

## EDITORIAL COMMENTS

### **The CFSP under the EU Constitutional Treaty – Issues of depillarization**

The simplification of the structure of the European Union – known to adepts of Eurospeak as “depillarization” – is one of the major achievements of the Treaty establishing a Constitution for Europe. Under the new dispensation, the activity of the Union in the areas of foreign, security and defence policy and of criminal law will no longer be the subject of provisions contained in a legal instrument distinct from the instrument organizing activity on the basis of the Community method. There is to be an integral Union order governed by a single foundational instrument, with the sectorally specific activity carried on under the EURATOM Treaty as the sole exception.

At the same time, the need to preserve the special character of the Union’s competence in respect of the CFSP was recognized from the outset by the Praesidium of the Convention on the Future of Europe.<sup>1</sup> Hence the strong measure of deviation from the standard decision-making model, which is found in the detailed institutional and procedural arrangements laid down for the CFSP by Chapter II of Title V of Part III of the Constitutional Treaty (“the CFSP Chapter”); and hence also the exclusion of the jurisdiction of the Court of Justice from nearly all aspects of Union activity in this area.<sup>2</sup> Nevertheless, there are two important issues relating to the CFSP, to which the text of the Constitutional Treaty fails to provide an unequivocal answer, and which are liable, therefore, to be the subject of controversy, not only in academic literature but also, and more immediately, in the political debate over the ratification of the Treaty.

#### *Article I-6 and the primacy of Union law*

One issue is whether the principle of the primacy of Union law enshrined in Article I-6 of the Constitutional Treaty is intended to apply to the CFSP.<sup>3</sup> If

1. See the Explanatory Note on draft Art. 10 (the forerunner of Art. I-16) in the text as originally proposed by the Praesidium.

2. Constitutional Treaty, Art. III-376.

3. The issue has not escaped the attention of academic commentators. See Dashwood, “The Relationship between the Member States and the European Union/European Community”, 41 CML Rev. (2004), 355.

that were so, it would be impossible to argue that Article I-6 is very old news – nothing but the articulation of a principle which has been known to European Community law since *Costa v. ENEL* in 1964.

As formulated in *Costa*<sup>4</sup> and further clarified in *Simmenthal*,<sup>5</sup> the primacy principle requires a national court, faced with a conflict between a national provision and a directly effective provision of Community law, both of them relevant to the case before it, to disapply the former and apply the latter. In the *Costa* and *Simmenthal* case law, the two principles of direct effect and primacy are indissolubly linked: the one makes no sense without the other. So the extension to the CFSP of the primacy principle in the sense of that case law could be taken to imply that there must be some CFSP principles or measures that are capable of producing direct effect. That would be a major constitutional development indeed.

At first sight, it appears that Article I-6 is intended to apply throughout the Constitutional Treaty. This is indicated by its position in Title I of Part I and by its unqualified language:

“The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States”.

The Declaration on Article I-6,<sup>6</sup> whereby it was noted by the IGC that the Article “reflects existing case law of the Court of Justice and the Court of First Instance” is of no help in determining whether the primacy principle extends to the CFSP. Under the law as it stands, the principle applies only to matters covered by the EC Treaty. It cannot be inferred from existing case law that Article I-6 does not extend to former Second and Third Pillar matters, because under the present Treaties the issue simply does not arise.

So far as concerns the criminal law matters presently covered by the Third Pillar, there is nothing in Articles III-270 to III-277, or elsewhere in the Constitutional Treaty, to suggest that the principle of the primacy of Union law is not intended to apply to them, in so far as they may be directly effective. However, this is unlikely to be seen as controversial, since the progressive assimilation of the Third Pillar to the Community model of the First Pillar has been under way since the Treaty of Amsterdam. Indeed, it is clearly desirable that the full panoply of rights and remedies developed within the le-

4. Case 6/64, [1964] ECR 585.

5. Case 106/77, [1978] ECR 629.

6. Declaration A. 1 to the Final Act of the IGC.

gal order of the European Community should be made available in an area where legislation will frequently have a potential impact on individuals.

Express language limiting the application of the principle of primacy is equally lacking in the provisions of the CFSP Chapter, and in other provisions of the Constitutional Treaty relating to the CFSP. However, there are strong reasons for thinking that it cannot be intended that Article I-6 should extend to the matters covered by those provisions.

A first reason is the almost total exclusion of the jurisdiction of the Court of Justice from this area. If the primacy principle extended to the CFSP, it would be the duty of courts in the Member States to refrain from applying any national provision found to be incompatible with a (directly effective) CFSP provision, whether contained in the Constitutional Treaty itself or in an act adopted under the Treaty by the European Council or the Council; but, in so doing, the national court would be left entirely to its own devices, with no possibility of obtaining guidance in the matter from the ECJ. For courts in the Member States directly to apply CFSP provisions under such conditions would be contrary to the system of the Treaty, since this could lead to an uncontrolled proliferation of conflicting interpretations. It would also be impossible to maintain the rule in *Foto-Frost*,<sup>7</sup> that only the Court of Justice has authority to hold an act of a Union Institution unlawful, since, without being able to seek a ruling on validity from the ECJ, national courts could not be expected to accept the validity of CFSP acts as beyond question.

A second reason can be found in Article I-12(4) of the Constitutional Treaty, which singles out the competence of the Union in the area of the CFSP from the other four categories of Union competence there identified. Since the authors of the Treaty set out deliberately to preserve the particularity of this area of Union competence, it would be surprising if they intended to remove one of the hallmarks of such particularity, which is the non-application of the principle of primacy (and that of direct effect).

A final point on Article I-6 is that it is a provision which the Court of Justice has jurisdiction to interpret. The exclusion of the Court's jurisdiction with respect to the CFSP is expressed by Article III-376 in terms of specified provisions of the Constitutional Treaty: Articles I-40 and I-41; the provisions of the CFSP Chapter; and Article III-298, in so far as action taken by the European Council under that Article relates to the CFSP. So the issue as to whether Article I-6 extends to the CFSP is one the Court could be invited to resolve by way of a reference for a preliminary ruling – though, for the reasons given above, it can be predicted with some confidence that the answer would be “No”.

7. Case 314/85, [1987] ECR 4199.

*Article I-16 and the jurisdiction of the European Court of Justice*

Article I-16 is the provision that sets out more fully the competence of the Union to define and implement the CFSP, as provided for by Article I-12(4). It has two paragraphs. Paragraph (1) determines the material scope of the CFSP, its language recalling that of Article 11(1) and Article 17(1), first subparagraph of the TEU. The competence is said to comprise “all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence”. Paragraph (2) is a summary statement of the duty of Member States actively and unreservedly to support the CFSP, which is presently found in Article 11(2) TEU, and which is re-stated in Article III-294(2). An addition, by comparison with Article 11(2) TEU, is the requirement that the Member States “shall comply with the Union’s action in this area”.

The issue that arises here concerns the jurisdiction of the Court of Justice. Since it is not among the provisions specifically mentioned in Article III-376, Article I-16 falls, in principle, within the scope of the Court’s jurisdiction. Does it follow that the duty of cooperation imposed on the Member States by the second paragraph of the Article could be the subject of proceedings before the ECJ? For instance, could proceedings be brought by the Commission pursuant to Article III-360 (equivalent to the present Art. 226 EC), on the ground that the defendant Member State was in breach of its duty to “comply with the Union’s action” on a given aspect of the CFSP?

The question has only to be raised in order to be dismissed. The duty of cooperation in Article I-16 is given substance by the rather muscular requirement of consultation in Article I-40(5), and by various provisions of the CFSP Chapter. However, those are all provisions with respect to which the jurisdiction of the ECJ is explicitly excluded by Article III-376. It would be against legal logic for the broad and general duty imposed by Article I-16 to provide a means of circumventing the exclusion of the Court’s jurisdiction with respect to the very Articles of the Constitutional Treaty which render that duty more concrete.

So while it may be true that the Court has jurisdiction to interpret Article I-16, that would only be to confirm that the Article cannot be used a basis for enforcement actions against Member States.

*Cause for concern*

The issues considered in this Editorial need not have arisen, if a little more care had been taken by those who drafted the Convention text that eventually became the Constitutional Treaty. An attempt was made by a delegation in

the course of the IGC to introduce language that would have banished ambiguity on those issues, but others were not convinced of the necessity of doing so. The ambiguity is potentially damaging, not because it is likely to be resolved otherwise than has been suggested above, but because it is liable to be exploited by those wishing to argue that the Constitutional Treaty will put an end to the possibility of Member States' pursuing an independent foreign policy – in the course of what promises, in some Member States, to be a rough ratification campaign, where opportunities for the kind of analysis which has been presented here will not be widely available.