

## **The European Convention**

### **Notes of the Session of Thursday 3 and Friday 4 October 2002.**

Ben Crum (CEPS) 7 October 2002

This session of the Convention was dedicated to the (preliminary) outcomes of Working Groups from the first wave. The final reports of the Working Group on legal personality and on subsidiarity were discussed, as well as progress reports on the Charter of Fundamental Rights and the Role of National Parliaments.

#### **Legal personality of the Union – final report of the Working Group (CONV 305/02)**

There was wide praise for the report by the Working Group on legal personality. The need for simplification of the overall Union structure was recognised by almost all. The most fundamental conclusions of the Working Group went as good as uncontested: the desirability of attributing legal personality to (Giscard: “the body to which we provisionally refer to as”) the ‘Union’, superseding the legal personality of the European Community, and the desirability of a merger of the Treaties. Various members expressed themselves in favour of also fully including the Euratom treaty in such merger (cf. CONV 305/02: §3).

Most of the debate focused on the implications that may follow from legal personality and the merger of the treaty. A number of Conventioneers expressed their preference for the retention of something like the pillar-structure, fearing that otherwise there would be little safeguards against the communitarisation of all Union competencies. However, Amato and Giscard insisted that one treaty would allow for various methods/ working procedures to be set out for various competencies, but that it would be anachronistic to retain the pillar structure after a merger of the treaties (cf. CONV 305/02: §3).

Almost all of the rest of the debate (as well as most of the report: pp. 6-14) focused on the possible implications of a single legal personality for the organisation of the Union’s external relations. British minister Peter Hain insisted that a merged treaty should recognise that the Common Foreign and Security Policy (CFSP) was to remain essentially intergovernmental in nature. He pointed out that only an appropriately intergovernmental framework could ensure the effectiveness of the High Representative for CFSP. Various conventioneers challenged this position by submitting that any prospect towards a genuine *common* foreign and security policy will remain undermined as long as is insisted on its purely intergovernmental character.

There were also a number of reservations expressed about the possibility of the Union to enter into international agreements. Bonde (MEP) fundamentally objected to opening the door to the Union binding member states through engaging in international agreements. Fini (IT gov.) insisted that any ‘mixed international agreements’, going beyond the Union’s exclusive competencies, would still need to be ratified according to national procedures. Contrary to the Working Group (CONV 305/02: §33), Ms. Yilmaz (TRK gov.) argued for retaining article 24 TEU which allows for the possibility that Member States can be (provisionally) exempted from an international agreement signed by the Union when thus required by its own constitutional procedure. A number of Conventioneers advocated the extension of the powers of the EP when it comes to the Union entering into international agreements (CONV 305/02: §45). Others insisted, however, that the power of the EP be limited to assent.

Giscard concluded that the Working Group’s main conclusions were supported by a broad consensus and that the issues pertaining to the Union’s external action are to be revisited by the Working Group on this topic and its report. For now the presidium will take up the essential conclusions coming out of the report and the debate, and report back on them to the plenary and use them to draw up the ‘skeleton’ for a constitutional treaty that is due for the end of October. Giscard reaffirmed the Working Group’s conclusion in favour of a single merged treaty text that can consist of two parts without a hierarchical relationship between them: one setting out the basic constitutional provisions, complemented by a second containing more operational provisions – possibly using also several separate protocols - concerning policies and instruments (CONV 305/02: §16). Asked by Bonde whether the skeleton framework was

more likely mount to 4 or to 50 pages, Giscard answered that at this point he envisaged a document of 8 to 10 pages.

### **Subsidiarity – final report of the Working Group (CONV 286/02)**

Iñigo Mendez de Vigo introduced the final report of the Working Group on Subsidiarity. He underlined the basic principle of the Working Group that any proposals “should not make decision-making within the Union more cumbersome or lengthier, nor block it” (CONV 286/02). Moreover the proposals of the Working Group were meant to leave the legislative process and the role of the two legislators (Council and EP) intact as well as the Commission’s exclusive right to initiative. Thus the most notable proposal of the Working Group did not involve a new body to monitor subsidiarity but rather an ad hoc mechanism, an ‘early warning system’.

The debate settled few issues. The only point on which a general consensus emerged was on the need to strengthen the political ex ante control of the subsidiarity and proportionality principles. The proposal of the early warning system involving the national parliaments was however broadly disputed on principle as well as on its details in practice. Also the proposal to broaden the role of the ECJ in reviewing compliance with the principle of subsidiarity provoked a considerable number of fundamental objections.

Notably the Working Group had seen no need to revisit the definition of the subsidiarity principle as currently available in the Treaty and the subsidiarity protocol to the Treaty of Amsterdam. However, various conventioners (Hain, Bruton, MacCormick) noted that if the principle was to be given more political bite, a reconsideration of the clarity and the neutrality of the current formulations would be desirable. A related point made several times (Hain) was that in practice the principle of proportionality may be as important - and possibly even more important – as the principle of subsidiarity.

The proposal of an early warning system left the Convention strongly divided. On the one hand a group of ‘optimists’ emerged who trusted that the early warning mechanism might well serve its task once properly fine-tuned in its details (Hain, Kiljunen, Glotz, Meyer, Vitorino, McDonagh, Haenel). On the other hand a group of ‘pessimists’ took shape who feared that the mechanism might overshoot its objective and who would favour an alternative solution (Michel, Duff, Van Lancker, Katiforis, de Vries, di Rupo, Lamassoure, Barnier, Maij-Weggen). Between these two camps stood a group of ‘cautious optimists’ (most notably Moscovici) who would be willing to support an early warning mechanism if convinced that proper procedural details would be able to avert any perverse effects.

A great number of conventioners noted that the early warning mechanism might evolve far beyond the ad hoc mechanism as it was now proposed. For one the Earl of Stockton (MEP, EPP) welcomed this prospect. However, the pessimists saw the early warning mechanism evolving into a “backdoor mechanism” allowing national parliaments and governments to hold up community legislation (Michel, B. gov.) or as a “virtual legislative chamber” (Duff). In return however optimists would insist that the mechanism should not operate as a veto, but rather as a “deterrent” (Hain) or a “reassurance” (McDonagh).

Pessimists argued that the early warning mechanism confined national parliaments to a negative role, rather than stimulating them to contribute positively to the decision-making process. Indeed they feared that national parliaments might be tempted to abuse the early warning mechanism for other considerations than subsidiarity. What is more, it was suggested that governments might well use their parliamentary majority to lend extra pressure to their position in the European negotiation process. Alternatively, whenever the opposition would be able to dominate (a chamber of) parliament, it might be tempted to use the early warning mechanism for the sake of its domestic struggle.

Optimists replied that Commission and ECJ would be well able to put aside any opinions that sought to abuse the mechanism. Adding that for any mechanism to work, one should have at least some trust in the willingness of the various parties to act in good faith and that if any institutions merited such trust it were the national parliaments.

While some optimists suggested that the imperative upon the Commission to follow suit upon the opinions of national parliaments should be strengthened, pessimists emphasised that the Commission should not be obliged to act upon the opinions of the national parliaments. In their view the early warning

mechanism, if adopted, would require a strengthening of the Commission to preclude that its effectiveness would be compromised under the pressure of the national parliaments.

Optimists argued that there was no reason in principle why the right of national parliaments to give an opinion should not be extended throughout the legislative process. Pessimists, on the other hand, noted that the proposed right of national parliaments to interfere at the Conciliation stage might well set the legislative process back again.

The suggestion that one third of the national parliaments should bind the Commission to re-examine its proposals was discussed several times. Some suggested to put the necessary number at a half or at a double majority (of member states and populations) (Moscovici). To this Giscard objected that then the procedure would come to resemble a decision-making procedure which it emphatically is not. Others (Haenel) suggested that most probably the Commission would have to appreciate what it recognised as a significant number on a case by case basis, taking into account the substance of the objections as well as the qualitative and quantitative composition of the coalitions of complainants.

In the end the question remained whether the early warning system would be the most appropriate way to meet the demand for a more effective political monitoring of the principle of subsidiarity. A number of pessimists emphasised that basically subsidiarity needs to be observed by all parties involved in the legislative process: Commission, EP and above all the member governments in the Council. For them any solution should thus start with strengthening the scrutiny powers and capacities of the national parliaments vis-à-vis their national governments, for instance by way of holding Council meetings in public (Barnier) or by strengthening the right of parliaments to deliver opinions on legislative proposals to their government rather than to the Commission (Maij-Weggen). To the extent that these regular mechanisms were found to fall short, alternative solutions were suggested. One alternative would be the establishment of a separate subsidiarity body involving national parliamentarians that would give an arbitrating ruling over any legislative proposals, leaving ultimate legislative authority, however, to the Council and the EP (proposed by Louis Michel and his alternate Pierre Chevalier). Another alternative, suggested by Moscovici, would be to establish a Congress to monitor the adherence to subsidiarity. Contrary to the Working Group (CONV 286/02: 5), John Bruton expressed his support for appointing a “Mr or Mrs. Subsidiarity” within the Commission.

The proposals to broaden the powers of the ECJ in monitoring the principle of subsidiarity were critically received by a large number of Conventioneers (Hain, Dastis, Moscovici, Kiljunen, Tiilikainen, Haenel) who feared that this would in effect turn the ECJ into a Constitutional Court. Dastis (Sp. Gov. alternate) warned that national parliaments might exploit this opportunity to play out national conflicts at a European level. Some MEP’s emphasised that if the ECJ were to be given these powers, it might well be used to drag down the legislative process. Hence it would be imperative to put it under a strict time limit and to facilitate it with the necessary resources. Moscovici suggested that one might establish a separate ex post monitoring institution similar to the French ‘Conseil d’Etat’. Similarly Lequiller suggested to establish a special chamber within the ECJ composed of both ECJ judges as well as national judges.

Many conventioneers objected against making the right of national parliaments to refer to the ECJ dependent on them having submitted an opinion earlier in the legislative process. This might well invite them to submit an opinion if only for precautionary considerations.

A number of Conventioneers (di Rupo, Teufel, Bösch) advocated measures to ensure that also regions (at least those with legislative powers) would be able to signal breaches of subsidiarity (cf. CONV 286/02: 8). On the other hand, MEP’s Duff and van Lancker questioned the proposal to grant the Committee of the Regions the right to refer matters to the ECJ because the way it is currently composed fails in their view to meet standards of democratic representation.

### **The Charter of Fundamental Rights – Progress report**

The Chair of the Working Group on the Charter of Fundamental Rights Antonio Vitorino (Commission) noted that a majority of the group tends to favour full insertion of the Charter in a future Constitutional Treaty of the Union. A minority would prefer a reference in the treaty whilst preserving the Charter as a

separate document. Ultimately, however, the preferred solution would very much depend on the overall constitutional framework adopted.

Vitorino explained that the Working Group had decided to leave the product of the former Convention intact substantially, but for the horizontal articles that are essential for its integration and interpretation. Of particular concern are article 51 that rules that the Charter does not in any way amend the competencies assigned to the Union, and article 52.2 that will need to take the form of a watertight referral clause from Charter articles to the corresponding, more specific provisions in the treaty. The Working Group considers also a possible new horizontal article that clarifies the status of new rights in the Charter that does not originate in the existing treaties nor in the European Convention on Human Rights.

Another concern of the Working Group is how to retain the precious content of the current preamble of the Charter in the case that its articles are inserted into a new constitutional treaty. The Working Group is also in favour of emphasising the importance of the common constitutional traditions and the ECHR as primary sources of the fundamental values of the Union, as currently featured in article 6 TEU.

There appears also to be a consensus in the Working Group on the desirability of the Union acceding to the ECHR. Such a move emphatically has to be seen as complementary to the Charter. What is more, accession will need to be subject to the limiting conditions that it is not in any way affect the competencies ascribed to the Union nor that it will affect the positions Member States have under the Convention including their reservations and exceptions to protocols. While the Working Group thus generally favours making the Charter legally binding, the question whether citizens will be granted direct access to the ECJ on grounds provided by the Charter is still to be discussed.

In response to Vitorino, Peter Hain stated that the United Kingdom would be willing to explore fully the possibilities to change the political character of the Charter into a legally binding one. He emphasised, however, that a strengthening of the horizontal articles would be an essential precondition for this. The horizontal articles need to leave no question that the Charter does not grant the citizens any new rights vis-à-vis their national governments but that it has the sole aim of protecting them against the Union and the member states whenever they are implementing Union law. In the end, he asserted, the decision to accept the Charter as a legally binding document would be an eminently political one that could not be prejudged by any technical amendments.

Jens-Peter Bonde (MEP) submitted that as it stands the wordings of the Charter are much too vague and open the risk that the Union is to prejudice the Member States, for instance on the issue of abortion and the right to life. On the other hand Jürgen Meyer (NMP, D) spoke highly of the way the Charter has been conceived by the earlier Convention and asked in particular to consider the caution with which that Convention had conceived of the preamble and also of the referral clause to the Treaty (52.2). Seppänen (MEP, GUE/NGL) argued that it would be inappropriate to turn the ECJ into a constitutional court and that the power to rule over human rights in Europe should reside exclusively with the ECHR in Strasbourg.

### **The Role of National Parliaments – Progress report**

Gisela Stuart presented the progress of the Working Group on the role of national parliaments. She explained that the Working Group had started from the premise that national parliaments should play a constructive role in the European decision-making process and that they should not be turned into co-legislators (i.e. ‘a third legislative chamber’). The Working Group was very happy to support the way national parliaments had a role in the proposal for an ‘early warning system’ by the Working Group on subsidiarity.

The Working Group had observed that national parliaments could do much themselves to improve the ways in which they scrutinise their governments in European affairs. However, it had been concluded that it was not up to the Union to issue on any prescriptions on this account, especially not as each parliament is characterised by its own distinct powers and rules of procedure. Nevertheless the Working Group is to make several recommendations to improve the stream of information to the national

parliaments. It will suggest that there is a place for something like a forum where national parliamentarians can exchange information and that the links between national parliaments and the EP can be improved. Another suggestion may be that the Commission will present its annual legislative program also to the national parliaments.

There was a general favourable sentiment in the Working Group towards something as a Congress bringing together national and European parliamentarians. It was however also considered that such an institution should not significantly affect the current institutional balance, nor should it be able to develop into a co-legislator. Other ideas floated were to establish an “Interparliamentary Conference” (IPC) as a kind of corollary to the Intergovernmental Conference (IGC) and to involve national parliaments in enabling procedures as they currently exist under article 308 TEC. In the end the Working Group will seek to provide the Convention with as wide a range of options as possible, leaving it to later debates to see whether and how they are most appropriately brought in.

A number of Conventioneers (a.o. Fayot, NMP Lux) observed that the progress report made little reference to Cosac and that there was much to be said to exploit such an institution already in place and to improve its working rather than to suggest all kinds of new institutions and procedures.

A couple of conventioneers (Haenel, MEP, Fr; Lennmarker, NMP, Sw) observed that the Working Group would also have to address the Convention method as a way to engage national parliamentarians. Indeed Stuart agreed that the Convention method should be anchored in the Treaty.

Andrew Duff submitted that the surest way to strengthen the scrutiny powers of national parliaments and to secure their engagement would be to make the Council meetings public.

Finally Peter Hain expressed some scepticism on the need for a Congress. For him such a new institution could only be justified if it would have demonstrable merits in terms of policy delivery or democracy of the European policy process.

#### **Other affairs and observations**

- Friday evening two motions were discussed urging for a debate and a Working Group on social policy. A great number of Conventioneers (signatures) spoke in favour of these motions. Kiljunen and Hain suggested that if a Working Group on social policy were established, then the case for more Working Groups on certain policy fields, in particular on regional issues, should also be considered. The only explicit voice against was Alain Lamassoure (MEP) who argued that a substantial debate on social policy had no place in the Convention that was established to deal with constitutional issues of a procedural kind. The debate was concluded by Giscard who proposed that relevant issues on social policy could be raised in the debate on the report of the Working Group on Economic Governance that is to take place in one of the next sessions. After that debate it can then be considered whether it is still deemed necessary to follow up on the requests tabled.
- By the end of the meeting on Friday there was no time left for questions. These will be taken up again next meeting.
- Notably during the debates on the Working Group reports a number of conventioneers (P, SP, Fi, NL) broke the language regime by speaking directly to each other in English even if this were not their native language. This happened in particular during the debates on the two progress reports that were completely run on the basis of the ‘blue card system’. Most notably Vitorino (P) spoke in both English and French and Mendez de Vigo (SP) did his report in English (after having thanked the chair in French).
- Giscard asked the people present to refrain from applauding any contribution because this cannot be taken as a valid indicator of the support any contribution actually enjoys. This stand invited some joking comments from the plenary. In any case the Convention insisted on applauding the presentations by the Working Group chairs.