Notes of the Meeting of The European Convention, 28 and 29 October 2002

Ben Crum (CEPS), 29 October 2002.[1]

The second Convention meeting of October 2002 featured the presentation of the preliminary draft constitutional treaty and a preliminary discussion thereof. Major topics on the agenda were the debates on the reports of the Working Groups on National Parliaments and on the Charter of Fundamental Rights. Finally, there were progress reports of the Working Groups on Economic Governance and on Complementary Competencies.

The Preliminary Draft Constitutional Treaty

The Preliminary Draft Constitutional Treaty (CONV 369/02) was presented at the beginning of the session on Thursday by the Chairman of the Convention, Valéry Giscard d'Estaing. The Convention's Praesidium proposes a Constitution for Europe consisting of three parts: a Constitutional structure, Union policies and their implementation, and General and final provisions. For part one, the Constitutional structure, 46 articles are proposed distributed over ten titles.

On Friday a preliminary debate was held that was meant to focus on the format proposed, not on its substance. The basic format was widely applauded. Opening the debate Klaus Hänsch praised the "courageous realism" the draft displayed but warned the Convention not to get stuck in the "reglementation of the Union". He emphasised what Convention's attainments this draft already embodied: the very idea of a Constitution, the integration of the Treaties, the incorporation of the Charter, legal personality for the Union and the deletion of the pillar structure. Many conventioneers showed themselves very satisfied that at last they had a clear picture of what the Convention was aiming for. Only Jens-Peter Bonde questioned whether this outline was really what was asked for by the peoples of Europe, and whether Giscard was not indeed pressing the federalist card on them.

Elmar Brok (D, MEP) underlined the need to ensure that all Union powers be defined in the first, constitutional part. Hubert Haenel (Fr, NMP) pointed out that the assessment of whether provisions were rightly or not relegated to the first or second part of the Constitutional Treaty would (also) depend on whether different revision requirements would apply to either part. To this Giscard responded that a differentiation of revision procedures would raise substantial difficulties. For sure it should not suggest any hierarchy among the various parts of the Constitutional Treaty. Follini wondered whether the order in which the European institutions were introduced was to convey any sense of hierarchy. Giscard responded that this order simply derived from the established order in the Treaty of Rome combined with that of the Maastricht Treaty.

Satisfied with the outline, many conventioneers emphasised that their eventual judgement would depend on its substance. In the view of some conventioneers the outline already prejudged some issues of substance. Thus Teija Tiilikainen (Fi, gov) took issue with the provisions on the presidencies of the Council and the European Council, the restructuring of the Commission and the Congress. Hanja Maij-Weggen detected an intergovernmental bias in the outline. Brok agreed, but felt sure that the Convention should be able to mend this.

[1] These notes are based on the observation of the Convention's session. They are not corroborated by the minutes. Their main aim is to complement the official notes of the Convention's secretary with a view of the political dynamics in the Convention. The notes are not meant for quotation. Though utmost care has been taken to give a correct rendering of the various contributions, the author cannot guarantee the absence of mistakes.

Notably a range of conventioneers rejected some more radical ideas suggested in the outline. Almost all – but for Giscard and Moscovici - rejected the suggestion that the new Europe might need a new name. Giscard insisted that the new edifice resulting from the fusion of Union and Communities requires a new name that strikes the right chord with the people in the long run. There was also wide resistance to what was perceived as a boosting up of European citizenship as a freestanding concept detached from national citizenship (Hain, Maij-Weggen, McAvan). Anne van Lancker (B, MEP) took up this point to suggest that European citizenship might hold a promise for third country nationals in the Union. Giscard maintained, however, that the proposal on citizenship involved nothing but a reorganisation of the current provisions.

Turning to institutional issues a striking consensus appeared to emerge among the conventioneers that a more effective Union has to start from the present institutional quadrant (EP, Commission, Council and ECJ), strengthen all of these institutions simultaneously, and guard the precious institutional balance. This thread was spelled out by de Vries (NL, gov) and reaffirmed by people like Lopes (P, gov), Barnier, Tiilikainen, but also by Hain and Roche. Starting from this principle, the added value of a Congress first needs to be demonstrated (besides the names mentioned a.o. Follini, Giannakou). Some (Lopes, de Vries, Maij-Weggen) also express strong doubts on the suggested need to reform the Union presidency. Lopes and de Vries even went further in arguing against the proposed fixation of competencies. Giscard rebutted, however, that competencies are already listed in the current treaty and that there has been a general wish in the Convention to have them defined more clearly.

Continuing in the predominant vein, Moscovici emphasised the need to enshrine the Community Method. Barnier objected to the phrase in art. 14 of “areas in which competence belongs to the Member States and is jointly exercised by them”. In his view the member states still act together with Union institutions in these areas. On the other hand, Peter Hain emphasised the need to clearly separate the distinct procedures in the field of CFSP. Giscard addressed these issues by observing that, while the draft treaty on the one hand dispensed with the present pillar structure, there is on the other hand clearly not one single method that befits all policy areas.

Martikonis (?) (LIT, gov) pointed out that as the candidate countries are currently in the process of affiliating themselves with the present *acquis*, it was desirable that the Constitutional Treaty would strongly express the continuity with the present structure.

A number of more specific issues were raised. Peter Hain argued for a strong and inspirational preamble that would appeal to the European citizens. A number of conventioneers (Duff, Brok, Fayot) noted a need to give a prominent place for the people of Europe in the opening and first articles of the Treaty. Others suggested the need to include ‘solidarity’ as one of the central values of the Union and to include references to the ‘European social model’ and European objectives in the fields like equality of opportunity, multicultural societies and the fight against xenophobia, environment and sustainable development (Borrell; Frendo; McAvan; Hjelm-Wallen).

Referring to the work of the respective working group, several conventioneers (Haenel; Borrell) suggested the need to include explicit provisions on the role of national parliaments. However, Giscard pointed out that the national parliaments are not European institutions and that the relevant rules fall in the domain of the member states. Roche objected to the suggestion of separate presidencies for the Council and the European Council. Maij-Weggen advocated the enshrinement of the Convention-method. Hjelm-Wallen noted the absence of the Ombudsman. To her taste the draft treaty also

reserved too much room for defence. Duff advocated a more precise definition of the Union legislative and executive and for insertion of the option of associate membership of the Union. He also questioned the need for a constitutional clause on enhanced cooperation. Alain Lamassoure (FR, MEP) argued for a better organisation of coordination policies that would secure the involvement of national parliaments and establish effective sanction procedures. Brok warned that offering withdrawal as a permanent option should not be thought of too lightly. It might well be too much of a temptation for national debates.

A number of Conventioneers (Duff, Tiilikainen, Fayot) pressed the chair to clarify the working procedures from now on. They signalled the fear that the debate would be cut short and that chair and Praesidium would move on too quickly. Giscard announced that the debate on the outline will be continued on the 8th of November. After that the Convention will have to start fleshing out the skeletal outline. For that the conclusions of the second wave of working groups (esp. Simplification and External action) should be of much use. Further revisions of the outline can then be adopted when required by substantive findings. By the end of the year the Praesidium will come back with a revised, possibly more detailed, outline on the basis of the debates in the mean time. Early 2003 the Convention should move towards a real, more descriptive draft. Quite likely by then the Convention will dedicate most of its plenary time to discussing the institutional articles, as these – technical details aside – probably do not allow themselves to be addressed in the Working Group format.

The Role of National Parliaments

The final report of the Working Group on The Role of National Parliaments (CONV 353/02) was presented by its chair Gisela Stuart. Stuart underlined the need for a forum in which NMP's and MEP's meet on an equal level. She also emphasised that the role of national parliaments lies first and foremost in scrutinising their own governments. This role falls often short in practice as NMP's are not used to exercise such a role and are moreover handicapped by the lack of transparency of Council meetings. Eventually the Working Group has aimed to secure that national parliaments can no longer disown European policies for lack of information or lack of formal powers.

The report was generally well received. There was broad agreement on the point that more openness of the European decision-making procedures and better communication are crucial preconditions for more effective scrutiny (e.g. Duff, Bruton, Dini). Stuart underlined that the agreements of the Seville European Council on holding legislative sessions of the Council in public did not go far enough. The Council meeting in public should be the rule, exceptions would need to be justified (cf. Maij-Weggen).

The intention to "anchor" EU decisions in national parliaments (Hain) was widely underwritten. There was broad agreement on the need to facilitate the optimisation of national scrutiny systems through the exchange of information on best practices. Also the idea of having Cosac draft a code of conduct was generally well received. MEP Mendez de Vigo proposed the drafting of a new charter or protocol on national parliaments that could be organised around an enumeration of best scrutiny practices and the proposed 'early warning system'.

At the same time government representatives (Dastis, Hain, Moscovici) underlined the autonomy of member states in defining their own institutional organisation. However, Neil MacCormick (UK, MEP) and Danny Peters (B, NMP) pointed out that national specificities in terms of representation and distribution of competencies (federal devolution), lead to structural inequalities

in the effectiveness of national scrutiny systems and the involvement of NMP's with European decision-making (cf. Dini).

The debate on the early warning system already initiated by last meetings debate on the report on subsidiarity was resumed to some extent. Belgian representatives (Di Rupio; Chevalier) reaffirmed that, though this system was an interesting idea, it lacked justification, was much too heavy-handed and would never work. On the other hand Heathcoat-Amory (UK, NMP) insisted that the early warning system left national parliaments at the receiving end of the opaque European political process. He advocated an even more radical approach towards subsidiarity, having the first reading of all EU legislation in the national parliaments. Barnier (seconded by Meyer D, NMP) pointed out that it was vital to have a subsidiarity test at the end of the legislative process after a proposal has undergone all its amendments. Dastis (SP, Agov) insisted that only national governments, and not national parliaments, should have the right to have legislation reviewed on subsidiarity by the ECJ (cf. Fini). Lekberg (Sw, NMP), Einem (Ös, NMP) and Lequiller (Fr, NMP) argued against any involvement of the ECJ in the supervising the subsidarity principle as they considered this to be an inherently political task. Also it was argued that the right to have legislation tested by the ECJ should not be reserved to parliaments who have protested at an earlier stage (Teufel, Barnier). The latter point was also recognised by Giscard as needing revision.

All conventioneers favoured a better coordination among national parliaments. There was however little convergence on how this should be achieved. Many conventioneers supported the suggestions for a better use of Cosac. However, opinions on the prospects for Cosac varied markedly. No one advocated a stronger centralisation of Cosac through a substantial strengthening of the secretariat. Borrell (SP, NMP) maintained that Cosac had become immune to any attempts of reform as it was fully absorbed by its own internal ineffectiveness. Other NMP's (Meyer, Dini) conceded that the role of Cosac would remain a limited one. Rather than strengthening Cosac a number of conventioneers (Azevedo; Fini; Tekin) argued for the development of a network of national parliamentary platforms.

There were various positions taken on the interplay of MEP's and NMP's. Various MEP's (Brok, Berès) warned that parliamentarians of different levels should not be played off against each other. Duff emphasised the need for partnership between parliamentarians of both kinds. He seconded the proposal of interparliamentary conferences (also Tekin). Dick Roche (Irl, gov.) rejected this idea, however, as only raising complications.

The idea of a Congress - or indeed any new institution - met with considerable scepticism. On the one hand it was widely agreed that the Congress should not be a legislative institution. Thus the question became whether there would be any tasks beyond its mere symbolic presence that would justify its establishment. Joschka Fischer and Elmar Brok submitted that a Congress bringing together MEP and NMP's would in fact create a third form of parliamentary representation. They both emphasised that such a Congress should not be involved in scrutinising the Commission, as this is the natural task of the EP (cf. Meyer). For Brok this was a reason to regard the idea of a Congress as problematical in principle. In particular he feared that it might come to be regarded as the overarching parliamentary structure. Fischer, on the other hand, conceded that a Congress might have a role in controlling the work of the European Council. In a similar vein Duff and Berès suggested that a Congress might play a role in controlling an integrated Union president.

Some were quite adamant that the establishment of a Congress was neither necessary nor useful (Einem, Voggenhuber, Tekin). However, others suggested various tasks for a Congress, though none involving it in the law-making process. Dick Roche (Irl, gov) suggested that a Congress might be involved in the election of the Commission President. It were however particularly the French who took up the defence of Congress. Moscovici insisted that a Congress would not be a rival to the EP. It should be a forum for interparliamentary dialogue, meeting once or twice per year to discuss subsidiarity, the Union's legislative program and possibly to ratify amendments to the Treaty. Lequiller suggested that a Congress might confirm the President of Europe (in a way similar of the confirmation of the German President) and that it might adopt an annual report on subsidiarity. Haenel (F, NMP) argued that the EP alone does not suffice in linking the citizens with the EU. At the same time he conceded however that at this point it was too soon for the Convention to fully assess the merits of a Congress.

Some conventioneers proposed to institutionalise the Convention-Method, with Maij-Weggen adding that if people would like to do so it might be called a Congress. Giscard commented, however, that it would be odd to institutionalise the Convention method as it has really been adopted ad hoc, for the occasion.

The debate on national parliaments also marked the first contribution of Joschka Fischer as the new representative of the German government. Fischer used the occasion to set out his ambitions. In his view the Convention will need to aim for a comprehensive and detailed end-product. It will have to ensure the full constitutional incorporation of the Charter. Furthermore he put forward four criteria by which he will assess the Convention's conclusions:

- improve democratic legitimacy: especially by placing the EP in the heart of the Union edifice and by having it elect the Commission president;
- clarify the separation of powers
- preserve the institutional balance
- strengthen the Union's capacity to act.

The Charter of Fundamental Rights

Antonio Vitorino presented the final report of the Working Group he had chaired on the Charter of Fundamental Rights (CONV354/02). He stressed the strong consensus the working group had been able to reach. There was a broad and deep satisfaction with the work of the Working Group. There was much praise for its conclusions that would enable the Union to take on board the full text of the Charter and to accede to the ECHR. However, Timothy Kirkhope (UK, MEP) expressed concern about possible consequences of granting constitutional status to the Charter. In his and John Bruton's (IRL, NMP) view the Charter still left open too many ambiguities that might cause legal uncertainties and be hard to explain to the citizens. Some conventioneers (Lopez-Garrido; Rack) were also very happy to note that the Charter could also count on the full support of the candidate countries that had not been involved in its drafting.

Quite a number of conventioneers noted the key role played by the UK government in the Working Group. Peter Hain praised the report as an excellent piece of work, a key building block, He made it clear that the UK is committed to constitutional incorporation of the Charter, provided that the line set out by the report is followed through and that the Charter, rather then being integrally

integrated, would be attached to the Constitutional Treaty through a reference in an bridging article specifying its importance and status.

Opinions diverged on the proposed adjustments of the horizontal articles 51 and 52. A number of conventioneers, predominantly representing national governments (Hain, Roche, Dastis, Hjelm-Wallen, Cisneros, Helveg Petersen, Kutzkova, de Vries), affirmed that these were indeed crucial for the Charter to acquire legal standing. Typically Hain emphasised that so far the Charter had been drawn up as a political document and that the move to granting it legal standing required that all legal uncertainties be removed and, specifically, that no doubt was left about the fact that the Charter would not open new Union competencies.

For others (Meyer, Duff, Rack, Helle) the necessity of the textual adjustments was less apparent but in the end they considered the adjustments as relatively harmless and an acceptable price for its constitutional incorporation. There were, however, also a number of conventioneers including many MEP's, (Duhamel, Kaufmann, Paciotti, Maij-Weggen) who rejected the proposed adjustments as regressive, tampering with the integrity of the Charter. Van Lancker argued that the adjustments might hinder the Charter to develop into the dynamic document it needs to be (cf. Muscardini). Duhamel submitted that the current §51.1 sufficed to define the scope of the Charter. Particular concern was expressed that §52.4 might allow the Member States too much discretion in keeping what they regard as their own traditions (Paciotti, Einem). Most controversial was article §52.5. Duhamel submitted that the use of the words "may be" rather than "shall" leave the implementation of the Charter's principles at the discretion of the member states. Kaufmann added that the Charter Convention had indeed agreed that there was ultimately no clear-cut distinction to be made between rights and principles. Moscovici considered this distinction simply unacceptable. Van Lancker insisted that the Charter's rights and principles should not only apply while "implementing Union law" but would have to inform al governmental action in the Union.

An additional point, raised in particular by those who are concerned to delineate the scope of the Charter (Hain, Dastis, Roche, Christophersen, but also Haenel), was to emphasise the importance of ensuring that the Explanations of the Praesidium of the Charter's Convention would inform the jurisprudence. However, Sylvia Kaufmann insisted that the Charter Convention (CONV 49) had explicitly rejected granting any status to these explanations. On another point, conventioneers (Meyer, Haenel, van Lancker) underlined the importance of the full incorporation of the Charter's preamble in the Constitutional Treaty, if needed, it might be inserted as article 1.

Opinions were split on the concrete form in which the Charter is to be incorporated in the Constitutional Treaty. A number of conventioneers (Attalides, Timmermans, Meyer, Einem, Lopez-Garido, van Lancker, Svennson, Helle) upheld the view dominant in the Working Group, that the Charter should be incorporated integrally at the beginning of the Constitutional Treaty. There appeared however a powerful movement (Hain, Dastis, Roche, Kutzkova, Fini) favouring the second option in which one article of the Constitutional Treaty would contain an appropriate reference to the Charter that would then be annexed to the Treaty. If only for practical considerations Fini and Hain pointed out that if only for its sheer volume full insertion of the Charter would completely upset the clear order of the 46 articles now proposed in the outline of the Constitutional Part. While most of the proponents of the second option insisted that it need to affect the status of the Charter, de Vries (NL, gov) supported it on the very ground that it would make it more likely that judicial overview would not interfere in member states' established traditions (like in education and social services policy). Some possible

compromises between the two options emerged. On the one hand Mendez de Vigo suggested that the Charter might be included integrally as part II of the Constitutional Treaty. On the other Maij-Weggen conceded that it may be acceptable to have the Charter as a separate annex or protocol if the formulation of the article referring to it would be clear and strong enough to secure its full constitutional status.

There was an overall support for authorising the Union to accede to the ECHR. Conventioneers (van der Linden) pointed in particular out that such a move would contribute greatly to the image of the Europe as an integrated space of human rights under the ECHR.

Finally, a number of Conventioneers argued that it would be important to extend the opportunities for citizens to access the ECJ. Kirkhope suggested that for a start the position of the Ombudsman might be strengthened as a kind of appeal of the first instance. Ben Fayot (Lux, NMP) insisted that Art. 47 of the Charter indeed requires the Union to provide for effective protection of the Union citizens and that it cannot leave this to the member states individually (cf. Rack, Moscovici). This would however also require revision of the current art. 320 TEC that severely restricts citizens' access to the ECJ.

Economic Governance – Progress Report

Klaus Hänsch, chairman of the Working Group on Economic Governance, stated that his working group had failed to put forward any important institutional proposals as it had become stuck in profound differences in socio-political understandings of Europe and about the proper competencies of the Union (CONV 357/02). The bottom-line of the debate had been that the current assignment of economic competencies to the Union was not disputed. It was also agreed that there is a need to strengthen coordination between member states' policies but there was strong disagreement on the question whether this would require a strengthening of the role of the Commission. Further, the Working Group considered that the EP should be consulted on the Broad Economic Policy Guidelines and that there should also be more involvement of national parliaments. As regards the current public debates on deficit targets and their time-line, the Working Group considered that these fell beyond the (constitutional) scope of its work. The Working Group had some lengthy debates on the Union objectives concerning economic governance, without, however, being able to reach an agreement. The Working Group had failed to say much about Europe's social dimension but hopefully this could be made up for by the plenary debate on 7 November. Amato added that the Praesidium had drawn up a list of questions dealing specifically with the social dimension that might serve as a guideline for this debate (CONV 374/02).

Speakers from the floor confirmed Hänsch's picture of the Working Group and praised his efforts to push the group forward nevertheless. At the same time a couple of conventioneers emphasised the urgency to rethink economic governance in Europe. Dini pointed at the lagging autonomous economic growth. Barnier insisted that economic governance in a Union of 25 or more simply cannot be maintained if not the role of the Commission is strengthened. With regard to the ECB Katiforis underlined that it might be possible to reformulate its mission without necessarily introducing additional political controls.

Complementary Competencies – Progress Report

The chair of the Working Group on Complementary Competencies Henning Christophersen indicated that the mandate had led the group beyond the mere issue of complementary competencies, to the categorisation of competencies in general. However, the conclusions of the group would not propose new competencies, nor abolish existing ones. The group proposed to rename complementary competencies as 'assisting measures', implying that in the fields concerned the Union should not be able to adopt binding instruments nor impose harmonisation measures. At the same time the Union should remain able to act where it needs to. The Working Group reaffirmed the importance of the principle of conferred powers. One problem it had struggled with was to find an appropriate balance between Union responsibilities that have been functionally defined and those that have been defined in sectoral terms. The group agreed that Article 308 TEC should not be abolished but that it should be clear that it might only be invoked as a last resort.

The few reactions from the plenary were mainly concerned to ensure that the working group would not abolish powers that were currently enjoyed by the EP and the Commission. Carnero-Gonzalex contested that there should be no Union legislation at all in fields of complementary competence. Vitorino wanted to make sure that codecision would not be abolished in fields were it already applied.

Final observations

- Problems increased with the limited speaking time. The preliminary debate on the outline had to be stopped short and a number of speakers were moved to the next meeting. Earlier speaking time had been reduced from 3 to 2 and even to 1 minute per contribution, provoking strong protests from certain conventioneers (Bonde, Muscardini).
- On 7 November the final reports on Economic Governance and Complementary Competencies will be discussed. On 8 November the debate on the outline will be continued.