

<p style="text-align: center;"><b>THE RESULTS OF THE INTERGOVERNMENTAL CONFERENCE AN ASSESSMENT IN THE LIGHT OF THE CONVENTION'S DRAFT</b></p>
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*Franklin DEHOUSSE  
Wouter COUSSENS  
Jordi GARCIA  
Pierre VAN DEN BRULE<sup>1</sup>*

Gathered in Brussels on 18 June 2004, the European heads of government concluded the negotiations on the Treaty establishing a Constitution for Europe. This paper will assess the results of the Intergovernmental Conference compared with the Convention's draft.<sup>2</sup> The first part sketches the process leading to the agreement on the Constitutional Treaty. Parts two, three and four compare the final agreement with the Convention's draft with regard to the institutional framework, the policies and the budgetary provisions. The final part concludes and draws lessons for the future.

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<sup>1</sup> F. DEHOUSSE is judge at the Court of first instance of the European Communities, assessor of European studies at the RIIR and professor at the University of Liège. Wouter COUSSENS, Jordi GARCIA and Pierre VAN DEN BRULE are researchers at the RIIR. The present comments are personal and cannot be attributed to the institutions to which the authors belong.

<sup>2</sup> See also : D. PHINNEMORE, The Treaty establishing a Constitution for Europe: an overview. Chatham House Briefing Note, June 2004. G. GREVI, Light and Shade of a quasi-Constitution. An assessment. EPC Issue Paper, no. 14, 2004.

## 1. A NEW PROCESS

### 1.1. The Convention's draft: a mixed record

At the Laeken 2001 European Council, led by the Belgian Presidency, the EU leaders adopted the Declaration of Laeken. The heads of state and government acknowledged in that declaration that the Nice Treaty was not sufficient to guarantee the efficient and democratic functioning of the enlarged Union.<sup>3</sup> The decision was thus taken to start a new process of treaty provision which would render the Union more transparent, democratic and efficient. A new body, dubbed 'Convention', was charged with preparing a draft text.<sup>4</sup> This text was presented in July 2003.<sup>5</sup>

The Convention's record was mixed<sup>6</sup>:

- The draft enhanced the *transparency* of the Union through the simplification of the treaty framework, an overhaul of the legal instruments and procedures, the categorisation of the competences, and the creation of a Legislative Council. Yet, the simplification could have gone further, with the institutional and policy framework remaining very complex in different areas.
- The Convention's draft also catered for more *democracy*, by strengthening the budgetary and legislative powers of the European Parliament (EP) and through a greater involvement of national parliaments. Notably, the draft also foresaw a popular initiative right and incorporated the charter of fundamental rights into the treaties. Yet, the democratisation was not complete. The supervisory role of the EP remained marginal in some important areas.
- The draft would render the Union more *efficient*, most importantly by extending substantially the use of majority voting. It catered for a substantial strengthening of the policies in the area of justice and home affairs and allowed a limited group of Member States to 'take the lead'. Yet, here also the Convention could have gone further. Unanimity remained the rule for foreign policy, social policy, taxation and the future revision of the Constitution. Moreover, the Union's efficiency was further undermined by certain institutional proposals. Most importantly, the creation of a European Council President risks provoking a turf battle between the European Council President, the Foreign Minister and the European Commission President.
- The Convention undertook the most important *institutional reform* since 1957. Yet, the main tenet of these reforms clearly tilted towards the intergovernmental side of the balance. The European Council is now expressly made a Union institution and sees its prerogatives extended. It will moreover

<sup>3</sup> F. DEHOUSSE, La CIG 2000 : vers une réforme incomplète des institutions européennes ? Courrier Hebdomadaire du Crisp, 2000, no. 1674.

<sup>4</sup> F. DEHOUSSE, Le débat sur l'avenir de l'Europe et la déclaration de Laeken, J.T., 2002 , pp. 297-301.

<sup>5</sup> OJ C 169.

<sup>6</sup> For an overall assessment: F. DEHOUSSE and W. COUSSENS, The Convention's Constitutional Treaty: old wine in a new bottle? Studia Diplomatica, 2003, no. 1-2 ; F. DEHOUSSE and W. COUSSENS (eds.), Le Traité Constitutionnel de la Convention pour l'Europe: un nouveau pas pour l'intégration européenne? Courrier Hebdomadaire du Crisp, 2003, no. 1808-1809.

be headed by a permanent President. Together with the Foreign Minister, the creation of the European Council President may lock in and even strengthen the intergovernmental nature of the Union's external relations. The introduction of a two-tier Commission risked introducing an intergovernmental conception of the Commission.

- The Convention amplified the *discord between the big and small Member States*. The decision on the composition of the European Parliament was essentially postponed. The compromise on the composition of the Commission was so flawed, that many Member States wanted to come back on this point. The new formula of qualified majority voting did also not alleviate the big-small divide, as it disproportionately strengthened the power of the big Member States. The Convention furthermore added a new battle field to this 'fight' by its proposals regarding the presidency of the (European) Council.

## 1.2. The Intergovernmental Conference

It must be emphasized that the Convention's text was simply a draft. It formed the basis for the Intergovernmental Conference (IGC) which was to reach a final agreement on the constitutional treaty.<sup>7</sup> This conference kicked off in October 2003.<sup>8</sup> Initially, the discussions progressed well, raising the prospect of concluding the talks by the end of the year. The December European Council however failed to come to an agreement on the Constitutional Treaty. Three reasons are often invoked to explain the breakdown of the IGC negotiations: the badly managed Italian Presidency, the intransigence of Spain and Poland on the QMV-issue, and the ambivalent attitudes of France and the UK. The UK was haunted by the perspective of a referendum on the Constitution and virulently insisted on its red lines. President Chirac, also facing the threat of having to resort to a referendum, was happy to make the point that decision-making with 25 Member States is difficult, thus proving the case for the need of pioneer groups.

After a 'cooling off' period, the talks were resumed. Under the agile Irish presidency, EU leaders finally managed on June 18 2004 to agree on a Treaty establishing a Constitution for Europe.<sup>9</sup> The treaty must now be ratified by all 25 Member States in order for it to enter into force.

The IGC has left intact most of the Convention's acquis. Yet, some important modifications were made with regard to the institutional framework (§2), the policies (§3), and the budgetary provisions (§4).

<sup>7</sup> Cf. Conclusions of the Thessaloniki European Council (20/06/2003).

<sup>8</sup> An expert group was set-up in order to 'tidy up' the Convention's draft. The group has produced some valuable clarifications and corrections of the text. CIG 4/1/03 and CIG 50/03.

<sup>9</sup> The agreement can be found in documents CIG 50/03, CIG 81/04 and CIG 85/04. A consolidated version of the 'Treaty establishing a Constitution for Europe' can be found in the document CIG 87/04. The protocols annexed to the Constitutional Treaty can be found in the document CIG 87/04 ADD 1, and the Declarations annexed to the final act of the IGC in the document CIG 87/04 ADD2.

## 2. INSTITUTIONAL ASPECTS

### 2.1. The Council

#### **2.1.1. The definition of qualified majority**

The Convention proposed to replace the messy, opaque and inefficient system of qualified majority adopted at Nice by a system of double majority.<sup>10</sup> This change was to enter into force in 2009. Instead of the triple majority of Nice, a qualified majority would be obtained when a measure is supported by half the number of Member States, representing 60% of the population. In case the Council is not acting on the basis of a proposal from the Commission or the Foreign Minister, the required qualified majority would consist of two thirds of the Member States, representing at least three fifths of the population of the Union. Compared to Nice, this system had the double advantage of being more transparent whilst enhancing the EU's ability to act. Yet, the proposal would substantially strengthen the voting power of the most populous Member States.

The IGC has come up with a more complicated system, which would also only enter into force by 2009.<sup>11</sup> A qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them, and representing Member States comprising at least 65% of the population of the Union. The requirement of fifteen Member States will most likely be superfluous by 2009, since 55% of Council members will comprise fifteen members in a Union of 27 (and more). In addition, a blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained. This latter condition was inserted to limit the weight of the most populous countries. Yet, it may lead to an inconsistency, because it may make it possible that a decision would be taken by a majority which does not bring together 65% of the population.<sup>12</sup>

When the Council is not acting on a proposal from the Commission or from the Union Minister for Foreign Affairs, the qualified majority shall be defined as 72% of the members of the Council, representing Member States comprising at least 65% of the population of the Union. This 'reinforced' majority will be applicable for important decisions, like for CFSP decisions when the Council acts on its own initiative, EMU decisions when acting on a recommendation from the Commission or the ECB, nominations etc.

By entering absolute numbers into the system, the IGC has rendered it less versatile. Indeed, one of the advantages of the double majority system is that it changes automatically. Hence, there is no need to define new numbers in the case of enlargement or in cases where not all Council members are entitled to vote (e.g. EMU, enhanced cooperation, structured cooperation). With the addition of absolute numbers, this advantage is foregone. Therefore, in cases where only some members of the Council have the right to vote, the provisions of the Constitution will have to

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<sup>10</sup> See : CEPR, Nice try : should the Treaty of Nice be ratified. Monitoring European Integration no. 11 (2001).

<sup>11</sup> Article I-25.

<sup>12</sup> J. EMMANOUILIDIS, Historically unique, unfinished in detail – an evaluation of the Constitution. Centre for Applied Policy Research Reform Spotlight, 2004/03.

specifically define the qualified majority. The percentages provided for in Article I-25 paragraph 1 and in paragraph 2 will then be applicable only to Council members which have the right to vote and to the population of the Member States which they represent. A blocking minority must include at least the minimum number of Council members representing more than 35% of the population of the participating Member States, plus one member, failing which the qualified majority shall be deemed attained. The requirement that a qualified majority must comprise at least fifteen Member States will in these cases be abolished.

Moreover, the system has been rendered even more complex because of the addition of a Ionnina-like compromise. If members of the Council, representing at least three-quarters of the level of population, or at least three-quarters of the number of Member States necessary to constitute a blocking minority, indicate their opposition to the Council adopting an act by a qualified majority, the Council shall discuss the issue and do all in its power to reach a satisfactory solution to address the concerns raised by those Member States. The compromise would take effect on 1 November 2009 and remain in force at least until 2014. Thereafter the Council may adopt a European decision repealing it.<sup>13</sup>

All in all, the system adopted by the IGC is less efficient and less transparent than the Convention one. By increasing the two thresholds and adding new conditions, the EU's ability to act is reduced, since it is easier to form a blocking minority.<sup>14</sup> It remains however slightly more efficient than the Nice system, although the efficiency in case of the 'reinforced' qualified majority is not a lot higher than the Nice system.<sup>15</sup> Yet, its equity is contestable, since it greatly boosts the voting power of the bigger Member States.<sup>16</sup> This boost comes on top of the already important shift of power to the big countries that occurred under Nice. The main losers compared to Nice are the 'medium-sized' Member States, as well as Spain and Poland (who were given a disproportionate voting power at Nice). The bias in voting power in favour of the most populous Member States may turn out to be excessive in cases where (1) the Council is not acting on the basis of a proposal from the Commission or the Foreign Minister, and/or (2) not all Member States have a voting right. This will be the case in sensitive areas, like EMU and defence.

Notably, the proposed system will only enter into force from November 2009.<sup>17</sup> Thus, decision-making in the Council risks being paralysed by the Nice rules during the next five years.

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<sup>13</sup> CIG 87/04 ADD 2, Declaration ad article I-25.

<sup>14</sup> R. BALDWIN and M. WIDGREN, Council voting in the Constitutional Treaty: Devil in the detail. CEPS Policy Brief, 2004.

<sup>15</sup> At Nice, a very high threshold of weighted votes, the most important of the three thresholds, was set to reach a qualified majority. This makes it easier to form a blocking minority and therefore more difficult to form winning majorities. The double majority system does away with the weighted votes threshold. The population and membership thresholds it sets are relatively easier to reach.

<sup>16</sup> Note however that the Convention's proposal would have favoured the bigger Member States even more. R. BALDWIN and M. WIDGREN, Another failing in the making. CEPS Commentary, 2004.

<sup>17</sup> See article 2 of the protocol 34 on the transitional provisions relating to the institutions and bodies of the European Union. CIG 87/04 ADD 1.

### **2.1.2. The scope of qualified majority voting**

The IGC rolled back the scope of qualified majority voting in the area of taxation and for certain budgetary decisions, and indirectly also in the domains of social security for migrant workers and justice cooperation in criminal matters. On the other hand, it has catered for the use of qualified majority voting within the structured cooperation on defence matters (see below).

The IGC has also made some modifications concerning the 'passerelle clauses'. The Convention had introduced two general passerelle clauses. The first one would allow the European Council to decide unanimously that in future certain decisions of Part III will be taken by the Council acting by qualified majority voting instead of by unanimity. The second allows it to decide unanimously that the certain (framework) laws of Part III will be adopted following the 'ordinary' legislative procedure, i.e. co-decision of the Parliament and qualified majority voting in the Council.

The IGC has limited the expediency of these clauses by providing for a more constraining decision procedure. In fact, any initiative taken by the European Council on the basis of these clauses shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the European decision shall not be adopted.<sup>18</sup> This is obviously a highly constraining procedure. The use of these clauses is also ruled out for decisions with military implications or those in the area of defence.

### **2.1.3. The Council formations**

As was to be expected, the idea of a legislative Council was one of the first 'casualties' of the IGC. Only a very limited number of Member States supported the idea. This is deplorable, since a legislative Council could have played a valuable role with regard to coordination and accountability. The only two formations retained are therefore the General Affairs Council and the Foreign Affairs Council.<sup>19</sup> The separation of both formations remains a step forward compared to the current situation. The European Council will adopt by a qualified majority the list of other Council formations.

### **2.1.4. The Council Presidency**

The Convention had come up with a very murky and blurred compromise on this point. According to the draft, the Foreign Affairs Council would be chaired by the Foreign Minister. For the other Council formations, an equal rotation system would be established by the European Council, providing for a presidency by Member States' representatives for a period of at least one year. This provision left many questions unanswered.<sup>20</sup>

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<sup>18</sup> Article IV-444.

<sup>19</sup> Article I-24.

<sup>20</sup> For an evaluation of this issue and an analysis of the results of the Convention in this respect : F. DEHOUSSE and W. COUSSENS, Which presidency for the future European Union? The Convention's dilemmas. in F.

Remarkably, in spite of all the previous declarations on the obsolescence of the rotating presidency, the IGC has generally returned to the current situation of rotating presidencies, adding the difficulties linked to a team presidency. This looks like maintaining an increasingly inefficient regime while adding a new layer of complexity. Furthermore, some modalities of this new regime have not been defined yet.

The European Council will adopt, by qualified majority voting, a decision establishing the conditions governing the exercise of the presidency of the Council. The draft decision adopted by the IGC<sup>21</sup> stipulates that the presidency of the Council shall be held by pre-established groups of three Member States for a period of 18 months. The groups shall be made up on a basis of equal rotation among the Member States, taking into account their diversity and geographical balance within the Union. Yet, each member of the group shall in turn chair for a six-month period all configurations of the Council, with the exception of the Foreign Affairs configuration which is still to be chaired by the Foreign Minister. One must also note that the Eurogroup will still be able to elect its own permanent chair.

There is one additional element for caution. Indeed, it is stated that the other members of the group shall assist the Chair in all its responsibilities *on the basis of a common programme*. Moreover, the General Affairs Council shall ensure consistency and continuity in the work of the different Council configurations *in the framework of multiannual programmes* in cooperation with the Commission. The risk exists that these provisions will undermine the prerogatives of the Commission in terms of multi-annual programming (article I-26). This may lead to a lack of continuity in agenda-setting.

One can better measure now the nonsensical character of the demand to preserve whatever the costs the present system. The latter cannot be preserved without collectivising the exercise of the presidency between different Member States. But this adds only more complexity and less visibility to the present system. Coordination must now proceed between the Member States in charge of the presidency, with the Commission and the Minister of Foreign Affairs, and possibly with the President of the European Council. And one should not forget the president of the Eurogroup. This complex web of coordination lines will prove extremely hard to manage.

## **2.2. The Commission**

### **2.2.1. Composition of the Commission**

The Treaty of Nice provided that from 2005 the Commission would comprise one national per Member State, the big Member States thus losing their second member of the Commission. Moreover, Nice foresaw that from the first Commission, which would be appointed once the Union reaches 27 Member States, there would be

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DEHOUSSE and W. COUSSENS (eds.), *The Convention's Constitutional Treaty: old wine in a new bottle? Studia Diplomatica*, 2003, no. 1-2.

<sup>21</sup> See CIG 87/04 ADD 2. Declaration 4 on Article I-24(7) concerning the European Council decision on the exercise of the Presidency of the Council.

fewer Commissioners than there are Member States, according to a system of equal rotation, which was however not defined.

The Convention adopted a complex compromise, which provided for the establishment from 2009 onwards of a two-tier Commission with a representative from each Member State. The college however would be composed of the President, the Foreign Minister and 13 'European Commissioners', the latter nominated following a system of equal rotation between the Member States. The Member States not having a European Commissioner would have a 'Commissioner', who would neither have a right to vote nor be part of the College.<sup>22</sup>

The compromise was a step backwards from Nice. Maintaining such a big Commission would have run the risk of an even more microscopic division of competences and may have negatively affected the collegiality of the Commission. Moreover, the role of the non-voting Commissioners remained rather ambiguous.

The IGC has therefore abandoned this idea of a two-tier Commission. In its stead, it has catered for a small Commission, but only from 2014 onwards.<sup>23</sup> In that way, the IGC has postponed the change-over to a small Commission, compared to the Nice treaty. The number of members of the Commission, including the President and the Foreign Minister, will correspond to two thirds of the number of Member States. Notably, the European Council can still change this composition through an unanimous vote. Although positive in principle, the postponing of the limitation of the number of Commissioners risks paralysing the functioning of the Commission during the coming decade. It is difficult to find any justifiable reasons why this reform should be postponed.

The IGC has also added a Declaration to the Constitution, stating that when the Commission no longer includes nationals of all Member States, the Commission should pay particular attention to the need to ensure full transparency in relations with all Member States. Accordingly, the Commission should liaise closely with all Member States and in this context pay special attention to the need to share information and consult with all Member States.<sup>24</sup>

Notably, the Member states shall be treated on a strictly equal footing as regards the determination of the sequence and the time spent by their nationals as members of the Commission.<sup>25</sup> This may have negative consequences, in that bigger Member States will be less willing to listen to a Commission in which bigger Member States are strongly under-represented and/or will push the Commission President to give their representatives a more important function.

### **2.2.2. Appointment of the Commission**

The Convention provided that the European Council henceforth nominates, *in the light of the result of the European Parliament elections*, a candidate, which the

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<sup>22</sup> Article I-25 of the Convention's draft Constitution.

<sup>23</sup> Article I-26 §6.

<sup>24</sup> CIG 87/04 ADD 2. Declaration ad article I-26.

<sup>25</sup> Article I-26 §6.



European Parliament shall then ‘elect’.<sup>26</sup> Arguably, this remains rather close the status-quo, although the reference to the EP elections may open some future perspectives for a genuine election by the EP.<sup>27</sup>

The IGC has adopted a Declaration which formalises somewhat the procedure for the appointment of the Commission President. The Declaration<sup>28</sup> stipulates that, prior to the decision of the European Council, representatives of the European Parliament and of the European Council will conduct the necessary consultations in the framework deemed the most appropriate. These consultations will focus on the backgrounds of the candidates for President of the Commission, taking account of the elections to the European Parliament. The arrangements for such consultations may be determined in due course by mutual agreement between the European Parliament and the European Council.

Notably, another Declaration<sup>29</sup> states that, in choosing the persons called upon to hold the offices of President of the European Council, President of the Commission and Minister for Foreign Affairs, due account is to be taken of the need to respect the geographical and demographic diversity of the Union and its Member States.<sup>30</sup>

A setback is the limitation of the prerogatives of the Commission president in appointing the other Commissioners. In the Convention’s draft, it was foreseen that Member States had to present the president with a list of three candidates, from which the president would be able to choose. The IGC has opted for the status-quo, whereby each member state can make a ‘suggestion’ to the president.<sup>31</sup> This will probably reinforce the dependence of Commission members vis-à-vis the national political level.

### **2.3. The European Parliament**

The number of members of the European Parliament increased with every enlargement of the Union. This has led to a tension between on the one hand the necessity of assuring an appropriate representation of the peoples of the Member States and on the other hand the necessity of limiting the maximum number of members so as to guarantee the effective functioning of the institution.

During the negotiations of the Treaty of Nice, the Member States found it difficult to address this tension. Instead of drawing up an objective criterion, they embarked on a haggling of seats and dropped the maximum threshold of members, determined in Amsterdam on 700 members.

<sup>26</sup> Article I-27.

<sup>27</sup> For an evaluation of this issue and an analysis of the results of the Convention in this respect : F. DEHOUSSE and W. COUSSENS, Which presidency for the future European Union? The Convention’s dilemmas, in F. DEHOUSSE and W. COUSSENS (eds.), *The Convention’s Constitutional Treaty: old wine in a new bottle? Studia Diplomatica*, 2003, no. 1-2.

<sup>28</sup> CIG 87/04 ADD 2, Declaration ad article I-27.

<sup>29</sup> CIG 87/04 ADD 2, Declaration ad articles I-22, I-27 et I-28.

<sup>30</sup> Fortunately, the European Council did not take this requirement of “geographical diversity” too seriously when it chose a few days later M. Barroso as candidate for the presidency of the Commission and M. Solana as the future Minister of Foreign affairs.

<sup>31</sup> Article I-27 §2.

In the Convention's draft, the Nice outcome was confirmed until 2009. In advance of the 2009 European Parliament elections, a new system would be decided upon by the European Council on the basis of a proposal of the European Parliament, that would be digressively proportional and grant every Member State at least four European Parliament members. The maximum number of members of the European Parliament was set at 736.

The IGC has again raised the maximum number of members. It is now set at 750. Thus, the European Parliament risks taking on ever more the looks (and the lacklustre performance?) of the 'Senate' in the Star Wars movies. The IGC has also raised the minimum number of MEPs per member state to six (instead of four) and has set a maximum number of 96 seats, which will lead to a reduction of the current number of German MEPs.<sup>32</sup>

#### **2.4. The Minister for Foreign Affairs**

The Convention proposed to bring together in the post of 'Foreign Minister' two functions which are currently exercised by two different persons: the High Representative for the CFSP (HR) and the Relex-Commissioner. This would end the competence conflicts and management difficulties and clarify who speaks for Europe.

There was some confusion in the draft Constitution as to whether the Minister for Foreign Affairs would have to resign from his function as CFSP representative in case his resignation is requested by the President of the Commission or in the event of a censure motion from the European Parliament. The Constitutional Treaty clarifies the consequences of these two situations. In both events, the Minister will retain his CFSP functions, as long as the European Council does not end his term of office.<sup>33</sup> Indeed, only the European Council, acting by qualified majority and with the agreement of the President of the Commission, can sack him regarding these functions.<sup>34</sup> This carries an additional germ of an institutional conflict between on the one hand the Commission President and the European Parliament, and the Council on the other.

#### **2.5. Enhanced cooperation**

The Convention had catered for more simplicity in the framework of enhanced cooperation, by reducing the number of procedures to two: one for the Common Foreign and Security Policy (CFSP), and one for all the other domains. It also enhanced its versatility by allowing the participating Member States to autonomously change the applicable decision-making procedures, thus making it possible to shift to qualified majority voting in areas where unanimity was still applicable. Importantly, its scope was widened, by opening up the possibility for enhanced cooperation in the

<sup>32</sup> Article I-20.

<sup>33</sup> Articles I-26 § 8, I-27 § 3, I-28 § 1 et III-340. In the case of a resignation request by the Commission President, the Foreign Minister will retain his functions in the Commission, until the European Council decides, with the agreement of the Commission President, to end his term of office.

<sup>34</sup> Article I-28 §1.

domain of defence and by no longer limiting it to the mere implementation of a joint action or a common decision.

The IGC has shown somewhat less courage with regard to enhanced cooperation. It has changed the decision-making procedure in the fields of CFSP and CSDP. The Council will have to decide unanimously to authorise an enhanced cooperation in these domains.<sup>35</sup> The same holds for the decision on the subsequent participation of other Member States.<sup>36</sup> This change in the decision-making process is a step backwards from the general provisions of the Nice Treaty. Moreover, the specific passerelle clause, which empowers the Council to change the decision-making procedure in the context of an enhanced cooperation, cannot be used to resort to qualified majority voting in an enhanced cooperation having military or defence implications.<sup>37</sup> Finally, a declaration is attached to the Constitution stating that Member States may indicate, when they make a request to establish enhanced cooperation, if they intend already at that stage to make use of the passerelle clause.<sup>38</sup> Although stated as a facultative indication, it is clear that the intention is to limit the recourse to these procedures.

On the other hand, the potential of enhanced cooperation in the area of justice cooperation has been boosted (see 3.3.3).

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<sup>35</sup> Article III-419 §2.

<sup>36</sup> Article III-420 §2.

<sup>37</sup> Article III-422 §3.

<sup>38</sup> CIG 87/04 ADD 2, Declaration ad article III-419.

### 3. THE POLICIES

#### 3.1. Fundamental rights<sup>39</sup>

The only two modifications introduced by the IGC concern: (1) the explanations to the Charter; and (2) the accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

##### **3.1.1. The explanations to the Charter**

At the time of the adoption of the Charter of Fundamental rights in 2000, the Praesidium of the Convention drafting this Charter prepared explanations as a way of providing guidance in the interpretation of the Charter. Following the inclusion of the Charter into the draft Constitution, these explanations were updated by the Praesidium of the European Convention on the future of Europe.<sup>40</sup> The Preamble of part II of the Constitution, however, only mentioned that : *“The Charter will be interpreted by the Courts of the Union and the Member States with due regard to the explanations prepared at the instigation of the Praesidium of the Convention which drafted the Charter.”* Therefore, no mention was made of the updated explanations.

The IGC has added a clause to the above paragraph referring to the update made under the responsibility of the Praesidium of the European Convention. It has also added a new paragraph to article II-112: *“The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and the Member States.”* Finally, a Declaration is to be incorporated in the Final Act, which states that *“the Conference takes note of the explanations relating to the Charter of Fundamental Rights prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention”*.

The main reason why so much stress is put on the importance of the explanations is the British fear that the inclusion of the Charter in the Constitution would extend the competences of the Union and would ‘create’ new rights which do not exist in the British legal order.

Although the explanations could be perceived as a barrier to a dynamic interpretation of the Charter, their being mentioned in the Treaty is not necessarily a negative development. It must not be forgotten that they do not have the status of law and that they are only one interpretation tool among others. Moreover, the Court would have used the explanations as a tool for the interpretation of the Charter anyway, even if they had not been mentioned in the Constitution.

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<sup>39</sup> For an evaluation of the results of the Convention in this respect : F. DEHOUSSE and J. GARCIA, The issue of fundamental rights in the European Convention, in F. DEHOUSSE and W. COUSSENS (eds.), The Convention’s Constitutional Treaty: old wine in a new bottle? *Studia Diplomatica*, 2003, no. 1-2.

<sup>40</sup> CONV 828/1/03.

### **3.1.2. Accession to the ECHR**

The IGC has introduced some positive changes regarding the accession to the ECHR. First, accession to the ECHR is rendered a compulsory task for the Union. The Constitution now states that the Union 'shall accede' rather than 'shall seek accession'.<sup>41</sup> Second, the accession is facilitated by eliminating the unanimity requirement for the adoption of the accession agreement and switching to QMV in the Council.<sup>42</sup> Third, a protocol has been added defining the negotiating position of the EU for the accession agreement.

## **3.2. EMU<sup>43</sup>**

### **3.2.1. Monetary pillar**

The IGC has made some modifications to the 'monetary pillar'. First, it has added price stability as an objective of the Union in the first part of the Constitution.<sup>44</sup> It also provided that the European Council will appoint the Executive Board members by qualified majority voting.<sup>45</sup> Finally, the law conferring upon the ECB specific tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions shall be taken unanimously and therefore no longer by qualified majority voting. The European Parliament will only be consulted.<sup>46</sup>

### **3.2.2. Recognition of the Euro area specificity in the decision-making process of the Council**

The IGC has also catered for a greater recognition of the euro-area specificity in the Ecofin decision-making process. This is necessary, in order to avoid that non Eurozone members would impede the efficiency of the decision-making process on matters where the Euro-area members have specific interests at stake.

The Convention remained very close to the status-quo in this respect. It merely provided for the possibility for the Eurozone countries to autonomously adopt specific measures concerning economic and budgetary coordination which would only apply to them.<sup>47</sup> Moreover, the Convention foresaw a protocol which recognises the role of the Eurogroup as an informal discussion-forum, chaired by a President chosen for two and a half years among its members.<sup>48</sup>

The IGC has taken this a step further. More in particular, the Constitution now stipulates that the voting rights of the 'outs' will be suspended for the adoption of

<sup>41</sup> Article I-9 §2.

<sup>42</sup> Article III-325 §8

<sup>43</sup> For an evaluation of this issue and an analysis of the results of the Convention in this respect : F. DEHOUSSE and W. COUSSENS, Economic and Monetary Union the Convention, in F. DEHOUSSE and W. COUSSENS (eds.), *The Convention's Constitutional Treaty: old wine in a new bottle?* *Studia Diplomatica*, 2003, no. 1-2.

<sup>44</sup> Article I-3 §3.

<sup>45</sup> Article III-382 §2.

<sup>46</sup> Article III-185 §6.

<sup>47</sup> Article III-194.

<sup>48</sup> See the protocol on the Eurogroup (CIG 87/04 ADD 1).

recommendations made to Eurozone member States within the framework of the Broad Economic Policy Guidelines.<sup>49</sup> This means that, for instance, only Eurozone Member States will vote on decisions like addressing an early warning to a Eurozone member whose economic policy threatens to jeopardise the proper functioning of EMU. The same holds for measures relating to excessive deficits concerning Eurozone Member States. For instance, only Eurozone states will be entitled to vote on decisions regarding the existence of an excessive deficit in another Eurozone state or on the corrective measures to be taken by that state.

This is definitely progress, especially in view of the greater number of 'outs' after enlargement. Yet, it is not a panacea: the Eurozone Member States have so far not proven to be more inclined to appropriate peer pressure than the 'outs', as proven by the dismal performance of the Eurogroup in upholding the Maastricht excessive deficit procedures.

Another notable change in this respect is that the entry of new members in the Eurozone will require that the Eurozone Member States first adopt a recommendation on their accession. This recommendation will be adopted within six months of the Council receiving the Commission's proposal on this matter.<sup>50</sup> The final decision on the accession of new Member States to the eurozone will still be taken by the Council in its full format. This is a welcome change, since it caters for an additional check on the admission of new members, ensuring that only Member States fulfilling the required conditions can adhere to the Eurozone. Given the substantial number of 'outs' in the Council, there is indeed a risk that the 'outs' embark on a horse-trading exercise on this highly important issue.

### **3.2.3. Prerogatives of the Commission in the Excessive Deficit Procedure**

The Convention had catered for a limited strengthening of the Commission's powers with regard to the excessive deficit procedure. More in particular, it provided that the Commission would now address a proposal instead of a recommendation to the Council when the latter decides both on the existence of a deficit and on the corrective measures to be taken by that member state in order to bring an end to the excessive deficit. This would strengthen the hand of the Commission, as its agreement would be needed to amend this proposal, unless the Council would unanimously decide to amend it.

The IGC has partially scaled back this progress. The need for a Commission proposal has been maintained for the decision on the existence of an excessive deficit. However, the IGC has returned to the status-quo with regard to the subsequent decision on the recommendation laying down the corrective measures required. This decision will be taken on the basis of a recommendation and not a proposal.<sup>51</sup>

Hereby, the IGC backtracked on the most important element of the Convention's dual progress in this respect. Indeed, the importance for the Commission's influence of the

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<sup>49</sup> Article III-197 §4.

<sup>50</sup> Article III-198 §2.

<sup>51</sup> Article III-184 § 6.

shift from a recommendation to a proposal depends on whether the decision includes modifiable content and thus amounts to more than a simple yes or no.<sup>52</sup> Thus, the shift mattered most for the decision on the corrective measures required. Unfortunately, it is exactly that decision which will still be adopted on the basis of a Commission recommendation.

### 3.3. Internal security

The improvements to the functioning of the Area of Freedom, Security and Justice proposed by the European Convention were without doubt one of its main achievements. QMV and co-decision were extended to most issues. Eurojust and Europol saw their powers increased. A new figure, the European Prosecutor, was foreseen.<sup>53</sup>

Most of the achievements of the Convention in the JHA area have been maintained. The Convention's proposals on asylum, immigration and border control issues have been maintained, and therefore creating the basis for true common policies in those areas. The articles related to police co-operation have not been modified either, although here it would have been possible to improve the Convention's text by stressing the importance of the common fight against terrorism and the need to share information and intelligence, things that have not been done by the IGC. However, the final result concerning the area of justice cooperation is in several aspects less ambitious than the Convention's text.

#### 3.3.1. Eurojust

The Convention's text had substantially beefed up the role of **Eurojust**. Indeed, whereas according to the Decision establishing Eurojust<sup>54</sup>, Eurojust may merely ask the competent authorities to undertake an investigation or prosecution of specific acts, the Convention's text attributed to Eurojust the right to initiate and coordinate criminal prosecutions itself. The IGC has partially scaled this back by declaring that one of Eurojust's tasks is the initiation of criminal investigations, as well as *proposing the initiation* of prosecutions.<sup>55</sup> Eurojust thus loses the right to initiate prosecutions and can only initiate criminal investigations. The IGC proposal is therefore an improvement to the current situation (where Eurojust can only 'ask' to undertake investigations and prosecutions) but it is a step backwards from the Convention's text, which gave Eurojust the power to initiate (by itself and without asking permission to anybody) prosecutions.

<sup>52</sup> F. AMTENBRINK and J. DE HAAN, Economic governance in the European Union: fiscal policy discipline versus flexibility, *Common Market Law Review*, 2003, pp. 1075-1106.

<sup>53</sup> For an evaluation of this issue and an analysis of the results of the Convention in this respect : F. DEHOUSSE and J. GARCIA, The Area of Freedom, Security and Freedom in the European Convention, in F. DEHOUSSE and W. COUSSENS (eds.), The Convention's Constitutional Treaty: old wine in a new bottle? *Studia Diplomatica*, 2003, no. 1-2.

<sup>54</sup> JOCE 2002, L 63

<sup>55</sup> Article III-273 §1.

### **3.3.2. European Prosecutor**

Article III-175 of the Convention's text provided for the creation of a **European Prosecutor**, with competence to combat serious crime having a cross-border dimension, as well as crimes affecting the interests of the Union. The final IGC text limits the scope of action of the Prosecutor to the protection of the *financial* interests of the Union. It does however foresee the possibility of extending, by an unanimous decision, the scope of action of the Prosecutor to other crimes. This extension of the scope of action could probably go hand in hand with the (unanimous) decision to set up the body of European Prosecutor.<sup>56</sup>

### **3.3.3. Minimum common rules in the area of criminal law**

Articles III-171 and III-172 in the Convention's text dealt with the establishment of **minimum common rules in the area of criminal law** regarding respectively procedural issues and the definition of criminal offences and sanctions. Both articles contain a list of issues to be treated following the normal legislative procedure (QMV in the Council and codecision of the EP), and the possibility to add other issues, but only after adoption of an unanimous decision in the Council.

The IGC text maintains the provisions of the Convention's text<sup>57</sup> but adds, in both articles, a new special procedure (*the brake-accelerator procedure*). The 'brake' concerns the possibility given to any Member State to block the adoption of a certain measure on the basis that it would affect fundamental aspects of its criminal justice system. It may in that case request that the draft framework law be referred to the European Council, which shall, within 4 months of this suspension, either (a) refer the draft back to the Council, which shall terminate the suspension of the procedure, or (b) request the Commission or the group of Member States from which the draft framework law emanates to submit a new draft.

The 'accelerator' concerns the right given to Member States wishing to adopt such measure through enhanced cooperation to go ahead. If no action has been taken by the European Council within four months, or if within 12 months from the submission of a new draft the European framework law has still not been adopted, the Member States that wish to establish an enhanced cooperation on the basis of the draft framework law concerned shall notify the European Parliament, the Council and the Commission. In such a case, and provided they bring together at least one third of the Member States, the authorisation to proceed with enhanced cooperation shall be deemed to be granted. Thus, the need for an authorisation decision (by QMV) of the Council is dispensed with and so is the requirement of a Commission proposal and the consent of the European Parliament.

This is an ambiguous reform. In one direction, this is again a step backwards. Although QMV is in principle maintained for the same issues as in the European Convention's text, the new procedure will certainly slow down the legislative process. Proposals will probably be watered down in order to gain acceptance from all Member States and avoid enhanced cooperations. In the other direction, faced with

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<sup>56</sup> Article III-274.

<sup>57</sup> Articles III-270 et 271.



an insurmountable opposition from one Member State, the elimination of different steps in the procedure offers an undeniable simplification for those Member States wishing to go ahead and could facilitate the establishment of interesting and fruitful cooperations.

### **3.3.4. Protocol on the position of the UK and Ireland**

The Convention's text did not include the **Protocol on the position of the United Kingdom and Ireland**, which excludes UK's and Ireland's participation in measures regarding immigration, asylum, border controls, and civil law. The final IGC text<sup>58</sup> maintains the Protocol but, surprisingly, it enlarges the scope of the UK's and Ireland's exceptions. Indeed, in principle the UK and Ireland will not take part in the adoption and application of measures related to an important aspect of police co-operation (the exchange of information). One or both of these countries, however, may notify the President of the Council of their wish to take part in the adoption and application of any such proposed measure, whereupon that country in question shall be entitled to do so.

It is difficult to understand how, instead of reducing or eliminating the scope of the UK/Ireland Protocol, the IGC text has enlarged it to cover an area where these countries have been fully participating up to now. The explanation given by the British that this new clause has been included in order to avoid fiscal harmonisation is rather unconvincing.

## **3.4. External relations**

With respect to the Union's external relations, the major changes compared to the draft Constitution made by the Convention<sup>59</sup> concern the (permanent) structured cooperation, mutual defence, decision-making in the common commercial policy, the external action service and the competence of the ECJ in CFSP.

### **3.4.1. The permanent structured cooperation**

In the draft Constitution of the Convention, the structured cooperation was a particular form of enhanced cooperation in CSDP matters, set up through the Treaty by those Member states which fulfil high military criteria and wish to enter into more binding commitments with a view to the most demanding military tasks. A Protocol would have listed the participating Member States and laid down the criteria and the undertakings. The structured cooperation would have been able to carry out a CSDP operation as well as its own tasks.<sup>60</sup>

<sup>58</sup> See CIG 87/04 ADD 1. Protocol on the position of the United Kingdom and Ireland on policies in respect of border controls, asylum and immigration, judicial cooperation in civil matters and on police cooperation.

<sup>59</sup> For an evaluation of this issue and an analysis of the results of the Convention in this respect : F. DEHOUSSE, P. VAN DEN BRULE and T. ZGAJEWSKI, The Union's external relations in the Convention, in F. DEHOUSSE and W. COUSSENS (eds.), *The Convention's Constitutional Treaty: old wine in a new bottle? Studia Diplomatica*, 2003, no. 1-2.

<sup>60</sup> Articles I-40 §6 and III-213 draft Constitution.

The Constitutional Treaty changes the name of this cooperation in 'permanent structured cooperation'. The Protocol attached to the Constitution will no longer list the Member States which are members of the cooperation. It only states the conditions that the Member States will need to fulfil in order to participate in it.<sup>61</sup>

These conditions are first of all that the Member States shall undertake to fulfil two objectives :

- a) to proceed more intensively to develop their defence capacities through the development of their national contributions and participation, where appropriate, in multinational forces, in the main European equipment programmes, and in the activity of the European armaments agency,
- b) and to have the capacity to supply by 2007 at the latest, either at national level or as a component of multinational force groups, targeted combat units for the missions planned, structured at a tactical level as combat formations, with support elements including transport and logistics, capable of carrying out the Common Defence and Security Policy tasks, within a period of 5 to 30 days and which can be sustained for an initial period of 30 days and be extended up to at least 120 days.

In order to achieve these objectives, the Member States participating in the cooperation will have to undertake to :

- a) cooperate with a view to achieving approved objectives concerning the level of investment expenditure on defence equipment, and regularly review these objectives in the light of the security environment and of the Union's international responsibilities;
- b) bring their defence apparatus into line with each other as far as possible particularly by harmonising the identification of their military needs, by pooling and, where appropriate, specialising their defence means and capabilities, and by encouraging cooperation in the fields of training and logistics;
- c) take concrete measures to enhance the availability, interoperability, flexibility and deployability of their forces, in particular by identifying common objectives regarding the commitment of forces, including possibly reviewing their national decision-making procedures;
- d) work together to ensure that they take the necessary measures to make good, including through multinational approaches, and without prejudice to undertakings in this regard within NATO, the shortfalls perceived in the framework of the 'Capability Development Mechanism';
- e) to take part, where appropriate, in the development of major joint or European equipment programmes in the framework of the Agency.

The Member States that wish to participate in the permanent structured cooperation and which fulfil the criteria and have made the undertakings set out in the Protocol should notify their intention to the Council and to the Minister.<sup>62</sup> Within three months following such notification, the Council will adopt, after consultation of the Minister, a

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<sup>61</sup> CIG 87/04 ADD 1. Protocol on permanent structured cooperation established by Article I-41(6) and Article III-312 of the Constitution.

<sup>62</sup> Article III-312 §1.

European decision establishing the cooperation and listing the participating Member States.<sup>63</sup>

If at a later stage, a Member State wishes to participate in the cooperation, it will need to follow the same procedure, except that in this case only the participating Member States will take part in the vote.<sup>64</sup> The IGC has also foreseen a suspension and withdrawal procedure. If a participating Member States no longer fulfils the criteria or is no longer able to meet the commitments, the Council may suspend its participation. Only the participating Member States, with the exception of the Member State in question, will take part in the vote.<sup>65</sup> If a participating Member States wants to withdraw from the cooperation, it will merely need to notify its intention to the Council to cease its participation.<sup>66</sup>

Remarkably, it is provided that the Council will act by a qualified majority when it will establish the permanent structured cooperation, admit new Member States and suspend the participation of a Member State in the cooperation. This is a substantial move away from the Convention's draft, where the structured cooperation would have been established by the Treaty, thus requiring the common accord of government representatives at the IGC and unanimous national ratification, and where all the relevant decisions would have been adopted unanimously.<sup>67</sup> All the other decisions within the framework of the permanent structured cooperation will be adopted by a unanimous vote of the participating Member States only.<sup>68</sup>

Contrary to the Convention's draft, non-participating Member States will no longer be excluded from the deliberations of the Council regarding this structured cooperation.<sup>69</sup> Moreover, the role of the Foreign Minister in the decision-making process is beefed up compared to the Convention's draft. The intergovernmental negotiation has thus delivered a new balance, which is both more efficient and more inclusive.

Finally, it should be noted that the final text no longer provides that the Council may ask the Member States participating in the structured cooperation to carry out a CSDP task<sup>70</sup>, although the Council could of course still have recourse to article III-310. This shows that the level of ambition regarding structured cooperation has clearly receded. Thus, structured cooperation seems limited to a flexible cooperation on capabilities, with a central role dedicated to the concept of 'battle groups'. It remains to be seen what its value added will be in this respect.<sup>71</sup>

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<sup>63</sup> Article III-312 §2.

<sup>64</sup> Article III-312 §3.

<sup>65</sup> Article III-312 §4.

<sup>66</sup> Article III-312 §5.

<sup>67</sup> Article III-201 § 1 draft Constitution.

<sup>68</sup> Article III-312 §6.

<sup>69</sup> Article III-312 §6 compared to Article III-213 §3 draft Constitution.

<sup>70</sup> Article III-213 §4 draft Constitution.

<sup>71</sup> S. BISCOP, *Able and willing? Assessing the EU capacity for military action* (forthcoming).

### **3.4.2. Mutual defence**

The draft Constitution foresaw that a closer cooperation on mutual defence would be established, until such time as the European Council has decided in favour of a common defence. This closer cooperation would be open to all Member States and a Declaration would list the Member states participating in this mutual defence commitment. A Member State participating in such cooperation which would be the victim of armed aggression on its territory shall inform the other participating States of the situation and may request aid and assistance from them. In execution of this mutual defence cooperation, the participating Member States would work in close cooperation with NATO. The closer cooperation would not affect the rights and obligations resulting, for the Member States concerned, from the North Atlantic Treaty.<sup>72</sup> There was also in the Convention's text a limited commitment of the Union and all Member States to assist a Member State which is the victim of a terrorist attack or a natural or man-made disaster (the solidarity clause).<sup>73</sup>

The Constitutional Treaty maintains the solidarity clause<sup>74</sup> but radically amends the closer cooperation on mutual defence. Article III-214 is abolished and Article I-40 §7 completely changed. Through the new Article I-41 §7 all the Member States, even the neutral ones, take towards the others a commitment of aid and assistance by all means in their powers (including military ones), in accordance with the UN Charter, in case of armed aggression on their territory. Collective defence is therefore no more a closer cooperation between the Member States which wish to enter in such a commitment but a common commitment in accordance with Article 51 of the UN Charter.

The Constitutional treaty however also states that this obligation shall not prejudice the specific character of the security and defence policy of certain Member States, for example the neutral ones, and that commitments and cooperation in this area shall be consistent with commitments under NATO, which, for those States which are members of it, would remain the foundation of their collective defence and the forum for its implementation.

Therefore, the scope of this article is smaller than it seems. The link between the mutual defence commitment and the specific character of the security and defence policy of certain Member States, like the neutral ones, is not clear. If it is to mean that those Member States can choose not to fulfil this engagement because of their neutrality, then the scope of this article is arguably further reduced.

### **3.4.3. Decision-making in common commercial policy (CCP)**

In the draft Constitution, the requirement of unanimity was maintained for the negotiation and the conclusion of agreements in the fields of trade in services involving the movements of persons and the commercial aspects of intellectual property if such agreements include provisions for which unanimity is required for the adoption of internal rules. Likewise, it was maintained for the negotiation and

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<sup>72</sup> Articles I-40 §7 and III-214 draft Constitution.

<sup>73</sup> Article I-42 draft Constitution.

<sup>74</sup> Article I-43.

conclusion of agreements in the field of trade in cultural and audiovisual services if they risk prejudicing the Union's cultural and linguistic diversity (the cultural exception).<sup>75</sup>

The IGC added agreements in the field of foreign direct investment to the above list where unanimity applies and deleted the requirement that the agreements in the field of services involve the movements of persons.<sup>76</sup> Furthermore, a 'social exception' has been added to the cultural exception. In the field of trade in social, education and health services, where the negotiation and conclusion of agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them, the Council will need to act unanimously.<sup>77</sup> This is an important change, since the risk of serious disturbance is obviously very difficult to estimate.

#### **3.4.4. The external action service**

The Declaration on the creation of a European external action service annexed to the draft Constitution has been integrated in the article III-296. The organisation and functioning of the external action service will be established by a European decision made on a proposal from the Minister after consulting the European Parliament and after obtaining the consent of the Commission. This wording limits somewhat the powers of the Commission compared to the Convention's draft.<sup>78</sup>

#### **3.4.5. The competence of the European Court of Justice in CFSP**

The new article III-376 further restricts the competences of the European Court of Justice in the area of CFSP. In the draft Constitution of the Convention, the Court had jurisdiction over the entirety of the European decisions of the European Council on the strategic interests and objectives of the Union. The IGC marks a step backwards on this point. It is now stated that the Court will have no jurisdiction over these decisions in so far as they concern the CFSP.<sup>79</sup> Only the parts of these decisions related to the other areas of the Union's external action will be subject to the jurisdiction of the Court.

### **3.5. Social policy**

During the Convention, calls were made for a horizontal consistency clause for social policy. Currently, such clauses already exist in the areas of environment or consumer protection. They hold that environment and consumer protection requirements must

<sup>75</sup> Article III-217 §4 draft Constitution.

<sup>76</sup> Article III-315 §4.

<sup>77</sup> Article III-315 §4.

<sup>78</sup> See the Declaration on the creation of a European External Action Service attached to the draft Constitution which required "the Council of Ministers and the Commission to agree, without prejudice to the rights of the European Parliament, to establish under the Minister's authority one joint service".

<sup>79</sup> Article III-376 states that the Court of Justice will have no jurisdiction with respect to Article III-293 in so far as it concerns the CFSP.

be taken into account in the definition and implementation of Union policies and activities. The Convention failed however to agree on a similar clause for social policy objectives.

Remarkably, the IGC has succeeded where the Convention failed. New article III-117 now stipulates that, in defining and implementing its policies and actions, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health. It is as yet an open question as to whether this clause will really lead to a fundamental reorientation of Union policies.

The IGC has inserted a reference to a 'Tripartite Social Summit for Growth and Employment'. This Tripartite Social Summit is to contribute to the social dialogue in the Union.<sup>80</sup>

On a more negative point, the IGC backtracked on the issue of coordination of the social security regimes for migrant workers. The Convention foresaw that these decisions would henceforth be taken by qualified majority voting in the Council. The IGC however has foreseen in the possibility for a member state, where it considers that a draft (framework) law would affect fundamental aspects of its social security system or its financial balance, to request that the matter be referred to the European Council, which would suspend the procedure. The European Council shall then, within 4 months of this suspension, either (a) refer the draft back to the Council or (b) request the Commission to submit a new draft. This amounts to reintroducing unanimity through the backdoor.<sup>81</sup>

The IGC has thus proposed a pretty similar procedure as the one installed in judicial cooperation area. There is however no reference of any automatic authorisation for enhanced cooperation in this domain. Thus, whereas in the judicial cooperation area a break-accelerator procedure was foreseen, the IGC only catered for a break in this domain.

The Convention had also introduced a legal base concerning services of general economic interest, stipulating that the Union and the Member States would ensure that services of general economic interest function on the basis of principles and conditions, which enable them to fulfil their missions. A European law would define these principles and conditions.<sup>82</sup> The IGC provided that these laws shall be without prejudice to the competences of the Member States to provide, fund and commission such services.

Another remarkable point is that a Declaration<sup>83</sup> now states that social policies fall essentially within the competence of the Member States. Measures to provide encouragement and to promote coordination shall be of a complementary nature and shall serve to strengthen cooperation between Member States and not to harmonise national systems. The Declaration adds that this would be without prejudice to the

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<sup>80</sup> Article I-48.

<sup>81</sup> Article III-136.

<sup>82</sup> Article III-122.

<sup>83</sup> CIG 87/04 ADD 2, Declaration ad article III-213.

provisions of the Constitution conferring competence on the Union. Yet, this declaration begs the question as to the nature of the Union's competences in the social domain, which the Convention had qualified as a shared competence. The declaration, to say the least, tends to limit the shared nature of this competence. This further reduces the clarity of the distribution of competences, in spite of the fact that increasing the clarity of this distribution was one of the main objectives pursued by the exercise of constitution-making.

### **3.6. Taxation**

The Convention's draft failed to make significant progress in terms of fiscal policy. The requirement of unanimity was retained for indirect, company and environmental taxation. A very small opening to qualified majority voting was however made for indirect and company taxation: the Council could decide unanimously that certain fiscal measures related to administrative cooperation and the fighting of tax fraud/evasion, after which it would have been able to decide by qualified majority voting.<sup>84</sup>

The IGC set aside this very limited progress. It simply scrapped the provisions inserted by the Convention. This may have a detrimental impact upon the functioning of the internal market. Multi-national firms in Europe are, as far as tax systems are concerned, still confronted with a forest of 25 different sets of national rules. In turn, this is a major impediment to the free movement of capital, services, and labour, and thus an obstacle to the functioning of the single market. No one is calling for the EU to unilaterally set common tax rates. A limited harmonisation of tax systems could however provide for greater simplicity and efficiency for EU firms, thus improving the functioning of the single market. In the enlarged Union, this requires a shift to majority voting.

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<sup>84</sup> Articles III-62 and III-63 draft Constitution.

## 4. THE BUDGET

### 4.1. Own resources

The draft Constitution of the Convention foresaw that the European law establishing the own resources ceiling and possibly also new own resources would still be taken unanimously by the Council and would only enter into force after national ratification by each member state. Yet, the text catered for more flexibility with regard to the law laying down the modalities concerning the own resources. This law would be adopted by the Council acting by qualified majority voting after the consent of the European Parliament. The move to qualified majority voting and the abolition of national ratifications would have facilitated the reform of the UK's budgetary rebate.<sup>85</sup>

Yet, the IGC backtracked on this issue. It is now foreseen that the latter European law, adopted by qualified majority voting in the Council, can only lay down *implementing measures* of the Union's own resources system, in so far as this is provided for in the European law establishing the provisions related to the system of own resources, which will still be adopted unanimously and will still require national ratification.<sup>86</sup> The door for a lighter revision procedure of the own resources system is thereby virtually closed.

### 4.2. Multi-annual Financial framework

The Convention had codified the practice of the multi-annual financial perspectives into the Treaty. The Council would adopt the multi-annual framework by qualified majority voting, after receiving the consent of the European Parliament, acting by a majority of its members. The move to qualified majority voting could have rendered the budgetary discussions (somewhat) less acrimonious. Yet, the Council would still have acted unanimously for the adoption of the first multi-annual framework following the entry into force of the Constitution.

The IGC has here also opted for the status-quo. The multi-annual framework will continue to be adopted unanimously. Yet, the European Council may adopt, by unanimity, a European decision allowing for the Council to act by a qualified majority.<sup>87</sup> The requirement of unanimity makes this highly unlikely. Moreover, the Netherlands have made a Declaration stating that it will only agree with a decision to move to qualified majority voting if a revision of the European law on the own resources has provided it with a satisfactory solution for its alleged excessive negative net payment position vis-à-vis the European Union budget.<sup>88</sup>

As a result, budgetary talks will remain acrimonious squabbles converging around the lowest common denominator and the EU budget is likely to remain, as the Sapir-report put it, a 'historical relic'.

<sup>85</sup> See : W. COUSSENS, A Fair solution to the UK rebate conundrum. [Ideas Factory Europe](http://www.theepc.net), Idea 3, Download from: [www.theepc.net](http://www.theepc.net).

<sup>86</sup> Article I-54

<sup>87</sup> Article I-55.

<sup>88</sup> CIG 87/04 ADD 2, Declaration of the Kingdom of the Netherlands ad article I-55.



### 4.3. Annual budget

According to the Convention's draft, the distinction between compulsory and non-compulsory expenditure would be abolished, and the European Parliament would get the last say regarding the annual budget.

At the instigation of some Member States, this mechanism has been replaced by a complex co-decision-like procedure, which does however retain the final word for the European Parliament.<sup>89</sup>

The Convention's draft provisions concerning the adoption of the annual budget were ambiguous regarding the question whether the Council would act by an ordinary qualified majority or by a 'reinforced' qualified majority. The IGC has clarified that the Council acts by a normal qualified majority.

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<sup>89</sup> Article III-404.

## **5. CONCLUSIONS**

### **5.1. A slight but certain regression**

The IGC has marked several steps backwards from the Convention's draft. Although from a quantitative point of view, the text has largely been kept as such, the text has been scaled back substantially from a qualitative point of view. In addition, the IGC's text is generally somewhat more complex and obscure.

There are nevertheless areas where, sometimes in an unpredictable way, the IGC has in fact improved the Convention's text. One could provide as examples the new version of article I-41 (solidarity against aggression), article I-9 (accession to the ECHR), article III-197 §4 (decisions of the Ecofin-Council taken only by the Eurozone Members). But these areas are distinctively less numerous.

The regressions appear far more numerous. They encompass for example article I-25 (definition of qualified majority voting), former articles III-62 and III-63 (disappearance of the passerelle clause regarding taxation), articles III-270 and III-271 (emergency brake for judicial cooperation in criminal matters) and article III-136 (emergency brake for social security measures for migrant workers).

Yet, this should not conceal essential realities. The end result is still better than the Nice outcome. The IGC has in some cases done away with certain ambiguities resulting from the Convention's text. Moreover, the end-result, although clearly insufficient, is better than what a normal IGC would have achieved. Finally, however regressive in some aspects, the IGC does not modify fundamentally the results of the Convention. The Convention's text was drifting towards intergovernmentalism in its institutional aspects, though it was also drifting towards supranationality in its policy aspects. The IGC is essentially more of the same. The intergovernmental drift in institutional domain has been strengthened, whereas the supranational drift in its policy aspect has on the contrary been weakened.

### **5.2. An institutional system slightly more complex and obscure**

The changes made by the IGC of the Convention's institutional provisions strengthen (further) the intergovernmental side of the balance. First, the thresholds of qualified majority have been raised. This strengthens the grip of the Member States, and the more populous Member States in particular. Second, the scope of qualified majority voting has been scaled back, and the versatility of the possible 'safety valve', i.e. the passerelle clauses, undermined. Third, the agenda-setting role of the Commission may be undermined by the provision on the multi-annual programs of the team presidencies. Fourth, the Commission will be composed following an intergovernmental logic until 2014, and the subsequent reduction of its size may be blocked given the requirement of equal rotation between Member States. Fifth, the powers of the Commission President in choosing his team are reduced, since he may no longer choose from a list of three candidates. Sixth, the modifications of the provisions on the Foreign Minister make clear that he will have to listen first and foremost to the demands of the Council. Finally, the limited progress concerning the Own Resources Decision and the multi-annual framework is scaled back.

The IGC's modifications do not serve democracy or transparency well either. The role of the European Parliament has been scaled back in some cases (e.g. budgetary decisions). The qualified majority voting system has been rendered more opaque and obscure. The Legislative Council – a tool for greater accountability – has been abolished.

Finally, the discord between big and small Member States may seem to be solved with the adoption of the treaty, but this is only partially true. Indeed, the settlement of many important points of discussion in this respect (e.g. the composition of the European Parliament) has merely been postponed. Moreover, the voting power distribution resulting from the new qualified majority voting definition, and in particular its bias in favour of bigger Member States, may prompt calls for revision. The same may hold true for the composition of the Commission.

### **5.3. Policies slightly less efficient**

In the area of EMU, the prerogatives of the Commission have been reduced compared with the Convention draft. The role of the Eurozone states has been beefed up, but as we have explained, this is not a panacea. It would indeed have been more important to preserve (and strengthen) the role of the Commission.

The substantial progress of the Convention in the domain of justice and home affairs has been partially scaled back. Emergency brakes have been foreseen in the area of justice cooperation on criminal matters. The prerogatives of Eurojust and the European Prosecutor have been reduced.

As far as the Union's external relations are concerned, the IGC has clarified and facilitated the functioning of structured cooperation. Yet, the Council can no longer ask the Member States participating in that cooperation to carry out a CSDP task. The authorisation for an enhanced cooperation in the area of CFSP now requires unanimity in the Council. The scope of qualified majority voting in the common commercial policy has been scaled back.

As for social policy, the IGC foresaw an emergency brake for the decision on social security for migrant workers. The nature of the Union's competence has been blurred. The references to the consistency clause and the Tripartite Social Summit may turn out to be mere window dressing.

Finally, the small progress of the Convention in the field of taxation has been scaled back completely.

#### **5.4. A revision process whose reform is overdue<sup>90</sup>**

##### **5.4.1. The creation of the Convention has been positive, but has a price in complexity, and is clearly not enough**

It is important to draw lessons from the revision process of 2002-2004. Indeed, the Constitutional Treaty now foresees that future treaty revisions can also be prepared by a Convention. The creation of the Convention by the declaration of Laeken has clearly been an improvement, but important problems remain. Firstly, the Convention debate remains presently (and in the constitutional treaty) a supplementary stage to the traditional revision process, and not a modification of this process. Secondly, even if this is an improvement, this also increases the length and complexity of the revision process. Thirdly, even now, it does not diminish strongly the traditional brake pressures of the revision procedure. In synthesis, it is a first step but the European Union needs more.

At the IGC, we have witnessed that national interests came back to the fore. Given the current decision-making procedures, this is probably unavoidable, especially since the shadow of unanimous national ratifications is also hanging over the negotiations. But this makes it very likely that future revisions of the Constitutional Treaty will be much like an Echnach-process, with the Convention taking two steps forward and the IGC one step back. This has obvious consequences as to the strategy to be pursued at the Convention.

##### **5.4.2. The real impact of the enlargement on the revision process has still to be measured**

This has been little noticed in the general chaos, but the enlargement has got substantial consequences for the revision process. It has already made a common agreement more difficult to reach. This first difficulty could be amplified by the phase of national ratifications of the constitutional treaty.<sup>91</sup>

In order for the Constitutional Treaty to enter into force, it must still be ratified by each member state, either through parliamentary vote or by referendum. At least 8 Member States are likely to hold a referendum. The chances that one country (or more) votes no are considerable. If this concerns mainly smaller countries and provided the number of countries voting no remains limited, then it seems likely that these countries will be asked to try again, possibly after some modifications to the Treaty, i.e. the same scenario as with Denmark (1992) and Ireland (2001). If not, then the entry into force of the Treaty may well be barred forever.

The Convention already seemed to take this problem into account by foreseeing the reunion of the European Council in case of problems with some national ratifications.

<sup>90</sup> For an evaluation of this issue and an analysis of the results of the Convention in this respect : F. DEHOUSSE, W. COUSSENS, Rethinking the revision and entry into force clauses of the European Constitution. In: F. DEHOUSSE, W. COUSSENS (eds.), *The Convention's Constitutional Treaty: old wine in a new bottle?* *Studia Diplomatica*, 2003, no. 1-2.

<sup>91</sup> For a more detailed analysis, see F. DEHOUSSE and W. COUSSENS, *The enlargement of the European Union – Opportunities and threats*, *Studia Diplomatica*, 2001, n° 4, pp. 1-139.

Indeed, if two years after the signature of the constitutional treaty, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council.<sup>92</sup> This obviously does not constitute a real solution for this problem.

Several solutions to this problem were proposed during the Convention. Yet, these solutions were not withheld, *inter alia* because their legal robustness was rather spurious. In fact, the new treaty being a follow-up of the current treaties, it has to respect their revision procedures, which cater for unanimous agreement and ratification. Therefore, it is previous IGCs which missed the opportunity to do away with the excessive requirement of unanimous treaty revision.

Yet, the message still not rings through. Both the Convention and the IGC failed to come up with a more flexible procedure for future revisions, although this would have been perfectly possible from a legal point of view. The IGC has merely provided that for future treaty revisions no Intergovernmental Conference needs to be convened for a revision of the provisions in part III on the internal policies which does not increase the competences conferred upon the Union. In its stead, the European Council will be entitled to decide such revisions by unanimous vote and they will only enter into force after unanimous approval by the Member States.<sup>93</sup> This is obviously a fairly minor change compared to the status-quo.

All this illustrates the impasse of the Member States' present approach: unanimity and traditional international law have now become fully inapt to the realities of an integrated Europe of 25 Member States and 500 million people. It is in this respect fully understandable that the IGC decided to remove the expression of Thucydides from the Constitution, which held that: "*Our Constitution ... is called a democracy because power is in the hands not of a minority but of the greatest number.*" The requirement of unanimous treaty revision may indeed have led to exactly the opposite.

Although a step in the right direction, the Convention's draft for a Constitutional Treaty was already inadequate to adapt the European institutions to the new realities of enlargement. The IGC has increased a little bit this inadequacy. In such circumstances, there is a need either to accept a deeper reform of the revision process or to push for an increased use of the flexibility mechanisms.<sup>94</sup>

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<sup>92</sup> CIG 87/04 ADD 2, Declaration on the ratification of the Treaty establishing a Constitution for Europe.

<sup>93</sup> Article IV-445.

<sup>94</sup> See F. DEHOUSSE and W. COUSSENS (eds.), The hopes and limits of flexible integration in the future Europe, *Studia Diplomatica*, 2003, no. 4, pp. 1-77.