

The Debate on the European Council in the Convention

Preparing the Institutional debate.

One of the recurring themes in the concert of criticism directed at the treaties of Amsterdam and Nice, and at the intergovernmental conferences leading to these treaties, was an excessive concentration on institutional problems, of variable importance, to the detriment of a debate on substance. Diplomats and legal experts, who had been playing a major role in the preparatory work, were accused of orienting the debate at heads of government level towards arcane points of procedure or institutional balance, not necessarily irrelevant, but which most citizens, and perhaps some heads of government, did not or could not understand. Technocracy and legalism was the winner, it was said, democracy and common sense the loser, and this was having a disastrous effect on the popular perception of the European process.

That assessment led, after Nice, to the widespread conviction that something different needed to be tried out. “We cannot go on working like this”, said Tony Blair when leaving the negotiating table after four days of confusion. Consequently the declaration on the future of the Union, adopted by the intergovernmental conference at Nice, called for a deeper and wider debate about the future, encouraging “wide ranging discussions with all interested parties : representatives of national parliaments, and all those reflecting public opinion, namely political, economic and university circles, representatives of civil society, etc.”⁽¹⁾

In the course of 2001, and particularly in the run up to the European Council at Laeken, speeches and press articles were putting the accent on the need to debate objectives and competencies before defining the institutional instruments needed to attain them. A catch phrase was the “delivery deficit” : people were not getting from Europe what they hoped and expected to get. These expectations needed to be identified before dealing with procedures. One of the basic challenges of the Union, said the Laeken declaration, is how to bring citizens, and primarily the young closer to the European design.

It is on this background that the President of the Convention sketched in his inaugural address what was to be the *modus operandi* of this new assembly. “How shall we conduct our proceedings ?” asked Valéry Giscard d’Estaing on 24 February 2002⁽²⁾ “The present situation of Europe prompts us to look back, to return to our sources and to ask ourselves what is the ultimate goal of the European project. The first stage of our work will thus be one of open, attentive listening”. And this was indeed the way the first plenary meetings of the Convention were conducted.

By the month of May it was clear that this “period of attentive listening” was drawing to a close and that substantive work needed to be organised. The presidium, on the initiative of its chairman, proposed the constitution of working groups and this was approved by the plenary session of 6 and 7 June. The proposal from the chair⁽³⁾ did not suggest the creation of a working group with a general institutional remit. Only one of the proposed groups dealt with a specific institutional problem, namely the role of national parliaments. All the rest were centred on issues of substance. Everybody understood that the choice was deliberate. Problems of substance needed to be clarified first, institutional issues would be discussed horizontally, in plenary sessions, at a later stage of the Convention. In the context of the Convention this decision made sense : primacy should be given to matters of substance, not to institutions, and moreover if an institutional working group were to be set up the whole Convention would want to participate. This decision, however, was to have far reaching consequences on the final stage of the exercise.

It was not until the last weeks of 2002 that the reports from various working groups of the Convention were made public and the general expectation was that institutional matters would begin to be addressed by the Convention in its first meeting in January 2003. To that effect a reflection paper

¹ Declaration 23 adopted by the Intergovernmental Conference at Nice. Official Journal of the European Communities. 10.03.2001

² Doc CONV 04/02 of 5 March 2002

³ Doc CONV 52/02 of 17 May 2002.

prepared by the secretariat of the Convention and approved by the Presidium was presented on 10 January. ⁽⁴⁾ Institutional matters had already been dealt with in contributions from the Commission, the Benelux countries, France and Germany. But by that time the end of the Convention, scheduled for June 2003, was beginning to look quite near. Time pressure was building up. An impressive load of work, including institutional matters, remained to be dealt with in a relatively small number of meetings. The President, and the presidium, clearly hoped that the duration of the Convention could be prolonged until the summer break (end of July), possibly even until September. These expectations were not met. In December 2002 the conclusions of the Copenhagen European Council reasserted that “the Convention will present the result of its work in time for the June European Council” and Ministers for Foreign Affairs repeated the same point early in the Greek presidency, much to the disappointment of President Giscard d’Estaing.

The result was that the institutional debate in the Convention, including matters which had been hotly debated in previous intergovernmental conferences and had led to laborious and convoluted compromises, was limited to a few plenary meetings held in an atmosphere of increasing time pressure. This point needs to be kept in mind when examining the results of the exercise.

The European Council before the Convention.

The European Council was created by a summit meeting in Paris in 1974. In the quarter of a century separating that meeting from the European Convention it has met about eighty times. It has developed from an informal meeting of heads of government (a *Kamingsgespräch* as Willy Brandt used to say) into a fundamental part of the decision making mechanism of the Union. Conceived initially entirely outside the Community framework, it was recognised in 1987 as “the most politically authoritative institution of the European Community” ⁽⁵⁾ and described in 1999 as “the primary source of history making decision” ⁽⁶⁾. On the eve of the initial meeting of the Convention Peter Ludlow sees in this body “the arbiter of systemic change, the principal agenda setter, the ultimate negotiating body and the core of the EU’s executive” ⁽⁷⁾

This is not the place to enter into an analysis of the role and historical development of the European Council ⁽⁸⁾. But two important characteristics need to be stressed because they are highly relevant to the debates in the Convention :

1. In the course of the years the legal nature of the European Council and its place in the institutional framework of the Union have always remained ambiguous. At the beginning, and for ten years, there was absolutely no mention of it in the treaties. This most extraordinary situation in a structure as legalistic as the European Community was due to the mistrust of the smaller, more *communautaire*, member states towards this intergovernmental newcomer. When the Single European Act, in 1985, mentioned, for the first time in a legally binding text, the existence and the composition of the European Council, it deliberately avoided saying what this body was supposed to do. It was finally, in 1992, article D of the Maastricht treaty (which became article 4 TEU) which gave a (quite inadequate) description of the role of the European Council. But the legal ambiguity was not dispelled because it was mentioned in an article apart, separate from the other institutions of the Union (which are enumerated in article 5 TEU) and it was not mentioned at all in the articles concerning institutions of the Community (Part V, Title I, TEC). The treaties of Amsterdam and Nice brought no change to this situation, so that, on the eve of the Convention, the only points which could be made with some legal certainty about the European Council were negative in nature :

⁴ Doc CONV 477/03 of 10 January 2003.

⁵ S. Bulmer & W. Wessels “*The European Council*“. London. Macmillan. 1987. p.2. See also an early recognition of its importance in W. Wessels “*Der Europäische Rat*“. Bonn. Europa Union Verlag. 1980.

⁶ J. Peterson & E. Bomberg. “*Decision making in the European Union*“. London & New York. Palgrave . 1999. p.33

⁷ Peter Ludlow. “*The Laeken Council*“. Brussels. Eurocomment. 2002. p. 5-15

⁸ For a general analysis of the development and role of the European Council see Philippe de Schoutheete “*The European Council*” in John Peterson and Michael Shackleton *The Institutions of the European Union*. Oxford University Press. 2002.

- the European Council is not an institution of the Union (not mentioned in article 5 TEU which is limitative),
 - nor is it a specific form of the Union institution known as the Council (the composition is different),
 - and the description of its task in article 4 TEU does not correspond to what, in fact, it has been doing for many years in the decision making process of the Union
2. Over the years the European Council has been considered as a remarkable success story, which in many ways it was. Perhaps for that reason, it has received very little criticism. When it became apparent, in the late nineties, that the institutional system of the Union was working inadequately, and that enlargement was obviously going to increase the inadequacies, the European Council was considered as part of the solution, not part of the problem. In Helsinki, in December 1999, the European Council, acting on the basis of the Trumpf-Piris report, concluded that substantial changes in the Council's working methods were necessary and approved guidelines to that effect. Those guidelines cover Council formations, legislative work, informal meetings, Coreper, working groups and other matters, but one single sentence is devoted to the European Council : it should continue to provide the Union with the necessary impetus. Two years later, the Laeken Declaration, enumerating the many institutional points which should be considered by the forthcoming Convention, mentions the authority and efficiency of the Commission, strengthening the European Parliament, the role of the Council, of the Presidency, of national Parliaments, but there is no mention of the European Council. The trend is consistent and it is only at Seville, in the summer of 2002, at a moment when the Convention was already under way, that some reforms in the functioning of the European Council were introduced at the suggestion of the Council Secretariat. I will come back to these reforms later but the interesting point to note is that right up to the beginning of the Convention the prevalent view in the upper reaches of the Union was that the wind of reform should blow at all levels, except at the top. "It is", writes Jacques Delors, "as if, at the dizzy heights where these summits take place, the lack of oxygen discourages enthusiasm for investigation and reform."⁽⁹⁾

Critical appraisal in 2002.

The fact that the European Council was subject to a more critical appraisal in 2002 than ever before can partly be attributed to the creation of the Convention. This decision was taken by the European Council because two successive intergovernmental conferences, leading to the treaties of Amsterdam and Nice, had failed, in most people's view, to adapt adequately or appropriately the institutions to the challenges of enlargement, globalisation and disillusionment in public opinion. For that reason the Laeken declaration gave the Convention a broad mandate to increase efficiency, democracy and transparency throughout the institutional process. But of course the main actor and ultimate negotiator in both previous IGCs had been the European Council itself. There was therefore an element of self criticism in the decision taken at Laeken.

In the Trumpf-Piris report of March 1999⁽¹⁰⁾, the Council secretariat had been very cautious in dealing with the European Council. Basically it considered that it was "satisfactorily fulfilling its role in the smooth running of the Union, without encroaching upon the Council's responsibility". The document proposed a limited number of "Avenues to be explored" with modest suggestions of procedure. But when reporting to the Barcelona European Council three years later the Secretary General was much more incisive.⁽¹¹⁾ He considered that for some years the European Council had been sidetracked from its original purpose, it spent too much time on low level drafting work and its meetings had been reduced to "report-approval sessions or inappropriate exercises in self congratulation". Those strong words led to conclusions asking the presidency to propose specific measures three months later at the Seville European Council. There some practical suggestions made by the presidency report ⁽¹²⁾ were

⁹ Jacques Delors. Introduction to Philippe de Schoutheete and Helen Wallace "*The European Council*". Paris. Notre Europe. Research and European Issues Nr. 19. September 2002.

¹⁰ Doc 2139/99

¹¹ "Preparing the Council for Enlargement". Doc S0044/02 of 11 March 2002.

¹² « Measures to prepare the Council for enlargement ». Doc. 9939/02 of 13 June 2003.

approved by heads of government. They include the drawing up of an annotated draft agenda, prior discussion of significant parts of the conclusions by the General Affairs Council (in practice by Coreper) and a general streamlining of proceedings. There is no doubt that this increased accent on preparatory work has had a beneficial effect on the working of the European Council.

It is also in 2002 that a more critical view began to be formulated outside official circles. Charles Grant, of the Centre for European Reform in London expressed the view that malfunctioning of the European Council was contributing to Europe's lack of leadership : summits were under prepared, minor matters were going to heads of government, conclusions covered every conceivable problem and were discussed at extreme length. ⁽¹³⁾. "Notre Europe", the Paris think tank led and inspired by Jacques Delors published a study on the European Council, distributed to all members of the Convention. It underlined a marked loss of leadership capacity, weak preparation and insufficient follow up, an indiscriminate agenda and the need for a new look at the procedures for treaty modification ⁽¹⁴⁾.

There is no reason to doubt that the sudden interest of the European Council for its own reform, a point which heads of government had hardly considered before 2002, is linked to the work of the Convention. Faced by an objective demonstration of some shortcomings and by the perspective of seeing those shortcomings addressed by the Convention with concrete reform proposals, they decided to do their homework themselves. The Seville conclusions have a certain defensive or pre-emptive character but, of course, they could only deal with reforms that could be introduced without treaty change. On the other side some members of the Convention were disturbed by the fact that the European Council was dealing itself with matters which the Convention considered part of its agenda. They did not want to see their work pre-empted ! But in any case it became abundantly clear in the summer of 2002 that reform of the European Council would be an important point in the Convention's agenda.

Debate around the European Council.

Although the formal institutional debate did not start until January 2003, there was, long before that date, an abundance of formal or informal proposals on institutional matters, including the European Council. It would be a formidable task to make an exhaustive analysis of these proposals but, before addressing the results, that is the articles of the draft Constitution, some indication on the general trends is useful.

Ideas put forward about the European Council concentrated essentially on the question of its presidency. In the spring of 2002 what became known as the "ABC proposal" (Aznar, Blair, Chirac) suggested the appointment of a permanent or semi permanent President of the European Council. This was not a formal proposal from the three governments but rather a meeting of minds. The President of the Convention made no mystery of his interest for this suggestion. The Benelux countries, the Commission, several smaller member states stated their opposition. A variant was floated by Pierre Lequiller, French member of the Convention representing the Assemblée Nationale : he suggested that there should indeed be a President of the Union chairing both the European Council and the Commission. Another idea was to accept a semi-permanent president chosen among the heads of government and remaining in that position. However by the end of the year positions were becoming crystallised around the question of the permanent presidency. A Franco-German paper presented early in January⁽¹⁵⁾ indicated that Germany was now also in favour of a full-time President of the European Council elected for a period of five, or two and a half, years, thereby consolidating a position common to all the bigger member states of the Union. On the other side of the debate the Commission ⁽¹⁶⁾ proposed maintaining the six monthly presidency rotation. A memorandum introduced by the Benelux countries ⁽¹⁷⁾, and supported in the plenary of the Convention by several other smaller member states, took a similar position.

¹³ Charles Grant « *Restoring leadership to the European Council* ». Bulletin of the Centre for European Reform; 15 April 2002.

¹⁴ Philip de Schoutheete and Helen Wallace. « *The European Council* ». Paris. Notre Europe. Research and European Issues Nr.19. September 2002.

¹⁵ Doc. CONV 489/03 of 16 January 2003

¹⁶ Doc CONV 448/02 of 5 December 2002

¹⁷ Doc CONV 457/02 of 11 December 2002. The memorandum states that "The Benelux will in any case never accept a president elected from outside the Council". Six months later they are supporting a

But even if public opinion and the press concentrated their attention on the issue of the presidency this was, of course, not the only issue at stake. In fact articles of the draft Constitution suggest changes to the nature, the composition, the competences, the decision making process and the presidency of the European Council and these issues need to be considered separately.

The nature of the Institution.

Article 18 § 2 states that the institutional framework of the Union comprises five institutions : Parliament, European Council, Council, Commission and Court (¹⁸). This puts an end to a quarter of a century of ambiguity. Initially conceived as operating completely outside the institutional framework, the European Council is now fully integrated within it. It also confirms the fact that the European Council is not a specific formation of the Council : it is a different institution.

This can be interpreted as a strengthening of the intergovernmental element in the institutional framework.⁽¹⁹⁾ Personally I interpret it as a simple recognition of political reality. Nobody can deny that the European Council has played, for nearly thirty years, a fundamental role in the development of the European Union, and that that development has not been predominantly intergovernmental. The Union of 2003 is a much more integrated, more “supranational”, whole than the Community of 1974, and, over the years, the motor of that integration has been the European Council. In its impact on the life of the Union the European Council has been neither purely intergovernmental nor entirely supranational, but it has been fundamental. The European Union website (“Europa”), which is managed by the Commission, notes that it “plays a vital role in all European Union fields of activity”. Javier Solana’s report to the Barcelona European Council (March 2002) states that it is “the Union’s supreme political authority”. From the point of view of rationality, it does not make sense to exclude such a body from the institutional framework of the Union. From the point of view of readability, it is unjustifiable to pretend that such an important decision making organ is not, in fact, part of that institutional framework. I believe that article 18 § 2 is a welcome clarification.

Composition of the European Council.

Article 20 § 2 states that the European Council consists of the Heads of States or Government together with its President and the President of the Commission. The Union Foreign Minister takes part in its work. The following paragraph allows the European Council, if the agenda so requires, to decide that its members may be assisted by a Minister and a Commissioner.

This means that Foreign Ministers who have been, since the beginning and up to now, de jure participants in the European Council deliberations (article 4 TEU) lose that capacity. The justification generally given for that decision is that in an enlarged Union the presence of two members per delegation would lead to a meeting of sixty or more people round the table. The meeting would become difficult to manage and above all it would lose that intimate character to which participants have always attached great importance. It remains to be seen if a meeting of thirty heads of government can lead to intimacy, but at least an effort is made in that direction.

Another justification, less openly formulated, is that Foreign Ministers were initially included, in the seventies, because they were supposed to exercise a co-ordinating role on all other Council formations. This they have in fact been unable, or unwilling, to do over the years, and the initial justification thus disappears. It should be noted however that Foreign Ministers get a sort of proxy presence in the European Council through the Union Foreign Minister, who is chairman of the Foreign Affairs Council (article 23 § 2). This may, in time, become a significant advantage. Moreover Foreign Ministers will, presumably, be admitted if and when the European Council deliberates on important points of foreign policy. Because the Union Foreign Minister is also a member of the Commission, his presence also

draft Constitution which includes such a proposal. This confirms a very old principle of diplomatic practice : never use the word “never” in diplomatic language.

¹⁸ The presidium initially considered naming the European Council before the Parliament but in the end they decided to maintain the traditional precedence in ranking of the parliamentary assembly.

¹⁹ See, for example : “*The draft Constitutional Treaty – An Assessment*”; Brussels. European Policy Centre. Issue Paper Nr. 5. page 7

means that the President of the Commission will always have another member of the college at his side.

Declaration number 4 annexed to the Maastricht Final Act states that the President of the European Council shall invite Finance Ministers to participate in European Council meetings when it is discussing matters relating to economic and monetary union. Whether this disposition, which Finance Ministers had requested with great insistence, will still be legally in force in the new system is one of the numerous points arising from declarations and protocols which need to be clarified in the forthcoming IGC.

Finally it should be noted that the President of the European Council and the President of the Commission are members of the European Council, even if they do not vote in it (article 24 § 5). The composition is different from that of a normal Council, as it is in present treaty texts.

Competences.

Article I 20 § 1 says that the European Council shall provide the Union with the necessary impetus for its development and shall define its general political directions and priorities. This is an adaptation of present article 4 TEU which says that it shall define “general political guidelines”. The new formulation proposed is certainly closer to political reality than the present one, but it still does not adequately reflect the role of ultimate negotiator which is so frequently that of the European Council. The elaborate and detailed bargaining implied by the definition of a financial package (Delors I and II, Agenda 2000 etc.) hardly falls under the new definition. The conclusions of the Berlin European Council which settled in March 1999 the last financial package include fourteen tables with precise numbers : can that be described as setting general political directions and priorities ?

The last sentence of Article I 20 § 1 states that the European Council “does not exercise legislative functions”. That statement, which came as an addition relatively late in the course of the discussion, seems strange and superfluous. Legislative acts of the Union are strictly defined by article I 32 of the Draft Constitution and the following article defines the way in which they are adopted. As an institution the European Council has no role in that process and it is therefore true that the European Council does not exercise legislative functions, not because article I 20 § 1 says that it may not, but because the treaty gives it no power to do so. The intention seems to have been to prevent the European Council from taking over, in a specific case, the legislative function of the Council, but, given that they are now legally recognised as two different institutions, the treaty would not allow that in any case. If heads of Government wanted to legislate they could presumably decide to meet as a formation of the Council (article I 23 § 3). But then the sentence quoted above would not apply : it could therefore, and should, have been omitted.

In the field of foreign policy the relevant text is article I 39 § 2 which says that the European Council shall identify the Union’s strategic interests and determine the objectives of its common foreign and security policy. It should establish strategic guidelines enabling the Council to frame this policy. This concept of strategic guidelines is picked up by article I 23 § 2 dealing with the tasks of the Foreign Affairs Council. The new text is a perfectly acceptable rewording of article 13 TEU which also speaks of objectives, guidelines and strategies. The new formulation discards the concept of common strategies which had been largely debased since its initial formulation in the Amsterdam treaty. However some verbal confusion occurs further on in the treaty. Article III 194 § 1 says that the European Council identifies the strategic interests and objectives of the Union. Article III 196 § 1 says that the European Council shall define the general guidelines for the common foreign and security policy. There is no real contradiction between these various formulations but they do seem slightly repetitive and it would help if exactly the same wording was used in different parts of the treaty. (Is there a difference between a strategic guideline and a general guideline ?). This harmonisation will presumably be one of the ancillary tasks of the IGC.

One of the traditional functions of the heads of government is to make high level appointments in the European institutions. Until quite recently these appointments were made by common accord of the heads of government, that is by unanimity and outside the institutional framework of the Union⁽²⁰⁾.

²⁰ The appointment of President Prodi, for example, is formulated by “heads of state and government” in Part II of the conclusions of the Berlin European Council in May 1999.

Building on the precedent of the treaty of Nice, the draft Constitution empowers the European Council to make these appointments, and to make them by qualified majority : this is the case for the President of the European Council (article 21 § 1), the candidate submitted to Parliament for President of the Commission (article 26 § 1) and the Union Minister for Foreign Affairs (article 27 § 1). This is not a trivial change as is demonstrated by the precedent of Jean Luc Dehaene blocked by the lone veto of John Major at the Corfu European Council in 1994. It comes then as a slight surprise to discover that the President, the Vice president and the members of the board of the European Central Bank still need to be appointed by common accord of the governments of the Member States at the level of Heads of State and Government (article III 84 § 2) . Perhaps the IGC will also want to look at this anomaly. There seems to be no reason to require unanimity at the top level for the appointment of the President of the Central Bank when the President of the European Council can be elected, at the same level, by a qualified majority.

Another traditional function of the European Council is to be the ultimate negotiator of treaty changes and this is a task which many consider that it has recently fulfilled imperfectly. “The structure and the *modus operandi* of the European Council is well adapted to collective bargaining, to the definition of general guidelines, even to the drafting of political statements. It is not well adapted to a legislative function”⁽²¹⁾. Confusion round the European Council at Amsterdam and Nice was noted by participants and observers and, in the last instance, led Tony Blair to exclaim “We cannot go on working like this”. “Hectic night sessions with no assistants in the room, multilingual debate on texts that appear and disappear from the negotiating table without having been studied in depth, across the board compromises on unrelated issues at the break of dawn, cannot lead to clear legal texts. The fact is that no civilised nation operates in such an uncoordinated and risky way”⁽²²⁾. It was this feeling of weakness, or dissatisfaction with the previous process, which led the European Council at Laeken to try a new procedure for treaty revision, namely the Convention. It is too early to declare that this new procedure is a complete success: we have to reserve our final judgment until the IGC comes to the signature of an agreed text. But up to now it is, by common consent, a remarkable performance. Unless the IGC decides to reopen the whole debate, Heads of Government will be able to conduct their discussions on a strictly limited number of points, each one of which has been previously debated by the Convention. The scope of the discussion is considerably narrower and the level of preparation is infinitely greater than in Amsterdam or Nice and this, presumably, should make for a more orderly debate. Moreover this should be a recurring benefit. Article IV 7 § 2 says that when the European Council decides on a revision of the treaty its President shall convene a Convention similarly composed to the one we have just seen operating. This new procedure is thereby entrenched in the treaties and this may bring a lasting improvement in the exercise by the European Council of one of its major competences, treaty change, where it has been in the past less than entirely convincing . But here again we have to reserve our judgment until the end of the IGC.

A New Competence.

Finally we have to consider a new competence which the draft Convention confers on the European Council. Article 24 § 4 says that the European Council may decide by unanimity to allow the adoption of laws by an ordinary legislative procedure, where the treaty prescribes a special legislative procedure, or to allow the Council to act by qualified majority where the treaty prescribes unanimity. National parliaments must be informed but they do not have to ratify those decisions. In effect the European Council is empowered to change the treaty in those limited cases. A similar disposition, but without compulsory information of national parliaments, is foreseen for common foreign and security policy in article 39 § 8 (and unnecessarily repeated in article III 201 § 3).

Such clauses commonly known as “*passerelles*” are not unknown in former treaties. The first one was introduced by article 100 C of the Maastricht treaty and, amended in Amsterdam, became article 42 TEU. But they gave competence to the Council, not the European Council, and they implied, in most cases, adoption of the decision by the member states in accordance with their respective constitutional

²¹ Philippe de Schoutheete : *The European Council*” in John Peterson & Michael Shackleton “*The Institutions of the European Union*”. Oxford University Press. 2002. page 43

²² Philippe de Schoutheete & Helen Wallace “*The European Council* » Paris. Notre Europe. Research and European Issues Nr. 19. September 2002.

requirements (which means ratification).⁽²³⁾ Since Maastricht existing *passerelles* have, in fact, never been used and some observers tend to conclude that they are useless, which may be true, and that this applies also to the clauses in the draft Constitution. This last point is a hasty judgment. In the years since Maastricht the Union has been in a practically permanent state of treaty revision. The incentive to use a cumbersome clause such as article 42 TEU when the same result could, possibly more easily, be obtained in a current or forthcoming IGC was very weak. In the present proposal the absence of formal national ratification procedures makes the prospect much more interesting. That is an essential difference, specially if, as President Giscard seems to believe, we were to enter a long period without IGCs, that is without the possibility of negotiating treaty modifications. Peter Ludlow is right to stress that “the radical expansion of the European Community’s agenda in the 1970s into areas such as environmental policy, regional policy and the EMS was based on article 235 which also required unanimity”.⁽²⁴⁾ Even if unanimity in the seventies implied a lesser number of member states !

I believe however that there is a significant difference between the eventual application of such a clause under article 24 § 4 and under article 39 § 8.

In the former case we are dealing with what used to be called the first and third “pillars”. The action of the Union is largely legislative or regulatory. It is reasonable to envisage that , given a change in circumstances, opposition of some member states to majority decision making could weaken or disappear. External shocks can contribute to such an evolution. Let us suppose an article such as 24 § 4 had existed when the European Council met in Brussels on 21 September 2001 : it is quite conceivable that, under the shock of 9/11, the European Council would have decided that several measures needed in the fight against terrorism, such as the common arrest warrant, were absolutely urgent and should move from unanimous decision making to qualified majority. In the circumstances I doubt if there would have been much opposition. In this case application of the *passerelle* clause is not implausible.

In foreign and security policy the situation is different because the action of the Union is largely executive. We are not talking here about the identification of strategic interest and objectives which, according to the Constitution, belong to the European Council and are adopted unanimously (article 39 § 7). Nor are we talking about implementing decisions, or decisions taken on the basis of a strategic decision of the European Council or at its specific request : such acts are taken anyway by qualified majority (article III 201 § 2). We are talking about other decisions such as those mentioned in article III 198 on operational action (objectives, scope, means to be made available, duration and conditions for implementation) or article III 199 (approach of the Union to a particular matter of a geographical or thematic nature) . It is difficult to conceive that a member state which, for whatever reason, was reluctant or opposed to such a decision (and, of course, if nobody was reluctant or opposed, unanimity would not be a problem), would accept that it be decided later by qualified majority voting . In this case the application of the *passerelle* clause does seem somewhat implausible.

Decision making.

The basic rule for decision making in the European Council remains what it is today, namely decision by consensus (Article I 20 §). However a number of articles in the draft Constitution introduce exceptions to this rule in that they foresee that the European Council should vote. In that case the President of the European council and the president of the Commission do not take part in the vote.

- As indicated previously major appointments such as the President of the European Council, the candidate President of the Commission and the Union Minister for Foreign Affairs occur by qualified majority (Articles 21 § 1, 26 § 1, 27 §1).
- Composition of the European Parliament (Article 19 § 2) and rotation of Council presidencies (Article III 245 § 2) are decided by unanimity.
- Deciding that a member state is in serious and persistent breach of the Union’s values requires an unanimous decision
- European decisions relating to common foreign and security policy are, with some exceptions, adopted unanimously (Article 39 § 7 and III 194 § 1) and that is also the case

²³ In the case of asylum and immigration the Treaty of Amsterdam introduced a *passerelle* which does not require ratification : article 67 § 2 TEC.

²⁴ Peter Ludlow. “*The Thessaloniki European Council*”. Brussels. EuroComment. Briefing note No 2.3. July 2003

when a member state, for vital and stated reasons of national policy, refuses to accept a majority vote (Article III 201 § 2).

- The decision to have a common defence is taken by unanimity (Article 40 § 2).
- Unanimity is also required to action the *passerelles* clauses allowing changes in the treaty procedures (Articles 24 § 4, and 39 §8)
- Rules of procedure of the European Council are fixed by a simple majority (Article III 244 § 3)
- A simple majority is required to decide to examine proposals for treaty amendments (Article IV 7 § 2)

It is worth noting that on the basis of the present wording of article III 270 § 1 it would seem that the Court of Justice does not have competence to review the legality of acts of the European Council, even when it votes and adopts decisions, a point which seems to put that body strangely above the law. Similarly it would seem that the European Council (contrary to the Council) does not have the power to bring an action to the Court for treaty violation or infringement by a member state or another institution (article III 270 § 2). These may be accidental blemishes that a detailed legal examination of Part III might correct.

Presidency of the European Council

This most controversial issue took up a lot of the limited time allotted to institutional problems and it may well be one of the questions member states will want to reopen in the IGC. As indicated above it was strongly advocated by the bigger member states, supported by the President of the Convention, and no less strongly opposed at least initially by most of the smaller member states and the Commission

The arguments in favour were based on the difficulties of maintaining a six monthly rotating presidency in an enlarged Union, of the impossible task facing an incumbent head of government if he had, over and above his national duties, to prepare, and chair, two or more European Councils with twenty five governments represented in the room. The credibility of this argument was strengthened by the fact that the outgoing President, Danish Prime Minister Fogh Rasmussen, shared the opinion that the task would become unbearable with enlargement. A separate argument given was the need to have some permanence, at the highest level, on the international scene if the Union wanted to “shoulder its responsibilities in the governance of globalisation” and to become “a stabilizing factor and a model in the new, multipolar world” to use the words of the Laeken declaration.

Arguments against were based on the risk of upsetting the institutional balance, by strengthening the intergovernmental pillar, identified with the European Council, to the detriment of the supranational pillar, namely the Commission and its President. The innovation was perceived as a presidential system *à la française*, which is alien to the political tradition of other countries. More implicitly there was the fear that a new structure of this sort would, in practice, be dominated by a group of bigger member states, and the fact that those states were all in favour of this proposal seemed to confirm that suspicion.

Article I 21, as it now stands is called “The European Council Chair”, and President Giscard made a point of using the word “chair” and not “president” in his interventions, in order to assuage the fears of presidentialism. But the article itself says the European Council shall elect its president for a period of two and a half years renewable once. His tasks are to chair, to drive forward, to prepare and ensure continuity in the work of the European Council, to facilitate cohesion and consensus, to report to Parliament and to ensure, at his or her level, the external representation of the Union in the field of common foreign and security policy.

It would be a fruitless exercise to try to formulate a clear cut judgement on this institutional novelty. The texts leave a lot of room for interpretation, time will tell and above all the personalities of the first incumbents will be of fundamental importance. I will limit myself to two cautionary remarks :

1. The institutional structure proposed by the draft Constitution seems to have a high level of inbuilt tension. The power relationship within the Union rests on the interplay between three functions: the President of the European Council, the President of the Commission, the Minister for Foreign Affairs. Their role is such that each should be a political personality with prestige and authority. But there is neither clear hierarchy nor clear division of competencies.

The draft treaty texts are open to various interpretations. Tension seems inevitable, conflict quite probable, on each side of that triangle :

- Between the President of the European Council and the President of the Commission : the first should drive forward the work of the European Council and the second take appropriate initiatives to promote the general European interest, the first should ensure continuity of the work of the European Council and the second ensure application of steps taken by the institutions. Is there not some overlap ?
- Between the President of the European Council and the Union Minister for Foreign Affairs : the first should ensure the external representation of the Union at his or her level on issues concerning CFSP, the second shall conduct the Union's CFSP. Is the distinction so clear ?
- Between the President of the Commission and the Union Minister for Foreign Affairs who is also Vice President of the Commission : it is not impossible to wear two hats but it is never easy, neither for the wearer nor for those who have some form of authority on him.

The Union has clearly demonstrated in the past its capacity to function effectively on the basis of ambiguous texts, but there may be limits to that capacity.

2. The system is supposed to strengthen the authority of the European Council and its presidency. But will it have that effect? Will the President of the European Council have on that body the influence and authority which an incumbent Head of Government can have on his colleagues ? Experience seems to show that authority and influence disappear when the highest function is no longer held. In those circumstances will Heads of Government allow him to ensure the external representation of the Union at his level, which is also their level ? Will he be able to influence, orient and coordinate the preparatory work of various Councils, and Coreper, without having the direct chain of command which Presidencies today can make use of ? ⁽²⁵⁾. It has happened in some occasions in the past that European Council conclusions were evaded or circumvented by reluctant Councils. Is that not more likely to happen if the President of the European Council has no direct grip on the presidencies of various Councils ? It is not obvious that the net result of this innovation will be a strengthening of the authority of the European council. It might well be the opposite.

Conclusion

At the time of writing it is impossible to be sure of the future destiny of the draft Constitution. It may well be, though no single country states that as its objective, that the whole process unravels in the I.G.C. under the multiple and frequently contradictory requests from member states. Institutional reforms, including those concerning the European Council, would then, presumably, be the first victims. It is also possible that the Intergovernmental Conference ratifies the draft Constitution with a very limited number of changes. One of those changes, advocated by some smaller member states, might concern the Presidency of the European Council, but it is also possible that this particular point, dear to some bigger member states, would remain unchanged. In the absence of prophetic gifts it is impossible to be certain.

What does seem certain however is that the European Council is a very important part of the institutional reform advocated by the Convention and that the question of its presidency is by no means the most important element in that part. Recognition of the European Council as an institution, change in its composition, clearer definition of its competences, clarification in decision making, changes in the way we modify treaties including the possibility for the European Council to introduce some changes without national ratifications, are important and far reaching propositions. It would be a pity if they were to be the victim of that atmosphere of mutual recrimination and suspicion which so often results from debates between big and small, intergovernmentalists and supranationalists. Hopefully wisdom and common sense will prevail.

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²⁵ See Peter Ludlow "*The Thessaloniki European Council*". *op cit*.