note. As is stated therein, Article 2 contains a short list of the essentials which must meet two criteria at once: on the one hand they must be so fundamental that they lie at the very heart of a peaceful society practising tolerance, justice and solidarity; on the other they must have a clear non-controversial legal basis so that the Member States can discern the obligations resulting therefrom which are subject to sanction. Interestingly, the shortness of the list is justified in the Explanatory Note by the fact that a manifest risk of serious breach of one of the values by a Member State would be enough to initiate the process under Article 7 TEU, even if the breach took place in the field of the Member State's autonomous action (not affected by Union Law). Insofar as Article 2 is a necessary list to show citizens the values which underpin the European construct and to lead to the creation of a European demos, there could arguably be a case for decoupling the connection between the values mentioned in Article 2 and those for which breach initiates the procedure laid down in Article 7 (to be Art. 45 in the new text). There seems no reason why Article 2 should not contain a longer list of descriptive and aspirational values, whereas Article 7/45 could contain the current short list of fundamental values the breach of which would set in train the procedure provided therein. If this proves impossible, additional values could be included in Article 3. This has been suggested by the Final Report of Working Group XI on the Social Europe as regards non-discrimination on the basis of racial or ethnic origin, religious or sexual orientation, disability and age (i.e. based on current Art. 13 values).[6]

Finally, in this connection, it should be recalled that a lively debate continues on the question as to whether religion or religious/spiritual values should be included in the Treaty. The Explanatory Note comfortingly states that the choice of a very short list of values contained in Article 2 "does not of course prevent the Union from mentioning additional, more detailed elements which are part of the Union's 'ethic' in other places, such as, for instance, in the Preamble, in Article 3 on the general objectives of the Union, in the Charter of Fundamental Rights (which, unlike this Article [Article 2], does not, however, apply to autonomous action by the Member States), in Title VI on 'The

6. CONV 516/1/03.

democratic life of the Union' and in the provisions enshrining the specific objectives of the various policies". Whether this will satisfy some of the Member States insofar as religion is concerned is doubtful. The personal and public intervention of His Holiness The Pope, and the diametrically opposed views of numerous Member States – and Candidate States including Turkey with its tradition of laicity – could not be more revealing of the fundamental gap which divides the sides here.

3.3 The Union's objectives

According to the Explanatory Note on Article 3, the philosophy "of this Article is to set out the general objectives justifying the very existence of the Union and its action for its citizens in a more cross-sectoral fashion and not list the specific objectives pursued by the various policies of the Union which are to be found in Part Two of the Treaty." The fundamental difference between Article 3 and Article 2 therefore needs to be emphasized according to the Explanatory Note: "while Article 2 is to enshrine the basic values which make the peoples of Europe feel part of the same 'union', Article 3 sets out the main aims justifying the creation of the Union for the exercise of certain powers in common at European level."

The Working Group on Social Europe had recommended that the social objectives in Article 3 should feature an extensive list including full employment, social justice, the social market economy, social inclusion and protection, equality between men and women, non-discrimination on the basis of racial or ethnic origin, religious or sexual orientation, disability and age, children's rights, a high level of public health, efficient and high quality services of general interest, and so on, but this is not reflected in the February text which did not take account of their recommendations, presumably because of timing issues. The objectives of the Union are presumably programmatic only in nature. In any event, it is difficult to sustain that as currently drafted, Article 3 justifies to the citizen the exercise of certain powers at European Level, as the Explanatory Note maintains.

3.4 Legal personality

The Union is to be granted legal personality. The positioning of this Article in Part One is slightly odd, given the highly technical nature of the subject. Already, the Praesidium envisages that an article on the Union's legal capacity will appear in Part Two of the Constitutional Treaty. It is therefore not entirely clear why the legal personality should be mentioned in Part One, which is intended to be clear and accessible to all. Presumably, the explanation is that

mention of it here, as the Explanatory note states in a different context, will underline the constitutional status of the provision.[7]

3.5 Fundamental rights

Title II of the February draft contains Articles 5–7, dealing respectively with fundamental rights, non-discrimination on grounds of nationality and citizenship of the Union. Article 5 provides that the Charter of Fundamental Rights should be an integral part of the Constitution, either as a protocol or else as incorporated in Part Two. It also enables the Union to accede to the ECHR.[8] Finally, fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. Oddly although this wording is presumably meant to reflect the Court's case law, it ignores other human rights treaties. This is presumably not intentional. The Charter is intended to have constitutional status and a fully binding legal nature. The general rules concerning future amendments of the Constitution will apply to it. According to the draft, accession to the ECHR is not to affect the Union's competences as defined by the Constitution. The wording here is inspired by a wish to comply with the opinion of the ECJ on the ECHR (Opinion 2/94), but apparently does not exclude the possibility of Union accession to other international conventions relating to Human Rights on the basis of the competences inferred in Part Two of the Treaty.

3.6 Non-discrimination on grounds of nationality

Article 6 reproduces the provision on discrimination on grounds of nationality contained in Article 12 EC. Disappointingly, Article 13 EC, which is truly innovative, is to be placed in Part Two of the Treaty – a demotion in terms of underlining its constitutional status.[9]

3.7 Citizenship of the Union

The provisions concerning citizenship in Article 7 fundamentally reflect the current Union citizenship provisions and do not represent any important material changes. This is in contrast to the October draft which caused a furore by referring to a "dual" citizenship, national or European, which the citizen could use freely as he or she chose.

7. Explanatory Note, p. 13.

8. The text still leaves certain matters related to accession to the ECHR unresolved, including the procedure which should apply to the decision to accede.

9. Compare with the statement concerning Art. 5 in the Explanatory Note.

3.8 The Union's competences

Finally, a brief word on the Union's competences, as set out in Title III of the February draft. As the Explanatory Note recalls, both the Nice and Laeken European Councils called on the Convention to consider this issue. The Nice European Council called on the Convention to consider "how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity". For its part, the Laeken European Council called on the Convention to consider "how the division of competence can be made more transparent", "whether there needs to be any reorganization of competence" and "how to ensure that a redefined division of competence" is maintained and "ensure at the same time that the European dynamic does not come to a halt".

The fundamental principles of conferred powers, subsidiarity, proportionality and loyal cooperation are set out in Article 8 of the February draft and further application is dealt with in Article 9. According to Article 9(1), "the Constitution, and law adopted by the Union Institutions in exercising competences conferred on it by the Constitution, shall have primacy over the law of the Member States." This statement apparently led to a heated debate at the informal extra plenary session convened on 5 March 2003 with objections coming from those who feared that the baldness of the text as drafted would lead to a lack of support by citizens.[10] Amongst commentators so far, there is considerable debate as to whether the principle of primacy should be inserted in the Constitution. Certainly, as drafted, it appears too bald; for example, it does not distinguish between the existing pillar competences. It is possible or indeed likely that this may be changed as it is hardly likely that this would apply to CFSP.

The draft then determines the different categories of the Union's competence: exclusive, shared and supporting. According to the Explanatory Note, the key factor in establishing those categories is the extent of the legislative competence conferred on the Union in relation to that of the Member States, according to whether such competence is conferred on the Union alone (exclusive competence) or shared between the Union and the Member States (shared competence), or whether it continues to lie with the Member States (areas for supporting action, defined as employment, industry, education, vocational training and youth, culture, sport and protection against disasters). Harmonization is excluded in areas of supporting action.

According to Article 11, the Union is given exclusive competence to ensure the free movement of persons, goods, services and capital, and establish competition rules, within the internal market, and in the areas of customs union, common commercial policy, monetary policy for the Member States who have

10. *EU Observer*, 6 March 2003.

adopted the euro, the conservation of marine biological resources under the common fisheries policy. The Union is to have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, is necessary to enable the Union to exercise its competence internally, or affects an internal Union act.

Further competences concern the coordination of economic policies by the Union (Art. 13), and the CFSP (Art. 14); both provisions are extremely broadly and to some extent misleadingly drafted. Finally, Article 16 provides for a flexibility clause, to enable the Union to act in the areas specified in Part Two to attain one of the objectives of the Constitution and the Constitution has not provided the necessary powers. National parliaments must be informed by the Commission and harmonization is not allowed where this is excluded by the Constitution.

4. Concluding remarks

As the preceding analysis has shown, many of the provisions of the Constitution are not new – for example primacy – and the reaction to the text so far in certain quarters seems disproportionate. No-one can question, however, the necessity of clarifying the extremely complex matters raised by the draft text. It would be well that they should be decided by and with the consent of not only the existing Member States and their peoples, but also by the Accession States and their peoples, in accordance with respective constitutional requirements. The Accession States are pressing to have equal rights at the Convention from the date of signature of the Accession Agreements on 16 April, and to have the right to ratify them as members before the IGC begins. Additionally, there remains the overall question of how the Treaty, as amended by the IGC, is to be ratified, by popular vote, or not.

A further comment is that the draft as a whole should focus on the principle of coherence and integration . Policy coordination, to be effective, depends less on law and more on political will and effective institutions and governance structures.[11] The Convention should also consider whether models such as the open method of cooperation which are foreign to certain national traditions are appropriate.

An important issue to be resolved is the duplication of provisions in the Charter and in the Constitution (e.g. discrimination on grounds of nationality, citizenship rights etc).

Given the importance of the work, the need for inclusion of the accession States and the necessity for a period of reflection by the Member States, time should not be a determining feature in the remaining work of the Convention.

11. Speech of J. Shaw at a conference of Federal Trust: "A strong Europe is a Social Europe".

If the work continues into the autumn, or even if it does not, there is no imperative need to have a Rome II during the Italian presidency. *Festina lente*.