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EDITORIAL COMMENTS

A Constitution for Europe

On 18 June 2004, the Heads of State and Government, meeting together as an intergovernmental conference, approved the text of the draft treaty establishing a Constitution for Europe. A process which began with the signature of the Treaty of Nice and which was influenced by the work of the Convention on the future of Europe – whose draft Constitution constituted the basis for the work of the intergovernmental conference – was thereby concluded. The failure of the European Council of December 2003 was accordingly erased; history will show that this failure enabled the participants to become aware of their responsibilities and forged the basis for the compromise drafted by the Irish Presidency. In fact, numerous Italian proposals were also included in the final compromise.

It is probably too early to give an overall judgement on this text. Moreover, as at the end of previous intergovernmental conferences, all those concerned analyse the text in the light of their own disappointments, while forgetting that in such negotiations no one can be the sole winner and that when everyone is dissatisfied with a compromise, it is often a good compromise. However, one can try to evaluate the Constitution in the light of the draft drawn up by the Convention by measuring the divergence between the two texts and by explaining the principal compromises.

The adoption of the framework drafted by the Convention on the future of Europe

The day after the European Council, the President of the Convention, Mr Giscard d'Estaing, expressed his satisfaction by noting that more than 90% of the text drafted by the Convention had been included in the constitutional treaty.[1] But any lawyer or junior diplomat knows the very relative value of this criterion and recognizes that, with the same words, it is possible to form

1. "sur les 14740 mots que comprend le nouveau texte dans sa partie constitutionnelle, 14000 mots proviennent de notre projet, soit 95%, 680 mots seulement ont été modifiés", in "Vive la Constitution, vive l'Europe", *Le Monde*, 10 July 2004.

many different sentences. What is important is not the texts retained from the Convention, but rather the complementary provisions or those added to make exceptions. A more serious analysis would show that the fundamental architecture of the draft was not modified. At no stage was the fusion of the treaties or the granting of legal personality to the Union challenged. It is true that those were ideas which were accepted long before the creation of the Convention and whose adoption had been delayed because they required a new ratification of the *acquis communautaire* (now Part III), an undertaking that no one wished to get involved in. It was feared that refusal by a Member State to ratify the new acquis simplified by the partial revisions undertaken in Amsterdam or in Nice might be interpreted as a rejection of the Community as a whole.

Similarly, the rationalization work carried out by the Convention emerged from the negotiations intact. The structure of the Constitution is unchanged, as are the provisions concerning the Union's competences and acts. Although an affirmation of the primacy of Union law, which had caused some reserves, remains in the Constitution, a declaration to the final Act specifies that this principle reflects the case law of the Court of Justice. This means that the Constitution does not bring anything new in this field, insofar as the Court has never had the opportunity of ruling on the CFSP. The way in which the principle could apply in this field is not therefore settled

As regards competences, even though two areas (tourism and administrative cooperation) were added, in which supporting actions can be carried out, the overall system remains unchanged. Numerous academics were critical of those provisions which did not take the criteria identified to differentiate the competences to their logical conclusion. It is curious to mention among the shared competences fields such as research and development co-operation, even though the possibility of pre-emption is excluded in this area, which shows that these competences involve merely supporting action. Similarly, why place the CFSP and the coordination of economic and employment policy outside the categories? Under this line of thinking, either the categorization of the competences is based on valid criteria and all the competences can be treated within this framework, or this is not possible and the criteria must be changed. An intergovernmental conference, however, is not bound by the same rules as a symposium of lawyers and these errors can be explained politically: placing research and development co-operation within the shared competences gives them a higher political profile; putting the coordination of economic policies in the category of mere supporting and coordinating actions would undervalue the importance of an action whose essential character was recognized by all, and which would have, moreover, the side effect of upsetting the all-powerful ministers for economic policy

and finance. Lastly, making the CFSP a shared competence would allow for pre-emption and would also standardize a policy whose exceptional character compared with other Union policies is recognized by the Constitution.

Similarly, with regard to legal acts and procedures, the intergovernmental conference has largely taken on board the Convention's proposals with a view to simplification. This simplification is, however, only superficial and frequently involves window-dressing. In accordance with good legal logic, the designation of a legal act should be based on its legal effects. Placing measures which produce different effects in the same category can only make the task of those to whom the act is addressed more difficult, as they will be forced to analyse the measure in order to appreciate its effects. This is the case for the implementing regulations, a catch-all category which can take the form of regulations or directives, and especially for decisions – which cover a series of measures ranging from individual decisions to general measures under the CFSP. Only the vocabulary, not the reality, was simplified. However, the essential outcome is undoubtedly to label as "laws" measures adopted under co-decision and certain measures adopted by the Council alone. In a constitutional context, this change is rich in political symbolism. The procedures for adopting legal acts were scarcely changed: co-decision remains as before. The budgetary procedure is at last rationalized and the way it works is clarified; however, the final text is not the one which was proposed by the Convention, which gave the last word to Parliament. The intergovernmental conference did some rebalancing in favour of the Council and a close reading shows that here too it is a case of genuine co-decision. On the other hand, the progress achieved on the adoption of implementation measures was continued, in particular the useful distinction between delegated legislation and implementing regulations. Lastly, lawyers will note that Article III-365(4) (as renumbered in the August version), which enables private individuals to seek annulment of a regulatory act that does not include implementing measures and which concerns them directly, was not modified. This is the Conference's response to the judgment of the Court of Justice in *Union de Pequenos agricultures*.[2]

2. Case 50/00 P, ECR [2002] I-6677. It will be recalled that in this case, the Court, going against the Opinion of A.G. Jacobs refused to allow the admissibility of an action brought against a regulation, since the applicant could not be individually concerned. The Court referred the case back to the national courts, only accepting jurisdiction if a reference for a preliminary ruling were made, even though, as a directly applicable regulation, there was no national implementing legislation. The Constitution only partially closes this loophole, since it does not exclude the undoubtedly rare scenario of a law which does not require implementing measures.

The Convention's ambition was to produce a text which was readable by all, but this goal is far from achieved. The Constitution comprises almost 100 more articles than the EC Treaty, and is accompanied by 36 protocols. True, the insertion of the Charter of Fundamental Rights contributed to this increase in volume. Moreover, the Convention had not completed its task, and the drawing up of transitional provisions and those concerning the inclusion of the *acquis communautaire* was a painstaking job. Similarly, the interminable Treaties of Accession were reduced to short protocols. In fact, the only parts directly readable by all are Part I, which contains the objectives and essential elements relating to the institutions and to the law of the Union, and Part II, which incorporates the Charter of Fundamental Rights. Part III, concerning policies, is a repetition and an adaptation of the EC treaty. Moreover, it was often rightly pointed out that the majority of the provisions in this part would never be found in a national constitution, since they involve the contents of policies rather than their institutional organization. In national systems, the definition of policy content is, with the exception of certain fundamental principles, done by the people's elected representatives, not by the constitution. However, the Union is not a State. Nevertheless, the Constitution introduces a distinction between its various parts by subjecting the provisions of Part III, concerning internal policies, to a simplified revision procedure.

The Conference's achievements

If rather broad agreement was quickly reached on the majority of the Convention's proposals, a number of controversial questions remained. These had been discussed, and in some cases solved, under the Italian Presidency. They were taken up again under the Irish Presidency and the Foreign Affairs Ministers did an excellent job in leaving only a very small number of questions open for the Heads of State and Government. Accordingly, the question of structured cooperation as regards defence and that of the EU Minister for Foreign Affairs were no longer problems by the time of the European Council.

Some of the remaining questions were deeply symbolic, even though not posing serious difficulties. This was the case for the insertion of horizontal clauses on social policy and on the protection of animals. These familiar clauses already exist as regards the environment and consumer protection. They call on the legislature to take account of such objectives in all Union policies. This allows the insertion of additional provisions concerning these policy areas, without changing the legal basis.

The discussion on the Christian origin of Europe was more problematic. At a strictly legal level, the debate is of little interest and the question of the origins of Europe is a matter for historians. At a political level, it is extremely sensitive. A reference to religious origins can entail reservations from States which are strictly secular as well as the opposition of those who consider that the traditions inherited from the enlightenment are at least equally valuable. A reference to the Christian origin rightly causes indignation among non-Christian religions, whose contribution to the development of Europe has been important. Faced with this situation, the Irish Presidency proposed maintaining in the Preamble the wording which mentions the cultural, religious and humanist inheritance of Europe. Willingly or not, all parties accepted this wording. In the same way, Article I-2, which lists the common values of the Union, refers to the rights of persons belonging to minorities. This represented a considerable change, because several Member States had previously opposed such a statement, even though they allowed the candidate States to be forced to respect such rights. With enlargement, the balance changed: the question of minorities concerns numerous Member States. The wording chosen reflects the framework agreement of the Council of Europe on national minorities and refers to the rights of persons belonging to minorities (individual rights) and not to the rights of minorities (collective rights). Lastly, the principle of equality between men and women now appears explicitly, and no longer indirectly under the heading of non-discrimination.

The last problem of this nature which surfaced during the Conference was the Portuguese request to insert in the Constitution the principle of the sovereign equality of States. This request raised drafting difficulties, because, presented in those terms, it could clash with the desire to reduce the number of Commissioners and could have made the question of voting rights more difficult to solve. It was for these reasons that it was decided to state in Article I-5 the fact that the Union respected the equality of the Member States before the Constitution. This wording is merely the expression of the fact that the law and the Constitution apply in the same way to all. It does not prohibit discrimination provided it is objectively justified and respects the principle of proportionality. There is no doubt that the Court will be required to fine-tune this interpretation.

Lastly, up until the last moment, the incorporation of the Charter of Fundamental Rights came up against reservations from the United Kingdom which feared the impact that it could have on its national social rights. The United Kingdom accepted the effect of the Charter on the Community institutions, but wanted to avoid any indirect effect. Agreement was not made easier by the President of the Court who, on the eve of the Conference, de-

clared in London that such an effect could not be excluded. This is correct, but the timing was unfortunate. In fact, the United Kingdom had already obtained certain assurances during the Convention, in particular the statement in a horizontal article of the Charter that the principles contained in the Charter (and therefore of those which cover social matters) could only be judicially cognizable as regards the interpretation and review of the legality of measures implementing the principles. In themselves, the principles cannot give rise to rights. A last concession was made by inserting in the Constitution a provision according to which a court, when interpreting the Charter, is to be guided by the explanations prepared under the authority of the praesidium of the Convention which elaborated the Charter.

As a result, only some fundamental questions were really discussed at the level of the Heads of State and Government, including primarily membership of the Commission, the move to qualified majority voting, and voting in the Council: once again, the never-ending saga of the Amsterdam "leftovers" and the central points of Nice.

As regards the Commission, the discussion between the supporters of a smaller Commission and those of a Commission made up of one national from each Member State continued. The Convention compromise, which differentiated between Commissioners with a right to vote and Commissioners without voting rights, was unsatisfactory. The solution chosen once more relies on a formula which is becoming usual in such cases, which is the creation of a transitional system. The membership of the Commission will be restricted to two-thirds of the number of the Member States, but will only apply to the second Commission set up after the entry into force of the Constitution, i.e. at best in 2014. States will take turns by way of rotation. For those who fear that a composition based on one national per Member State could lead to a weakening of the Commission transformed into an intergovernmental body, it would seem that, if their forecast is correct, it will be difficult for the Commission to regain its lost authority ten years hence.

With regard to qualified majority voting, it was necessary to convince the two actors responsible for the December failure to change their position. Behind them, however, was a group of small States, which did not accept the creation of too large a divergence between a majority of the States and a majority of the population. It was clear, however, that the double majority could not be thrown overboard. Moreover, the problem lay less in the principle of the double majority than in the thresholds proposed by the Convention. For Spain and Poland, the main difficulty was more in the definition of the blocking minority than in that of the qualified majority. Even if the system provided for by the Convention increased their weight in relation to that which Nice had conferred on them, it also increased their differential in relation to the most populated States, thereby eradicating their influence which

was comparable to that of a major State in the creation of a blocking minority. The proposal of the Irish Presidency consisted of increasing the percentage of the population necessary to take a decision from 60 to 65%. The number of States necessary for decision-making went from 50 to 55%. However, this population threshold still did not give them a blocking power comparable to that of the major States. Accordingly, they obtained an agreement that even if the blocking majority had the population necessary to prevent a decision, it would not be taken into account if it was not made up of at least four Member States. This requirement penalizes the largest Member States, three of which could have constituted such a minority, and gave Spain and Poland a weight equal to those Member States large enough to block a decision. The 55% threshold did not appear sufficiently protective to certain small States, led by Austria. In addition, while maintaining this threshold, the Constitution requires that the 55% comprises at least 15 Member States, which actually brings this threshold to 60%.[3]

Finally, in order to reach agreement, the Ioannina compromise was reintroduced. If three-quarters of the States or of the population necessary to form a blocking minority so request, the adoption of the measure is suspended for a reasonable period in order to find a satisfactory solution. This suspension cannot result in the postponing of deadlines provided for in the Constitution (e.g. co-decision cases) or in other rules (provisions in the rules of procedure which allow a majority of States to call for a vote). The Ioannina compromise was rarely used in practice, so one can hope that it will be the same in this case.

The Nice system was criticized for its complexity – is it now any simpler? The Constitution has at least the merit of ending the debate and, one hopes, of putting an end to the alleged friction between large States and small States, which does not exist in reality. Large States or small States vote according to their interests, and there are no cases to be found in the Community where all the large States are against all the small. Just as people used to discuss the sex of angels, the Convention and the Conference devoted a lot of time to settling a problem which did not exist in the real world.

Moving to majority voting in the areas of taxation, social security and justice and freedom (JHA) brought the Conference up against the "red lines" of the British Government. These "red lines" had assumed considerable importance since the announcement by the United Kingdom that it would hold a referendum on the Constitution. The CFSP question had been agreed earlier,

3. However, at the time of the entry into force of the Constitution, the Union will probably comprise 27 Member States and one will then be getting close to 55%. It will be interesting to see whether this minimum number of states develops during the next enlargement.

and the maintenance of unanimity had been accompanied by a bridging, or "passerelle", clause enabling the European Council to decide unanimously on the move to qualified majority voting (Art. III-300(3), as renumbered in the August version). This clause does not apply to defence. This solution seems the best. Trying to impose qualified majority voting before there is agreement between the States on common policy guidelines could only have a destructive effect and accentuate divisions. On the other hand, as mutual confidence increases, it is foreseeable that a move will gradually be made towards qualified majority voting, Moreover, qualified majority voting is not excluded in all cases. It applies to implementing actions initiated by the European Council. The Conference adopted a comparable solution for taxation and social security. Unanimity is maintained, but it is possible to move to qualified majority voting or to the ordinary legislative procedure on the basis of a simplified revision procedure initiated by a decision of the European Council, submitted to Parliament for approval. This decision is adopted definitively if, within six months, no national parliament opposes it. For the JHA, the system is more complicated. For a start the United Kingdom and the Irish Republic retain their opt-out for asylum and immigration. It has, however, been widened surreptitiously to legal cooperation in civil matters in order to neutralize for these States the move to qualified majority voting. This opting out is accompanied by the possibility of choosing to take part in a given decision. For cooperation in criminal legal matters, institutional engineering has worked wonders. If one legislates by qualified majority, the system is equipped with an emergency brake. Indeed, any State can consult the European Council if it considers that the decision affects fundamental aspects of its legal system. Within four months, the European Council can either refer the file back to the Council, or ask for a new draft to be submitted. If the European Council cannot decide or if, within twelve months from the presentation of the new draft, the decision cannot be adopted, the accelerator is activated. A third of the Member States can proceed with strengthened cooperation without requiring Council authorization. In any case, the United Kingdom and Ireland have the guarantee of not being bound against their will by a JHA decision. The same is true for Denmark, which has an opt-out for the entire sector and can only opt in for measures which develop the Schengen acquis. For the United Kingdom, Mr Blair could have reiterated the phrase attributed to John Major the day after Maastricht; "Game, set and match".

Will these compromises be enough to ensure ratification in a climate characterized by the increasing use of referendums? A balance was found between large and small Member States at the cost of significant concessions by the large Member States. The United Kingdom received broadly what it wanted and its government should be able to conclude that none of its essen-

tial interests were compromised. The partisans of greater integration will be able to use strengthened cooperation especially when the time comes to take advantage of the various bridge clauses inserted in the Constitution. The future is not therefore writ in stone. The Constitution allows gradual developments. It is nonetheless true that the system will remain difficult to explain to those who have to be convinced first and foremost: the people. Even if the authors of the Constitution found a good balance, it remains, as a result of the nuances it contains, complex. That, however, is the name of the game. It would be easy to build a super-state or to transform the Union into an international cooperation organization, but it is difficult to regulate the workings of a machine which is based on an association of sovereign States and their peoples, aiming at exercising a part of their sovereignty jointly. The difficult task of the political leaders now is to explain in a clear way what they wanted to create, so that their citizens do not decide on the basis of propagandist clichés, but rather on the Union as they wanted it.