

Making It Our Own

A trans-European proposal on amending the draft Constitutional Treaty for the European Union

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Note: This is a living document. We made Version 1 public at the start of the IGC in October 2003. This updated version takes into account the many comments we received thereafter along with additional signatures and subsequent discussions between the drafters. Anyone interested in participating and adding his or her signature please email our protocol manager, Lars.Hoffmann@st-antonys.oxford.ac.uk or one of the convenors. Posting of the document on the Web needs to be registered with email above for updates.

Purpose

We are a group of academics and researchers on the European Union, coming from many disciplines and teaching across Europe and beyond. We have taken seriously the calls by the Nice Treaty, the Laeken declaration and the Convention itself for input from academia in the writing of a Constitution for Europe. We are not the only ones. Our originality is to have done so on a truly trans-European scale.

Having followed with the greatest of interest the debates of the Convention we recognise that most of the articles in the draft Constitution have been the object of intense exchange of views within this forum. Nevertheless, we believe that there is still room for discussion and improvement. This document contains proposals on only a few selective aspects of the draft Constitution and should be read as part of the overall draft which is in the public domain. We do not in any way purport to present an alternative Constitution.

As drafting contributors we met face-to-face and virtually to work on our proposals, reached through passionate debate and a "broad consensus". As signatories, we endorse the overall set of proposals while not all necessarily agreeing with every single amendment. On the whole, however, we believe that these amendments would contribute to improving the current text. We sign in our personal capacity and do not represent our respective organisations.

Our goal is not to propose our own constitutional project, whatever each of us may have written or argued for in our individual capacities. Instead we have taken the draft Constitutional Treaty as delivered by the Convention in June and sought to improve it through amendments – in the same spirit as IGC delegates whose mandate might have been to suggest "embellishments" or "positive sum amendments" to the draft. In doing so we have been relatively conservative and thus hopefully more likely to be taken seriously. We have refrained from suggesting big structural changes, however desirable. We have also refrained from suggesting revisions straightforwardly favouring one type of Union or another.

We do not endorse a 'more supranational' or a 'a more intergovernmental' approach than the current draft. Instead, we suggest three types of amendments:

1. Stylistic. Unfortunately, and unlike at Philadelphia, this Convention has not included a style committee. In a number of cases, our suggestions are simply meant to improve the readability of the document, to make it citizen-friendly.
2. Legal. In other cases, we suggest ways of improving the legal clarity or consistency of the document.

3. Normative. In yet other areas, we suggest amendments which we believe are normatively superior to the current draft, so as to ground the Constitution on more balanced compromises, likely to be accepted wholeheartedly by a greater number of European states and citizens.

Proposed Amendments **Illustrative Highlights**

Stylistic

Preamble: We believe that the Preamble should be short, precise and memorable (since European children are supposed to learn it by heart). The new Constitution should avoid the grandiloquence of the Convention's draft, yet incorporate its most important features, and build on some of the elements of the Charter's Preamble. We suggest a way this could be done. This proposal stands on its own, but we also suggest as a possible and daring, addition to incorporate national "mottoes" at the end of the preamble –mottoes that would be arrived at through national debates before ratification.

Shared competences: We reformulate the Convention's definition of shared competence in an attempt to alleviate current misconceptions that once the Union acts in a field the Member States can no longer act (Article I-11.2).

Solidarity provision: We suggest to make this a more general clause (albeit well short of a mutual defense clause) beyond the single obsession with terrorism conveyed by the current text (Article I-42).

Legal

Legal continuity: This amendment is meant to reinforce legal certainty by ensuring that the Constitution will not bring about unwarranted changes in the case law of the Court (Article IV-3).

Exclusive competences: Here., we revize the Convention's description of the fields subject to exclusive Union competence, so as to better reflect the caselaw of the Court of Justice, particularly on competition law and external relations (Article I-12).

Normative

EU Presidency: Small and medium states have not embraced wholeheartedly the proposed institutional reforms. We believe that the introduction of a collective EU presidency of a symbolic and ceremonial nature which stands above all other Union institutions would go a long way in redressing the situation. While retaining some elements of rotation (except for foreign policy) this would not prejudice in any way the introduction of a Chair of the European Council and the functions attributed to it (new article 19).

QMV: What could be more simple and transparent? the most democratic way to take decisions in the Council is a majority of Member States representing more that half of the EU's population. At the same time, issues under discussion may exceptionally raise specific national concerns, warranting the introduction of an "emergency brake" requiring 1/3 (population) and 1/3 (member states) (Article 24).

Future revision: while we believe, like a majority in the Convention, that the move from a Treaty revision process to a Constitutional revision procedure must not prejudice the requirement of continued control by Member States, we propose a concrete and balanced solution to the situation

in which the revision process becomes deadlocked by the inability of one or more Member States to ratify the changes agreed upon.

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Preamble

We the peoples and the States of Europe,
Resolved to create an ever closer union among ourselves, to transcend the old divisions of the European continent and to share a peaceful future,
Inspired by our cultural, religious and humanist heritages,
Desiring to found the Union upon the indivisible, universal values of human dignity, freedom, equality, solidarity, constitutional democracy and the rule of law,
Determined to contribute to the preservation and to the development of these common values while respecting the diversity of our respective cultures and traditions,
Recognising the place of Europe in the world and committed to the principles of tolerance, inclusiveness and universalism in our relationship with all non European citizens living inside and outside the Union,
Recalling the importance of the Treaties of Paris and Rome, which laid down the foundations of the European Union, and conscious of the need to strengthen the fundamental legal framework developed through subsequent Treaties,
Do hereby establish the Constitution of the European Union.

[Individual countries will debate and decide their own line in the list that follows:

- As Austrian citizens, we bring to the Union our
- As Belgian citizens, we bring to the Union our
- As British citizens, we bring to the Union [e.g. our belief in pluralism and the rule of law.]
- As French citizens, we bring to the Union [e.g. our commitment in the principles of liberty, equality and fraternity.]
- As Cypriote citizens, we bring to the Union our
- As Czech citizens, we bring to the Union our
- As Danish citizens, we bring to the Union our
- As Dutch citizens, we bring to the Union our
- As Estonian citizens, we bring to the Union our
- As Finish citizens, we bring to the Union our
- As German citizens, we bring to the Union our
- As Greek citizens, we bring to the Union our
- As Hungarian citizens, we bring to the Union our
- As Irish citizens, we bring to the Union our
- As Italian citizens, we bring to the Union our
- As Latvian citizens, we bring to the Union our
- As Lithuanian citizens, we bring to the Union our
- As Maltese citizens, we bring to the Union our
- As Luxemburg citizens, we bring to the Union our
- As Polish citizens, we bring to the Union our
- As Portuguese citizens, we bring to the Union our
- As Spanish citizens, we bring to the Union our
- As Slovak citizens, we bring to the Union our
- As Slovene citizens, we bring to the Union our
- As Swedish citizens, we bring to the Union our

Signature of the Heads of State and Government of the Member States

Comment

We propose to considerably modify the current Preamble. The text above is partly drawn from the existing draft-Preamble and the Charter Preamble. A Preamble should be brief and memorable, yet avoiding grandiloquence. There should be a single Preamble opening the Constitution, and no separate Preamble for the Charter. The Preamble of the Charter contains useful elements for a possible merged Preamble for the Constitution, and was extensively debated at the time. But some of its elements should not be included, in particular the reference to the explanations on the

Charter, which would freeze the interpretation of norms whose interpretation should be open to evolution over time.

With regards to the existing draft preamble, a Constitution is not a proper place for quotations, Greek or otherwise. The quotation does nothing to bring the text closer to the people. Moreover, the text quoted does not fit with the peculiar political system of the European Union, which is not a homogeneous state and even less a city-state such as Athens which the quotation refers to.

The Preamble should not repeat phrases which are in the first articles of the Constitution. It should try to eschew “Euro-centrism” and the attendant “clash of civilisations”. If we were to recognize Europe’s contributions to “civilisation”, then we should also refer to its share in war, misery and destruction throughout the world. The reference to Europe’s “heritage” should be kept to a minimum. It also seems appropriate to highlight Europe’s credo regarding its role in the world. The preamble should make clear that this Constitution builds on the achievements of 50 years of European integration. And the preamble should not mention the work of the Convention (or else why not the IGC and any other forum where it has been discussed?).

Finally, we suggest an original way of signing this preamble echoing an idea that was presented at the Convention. Every member state would have to come up with a formula or a motto for their national contribution to the Union. Here process matters as much as substance and the very exercise of coming up with this motto through a national debate would contribute, we hope, to greater “ownership” of the Constitution by public opinion across the EU. New members would be invited to submit their own motto upon accession. When read by schoolchildren across Europe, the list would convey the notion of “unity in diversity” at the heart of the European project and enhanced mutual awareness between the peoples of Europe. While we recognize that there is a risk here of reinforcing mutual prejudices and clichés about national character, we trust that national debates would prove such fears wrong. Moreover, we believe that the benefit that could be drawn from this process amply counter-balance this risk.

Proposed Amendments

Part I

Title I: Definition and Objectives of the Union

Article I-1: Establishment of the Union

~~1. Reflecting the will of the peoples and the States of Europe to build a common future, this Constitution establishes a Union [entitled ...], within which the policies of the Member States shall be coordinated, and which shall administer certain common competences on a federal basis.~~

1. This Constitution, reflecting the will of the peoples and the States of Europe to build a common future, establishes the European Union.

~~2. The Union shall be open to all European States which respect its values and are committed to promoting them together.~~

Comment

We propose to modify the first part of Article 1 for stylistic reasons and the second part is superfluous as it mentions values that appear later in the text.

Article I-4 Fundamental freedoms and non-discrimination

This article has been amended and moved to Part II (see below Article II-16bis)

Comment

This provision has been amended and moved to Part II (Article II-bis). Its presence in Title I (Definition and Objectives of the Union) is unhappy in systematic terms. The provision on discrimination on the basis of nationality already exists in the Charter, and the redundancy must be avoided. The fundamental economic freedoms and the non-discrimination provision should not be together, for the reasons stated below, in the comment to Article II-16 bis. Finally, the free movement rules have traditionally been interpreted by the Court as fundamental economic

freedoms. This justifies a reference to them in the Charter, not in Title I. This is done, of course, on the assumption that the Charter will be an integral part of the constitutional text to be adopted.

Article I-5: Relations Between the Union and the Member States

2. Following the principle of loyal cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the objectives set out in the Constitution.

Member States shall take all appropriate measures, general or particular, to ensure fulfilment of the obligations flowing from the Constitution or resulting from the Union Institutions' acts.

3. The Union shall also constitute a framework for mutual loyalty between its constituent states and peoples.

Comment

The new third paragraph of Article I-5(2) simply reproduces the text of Article I-10(2). It was felt more appropriate to include this text in the section dealing with the relationship between the Union and the Member States, rather than in the section on Union competences.

The new Article I-5(3) is intended to reflect the idea that the Union provides a framework for mutual cooperation not just vertically between the Union Institutions and Member States but also horizontally between the Member States themselves.

Article 6: Legal Personality Relationship between Union Law and National Law

~~The Union shall have legal personality.~~ The Constitution, and law adopted by the Union's Institutions pursuant to it, shall prevail over the law of the Member States.

Comment

The provision on the legal personality of the Union seems too technical and after all not so important as to warrant a place right at the beginning of the Constitution. If it were to remain in Part I Title I the drafters would need to explain the content and import of this legal concept. We propose to keep it as it is but to move it to Part IV, with other provisions of a similarly technical nature.

We recommend filling this space with the principle of supremacy, which seems to belong better here than in the section dealing with Union competences. We prefer as title "Relationship between Union Law and National Law" because it echoes the previous provision and also because it is less programmatic. The text of the provision has been amended: "prevail over" is plain language that can be understood by the man in the street and it is also correct in legal terms. Finally, we have eliminated the reference to the "exercise of the competences" conferred to the Union, since such a reference might encourage certain Member States not to respect this principle, where they believe that the institutions have overstepped the boundaries of the Union's competences. Such unilateral action would be inimical to the proper functioning of the Union legal order. The Constitution should at least refrain from offering a textual basis for such improper challenges to the full application of Union law.

Title II: Fundamental Rights and Citizenship of the Union

Article I-7: Fundamental rights

1. Unchanged.
2. Unchanged.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. **For these purposes, the Union may also draw inspiration from other international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.**

Comment

The purpose of Article I-7(3) is to ensure that incorporation of the Charter does not have a “chilling effect” on the future recognition of new fundamental rights within the Union legal order. It is intended to act as a flexibility clause, so as Union law can remain responsive to changes in European social and cultural values. Our addition is simply intended to reflect the Court’s caselaw, whereby fundamental rights as general principles of Union law can be inspired, not only by the common constitutional traditions of the Member States, but also by international treaties (other than the ECHR).

This provision could also be moved into Part II, to form part of the horizontal provisions of the Charter, and in particular, to replace (or be combined with elements of) Article II-53.

Title ~~V~~IIbis: The Democratic Life of the Union

Comment

Since enhancing the democratic life of the European Union was at the core of the Convention mandate, we propose to move this title as early as possible in the Constitution, that is right after Title I and before the articles on institutions whose nature are supposed to derive from the democratic principles outlined in this Title on Democracy. We seek to justify this move further by reinforcing the substance of the articles of this title, as described below.

Title III: Union Competence

Article I-9: Fundamental principles

1. Unchanged.
2. Unchanged.
3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The Union Institutions shall apply the principle of subsidiarity as laid down in ~~the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Constitution~~ **Articles III-XX-XX of this Constitution**. National Parliaments shall ensure compliance with ~~that~~ **the principle of subsidiarity** in accordance with the procedure set out in ~~the Protocol~~ **those Articles**.

In areas which fall within the Union’s exclusive competence, the Union Institutions may consider whether specific objectives might be better achieved by action at the national, regional or local level. In such cases, the Union Institutions may, where they consider this appropriate, authorise the Member States to exercise the necessary powers to legislate and adopt legally binding acts.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution.

The Institutions shall apply the principle of proportionality as laid down in ~~the Protocol referred to in paragraph 3~~ **Articles III-XX-XX**.

Comment

Our amendments to the second paragraph of Article I-9(3) reflect our belief that the Convention’s Protocol on the application of the principles of subsidiarity and proportionality should be fully integrated in the text of the Constitution itself (preferably in Part III). There is no reason why the procedure for monitoring application of the principle of subsidiarity, which is a crucial element in the overall balance of the Convention’s proposals, should be consigned to a protocol. Other references to the Protocol (e.g. in Article I-9(4)) would have to be amended as well.

The new third paragraph of Article 9(3) is intended to reinforce the idea that, even in areas of exclusive Union competence which are not subject to the principle of subsidiarity per se, there might still be scope for the Union to delegate power to adopt legally binding acts to the Member States as regards specific aspects of a given policy initiative. However, there would be no binding obligation upon the Union to do so, and the new text would not provide a novel basis for

challenging the legality of Union action in spheres of exclusive competence. In some ways, the addition is no more than a statement of the obvious: in areas of exclusive competence, the Union can already decide that the Member States should take certain types of action.

Article 10: Union law

- ~~1. The Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States.~~
- ~~2. Member States shall take all appropriate measures, general or particular, to ensure fulfilment of the obligations flowing from the Constitution or resulting from the Union Institutions' acts.~~

Comment

Article I-10(1) has been amended and moved to Article I-6.

Article I-10(2) has been moved to Article I-5(3).

Article I-11: Categories of competence

1. Unchanged.
2. When the Constitution confers on the Union a competence shared with the Member States in a specific area, ~~the Union and the Member States shall~~ **each have retain** the power to legislate and adopt legally binding acts in that area, ~~but only to the extent that such exercise is compatible with the Union's exercise of its competence. The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence.~~
3. ~~The Union shall competence to promote and coordinate the economic and employment policies of the Member States.~~ In certain areas and in the conditions laid down in the Constitution, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.
4. ~~The Union shall have competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.~~ The Union shall have competence to promote and coordinate the economic and employment policies of the Member States.
5. ~~In certain areas and in the conditions laid down in the Constitution, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.~~ The Union shall have competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.
6. The scope of and arrangements for exercising the Union's competences shall be determined by the provisions specific to each area in Part III.

Comment

The text of Article I-11(2) has been reformulated to avoid giving the impression that, once the Union has exercised its power to legislate in an area of shared competence, the Member States are automatically and totally precluded from exercising theirs. This will not necessarily be the case. For example, in fields characterised by minimum harmonisation, the adoption of legally binding acts by the Union Institutions does not preclude the Member States from enacting higher regulatory standards. Our revised formulation addresses issues both of competence and compatibility, so as to offer an informative picture of not only the relationship between Union and Member State power, but also the Member State's obligations about how to use its power, in fields of shared competence. It would of course remain possible for the exercise of Union competence to occupy the relevant regulatory field, whether expressly or by implication, and thus effectively preclude Member States from exercising their competence therein.

The order of Articles I-11(3)-(5) has been changed, for two reasons. First, because it seems preferable to identify the three basic types of Union competence, and only then to indicate that other more specialised models also exist. Secondly, because the coordination of economic and employment policies, and probably also the CFSP, seem more closely related to the notion of coordinating competence (where the Union is unable to harmonise) than to the idea of shared competence (where the Union is capable of adopting harmonising measures).

Article I-12: Exclusive competence

1. The Union shall have exclusive competence ~~to establish the competition rules necessary for the functioning of the internal market, and~~ in the following areas:

- monetary policy, for the Member States which have adopted the euro,
- common commercial policy,
- customs union,
- the conservation of marine biological resources under the common fisheries policy.

2. The Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, ~~is necessary to enable it to exercise its internal competence, or affects an internal Union act.~~

Where the Union cannot attain an objective established by this Constitution through the exercise of its internal competence alone, such that it is necessary at the same time to enter into an international agreement, the Union shall have exclusive competence to conclude that international agreement.

The Union shall have exclusive competence for the conclusion of an international agreement if and to the extent that an autonomous decision by a Member State to assume obligations at the international level might affect or alter the scope of common rules established by an internal Union act.

Comment

In Article I-12(1), we delete the reference to competition rules. This would be a more accurate reflection of the Court's caselaw (well-established since Case 14/68 Walt Wilhelm [1969] ECR 1), which clearly treats competition law as a field of shared competence: Community and national competition rules can apply to one and the same agreement or practice, even in situations having cross-border effects, provided the application of national law does not contradict or undermine the effectiveness of Community law. This principle of shared competence in the field of cross-border competition disputes is also enshrined in Regulation 1/2003 on the modernisation of competition law enforcement. Indeed, the Council specifically rejected the Commission's original proposal for the exclusive application of Community competition rules to cross-border situations. The Convention proposals flatly contradict both the caselaw and the Regulation.

In Article I-12(2), we suggest a reformulation of the provisions on implied exclusive external competence. The current drafting does not accurately reflect the Court's caselaw under either Opinion 1/76 or the ERTA judgment. Indeed, the Convention's drafting could pose a threat to the very existence of implied shared external competence and mixed agreements. It is, admittedly, very difficult to codify the Court's extensive and complex caselaw in this field into a concise and informative formula. We hope that our suggested drafting comes closer to that goal than the existing proposal.

Article I-13: Areas of shared competence

1. The Union shall share competence with the Member States where the Constitution confers on it a competence which does not ~~relate to~~ **fall within** the areas referred to in Articles 12 and 14 to 16.

2. Shared competence applies in the following principal areas:

- internal market,
- **competition law,**
- area of freedom, security and justice,
- agriculture and fisheries, excluding the conservation of marine biological resources,
- transport and trans-European networks,
- energy,
- social policy, for aspects defined in Part III,
- economic, social and territorial cohesion,
- environment,
- consumer protection,
- common safety concerns in public health matters.

~~3. In the areas of research, technological development and space, the Union shall have competence to carry out actions, in particular to define and implement programmes; however, the exercise of that competence may not result in Member States being prevented from exercising theirs.~~

~~4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to take action and conduct a common policy; however, the exercise of that competence may not result in Member States being prevented from exercising theirs.~~

Comment

In Article I-13(1), the wording has been changed to reinforce the idea that shared competence is the default category for all fields not specifically listed in Articles I-12 and 14 to 16. The revised Article I-13(1) thus also clarifies that the coordination of economic and employment policies, and the CFSP, are not strictly speaking areas of shared competence.

In Article I-13(2), we add a reference to competition law, to clarify that it is an area of shared rather than exclusive competence.

We suggest deleting Articles I-13(3) and (4). It is self-contradictory to have fields of shared competence, which should be defined according to the ability of Union measures to have pre-emptive effect, but in which Union legislation cannot have the effect of preventing Member States from exercising their competences. These areas are therefore better considered areas of supporting competence.

An alternative option would be to leave Articles I-13(3) and (4) in place but delete from each the words “however, the exercise of that competence may not result in Member States being prevented from exercising theirs”. By so recognising the possibility for Union acts to have pre-emptive effect, the relevant policy fields would then fit more comfortably into the category of shared competence. However, that would represent a political decision to expand the substantive boundaries of Union competence beyond those agreed at the Convention.

Article I-14-15: The coordination of economic and employment policies...

Comment

See the comment on Articles I-11(3)-(5) (above).

Article I-15-16: The common foreign and security policy...

Comment

See the comment on Articles I-11(3)-(5) (above).

Article I-16 14: Areas of supporting, coordinating or complementary action

1. The Union may take supporting, coordinating or complementary action.
2. The areas for supporting, coordinating or complementary action shall be, at European level:
 - industry,
 - **research, technological development and space,**
 - protection and improvement of human health,
 - education, vocational training, youth and sport,
 - culture,
 - civil protection,
 - **development cooperation and humanitarian aid.**
3. **Legislation and** legally binding acts adopted by the Union on the basis of the provisions specific to these areas in Part III may not entail harmonisation of Member States’ laws or regulations.

Comment

See the comment on Articles I-11(3)-(5), and also the comment on Articles I-13(3)-(4) (above).

The addition to Article I-14(3) is intended to clarify that the Union may still adopt legislative measures in fields of supporting, coordinating or complementary competence, even if such measures cannot have pre-emptive effects.

Title IV: The Union’s Institutions

Proposed: New Article I-18b (to be renumbered Article 19) The European Union Presidency

1. The European Union Presidency shall symbolise the Union as a whole for its citizens. Its main role will be to host European Council Meetings twice a year and organize the proceedings in close coordination with the Chair of the European Council.

2. The European Presidency shall be rotating among the Member States every six months. Every two years, the four Member States holding the Presidency will constitute a Presidency team to coordinate their action.

3. The European Union Presidency shall work in close cooperation with all Union institutions, including the designated heads of the European Parliament, the European Council and the European Commission. It will provide the Presidency for the formations of the Council of Ministers except for the Foreign Affairs Council. The Presidency team may also decide to allocate the Presidency of some of the Councils for a whole year to some of its members.

Comment

This article is compatible with the institutional innovation proposed by the Convention to create a Chair for the European Council. It introduces an EU presidency of a symbolic and ceremonial nature which stands above all other Union institutions. While retaining some elements of rotation in this way would not prejudice in any way the introduction of a Chair of the European Council and the functions attributed to it, it would go a long way in addressing the concerns of small and medium states. Moreover, the proposal is predicated on the belief that EU Summits held in cities around Europe, in spite of the “folklore” sometimes surrounding them, are the events which bring the EU closest to its citizens (be they those of the state holding the presidency or those of other member state who can thereby see that EU decisions are not all “made in Brussels”). Such an EU Presidency would be the EU institution meant to convey the shared and collective nature of leadership in the EU as a whole. The powers of the EU Presidency would be limited mostly to the hosting of Summits, and to the provision of Chairs for Council formation. The latter would entail some managerial coordination, stripped down to a considerable degree in light of the respective roles of the Council chair, Council secretariat and Commission in this realm.

Article I-23: Formations of the Council of Ministers

~~1. The Legislative and General Affairs Council shall ensure consistency in the work of the Council of Ministers.~~

~~When it acts in its General Affairs function, I~~ It shall, in liaison with the Commission, prepare, and ensure follow-up to, meetings of the European Council.

~~2. When it acts in its legislative function, the Council of Ministers~~ **The Legislative Council** shall consider and, jointly with the European Parliament, enact European laws and European framework laws, in accordance with the provisions of the Constitution. In this function, each Member State's ~~representative~~ **or shall be assisted by** ~~include~~ one or two representatives at ministerial level with relevant expertise, reflecting the business on the agenda of the Council of Ministers.

~~3. (2)~~ The Foreign Affairs Council shall, on the basis of strategic guidelines laid down by the European Council, flesh out the Union's external policies, and ensure that its actions are consistent. It shall be chaired by the Union Minister for Foreign Affairs.

4. The European Council shall adopt a European decision establishing further formations in which the Council of Ministers may meet.

5. Council formations other than the Foreign Affairs Council are presided by the Minister of the Member State currently designated as host state for the European Council.

~~The Presidency of Council of Ministers formations, other than that of Foreign Affairs, shall be held by Member State representatives within the Council of Ministers on the basis of equal rotation for periods of at least a year. The European Council shall adopt a European decision establishing the rules of such rotation, taking into account European political and geographical balance and the diversity of Member States.~~

Comment

The article proposed by the Convention displays all features of a compromise between two positions and combining the disadvantages of both. On the one hand it does pay tribute to the much-needed separation of legislative and executive tasks within the Council by locating the responsibility for legislation within one specific Council formation. On the other hand, this line of thought is watered down by combining this responsibility with the responsibility for general coordination of the work within the Council formations. This move is motivated by the fear that the Legislative Council might lead to too much centralisation of powers in the hand of the legislative council and its members to the detriment of other, specialist ministers.

The amendments we propose meet this fear by strengthening the proposal that specialist ministers shall (rather than ‘may’) sit in on the legislative Council (2nd sentence of paragraph 2). These specialist ministers would assist their member state’s permanent ministerial representative in the Council. At the same time we seek to restore the original idea of a separate Council formation that is exclusively dedicated to legislation, as it was also originally proposed in the Convention (see CONV 691/03), and that is composed of one permanent ministerial representative per member state. A clearly delineated legislative Council has the important merits of:

- *clarifying the separation between legislative and executive powers of the Council*
- *providing a focal point for the accountability of the member governments’ legislative engagement;*
- *preventing compromises of the obligation to examine and adopt legislative proposals in public (article I-49.2);*
- *improving coordination and coherence of legislative activities of the Council and guaranteeing consistency of its execution.*

Article I-23.3 as it stands; I-23.4 is deleted and replaced by our proposal for article I-19.

Article 24: Qualified majority

1. When the European Council or the Council of Ministers takes decisions by qualified majority, such a majority shall consist of the majority of Member States, representing at least ~~three-fifths~~ **half** of the population of the Union. Member States may invoke reasons of fundamental national interest to activate an “emergency brake” before the European Council requiring one third of Member States representing at least one third of the population of the Union (Article 24).

Comment

First and foremost, this amendment is meant to improve the balance between the two principles of representation (States and population) in the Council.

First and foremost, it is simply easier to understand for EU citizens, because it respects the democratic principle as we know it.

Second: Subject to a request of a Member State for verification the population criterion (62%) was introduced in the Treaties at Nice for a very specific reason: in order to counterbalance the system of reweighting of votes agreed at Nice that was considered to favour the relative voting power of small and medium Member States in the enlarged Union.

The draft Constitution proposes the abolishment of the cumbersome and hard to understand system of weighting of votes – a proposal that we mostly welcome as more citizen-friendly.

Furthermore, the draft Constitution maintains the population criterion, turning it from an optional requirement into one of the two pivotal elements of QMV. This is also mostly welcome – decisions must not be taken against the will of the majority of Union’ population.

However, maintaining the population criterion at practically the same level as Nice (62% _ 60%), while its “raison d’être”, i.e. counterbalancing the weighting of votes, ceases to exist, is highly arbitrary and against the democratic principle.

It is as if population criterion was brought in the EU for purely instrumental purposes, that is only to the extent necessary to exclude the veto power of some States but not others (i.e. the four bigger Member States). Even if blocking minority groupings within the Council are never given, the QMV definition of the draft Constitution could, eventually, prevent a proposal endorsed by 22 Member States representing 56-57% of the Union’s population, from being transformed into a legislative act. This is incompatible with the democratic principle and impossible to justify to the European citizen.

Democratization and simplification impose a clear-cut criterion that is based on the fair, understandable and age-old 50+1 rule of simple majority, as an exact parallel to the criterion adopted for state representation.

Moreover, one should bear in mind that the current three fifths (60%) of the population will give a greater weight to population than States, indeed to an extent not even seen in traditional federal systems which are supposed to be more "integrated" than the EU. This, in conjunction with the increased use of the legislative procedure, would represent a considerable shift in the balance between the two traditional principles of representation in multi-polity systems.

Furthermore, the Convention proposal would risk creating a pivotal group of States whose relative veto power (combined with the disappearance of the veto power of the other States) could, de facto, translate into a permanent control over legislation. The permanence of such relative veto power by a limited set of actors will have an impact not only in the blocking of legislation. It will also imply permanent control over the content of EU legislation. Such a dynamic can only be prevented if the principle of population does not leave any particular group with effective veto rights. In other words, the principle of representation on the basis of population must serve as "voice" and not "veto".

At the same time, a number of countries may feel that such a decision rule may not grant them enough blocking power in situations when a matter of highly sensitive national is at stake and comes under QMV. In the past, European integration has been able to evolve by assuaging such fear through a de facto veto (Luxemburg compromise). Experience has shown that such a veto might be exploited in the short term but will progressively be less invoked. Why not then, include the possibility of an "emergency brake" that would require not one state but several to refer a proposal to the European council –eg the one third rule.

All things considered, one could hardly find an argument, reasonable and understandable to all, justifying why the population criterion should be raised up to 60%, while keeping the States representation criterion to 50%. The so-called 50/50 solution seems all the more acceptable if softened by an emergency brake.

Article I-25: The European Commission

1. (paragraph 1 unchanged)
2. (paragraph 2 unchanged)
3. **The Commission, including the President and the Minister for Foreign Affairs, shall be made up of one national from each Member State. Commissioners will be divided between those with or without portfolio under a system of one third rotation.**

~~The Commission shall consist of a College comprising its President, the Union Minister of Foreign Affairs/Vice President, and thirteen European Commissioners selected on the basis of a system of equal rotation between the Member States. This system shall be established by a European decision adopted by the European Council on the basis of the following principles:~~

~~(a) Member States shall be treated on a strictly equal footing as regards determination of the sequence of, and the time spent by, their nationals as Members of the College; consequently, the difference between the total number of terms of office held by nationals of any given pair of Member States may never be more than one;~~

~~(b) subject to point (a), each successive College shall be so composed as to reflect satisfactorily the demographic and geographical range of all the Member States of the Union.~~

~~The Commission President shall appoint non-voting Commissioners, chosen according to the same criteria as apply for Members of the College and coming from all other Member States.~~

~~These arrangements shall take effect on 1 November 2009.~~

4. (former article I-26.3) **The Commission shall work within the political guidelines laid down by its President who will decide on its internal organization in order to ensure that the Commission's activities are coherent, effective and have the support of all its Members. The President shall allocate the Commission's responsibilities to its Members and may reshuffle their portfolios during the Commission's term of office.**

The President shall exercise these tasks in full respect of the demographic and geographical diversity of the Union and ensure that over time Member States are treated on an equal footing as regards the responsibilities exercised by their nationals as Members of the College.

The Members of the Commission shall perform the tasks delegated to them by the President under his authority.

A ~~European Commissioner or Commissioner~~ **the Union Minister for Foreign Affairs** shall resign if the President so requests.

5. (Paragraph 25.4 unchanged)

6. The Commission, as a College, shall be responsible to the European Parliament. ~~The Commission President shall be responsible to the European Parliament for the activities of the Commissioners.~~ Under the procedures set out in Article III-243, the European Parliament may pass a censure motion on the Commission. If such a motion is passed, ~~the European Commissioners and Commissioners must all resign~~ **the entire College must resign**. The Commission shall continue to handle everyday business until a new College is nominated.

[Further systematically delete all references to the distinction between European Commissioners and non-voting Commissioners in Articles III-250, III-251, III-252 and III-253

Article III-254 can be deleted since its substance is contained in Article I-25.4.]

Comment

The European Commission is not a representative institution. Its composition should in principle follow from the responsibilities assigned to it. From that perspective there is much to be said for a reduction of the number of Commissioners below the (future) number of Member States.

Nevertheless, the Convention debate has brought out fundamental objections against forcing through such a reform at this stage. As a result, the Convention's proposal that achieves little more than a symbolic reduction of the size of the College of 'European' Commissioners with voting rights at the cost of a very complex, even dubious, set-up for rotation and the creation of the additional function of non-voting 'junior' commissioners. We do recognise the value of having all Union nationalities within the College in terms of local knowledge and legitimacy of the functioning of the Commission, as well as the political sensitivities involved in reducing the size of the College at this point in time. Instead of endorsing the half-baked compromise of the Convention, we rather think through the implications of these considerations. It may be desirable indeed to have reduce the number of Commissioners with portfolio to a third who may meet more often and each coordinate between 1 and 3 colleagues.

Hence in paragraph 3 we strike the number of 15 European Commissioners, the distinction with non-voting Commissioners and the principles of rotation. Instead we propose to have one Commissioner from each Member State. Thus we basically follow the proposal made by the European Commission in its communication (annex 2) of 17 September 2003.

We also follow the Commission proposal in insisting that coherence and effectiveness of the Commission need not necessarily be a function of its size. These purposes can be served by alternative measures within the Commission's internal organisation. In this the Commission President is to play a particularly important role. For that reason the provisions proposed for article 26.3 are better moved to article 25 and are to be spelled out in more detail, underlining the President's responsibilities for defining the political guidelines, the internal organisation and the allocation of portfolio's. Contrary to the Commission proposal we refrain from inserting the idea of Groups of Commissioner in the Constitutional text. This is an interesting idea that future Commissions may well want to explore but need not be bound to.

One thing we do add to the Commission text is a proviso with regard to the overall balance in the allocation of responsibilities to the various Commissioners to prevent a situation in which certain nationalities would systematically be privileged.

We amend the final sentence of paragraph 4 to clarify that the Commission President can force the resignation of any member of the College – including the Minister for Foreign Affairs. The corresponding provisions of Article III-252 would require similar amendment. Similarly, paragraph 6 is amended to clarify the effects of a motion of censure by the European Parliament, based on the understanding that it would result in the resignation of the entire Commission – including the Commission President and the Minister for Foreign Affairs. The corresponding provisions of Article III-243 would require similar amendment.

Obviously, if a Commission in which all Member States are represented turns out to be too difficult to manage in the future, the option of limiting the Commission could be revisited including inter alia by drawing on the recent reform of the ECB Governing Council or by setting up a lottery system. But for the moment the best way to find out what works is by taking the appropriate measures within the overall constitutional framework.

Article I-26: The Election of the President of the European Commission

1. ~~Taking into account the elections to the European Parliament and after appropriate consultations, the European Council, deciding by qualified majority, shall put to the European Parliament its proposed candidate for the Presidency of the Commission. This candidate shall be elected by the European Parliament shall elect the President of the Commission, acting by a majority of its members. The candidate will be appointed after having received the assent of the European Council acting by qualified majority.~~

~~If the candidate does not receive the required majority support~~ **fails to receive the assent of the European Council**, the European **Parliament** ~~Council~~ shall within one month propose a new candidate to the European **Council** ~~Parliament~~, following the same procedure.

2. **The governments of each Member State, except those of which the President and the Minister for Foreign Affairs are nationals, determined by the system of rotation shall draw up** ~~establish~~ a list of three persons, in which both genders shall be represented, whom ~~are deemed~~ **it considers qualified to perform the duties of a Member of the Commission** ~~be a European Commissioner~~.

By choosing one person from each of the proposed lists, the President-elect shall select the ~~thirteen European~~ **thirteen** Commissioners for their competence, European commitment, and guaranteed independence.

The President and the persons so nominated for membership of the College, including the future Union Minister for Foreign Affairs, ~~as well as the persons nominated as non-voting Commissioners~~, shall be submitted collectively to a vote of approval by the European Parliament.

3. The Commission's term of office shall be five years. **The term of office of the President of the Commission shall be renewable only once.**

(former paragraph 3 moved to I-25.4 above)

Comment

The text proposed by the Convention for I-26 appropriately subjects the Commission President election to some kind of conciliation procedure between the national heads of state in the European Council and the European Parliament. However, as drafted it is tilted towards the European Council and therefore de facto in contradiction article I-19.1 that provides that the European Parliament shall elect the president of the Commission. The amended text does not rely on the somewhat hollow call on the European Council to take account of the elections of the European Parliament, but rather reverts the order of the procedure by giving the European Parliament the first word on the election of the Commission President. Still Parliament's choice is conditional upon the assent of the European Council acting by a qualified majority.

A more radical alternative that would literally make the Parliament the Commission's home, would be to require the candidate for the Presidency of the Commission to be a member of the Parliament. Even if in that case the first choice would be left to the European Council, the Commission Presidency would become a central stake in the European elections. Politicians of the authority required for the job would be forced to put their stakes in the elections and the interest citizens take in these elections would get a major boost.

The amendments to paragraph 2 follow logically from the abolition of the distinction between voting and non-voting commissioners proposed for article I-25. We also copy in some stylistic improvements proposed in the Commission Communication of 17 September 2003.

Paragraph 3 copies the proposed text on the Commission's length of office but adds that the term of office of the Commission President shall be renewable only once. This proposal prevents power to become concentrated in one person for too long a time. At the same time a time span of 10 years (subject to midterm renewal) allows a Commission President proper time to get things done and serves to secure his or her independence from possible career prospects in one's home country.

Article I-28: The Court of Justice Judiciary of the European Union

1. **The judiciary of the European Union** shall ensure respect for the law in the interpretation and application of the Constitution. **It comprises** the Court of Justice, the **High General** Court and specialized courts. The Member States shall provide ~~rights of appeal~~ **legal remedies before their courts and tribunals that are** sufficient to ensure effective legal protection in the field of Union law.
2. ~~The European Court of Justice~~ **The Court of Justice** shall consist of ~~one judge from each Member State,~~ and shall be assisted by ~~Advocates General~~ **judges and Advocates-General, the combined number of which shall equal the number of Member States.**
The **High General** Court shall include at least one judge per Member State. The number shall be fixed by the Statute of the Court of Justice.
The judges and the Advocates-General of the ~~European Court of Justice~~ **Court of Justice** and the judges of the **High General** Court, chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles III-260 and III-261, ~~shall be appointed by common accord of the governments of the Member States for a term of six years, renewable~~ **shall be appointed by common accord of the governments of the Member States for a term of 12 years, nonrenewable.**
3. [unchanged]

Comment

Paragraph 1. *This wording gives more prominence to the task of the judiciary, emphasising its unity, and only afterwards referring to its composition. It makes clear that the judiciary is mainly composed of the Court of Justice, the General Court (a term preferable to High Court, which could create confusion, particularly for the general public, regarding its relationship with the Court of Justice) and specialised courts, but also that the courts and tribunals of the Member States contribute to its tasks and are part, within the field of their jurisdiction, of the judiciary of the Union. The second sentence also evokes the wording of the provision on preliminary references. The terminological changes introduced (“judiciary of the European Union”; “Court of Justice” instead of “European Court of Justice” would imply changes in Part III of the Constitution). As currently written, the English “rights of appeal” may suggest a narrower obligation than ‘legal remedies.’*

Paragraph 2:

First, the current version threatens to convert judges into representatives of their Member States. The practice under the EC Treaty until the Treaty of Nice provided a good compromise, in that the nationality of the judge was not mentioned in the Treaty, although it was observed in the practice of appointing judges.

Second, the current version threatens to expand the number of judges beyond what is feasible for a functioning court.

By ensuring that the total number of AG’s and judges does not fall below the total number of Member States, we preserve the possibility that the Court (including AG’s) contain experts on each MS legal system without validating the idea of judges as representatives of the Member States.

Renewable terms for judges threatens the independence of the judiciary, as do very brief terms of office. We therefore propose a long, fixed, and non-renewable term. Although 12 years is not a magic number, it seems a reasonable period so as to allow significant insulation of the judiciary from the political process especially when coupled with the proposed non-renewable nature of the office.

Article I-32 - The Legal Acts of the Union

A European law shall be a legislative act of general application. It shall be binding in its entirety and directly applicable in all Member States.

A European framework law shall be a legislative act binding, as to the result to be achieved, on the Member States to which it is addressed, ~~but leaving the national authorities entirely free to choose the form and means of achieving that result~~ **but leaving to the national authorities the choice of form and means of achieving that result.**

A European regulation shall be a non-legislative act of general application for the implementation of legislative acts ~~and of certain specific provisions of the Constitution.~~ It may either be binding in its entirety and directly applicable in all Member States or be binding, as regards the result to be achieved, on all Member States to which it is addressed, ~~but leaving the national authorities entirely free to choose the form and means of achieving that result~~ **but**

leaving to the national authorities the choice of form and means of achieving that result.

Comment

The current version may roll back the *acquis* by suggesting that the MS have additional freedoms in transposing directives. It is not clear what “entirely free” adds that would not be contrary to the *acquis*.

Title V: Exercise of Union Competence

Article I-36: Implementing acts

2. ~~Where uniform conditions for implementing binding Union acts are needed, those acts~~ **Binding Union acts** may confer implementing powers on the Commission, or, in ~~specific~~ **exceptional** cases duly justified and in the cases provided for in Article 39, on the Council of Ministers.

3. ~~The European laws~~ **In cases where the binding Union act was adopted by or pursuant to the ordinary legislative procedure, a European law** shall lay down in advance rules and general principles for the ~~mechanisms for control by Member States~~ **of Union implementing acts adopted by the Commission.**

In all other cases, a European law adopted by the Council after consulting the European Parliament shall lay down in advance rules and general principles for the control of Union implementing acts adopted by the Commission.

Comment

Article I-36(2) has been redrafted so as to remove the Convention’s unhelpful benchmark for when implementing powers may be exercised by the Commission rather than by the Member States. Extensive legal scholarship has demonstrated that “uniform rules” are in fact surprisingly rare within the Union legal order. There is often room for flexibility in the scope and content of Union acts. The idea of “uniform rules” therefore does not provide objective guidance for when implementing powers should be exercised at the Union level. The principle of subsidiarity should be sufficient to achieve the Convention’s apparent objectives here. As regards the Council, we acknowledge that it may be appropriate in particular circumstances to confer implementing powers upon this Institution, but wish to emphasize that this should be very much exceptional. Thus, legislation should state in its preamble why it is necessary for the Council, rather than the Commission, to exercise executive responsibilities in particular cases.

Article I-36(3) has been redrafted so as to clarify the nature of the inter-institutional balance, for the adoption of comitology rules, based on a number of assumptions:

- the European Parliament should have a full say in the adoption of comitology rules in respect of parent acts which were themselves adopted by the ordinary legislative procedure. But otherwise, e.g. as regards parent acts adopted by Council after consulting or with the consent of the European Parliament, the relevant comitology rules should be adopted by a different procedure, i.e. by the Council alone, with a more limited role for the European Parliament.

- the supervision of Union implementing acts need not be limited to the Member States alone. Supervisory rules could also provide, e.g. for powers of objection or call-back by the European Parliament.

- the supervision envisaged by this Article should be limited to Union implementing acts adopted by the Commission – not by the Council (e.g. in the sphere of anti-dumping), and certainly not as regards the CFSP.

Article I-41: Implementation of the area of freedom, security and justice

1. – 3. no changes

4. **With a view of ensuring the full protection of individual rights, the content of Title [X] shall be subject to political and judicial control by the respective organs of the Union, as the present Constitution provides for.**

Comment

The area of FSJ should be defined in the same way as CFSP and CDP are defined in articles 39 and 40. A provision should be added to enshrine the principles of judicial and parliamentary control in this area.

Article 41bis: Specific provisions on the open method of coordination

(1) In areas which do not fall within the Union's exclusive competence, its objectives may be pursued by means of the coordination of national and Union policies, with a view to achieving the compatibility, consistency and, where appropriate, convergence of national policies and to support legislative policy.

(2) The open method of coordination shall seek to encourage cooperation between Member States through initiatives aimed at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation.

(3) The implementation of this method shall be transparent and democratic, in accordance in particular with the provisions of Article I-46, and shall involve as broad a spectrum of society as possible.

(4) Such coordination of national policies shall be without prejudice to the adoption of common policies of the Union in accordance with the provisions of Article 12 and 13, where appropriate competences are conferred on the Union, or to the adoption of other forms of supporting action, as governed by Article [14].

Comment

This provision creates a general framework for OMC amongst the specific provisions on the Implementation of Union Action. It is not a separate category of Union instrument, but could be implemented at the Union level via Decisions (Article I-32) or via Recommendations and Framework Laws. At present, there is minimal explicit coverage of OMC in the Constitution, and it is not referred to in Part I at all. In Part III, there are references to OMC-type practices in Article III-107 (social policy), which itself replicates the existing Article 137 EC, and these formulas were picked up in last minute additions to Article III-148(2) (research and technological development), Article III-179(2) (health and, Article III-180(2) (industry). The possibility of OMC is also recognised implicitly in the ascription of a specific role to the Union in relation to the coordination of policies in relation to economic and employment policies. In the interests of legal certainty, as well as for symbolic reasons, it is important to provide constitutional recognition of OMC in Part I, but it is important to do so in a way which recognises the breadth and flexibility of this mechanism, as well as recognising fears that OMC itself could be used as the basis for refusing the adoption of common policies or the harmonisation of laws and that there are a number of perceived flaws in relation to democratic process in relation to its implementation.

Article 42: Solidarity clause

1. The Union and its Member States shall act jointly in a spirit of solidarity.

2. **In particular, if a Member State is the victim of terrorist attack or natural or man-made disaster, natural or man-made disaster, including a terrorist attack, or in order to prevent such threats,** the Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States. ~~to:~~

(a) ~~prevent the terrorist threat in the territory of the Member States;~~

~~protect democratic institutions and the civilian population from any terrorist attack;~~

~~assist a Member State in its territory at the request of its political authorities in the event of a terrorist attack;~~

(b) ~~assist a Member State in its territory at the request of its political authorities in the event of a disaster.~~

2. The detailed arrangements for implementing this provision are at Article III-231.

Comment

It would be preferable to provide a wider scope for the application of the solidarity clause (disasters in general) and then focus on the “terrorist threat”. Prevention in all cases needs to be highlighted. The deletion of paragraphs (a) and (b) eliminates redundancies. They are not essential here, as the detailed arrangements for the implementation of this provision (for example, the need of a request of the political authorities of the Member State affected) are in Article III-231.

Title VI: The Democratic Life of the Union

Article I-44: The principle of democratic equality:

In all its activities, the Union shall observe the principle of the equality of citizens. All shall receive equal attention from the Union’s Institutions. **All shall have equal access to the Union’s Institutions and an equal opportunity for involvement in the shaping of Union policies.**

Comment

The current version is a patronizing top-down approach, in which the benign Union takes care of all citizens equally. It does not ensure that each citizen can have equal access to convey his or her views.

Article I-45bis: Parliamentary control of executive institutions

1. European institutions, bodies and agencies are subject to democratic control. This concerns, in particular, the Commission, the Minister of Foreign Affairs of the Union, the Court of Auditors, the European Central Bank, Europol and Eurojust.
2. European institutions, bodies and agencies shall only act within the limits of the tasks assigned to them by the Constitution and by acts adopted pursuant to this Constitution.
3. They shall report annually on their activities and communicate these reports directly to the European Parliament and the national parliaments of the Member States.
4. They shall reply orally or in writing to questions put to them by the European Parliament or by its members.

Comment

Much of the popular anxiety about the EU stems from the fear of executive power unbound. An article like this does serve the function of democratic re-assurance by laying out the general principles of democratic control of executive action by European institutions. The substantial provisions proposed basically reflect provisions that are now already dispersed throughout the Constitutional Treaty.

[NEW] Article I-45bisbis: The role of national parliaments

1. National Parliaments shall be fully informed of all legislative action in the Union. All legislative proposals, instruments of legislative planning and consultation documents sent to the European Parliament and to the Council of Ministers shall simultaneously be sent to Member States' national Parliaments.
2. A six-week period shall elapse between a legislative proposal being made available by the Commission to the national Parliaments in the official languages of the European Union and the date when it is placed on an agenda for the Council of Ministers for its adoption or for adoption of a position under a legislative procedure. Save in urgent cases for which due reasons have been given, no agreement may be established on a legislative proposal during those six weeks. A ten-day period shall elapse between the placing of a proposal on the agenda for the Council of Ministers and the adoption of a position of the Council of Ministers.
3. Member States' national Parliaments may send to the Presidents of the European Parliament, the Council of Ministers and the Commission a reasoned opinion on whether a legislative proposal complies with the principle of subsidiarity, according to the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality.
4. The agendas for and the outcome of meetings of the Council of Ministers, including the minutes of meetings where the Council of Ministers is deliberating on legislative proposals, shall be transmitted directly to Member States' national Parliaments, at the same time as to Member States' governments.

5. [When the European Council intends to make use of the provision of Article I-24(4), first subparagraph of the Constitution, national Parliaments shall be informed in advance. When the European Council intends to make use of the provision of Article I-24(4), second subparagraph of the Constitution, national Parliaments shall be informed at least four months before any decision is taken.]
6. In the case of bicameral national Parliaments, these provisions shall apply to both chambers.

Comment

The closer involvement of national parliaments in the Union's decision-making process is one of the main achievements of the Convention. We fail to understand why the relevant provisions have been relegated to a protocol. Instead we propose to include the provisions that impose obligations on the Union's institutions as an additional article in Part I of the Constitutional Treaty.

The article we propose follows article 1 to 8 of the protocol proposed by the Convention. Articles 9 and 10 of the protocol are more of a declaratory nature and can be followed up upon by the national parliaments, COSAC and the European Parliament themselves. Paragraph 5 of the article above is probably better added to article I-24 to which it refers.

Article I-46: The principle of participatory democracy

1. The Union is committed to empowering individual citizens and enhancing the quality of direct democratic participation in Union affairs at all levels of governance. The Union shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.

3. – 4. unchanged

Comment

This article is at the core of the Laeken mandate and should be strengthened by defining participatory democracy more broadly. "at all level of governance" is meant to convey that a democratic Europe must rely on participation in European affairs at the state and local level too and not only through lobbying in Brussels. We believe that a "Charter of governance", codifying the process of consultation with civil society organizations should be developed in cooperation with these organizations in connection with the reference to "appropriate means".

Title IX: Union Membership

Article I-59: Voluntary withdrawal from the Union

2. A Member State which decides to withdraw...

Representatives of the withdrawing Member State shall not participate in Council of Ministers or European Council discussions or decisions concerning it.

Members of the European Parliament elected from the withdrawing Member State shall not participate in European Parliament discussions or decisions concerning it.

Comment

This amendment is intended to exclude the participation of MEPs elected from the withdrawing Member State, when the European Parliament is agreeing the withdrawal agreement, based on the assumption that there would be a clash of interests.

Part II

Title II: Freedoms

Article II-16 bis ~~Article 4: Fundamental economic freedoms and non-discrimination~~

~~± Free movement of persons, goods, services and capital , and freedom of establishment—shall be guaranteed within and by the Union, in accordance with the provisions of the Constitution.~~

~~2. In the field of application of the Constitution, and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited.~~

Explanation:

This is one of the most unlikely couples in Community law. The logic of free movement law has actually been, for decades, that of liberating itself from a non-discrimination paradigm. Both provisions are important, but they should be separate provisions. Systematically, they should be in the Charter, which already includes a provision on non-discrimination on the basis of nationality (Article II-21(2)). The provision on fundamental economic freedoms could be included in Title II of the Charter (Freedoms), after the freedom to conduct a business. The adjective "economic" should be added not to confuse them with the right to free movement of citizens qua citizens, which is enshrined in Article II-45. Finally, freedom of establishment is already covered by the free movement of (legal) persons (see the title of Part III, Title III, Chapter I, Section 2: "Free movement of Persons [workers and establishment] and Services").

Title VII: General Provisions governing the interpretation and application of the Charter

Article II-51: Field of Application

1. The provisions of this Charter are addressed to the Institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are ~~implementing~~ **acting within the scope** Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution.

Comment

This amendment is intended to bring the Charter into line with the Court's long-established caselaw, whereby fundamental rights are binding upon the Member States not only when implementing Union law but also when derogating from their Treaty obligations.

Article II-52 – Scope and interpretation of rights and principles

1. – 4. Unchanged

5. ~~The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by Institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They~~ **Without prejudice to Article II-51 and the remaining provisions of this Article, to the extent that provisions of Title IV of this Charter require implementation by Union law or national laws and practices in order to be effective, such provisions shall be cognizable in the interpretation and application of such laws and practices and in ruling on their legality under this Constitution.**

Comment

*The current version threatens to undermine core fundamental rights provisions that have been enforced by the ECJ. For example, the equal pay "principle" may hereby be rendered non-justiciable, contrary to the *acquis*. In order to make sense of the Article II-52, par.5, we must read it together with Art. II-51, which sets for the basic duty to implement. In other words, if a MS fails in its obligation to translate a principle, such as equal pay, that principle may nonetheless yield judicially enforceable rights.*

Our primary suggestion would be simply to strike Article II-51 par. 5 in its entirety, and allow the courts to decide, on a case by case basis, the extent to which any given right is justiciable. Short of striking this paragraph, we suggest revising the paragraph as noted in order to clarify the extent to which provisions of Article IV are justiciable.

Article II-53: Level of Protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by

international agreements to which the Union or all the Member States are party, including the European Convention of the Protection of Human Rights and Fundamental Freedoms, ~~and by the Member States' constitutions.~~

Comment

*The current version simply goes against the *acquis*.*

Part III The Policies and Functions of the Union

Title IV The Functioning of the Union

Article III-282

~~The Court of Justice shall not have jurisdiction with respect to Articles I 39 and I 40 and the provisions of Chapter II of Title V of Part III concerning the common foreign and security policy.~~

~~However, the Court of Justice shall have jurisdiction to rule on proceedings reviewing the legality of restrictive measures against natural or legal persons, adopted by the Council on the basis of Article III 224, and brought in accordance with the conditions laid down in Article III 270(4).~~

Article III-283

~~In exercising its competences regarding the provisions of Sections 4 and 5 of Chapter IV of Title III concerning the area of freedom, security and justice, the Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security, where such action is a matter of national law.~~

Comment

We have generally refrained from making proposals on Part III, but we make an exception with Articles III-282 and III-283, which touch upon the very essence of the judicial function and of a European Union that presents the rule of law as one of its central values. These limitations on the jurisdiction of the Court are not acceptable from the point of view of the rule of law. The Court should be competent in the field of CFSP as a matter of principle and it should be trusted to modulate itself the degree of its intervention through a “political questions” doctrine. Article III-283 is a contradictory provision in legal terms, as the Court does not have in any event jurisdiction to review acts of the Member States in the context of the preliminary procedure. The provision would be dangerous if its defective wording were interpreted as a limitation on the jurisdiction of the Court to rule on acts of Community law that have a bearing upon the operations mentioned in the provision, in fields in which fundamental rights are always involved and in which judicial protection is an essential element of the rule of law.

Part IV: General and final provisions

Article IV-3

Legal continuity in relation to the European Community and the European Union

The European Union shall succeed to all the rights and obligations of the European Community and of the Union, whether internal or resulting from international agreements, which arose before the entry into force of the ~~Treaty establishing the~~ Constitution by virtue of previous treaties, protocols and acts, including all the assets and liabilities of the Community and of the Union, and their archives.

The provisions of the acts of the Institutions of the Union, adopted by virtue of the treaties and acts mentioned in the first paragraph, shall remain in force under the conditions laid down in the Protocol annexed to the ~~Treaty establishing the~~ Constitution, **insofar as they are compatible with**

it. The case-law of the Court of Justice of the European Communities shall be maintained **in full with regard to those provisions and acts of European Community and European Union law the content of which is not substantially affected by the Constitution**—as a source of interpretation of Union law.

Comment

Acts of secondary law may only remain in force insofar as they are compatible with the Constitution. If continuity and legal security are to be preserved, the case law of the Court should be maintained in full, not simply as a “source of interpretation of Union law”. It is indeed the authoritative interpretation of European Community law and in this sense a source of law proper, not just a source of interpretation. The current continuity clause could open the door to unwarranted jurisprudential changes. This more stringent continuity clause is therefore needed. We prefer our own formulation, finally, to that proposed by the Working Party of IGC Legal Experts (document of 6 October 2003, CIG 4/1/03, pp. 498-499), which could be too complicated for its actual aim, and refers to the case law as providing an “authentic interpretation” of the law – which is incorrect in legal terms.

Article IV-7 - Procedure for revising the Treaty establishing the Constitution

1. The government of any Member State, the European Parliament or the Commission may submit to the **European Council of Ministers** proposals for the amendment of ~~the Treaty establishing the Constitution~~. The national Parliaments of the Member States shall be notified of these proposals.
2. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments of the Member States, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene the Convention should this not be justified by the extent of the proposed amendments. ~~In the latter case, the European Council shall define the terms of reference for the conference of representatives of the governments of the Member States.~~ The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to the conference of representatives of the governments of the Member States provided for in paragraph 3.
3. **The European Council shall decide** ~~conference of representatives of the governments of the Member States shall be convened by the President of the Council of Ministers for the purpose of determining~~ by common accord the amendments to be made to ~~the Treaty establishing the Constitution~~. The amendments shall enter into force after **having received the assent of the European Parliament and** being ratified by all the Member States in accordance with their respective constitutional requirements.
4. If, two years after the ~~signature of the treaty amending the Treaty establishing the Constitution~~ **decision on the amendments to be made to the Constitution**, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, **the amendments shall enter into force on the first day of the 36th month after the decision, unless a majority of the Member States acting through the European Council decides otherwise** ~~the matter shall be referred to the European Council.~~

Comment

Four changes are involved here.

First, we propose to abolish the institution of the IGC since as an institution under international law it has outlived its purpose within the constitutionalised framework of the European Union. Now the European Council has been recognized as an EU institution, it can well take over its role.

Secondly, we propose to give the EP a role in the ratification process.

The third amendment is probably of greatest importance as it seeks to draw a proper way out of the (not unlikely) event that one or more Member States will be unable to ratify the amendments agreed upon, for instance because of a negative referendum outcome. The text proposed by the Convention

acknowledges this possibility, but remains extremely vague upon the way it is to be handled and basically leaves all Member States hostage to the few unable to ratify. Our proposal puts the burden of proof on the side of non-ratifying states and enables the other Member States to surpass their blocking power. Since this is a constitutional amendment procedure we suggest the decision rule to be based on states. Our proposal introduces a period of consideration of 12 months (length can be discussed) beyond the elapse of two years after the amendments have been unanimously agreed to, during which period the non-ratifying states either decide to ratify still or have explore possible alternative solutions in negotiation with the other Member States.

Finally, in line with the rest of the draft Constitutional Treaty, we insist that this article (and all other articles in Part IV) should refer to the "Constitution" instead of to the "Treaty establishing the Constitution". Once the Constitution is in force we are not amending the Treaty that established it, but the text of the Constitution.

A more radical option to further ease future revisions would be to identify those provisions in Part III that could be subject to a simplified revision procedure (for example, a majority of four fifths in the Council and Parliament with no ratification). The exercise is not easy, to be sure, but it could be essential to avoid having a Constitution that is too rigid and works as a straightjacket in a Union of twenty five or more Member States

The provisions of Part III that could be subject to a simplified revision procedure would be those related to policies which remain quite vague, limited and clearly perfectible in the current Treaty and in the draft Constitution (economic or social policies are a case in point). The normal revision procedure would block any change in these areas, the current state of which is not generally perceived as being satisfactory. But not all of Part III would be amendable through the simplified procedure: provisions that create individual rights or policies which are well established and developed would remain subject to the normal revision procedure.

If this course were taken, it would not be coherent to maintain the unanimity requirement in Article 17 (the so-called "flexibility" clause).

In addition, this could also be a way, perhaps, to simplify the Constitution itself if those parts were taken out of its text and included in "organic laws" that could be amended through the simplified procedure ("organic laws" which may also be used to include the existing "protocols", another traditional international law term that does not fit well in a Constitution).

Article IV-8 Adoption, ratification and entry into force of the Treaty establishing the Constitution

Add:

3. As soon as five-sixths of the Member States have ratified this Treaty, these states may decide by common accord to open negotiations with the remaining Member States in order to agree upon any other terms on which this Treaty will enter into force. All states shall seek, in a spirit of sincere cooperation, to bring such negotiations to a mutually acceptable conclusion.

Comment: Such a clause does not directly challenge the important principle of unanimous treaty ratification. It nevertheless opens up the possibility of avoiding stalemate during the ratification process