

**The European Convention:
Bargaining in the shadow of Rhetoric**

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The European Convention on the Future of Europe was initially presented as a turning point in the history of European integration. This paper argues that, although its composition was broader, its process more transparent and its rules more flexible than classic intergovernmental conferences, the Convention was not Europe's Philadelphia. Since it took place under the shadow of the IGC and under a leadership especially sensitive to the positions of big member states, the Convention reproduced by enlarge the logic of intergovernmental bargains. Nevertheless, some of the Convention's outcome – the most formal aspects of its draft treaty with less predictable distributional consequences– can be explained by the 'social norm' of constitutional deliberation conveyed by its president and supported by a majority of its members. The advent of constitutional politics, while consistent with prior political dynamics, is thus renewing the language of national interest convergence in the European Union.

A constitutional Convention does not come every day in the history of a polity. When in December 2001 at Laeken, the Heads of state and government of the European Union (EU) agreed on the creation of a 'Convention' with a broad and open mandate to prepare the next reform of the treaties, many claimed that this would be remembered as a turning point in the history of European integration¹. While no-one knew for sure what the outcome of this process would be called, enthusiasts already saw the dawn of a 'Constitutional moment' for Europe. Accordingly, the Laeken declaration meant that EU governments acknowledged the limits of intergovernmental conferences (IGCs) as the prevailing approach for revising the EU's basic treaties. Moreover, the story went, if the EU was to survive the most far-reaching enlargement in its history, it had to move from inter-state diplomacy to a politics more closely resembling domestic politics and adopt a new pact to make such evolution irreversible.

Was the inflated rhetoric born out? It is no surprise that when, a year and a half later the Convention adopted its ‘draft treaty establishing a constitution for Europe’ most members of the Convention hailed this outcome as a great success, the proof of the superiority of the ‘conventional model’. Others, on the contrary, argued that in spite of all the constitutional rhetoric it generated, the Convention had been no Philadelphia. This had been business as usual after the initial enthusiasm, as classic forms of bargaining between the governments took centre stage. As a result, the draft treaty did little more than codify and clarify the *acquis*, thereby demonstrating that the logic of treaty reform in the EU remains fundamentally unchanged (Moravcsik 2003).

The purpose of this paper is to address this conflict of interpretations and seek to characterise the current phase of European integration. Are we witnessing the advent of a new form of ‘constitutional politics’ in the EU? Beyond the traditional debate over intergovernmentalism vs supranationalism, can it be that the very fact of writing a constitution would itself make room for a new kind of European politics? We argue that there has indeed been a *Convention paradox*. On one hand, the negotiations within and around the Convention did not fundamentally differ from previous treaty reform. In spite of the Convention’s formal independence from the governments that had given birth to it, the broader range of actors participating in the process, and the public character of their deliberations, there is little doubt that the work of the Convention took place above all ‘in the shadow of the IGC’ with the familiar patterns of interests and strategies. And yet, on the other hand, the final result of the Convention would not have been imaginable as the output of an IGC. This, we argue was due to two contradictory factors: the ‘constitutional ethos’ pervading the proceedings of the Convention and the special brand of ‘forceful leadership’ to which it gave rise which combined in almost eliminating strict veto tactics.

WHY A CONVENTION?

In the narrow circles of those who follow the evolution of the EU, a ‘constitutional legend’ is born. It goes as follows. First, the famous speech of the German Minister for foreign affairs Joschka Fisher, in May 2000, resuscitated a ‘constitutional ambition’ for the EU which, since the failures of the 1950s, had been confined to the federalist groups within and around the EP. This speech gave rise to a broad stream of public reactions among European leaders and intellectuals, and popularised the idea that the EU treaties should be transformed into a single

and clear constitution. Second, the *how* followed the *what* and the EP, soon supported by the Commission and the traditionally federalist member states, used this context to promote its favourite arguments: since the IGC process is both inefficient and illegitimate, the next revision of the treaties should be prepared by a broader, more representative and open body. It so happened that the Convention which met in 2000 to write the EU's charter of fundamental rights offered an appealing alternative to the IGC method and a credible precedent. Indeed the contrast between its widely acclaimed results and the 'fiasco' at Nice within a month interval could not have been greater. Third, this idea was adopted by the Belgian government and became the top priority of its Presidency in the second half of 2001 leading to the Laeken Declaration..

This is an attractive story emphasising as it does the role of ideas and institutions. Beyond the headlines and collective myth, however, we must, as usual with European politics, examine the intergovernmental bargain which gave birth to the Convention if we are to explain its features.

The weight of interests

The anti-IGC coalition was not made up of 'idealistic' actors promoting a public and deliberative style of constitution-making in the name of legitimacy and popular sovereignty, against the opaque and interest-based approach of diplomatic negotiations. Instead, proponents of the Convention method from the Nice Summit onwards were those with an obvious interest in this process. For one, the European Parliament and the Commission who, until then, had been excluded from treaty changes² would obviously benefit from a process where their representatives would be associated as full and equal partners with governments. The prospect was all the more appealing if they believed that a Convention could be steered to produce 'an offer that cannot be refused' to governments giving them more influence than ever in the past³.

Second, the representatives of the small member states who supported the idea from the start had good reasons to think that such a process would strengthen their position. The Maastricht, Amsterdam and Nice negotiations had demonstrated that their capacity to shape the final outcome of the IGC was marginal (Moravcsik and Nicolaïdis 1999) with only a theoretical recourse to the veto. Within the framework of the Convention, composed of a hundred members, and where the representatives of the governments would have to negotiate with MEPs, commissioners and national parliamentarians, they believed the veto of the big

states would be diluted, while the range of opportunities to forge alternative coalitions – with MEPs notably – would be broadened. Obviously, such a prospect was only shared by those governments who wanted to go beyond the status quo – namely, the Benelux, Portugal, Greece and Finland.

On the other side of the fence, governments from bigger or more euro-sceptic member-states were less prone to launch a new Convention. In Britain and Denmark, the experience of the first Convention, created two years earlier to write the EU's Charter of fundamental rights, had left a bitter taste. These two governments had accepted, in June 1999, the German proposal to create this latter body believing it would be under their control. The German government had strongly promoted the 'Charter convention' in light of the Karlsruhe jurisprudence on the EU's fundamental rights deficit and the ensuing domestic support for an EU charter. As with other temporary holders of the rotating presidencies, this was also a chance to 'shape the history' of the EU in an area that mattered to the domestic electorate. The British government had initially pleaded for a 'body' composed of representatives of governments only, but the German government had reiterated its usual stance on associating MEPs⁴. In the meanwhile, the French government, who had been promoting 'parliamentary cooperation'⁵ since the early 1990s, argued that national parliamentarians should be part of this organ. The latter would also placate, it was hoped, British opposition. The compromise presented by the Finnish presidency merged the three options – and added that the Commission would also be represented – and it was accepted by its partners at the Tampere Summit in October 1999, apparently without tensions. The British government had required, and obtained, other 'guarantees': this first Convention was supposed to codify the *acquis*, not to invent new rights; and the decision on the charter's legal status would be left in the hands of the governments.

Despite these precautions, the British and Danish governments realised one year later, at the Nice Summit in December 2000, that they had underestimated the autonomy of this first Convention. The 'conventioners' had adopted a full-fledge Charter of Rights, which in large parts bypassed the *acquis*. And although concessions had been made to the British government's representative⁶ they knew that the symbolic strength of this charter would be important, and that it would be difficult to resist for a long time the demands of most governments for incorporating the Charter in the treaty – and thereby give it full legal force. With such a recent reminder of the power of 'unintended consequences' (Pierson 1996) in the Union, the British and Danish governments were unwilling, in December 2000, to accept a new Convention that would prepare the next IGC.

Other governments were reluctant too for their own domestic reasons. Apart from the small federalist countries, only Germany supported this idea at that time. Joschka Fischer's speech had resuscitated constitutional debates in the EU and more specifically, the German government thought of itself as the 'father' of the Charter and of the 'Convention method' making its reproduction an even greater testimony to German farsightedness. There were also more pragmatic calculations: Germany had abandoned its institutional claims in Amsterdam and Nice (smaller Commission; elected president of the Commission; more proportional weighted voting) because they had calculated that they would get them before the next wave of enlargement. And of course, Chancellor Schroeder was keen on collecting electoral points rather than leave the European idea, still more popular in Germany than anywhere else in Europe, in the hands of the Greens and the Conservative opposition. Not least, the likely inclusion in a constitutional text of something akin to a catalogue of competences would placate the vocal Länder, including the ever more popular Bavarian leader, Erwin Teufel.

Most of the other governments, however, were either reluctant or sceptical about this process. In France, President Chirac had felt it necessary to affirm his support for the 'constitutional prospect' one month after Fischer's speech (to avoid being seen as the weak part of the Franco-German engine), but the Prime Minister, Lionel Jospin, remained more aloof⁷, as did his Minister for foreign affairs and the Quay d'Orsay. Later on, the large support of the centre-left and the centre-right for the idea would constrain them to accept it. The Spanish and Italian governments were reluctant too: Aznar was unwilling to renegotiate what he thought he had won at Nice – the position of Spain among the big states in the weighting of votes and in the distribution of seats in the EP – and Berlusconi hesitated between the traditionally pro-European stance of his country's leading class and public opinion, and his own more 'pragmatic' position and inclination to support the UK line. The other countries' government oscillated between opposition fed by domestic Euroscepticism (Sweden, Austria) and apparent neutrality (Greece, Ireland).

Selling the Convention idea

How then can we explain the progressive broadening of a pro-Convention coalition leading to the Laeken Declaration in December 2001? Here, both ideas and strategies mattered.

The core idea driving the process was certainly that the most radical enlargement in EU history necessitated radical methods. 'Deepening in order to widen' had traditionally been a classic in the EU but this time the deepening called for a qualitative adaptive step.

Moreover, the vague but powerful call for democratising the EU called for, at a minimum, not only a revision of the content of the treaties, but also simplification and clarification of its form. And in light of this twin requirement, the alternative to a Convention – the IGC - had demonstrated its limits during the stalemates at Amsterdam and Nice. Instead, the precedent of the first Convention offered an alternative ‘model’ coherent with ‘constitutional’ issues, since it comprised European and national parliamentarians and operated in public. In spite of all this, it was far from clear yet that such an exercise of reappraisal ought to lead to an EU constitution.

Against this background, the Belgian government implemented a clever ricketing-up strategy. A year in advance M. Verhofstadt had decided that the priority of his presidency would be the ‘Laeken declaration’ launching a new Convention. Accordingly, he convinced his Benelux partners and the other three ‘founding members’ to support the adoption of a ‘declaration on the future of the Union’ as last minute footnote to the Treaty of Nice. Apparently innocuous, it called for ‘a deeper and wider debate about the future of the European Union’ and stated that ‘the Swedish and Belgian Presidencies ... will encourage wide-ranging discussions with all interested parties’⁸. The Belgians fought hard for a firm rendez-vous a year hence that would result in a declaration on future reform⁹.

As for the content of this future initiative, other member states balked at anything that may smack of a constitutional agenda. At the same time, could they be threatened by a ‘wide-ranging discussion’? Even the British led by Tony Blair were keen to be seen as a ‘reliable’ rather than an awkward partner (Menon 2003). As a result, heads of states committed to deal with four issues ‘inter alia’ namely: delimitation of powers between the EU and the member states, status of the charter, simplification of the treaty, role of national parliaments. Hardly a full blown constitutional agenda. As far as process was concerned, there was no mention of a Convention and the declaration insisted that debates would take place in a large variety of forums, most of which would be national.

Undaunted, the Belgian government proceeded to build on these initially vague commitments.

An ambivalent compromise

The issue was put on the back burner during the next, Swedish, Presidency which had other priorities (the three ‘e’s of employment, environment and enlargement) and did not in any case want to interfere with what was obviously by then the Belgians’ baby.

In contrast, the Belgian presidency was entirely geared at producing an historic 'Laeken declaration' reflecting their constitutional ambition for Europe. Not even the September 11th earthquake, which admittedly dominated the Presidency, succeeded in derailing the Belgian government in its plan. The key to its ultimate success could be described as a strategy of 'withering safeguards'. The Belgians needed to reassure reluctant partners, especially the British, but also the French and Spanish, that governments would remain in control of any future development, both collectively and individually¹⁰. Indeed this was the basis of a very explicit deal between the Belgian and British Prime ministers, Verhofstadt and Blair. Thus the first and most important safeguard consisted of creating a 'firewall' between a would-be Convention and the IGC to follow.¹¹ If there was to be a Convention, it would only be a preparatory body, all decisions remaining with the IGC. In this spirit, the British demanded that a clear and short deadline be imposed upon the Convention, so to allow enough time to lapse before the IGC. Most importantly, when the Foreign Minister, Louis Michel initially broached the topic at the start of the presidency, he indicated that the would-be Convention's task would simply be to identify 'options' to be settled by the IGC¹². It was on this basis that the idea of the Convention was accepted a month later as a matter of principle¹³. But the Belgians could not rest content with what they saw as a recipe for irrelevance. The experience of the Westendorp Group in 1996 had shown that, when the draft submitted to the IGC simply reflects existing divisions, it does not shape ultimate outcomes. Thus, once the principle of the Convention had been agreed, the Belgians reneged on their concession and chose to promote an open compromise¹⁴. Finally at Laeken, it became untenable even for the British to deny conventioners their freedom: they would themselves decide to propose a single consensual text or a set of options¹⁵.

Such open-endedness would be tolerable if governments were in control of the Convention itself and thus able to make sure its debate would take place 'in the shadow of the IGC' (read national vetoes). A second category of safeguards thus concerned the composition of the Convention, whereby, as with the first Convention, national representatives would make up for three quarter of membership. Hence the resistance to the European parliament's demand for equality with national parliaments – resulting in only 18 out of the 105 seats for the EP and Commission as the sole supranational bodies represented, including Eurosceptics among them. The only major difference with the first experience was equal representation for candidate countries. This could only please member states bent on reinforcing the weight of governments in the institutional system since candidate countries were seen as less prone to integration.

Here again, however, the composition safeguard was less fail-proof as it seemed. For one, the candidate countries were precluded from preventing the formation of a consensus. On the other hand, representatives from the two supranational bodies were bound to have disproportional weight, with more knowledge of EU affairs and more resources (working on the spot was bound to help) than their national counterparts. Perhaps most importantly, the biggest contingent, that of national parliamentarians, was the least predictable, with about a third of the representatives drawn from the opposition who could be more federalist, and less bent on national control (at least by the executive) than their government.

What then would be the mandate of the Convention? This third category of safeguards was spelled out during the final negotiations at the Laeken Summit and constitutes the bulk of the Laeken Declaration for which the Belgian presidency aimed to be remembered. In order to soften their potentially far-reaching character, the objectives assigned to the Convention were stated in the form of ‘questions’, the ‘questions of Laeken’ following an evaluation of the state of the Union¹⁶. A number of heads of states, however, including Chirac and Blair, were not fooled by such apparent humility. Indeed, the questions were bold, sometimes more than implying the ‘right’ answer to be expected. The British government in particular proposed about 100 amendments, such as downplaying the diagnostic of the Union’s crisis or deleting a sentence criticising the ‘deadlocks of unanimity.’ They also demanded a broadening of the range of questions to include, beside the rather federalist options put forward by the Presidency, more intergovernmentalist perspectives. Nevertheless, in its breath and call for revisiting the fundamentals the final Laeken declaration reads more like a constitutional agenda than the basis for a classic treaty reform, and in any case goes much beyond the restricted list of left-over agreed at Nice.

A fourth and final safeguard became the governments’ ultimate trump-card and the object of intense last-hour negotiations at Laeken, when they insisted on nominating the Chair of the Convention instead of letting this matter to the conventioners. When Jacques Chirac, backed by Tony Blair and Gerhard Schroeder, requested the nomination of Valéry Giscard d’Estaing, many of his counterparts from smaller countries (Benelux, Portugal, Finland, Greece) feared a big country bias¹⁷. They turned out to be right. But while this last safeguard – in effect, the expectation of loyalty on the part of the chair - was to prove most valuable for governments bent on retaining control of the process, it was no guarantee against ‘Constitutional ambition’ either.

In sum, each of the four safeguards extracted by the most sovereignist governments as preconditions for launching a Convention (leeway for the IGC, composition, mandate, Chair)

were quite obviously lacking in bite even before the Convention had started. Why did everyone say yes in the end? For one, like many Summits in the history of the EU, the Laeken Summit was a typical case of an ‘ambivalent agreement’, i.e. an ‘agreement based on preference differences and belief differences that cancel each other’ (Elster 1998: 101). Federalists and sovereignists each chose to believe that their favoured outcome was made more likely by the initial set up. Yet, contrary to other pre-IGC launch, inter-governmental bargaining would only be one factor in determining the ultimate outcome. All sides knew therefore that the game was very open.

While the most powerful states in the EU, especially France and Britain, were obviously critical players in setting up this game, it is hard to see how and why these states would have chosen such an untested route were it not for two additional factors. First, prevailing ideas, from populist clichés to expert opinions, made a straight ‘no’ increasingly unsustainable throughout this period. Accordingly, the democratic deficit suffered by the Union could no longer be dealt with through the discredited IGC process, calling as it did for radical simplification of the treaties (Closa, 2004; Shaw, 2003). How could governments be seen to say no to broadening and opening up the debate? Second, the Belgian Presidency leveraged this context for all its worth and acted skilfully as a ‘policy entrepreneur’ by reassuring reluctant member states that credible safeguards were in place while at the very same time maximising the flexibility allowed by those same safeguards.

Indeed, the Belgian strategy paid off. During the first months of the Convention, the main ‘guarantees’ obtained by the British and French governments turned out to be very fragile (Magnette 2004). With the support of the vast majority of the conventioners, President Giscard announced in his introductory speech that the Convention would try to agree on a single text rather than options, that this text would have a ‘constitutional’ shape, that it would include all aspects of EU action even those not mentioned in the Laeken declaration, and that he understood the calendar as an indication more than as an obligation. The message was clear: like most Conventions in history, this Convention had enough legitimacy not to feel constrained by firewalls and mandates thus affirming its autonomy vis-à-vis its creators. This did not mean, however, that government control was lost. Indeed, after two or three months of vague and slow discussions christened the ‘listening phase’, it became clear that if neither the prior safeguard (eg mandate) nor the end game safeguard (options) gave them what they wanted, governments would exert control during the process itself through their representatives in the Convention, who started to emerge as the leading figures of this

assembly. Their presence and stance reinforced by the strategy of the Chair ensured that when it came to real business, the Convention would decide in the shadow of the IGC.

FORGING COMPROMISES: THE PERSISTENCE OF INTERGOVERNMENTAL BARGAINS

It was reasonable to expect that the specificity of the Convention method would lead to a broader spectrum of preferences than in conventional IGCs. For one, since governments in Europe are usually the result of coalition politics, they are likely to be more moderate on EU issues than members of their national parliaments. Indeed, there were in the Convention a dozen of ‘sovereignist’ representatives from national parliaments whose views are usually not heard in IGCs. At the other end of the spectrum, some of the MEPs were more radically federalist than any. More structurally, transnational political parties had a greater potential role to play in structuring positions in an assembly where three fourth membership was made up of parliamentarians, eg more overtly partisan than their executive colleagues. At the same time, the fact that each “component” was to form part of a final consensus, gave them a potential collective veto.

Yet, none of these factors played a significant role in the end. If there was a change in the preference patterns compared to previous IGC, they did not translate in bargaining power. Outliers turned out to be just that, broadening the spectrum of expressed opinions, enlivening the debate but not changing the median position in the Convention on any significant issues. For instance, as it became clear in the last phase of the negotiations that the sovereignists gathered in the ‘Union of democracies’ would exercise their exit option, there was even less incentive to take their view into account. Neither political parties, nor the components were able to develop coherent visions and positions, except in a few specific instances. Components managed to unite behind ‘corporate’ interests and to this extent promote changes that had eluded IGCs (protocol on national parliaments, increased scope of co-decision for the European Parliament). Trans-national parties pushed for symbolic ideological gains (mention of the ‘social market economy’ for the socialists) leading in a few cases to a left-right debate in the Convention (dominated by the PSE, EPP, with the liberals as a middle ground and the Greens and assorted left almost absent). But the big parties only had a superficial unity and on most issues were unable to overcome their divisions and build a coalition to go beyond the status quo. For most representatives, party political or component identity were not the primary determinant of their positions in the Convention. They themselves emphasised the

role of party groups as channels to exchange information (Peres 2003) rather than as forums to coordinate positions.

Instead, two classic cleavages dominated the debates in the Convention as well as the parallel debates taking place at the national levels (Magnette and Nicolaidis, 2003). First and foremost, the traditional ‘federalist’ (or ‘supranationalist’) vs. ‘intergovernmentalist’ cleavage emerged as clearly and powerfully in the Convention as it had in European politics to date. This was true both on the front of institutional reform and on the substantive policy front. On the policy front, federalists fought the same incremental battle as they had since the beginning of the Union, seeking to extend the reach of QMV voting and co-decision by for the European Parliament. Contrary to what might have been expected from recent developments in the European Parliament voting patterns (Hix, 2001), this cleavage far outweighed the left-right divide in determining substantive positions. The second cleavage dominating the Convention was also familiar to European politics, namely that between big and small countries. But never before had it been so prominent and to some extent this second cleavage overlapped with the first, since most of the small member states take federalist stance (with the exception of Denmark and Sweden). How then did the members of the Convention reach a ‘consensus’? Jon Elster argues that when ‘the initial distribution of opinion falls short of consensus’, the actors ‘can go about [taking decisions] in three different ways: arguing, bargaining, and voting’ (Elster 1998: 5). This is an exhaustive set of option if we assume that in spite of asymmetries of power and resources, players will not resort to more coercive means of forcing outcomes¹⁸. Since voting was formally excluded as a mode of decision-making, the conventioners were condemned to argue and to bargain¹⁹.

Bargaining: under the shadow of the IGC

It is no surprise that the bargaining space – that is the set of settlements potentially acceptable to the Convention – should have been bounded by the positions and bottom lines of the most powerful member states. All Convention members were well aware that they were negotiating in the shadow of the IGC to follow and the vetoes that could be wielded therein. In fact, the representatives of the governments loyally defended their interests – as did most of the national parliamentarians nominated by the governments²⁰; the other members, anticipating the IGC, adapted their behaviour to this constraint.

In this context, conflicts were dealt with through classic forms of bargaining. The logic of negotiation, and its outcome, were primarily governed by the initial distribution of

preferences and their intensity. Although we cannot offer an exhaustive demonstration in this paper, some key examples can illustrate this hypothesis. We divide the issues in four categories.

First, a number of *non controversial issues* commanded consensus early on. Hence, regarding the delimitation of powers between the EU and the member states, all the members agreed that the existing system required ‘clarification’. Since only a very small federalist minority wanted to shift competences upwards, and only a very small minority downwards, a consensus rapidly emerged around the objective of an ‘improved status quo’. The draft treaty establishes a typology of competences clarifying the present situation. The same logic governed the discussions on the role of national parliaments and on the implementation of the principle of subsidiarity. Although most MEPs and the representatives of the federalist-leaning countries initially opposed any innovation in this field, fearing an erosion of the powers of Brussels, it was hard to resist demands supported not only by a large majority of the national parliamentarians but also by a large segment of public opinion. These were not Convention innovations: they had been the object of on-going discussions since Maastricht, and had received growing attention during previous treaty changes²¹.

Second, and at the other end of the spectrum, there were indeed *highly controversial issues* where agreement as a result was skewed in favour of the status quo²². Thus, most Polish and Spanish representatives, supported by Christian democrats and conservatives from other member states, requested a mention of Europe’s ‘Christian heritage’ or a mention of God, in the draft treaty. This old recurring question, already discussed by the first Convention on fundamental rights, gave rise to a very strong opposition from France and other countries, and thus never made it into the draft²³. The same dynamic occurred with another highly symbolic issue: the reference to the EU’s ‘federal’ nature. Strongly opposed by Britain and other governments from countries with large Eurosceptic constituencies it became clear early on that, like in Maastricht a decade earlier, the ‘F-word’ would not make it into the text. The Presidium did test the waters with its first draft but, after Giscard had heard the oppositions, he decided to mention instead the rather innocuous ‘Community way’.

Third some issues equally gave rise to opposing *coalitions with intense preferences* but the strength of those opposing the status quo made change impossible to avoid. The reform of the EU’s institutional balance, at the core of the Convention’s mandate, clearly fell in this category. As discussed above, in this area, initial ideological polarisation gave way early on to a much more pronounced split between large and small countries. With the exception of Germany, the large states sought to strengthen the role of the European Council – and thereby

the role of the governments in the decision-making process. Most of the small states defended existing EU institutions and the rotating presidency of the Council. Germany, driven by ideological concerns, promoted existing EU institutions, sought to strengthen the Commission, without however defending the rotating presidency. A Franco-German compromise made public in January 2003 sought to reconcile the two views by combining the French demand for an EU Council President with the German desire to see the Commission president elected by the parliament (Magnette and Nicolaidis, 2003). A coalition of small states continued to oppose this prospect, while the British governments, backed by Denmark and Spain, remained reluctant to strengthening the EP-Commission pair. The final compromise – reached through very typical intergovernmental bargains where the MEPs stayed on the bench – reflected the Franco-German proposal²⁴. As Peter Hain, the British government representative had put it to his Parliament some weeks earlier:

‘in the end there will have to be an agreement and a necessary process of adjustment by all parties. We have, for example, been willing to look at, with certain very big safeguards, elect the Commission President through some method, provided that does not involve being hostage to a particular political faction and provided that the outcome is one that the Council can accept. So it is not something we sought and we remain deeply sceptical about it, but if, as part of the end game, getting an elected President of the Council, which is very much a priority for us, involves doing something with the Commission President with those very important safeguards that I mentioned, then that is something that we might have to adjust to’²⁵.

Finally, as with previous IGCs, there were a wide range of issues, where not only the *distribution of preferences but also their intensity was asymmetrical* and the agreement reached through classical exchanges of concessions. When some member states realised that they were isolated on points that could not easily be presented as ‘red lines’, and unable to build a coalition to oppose a reform supported by a very large majority, they made unilateral concessions²⁶. The negotiation on the status of the Charter of fundamental rights illustrates this case. Most members made clear, from the very beginning, that they wanted the Charter to be incorporated in the new treaty. Their position was primarily driven by ideological concerns: to placate the critics of the EU. Britain, as well as Denmark, were not enthusiastic about this option because they feared a catalogue of fundamental rights could be used by EU activists to expand EU competences through litigation and was in any case dissonant with

British civic culture. But they saw that a simple ‘no’ could lead to a deep crisis between Britain and its partners, and deprive the British government from the ‘gains’ it saw in the treaty. So they resorted to demand stringent conditions for their assent²⁷. The same kind of bargain occurred on the redefinition of ‘qualified majority’ used for the votes in the Council. While a large majority supported a simplification of the system, this was very strongly opposed by Spain and Poland who would lose weight under the new system²⁸. Unable to forge a coalition against this reform, they extracted a minor concession: the Nice system would remain in force until 2009²⁹.

Arguing: the rhetoric of simplification

If bargains were at its core, what if anything was different about the so-called “Convention method”? To what extent did it heed the expectations of constitutional scholars who argue that the publicity of the debates in convention-type settings and indeed the deliberative nature of such settings can even ‘shape outcomes independently of the motives of the participants’ (Elster 1998)? Did we witness Elster’s ‘civilising force of hypocrisy’ leading to the kind of comprehensive agreements unachievable through classic smallest common denominator bargaining?

Here, rather than drawing general conclusions, which most often could not be empirically demonstrated, it is possible to emphasise distinctions which may help understand under which conditions deliberation could work. First, in terms of actors, it seems necessary to distinguish between at least two types of Convention members. On one hand, most members either had specific mandates from their capitals or strong ideological agenda. On the other hand, there were some members who appeared more open to learning through argumentation, either because they came from new member countries with less entrenched positions or because they cared most about one or two issues (role of regions, role of parliaments) and did not have strong views on others. But the latter did not define what negotiation analysts call ‘the zone of possible agreements’. Thus, while there is little doubt that in this Convention as in others, powerful ‘social norms’ against naked appeals to interest or prejudice induced members to disguise their interests and generally justify their proposal by appeals to the public interest, there is little evidence that debates led actors ‘that mattered’ to actually *modify* their preference. In between these two alternatives, however, a certain ‘constitutional ethos’ led many members to openly rethink the kind of outcomes that, while compatible with existing

preferences, would nevertheless constitute a change significant enough to warrant the very label of ‘constitutional’ conventioners they had now acquired.

Second, one can also distinguish the successive stages of the Convention. To be sure, during the listening phase, the conventioners did seem to examine thoroughly every possible options, while listening to each other and appealing to the common good (Magnette 2004). But as soon as, by the fall of 2002, concrete issues were put on the table, most government representatives started to openly defend their brief, build coalitions and invoke their veto in the pending IGC. The pendulum had moved back to classic forms of diplomatic bargaining.

Third, and most importantly, the nature of the issue at stake largely determined the oscillation between bargaining and arguing. As could be expected, deliberative dynamics played a role for issue-areas where preferences were less intense and consequences less predictable, that is neither institutional nor policy but essentially ‘constitutional’ issues. These include the definition of the features of the EU legal order (merging of treaties and ‘pillars’, legal personality of the Union, status of the charter, codification of the primacy of EU law over national law), the legal form of the treaty’s basic norms (typology of competences, hierarchy of norms, correspondence between norms and procedures) and the ‘constitutional process’ itself (the Convention method). According to the Laeken mandate, constitutional issues had to be dealt with by the Convention, at a minimum under the guise of ‘simplification’ a notion which served as a conceptual anchor for seeking agreement, providing a common analytical lens and a common language on which deliberation could be based. Such emphasis on simplification played both a positive role, helping to ‘constitutionalise’ the legal order, and a negative role, precluding the creation of new institutions³⁰.

Specifically, Giscard and the Secretariat working under him used this theme to probe conventioners into making legal reforms that had been left out of previous IGCs. In several of its notes the Secretariat stepped beyond the remit of a ‘description’ and in the realm of advocacy. One example, among many others, can illustrate the Secretariat’s attitude: ‘these procedures are so complex that they are difficult to understand. Their course can often only be followed by specialists. Citizens demand greater simplicity. They want to be able to grasp what is at stake, and to know how the Union makes legislation’³¹. Purporting to raise questions for debate, these reports actually made irrefutable statements: ‘Is this increase in the number of instruments a factor of legal uncertainty, and one of the reasons for the opacity of which the Union stands accused? (...) Is the lack of a coherent system of decision-making procedures and their great diversity an additional cause of complexity and opacity?’³².

As conflicts of interpretation and oppositions of interest increased in the drafting phase, the quest for simplification became an undoubtedly shared purpose reflecting a common belief in the Convention that the Union's complexity and opacity was one of the greatest obstacles to its legitimacy. The most federalist and the most Eurosceptic members who disagreed on everything, agreed on this point. In this climate, the Working groups set up to study the questions of the legal personality of the Union on the one hand and the simplification of the instruments and procedures on the other hand worked rapidly, without being affected by internal tensions. It is worth noting that the second group was considered so innocuous that only three representatives of the governments – of which two were from candidate countries – belonged to it. Both groups were chaired by Giuliano Amato, former head of the Italian cabinet, professor of public law and vice-president of the Convention, who managed to impose formal reasoning in the discussions, suggesting to approach the question of simplification by analogy with national constitutional systems – a type of intellectual projection familiar to EU circles (Weiler 1997, Kohler-Koch 2000, Nicolaidis and Weatherill 2003, Baquero Cruz 2003).

On this basis, he convinced the members of his working group, and later the plenary, that a simpler hierarchy of norms, inspired by national constitutional traditions, should replace the existing EU system. He also vigorously promoted the necessity for a stricter correspondence between legal norms and relevant procedures. Thus, a 'legislative act' should be adopted by QMV in the Council and by co-decision with parliament, which in turn implied generalising this procedure to hitherto excluded fields. And of course there had been good political reasons for such exclusion. So the rationale for this change in the Convention was not that QMV would be more efficient, or that the EP might improve the quality of the decisions, but the quest for simplification. The same logic governed the discussions on the merging of the treaties, the suppression of the pillars and the definition of the EU's legal personality. Formalist reasoning also explains why a vast majority supported the codification of the principle of primacy of EU law and the incorporation of the Charter in the new treaty. In this range of topics the reasoning of the conventioners was in large part dominated by a 'formalist' pattern of thought, which made 'rational deliberation' possible (Magnette 2003). Here, formalist arguments clearly counter-balanced self-interested bargaining.

Many members, however, resisted the pull of this kind of arguments, aware of the impact such a quest for simplification might have on their interest. But more often than not, they themselves used rhetorical device to do so, remarking for instance that complexity is often the price to be paid for democracy or that it is a necessary feature of a multi-level EU. The

rhetoric of simplification also backfired to the point of generating distrust with regards to institutions when used to support positions which went well beyond the task of clarification³³. Thus, the rhetoric of simplification offered a minimum consensus on the diagnosis, and helped remind members of their ‘noble task’ when contemplating potential failure, but its practical impact remained limited. The fusion of the treaties, the suppression of the pillars, the generalisation of the co-decision and QMV in legislative matters, the incorporation of the charter, are important legal and symbolic changes, especially in light of the resistance to change in these areas during prior IGCs. Nevertheless, the rhetoric of simplification only fostered reform where no crucial issue of balance of power was involved and did not help move national bottom lines such as in the case of competences or institutions.

Institutional mediations?

Did the Convention’s institutional framework influence the final outcome? Since the process of the Convention had not been described in details by the Laeken declaration, it was shaped by the Presidium – and more precisely its President. Giscard chose to adopt a weakly institutionalised and flexible process, with the tacit agreement of most members. He divided the life of the Convention into three phases: listening, studying and proposal.

During the first three months members were invited to ‘present their views on the EU’ and to listen to civil society associations. On this basis, the President presented what he called issue-specific ‘synthesis’ to reduce the scope of discussion, and set up ‘working groups’ on controversial topics to ‘study’ the subject and suggest reforms. Finally, after the reports of the working groups had been discussed in plenary sessions, the Presidium presented actual draft articles to the Convention which were supposed to mirror the substance of working group reports and the reactions of the plenary sessions. Members then suggested amendments (and they did! With 1500 amendments solely for the first 15 articles) leading to revised proposals by the Presidium. But, crucially, while the Convention was supposed to remain ‘sovereign’ in this process, the Presidium acted as the interpreter of the dominant view and was the sole drafter of actual text presented to the floor. In May 2003, at the end of this piecemeal work, it submitted a full draft treaty to the ‘components’ of the Convention and made ultimate adjustments where this appeared necessary to reach an agreement, before, finally, ‘taking notice’ of the consensus on June 13, 2003.

The sequencing of the debates probably helped reach this consensus by limiting the complexity of multi-party multi-issue bargains reached through linkages across issues.

Although as with most negotiations, the conventioners laboured under the assumption that ‘nothing is agreed until everything is agreed’ it proved very difficult, in the end, to exchange concessions across issues (such as institutions vs policies, a classic in IGC, or compensations for ‘difficult’ concessions such as Britain with the Charter). And while this prevented the final outcome from being hostage to a few issues, it may also have prevented useful trades between actors with different intensity of preferences.

We argue that, due to both its hybrid character and the style of its President, the Presidium played an important role in shaping the final outcome, by applying the ‘single negotiating text’ approach and bypassing threats of veto. It leveraged its hybrid nature as a secretariat/mediator and as a college to the fullest. On the one hand, like presidencies in IGCs, it acted as organiser and as mediator with the support of the Convention’s Secretariat, seeking to forge a compromise on a step-by-step basis. But it chose to do so, not by leaving options open until a last minute package deal but by submitting a single negotiating text (from the initial draft in the fall to the final set of new versions). This text in turn became the reference or the status quo, with the burden of proof being put on the dissenters. More often than not, after submission of the initial draft articles, the Secretariat in its explanatory comments was able to pit one set of amendments against another, and represent its own initial version with only cosmetic alterations; this was especially true in cases where opposing amendments reflected intense and opposing preferences towards *more* or *less* integration such as the distribution of competences or with the decision procedures associated with policies

Since on the other hand, the Presidium was a collective organ, a college rather than a single presiding member state it had enough authority to impose its viewpoints, as ‘consensual’ or at least ‘the best possible compromise’. As a sample of the Convention, characterised by the same cleavages and tensions, it was known to arrive at its own compromise through the same mixture of bargaining and argumentation.³⁴ This made it harder for the rest of the Convention to question its proposals. Moreover, its President mastered the art of communicating with the broader media at regular press conference which he generally attended alone, sometimes presenting his own position as that of the Presidium, and often presenting the latter as that of the whole Convention. In this context, potential vetoes were forestalled (such as that of the group of 16 small and medium size countries on the issue of the Council presidency) and actual ones ignored (as with the sovereignists’ Union of democracies proposals).

These tactics worked in reaching a ‘consensus’ which might have eluded a traditional IGC. But they also left a definite ‘bad taste’ among many delegates, which in the end, might have deprived the Presidium proposal from the kind of legitimacy that a more negotiated text

would have. By debating in absolute secrecy, without displaying the textual basis for its own sessions, the Presidium conveyed the idea that the grounds for its decisions were not purely normative. Moreover, within the Presidium itself, the Chair acted with an iron fist, controlling relations with the Secretariat and often submitting proposals to his twelve colleagues a few hours before discussion. By requiring that once a topic had been tabled in the Presidium, members were not allowed to present amendments for debate in the plenary, he sought to signal consensus even where it did not exist. This approach was tested to its limits in the case of the institutional provision where the Presidium was unable to reach a consensus after long acrimonious debates and Giscard chose to present his own proposals as that of the college while recognising that members would probably relax his solidarity rule. It is little wonder then that these provisions never commanded the support of a majority of member states in Convention, with obvious implications for the IGC.

More generally, the strategy of the Praesidium consisted in part in eroding the effectiveness of the safeguards some of the member states had fought so hard over in the lead up to the Laeken declaration. Not only would Giscard not contemplate presenting options in cases of obvious forthcoming disagreements in the IGC but the message that the draft Constitution was not meant to be tinkered with by national governments was underpinned symbolically by a solemn signing the text by all conventioners in the last session in July. Moreover, the mandate of the Convention came incrementally to be read as “Constitutional” with the mention of “draft treaty establishing a [Constitution for Europe]” included extremely discretely in the last drafts produced by the Convention. And finally, in the hours leading to final compromises in June, the Praesidium chose to bypass the strong opposition by small and medium states, highlighting instead the need for balance between the different components of the Convention.

The dynamics of the Intergovernmental Conference that followed in the Fall leading to the failure of the Brussels Summit in December 2003 revealed the limits of this strategy. For one, heads of states adamantly refused for Giscard to be part of the IGC. The Convention draft was revisited in a number of important issue-areas including on competences, defense, justice and home affairs and above all of course, institutions. Most importantly, the provisions on institutions presented as “compromise” did not withstand the test of “real bargaining”. After the initial divide between the “big” vs other member states, the divide between “big” and “almost big” came to the fore. While France and Germany strongly supported the Convention text which strengthened their own power, Spain and Poland continued to oppose the double

majority (50 percents of states, 60 percents of population) that would replace the system of weighting votes agreed at Nice after 2009, while a majority of the small states refused to abandon their ‘representation’ in the Commission. Although a dozen of possible compromises were put on the table, the Italian presidency was unable to craft an agreement during this final Summit. The so-called “consensus” arrived at in the Convention, without real deliberations and by- -overlooking the strong opposition of two medium states and the great lack of enthusiasm of all small states proved very fragile to say the least³⁵.

CONCLUSIONS. MUCH ADO ABOUT NOTHING?

The story sketched out in this paper will be told and retold in support of different theories of integration, ideological views and personal aggrandisement. Our goal was merely to make a simple argument, namely that despite the originality of its composition and procedures, the European Convention did not substantially differ from previous rounds of treaty reform in the EU, except in areas marked by a high level of formalism that could be fitted under the rubric of simplification. In the latter case, the Union was ripe for reform and the Convention appeared to be a close to optimal mechanism to hammer out such reform by providing a deliberative space where arguments in favour acquired the force of powerful social norms. Strategic patterns of negotiation were not absent but at least subdued and ideas mattered – in particular constitutional mimetism. But the largest part of its proceeding – related to the institutions and policies – was dominated by bargaining between the representatives of the governments. Obviously, all convention members knew that they were negotiating under the shadow of the forthcoming IGC and therefore of individual member states vetoes. This in turn had two effects on positions in the convention: it strengthened the hands of member state representatives but it also allowed some of them (especially small states and new members) to acquiesce without enthusiasm in the end, knowing that the final result would be revisited.

But, to close the circle, bargaining did itself take place under the shadow of rhetoric. When conventioners met, they needed to be seen to deliberate like free, equal and rational actors, creating a year and a half of broad ranging debates on the future of the EU unprecedented in its history.³⁶ Even if they did so under the shadow of the veto, this deliberative ethos did contribute to resolving some constitutional issues in ways unlikely to be revisited by the IGC.

Were governments who had reluctantly agreed to the Convention in the first place under the reassurance of safeguard vindicated in their initial position? Or did the more ambitious

promoters of a 'constitutional moment' reach with the day in the end? Clearly, the IGC ended up being bound by the Convention, as much as the Convention was constrained by the IGC. There is little doubt that the safeguards initially on offer continued to be withered away by the Convention itself. Although tempted at various points to offer options to the IGC, the Convention managed to produce a single text greatly due to the iron will of its President. Its deadline was pushed from March to June and then July leaving very little time before the opening of the IGC. There was a crucial price to pay for the choice of a president chosen for his allegiance to governments: his disregard for smaller states and his even greater allegiance to the legacy of the Convention itself, hence his crusade against 'detricotage' albeit by the very same governments who had anointed him. This stance on 'untouchability', supported by France and Germany, was to open a new cleavage unforeseen at the beginning of the Convention itself: that between founding members and the rest along side small and big countries. Finally and perhaps more importantly, it proved impossible to resist the self-proclamation by the Convention that it was indeed a Constitutional convention. Although the issue had carefully been left open at Laeken, this was one of the few instances where the interests of all Conventioneers converged: their role in history was at stake.

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¹¹ This was the leitmotiv of the discourses made during the Convention's inaugural session, on 28 February 2002. This argument was echoed in many editorials in the next days.

² Although two members of the EP had been nominated as members of the 'Westendorp group' which prepared the negotiation of the 1996-97 IGC. The MEPs themselves acknowledged that this minimal form of participation did not give them the opportunity to influence the outcome, since this group only identified 'questions' and 'options' and all decisions were left to the IGC.

In 1994, before the former enlargement, some MEPs had also suggested the EP should threaten to refuse its 'assent' to the treaty changes to force the governments to adopt the reforms they advocated (Bourlanges-Dury report 1994), but they could not form a majority within their own assembly. Their threat were thus far from credible.

³ Research on previous treaty changes conclude that the influence of the Commission and of the EP on IGCs simply cannot be demonstrated. See (Pollack 1997). For undemonstrated hypothesis about the role of ideas and institutions, see the special issue of the *Journal of European Public Policies*, 2002, 9/1.

⁴ Apart from the weight of an implicit constitutional doctrine which states that charters of rights should be written by representative assemblies, not by diplomats, this point was also built on the fact that, in 1989, the EP had adopted a 'declaration of EU rights' and launched the debate on the codification of these rights, until then only present in the Court's jurisprudence.

⁵ The support for the participation of national parliamentarians in EU politics had been very broad in France since the early 1990s, ranging from the left to the right and as strong in the two heads of the executive as in the Parliament. This can be seen as a projection of France's own constitutional model (where the Senate indirectly represents the sub-units). On this issue, see (Costa and Latek 2001).

⁶ These concessions were, on the one hand, a definition of 'social rights' as principles rather than fully justiciable rights, and on the other hand the so-called 'horizontal clause' defining the scope of this charter's legal validity and designed to avoid the extension of EU competences through jurisprudence about rights.

⁷ Jospin's speech on the Future of the EU in May 2001 only came after a long period of hesitation and was generally interpreted as a 'Euro-shy' or even Euroskeptic vision in the French press. However his party was generally more pro-European than him and largely supported the constitutional prospect.

⁸ Treaty of Nice, Declaration 23.

⁹ Interview with Louis Michel, Belgian Minister for foreign affairs, 29 May 2001.

¹⁰ In a speech before the EP in July 2001, M. Verhofstadt refused to associate himself the most enthusiastic claims for a new constitutional convention made by MEPs. In the same period, he gave interviews to the international press where he argued that he favoured a 'third way' between federalism and intergovernmentalism, and he met Tony Blair several times.

¹¹ This term was used in Coreper circles in the months leading to Laeken to refer not only to the status of potential Convention output, but to the length of time to elapse between it and an IGC, etc.

¹² On 21 September 2001, at the Extraordinary European Council of Brussels, Louis Michel clearly mentioned some governments' reluctance : 'Le résultat de la Convention sera présenté sous forme d'options, ce qui devrait rassurer tous ceux qui redoutent de se voir forcer la main', while adding 'S'il ne dépendait que de moi, on irait encore beaucoup plus loin, croyez-moi, que des propositions.' (The outcome of the Convention will be presented as options, which should reassure all those who fear to be coerced into acquiescence. If it were up to me, we'd go much further, believe me, than these propositions').

¹³ 19 October 2001, declaration after the informal European Council in Gent.

¹⁴ Verhofstadt indicated this immediately after having announced the agreement on the Convention, in Gent in October 2001, in a discussion with MEPs : 'Er is dus een discussie ontstaan over de vraag of dat nu een consensustekst is dan wel een tekst met opties. Het antwoord is zeer eenvoudig. Dat zal alleszins mijn antwoord zijn binnen enkele weken als wij in Laken samen zijn. (...) Is er geen consensus in de schoot van de conventie, dan vind ik uiteraard dat de opties moeten worden weergegeven. Niet op een neutrale manier, maar wel op een manier waarbij duidelijk wordt aangegeven wat de meerderheidsopties zijn, wat de minderheidsopties zijn, wat eventueel de individuele optie is van één lid van de conventie.' (We will, thus, have a discussion on whether this is now a consensus text rather than a text with options. The answer is very simple. This will be my answer in a few weeks when we will be together in Laeken (...) Is there no consensus within the Convention, then I find it natural that the options must be expressed. Not in a neutral fashion, but in a fashion through which it can be understood clearly what the majority options are, what the minority options are, what, should the occasion arise, the individual options of a member of the Convention is).

¹⁵ The Laeken declaration states that 'The Convention will consider the various issues. It will draw up a final document which may comprise either different options, indicating the degree of support which they received, or recommendations if consensus is achieved.'

¹⁶ This text, prepared by two academics (Franklin Dehousse and Koen Lenaerts, the latter also being, at that time, the Belgian member of the Court of first instance) had been discussed by a 'Wise committee' composed of Giuliano Amato, Jean-Luc Dehaene, Jacques Delors, Bronislaw Geremek and David Miliband. Mr Verhofstadt insisted that the mandate should be as open as possible and 'without taboo' and he hoped the support of this prestigious and multinational group would give additional authority to the Belgian presidency's proposal.

¹⁷ Chirac's choice was driven in part because he thought the second Convention had to be chaired by a French, since the first Convention had been chaired by a German and in part because he hoped Giscard would not interfere in the French presidential election after having been nominated. The five countries opposing him supported the candidature of a more 'federalist' leader, like Dehaene, Delors or Amato. Others criticised the choice of Giscard, without supporting another candidate (Sweden, Denmark). The Belgian presidency had hoped that the Convention would be chaired by one of the members of its 'Laeken men' group but instead proposed the final compromise in light of the deadlock at Laeken: Giuliano Amato and Jean-Luc Dehaene – indeed members of that group and supported by the small countries would be nominated as vice-presidents.

¹⁸ One could argue that, in the European Convention as in most other forums of negotiation, the actors were not equal, so that other forms of negotiation based on an asymmetrical distribution of resources – such as intimidation, cunning, manipulation... - could be used too. We believe this is true but Elster's condition of equality should not be understood in strict terms: in this body, as in many other modern forums, the 'social norm' of civility limited the resort to these behaviours.

¹⁹ Since all the member states had been given the same number of seats, and in the absence of a system of weighting votes, a majority could have represented a very small minority of European population. Moreover, the mixed composition of the body rendered a system of weighted votes impossible. Hence the rule, laid down by the Laeken declaration, according to which the final decision had to be taken by 'consensus'. Giscard never really clarified this rule, only stating that 'consensus does not mean unanimity'. Most conventioners understood that a consensus would be reached if the final draft was accepted without major opposition in each of the components. In June 2003, the draft treaty was considered as adopted 'by consensus', despite the opposition of a group of thirteen conventioners and alternates who issued a 'minority report', and despite the explicit reservations of at least four government representatives (Spain, Poland, Austria, Portugal).

²⁰ In most states, one of the two national parliamentarians was drawn from the opposition. But this does not mean that they did not defend national interests. The British conservative MPs, for example, were more critical than the representatives of the government, and this helped them play on the 'domestic' constraint.

²¹ The change in the EP's attitude, which softened its traditional hostility towards the implication of national parliaments in the EU game in their last report on this subject (Napolitano report 2002) influenced the position of the countries which traditionally support the EP – such as the Benelux, Germany and pre-Berlusconi Italy. But this shift of preference was already observable before the Convention.

²² In the past, issues strongly supported and opposed by approximately equal coalitions, always led to non-decisions. Although as we will discuss below, 'constitutional deliberation' is supposed to overcome divisions about values as actors engage into mutual persuasion – contrary to bargains, which are supposed to leave the

initial preferences unaffected, there are cases where even ‘conventioners’ can only agree to disagree. See (Holmes 1988) and (Sunstein 2001).

²³ The preamble of the draft treaty mentions ‘the cultural, religious and humanist inheritance of Europe’ but this is a modest concession to those who required a much more explicit reference to Christianity.

²⁴ On this negotiation, see (Magnette and Nicolaïdis 2003).

²⁵ Peter Hain, Interview in the European Affairs Committee of the House of Commons, 25 March 2003.

²⁶ The reason why they will make concessions in this case is obvious. In some instances, they make concessions on some points because they believe, on the whole, their gains are superior to their losses. But even in the absence of such an incentive, they can be induced to make concessions: as the possibility to leave the EU is very limited, and as they need to preserve their reputation to remain efficient in later negotiations, the governments have no other choice.

²⁷ The ‘horizontal clauses’ defining the scope of the Charter and making clear that it only applies to EU law and institutions, and cannot be used to expand EU competences, were redefined. Moreover, the ‘Commentary’ of the Charter written by the Presidium of the first Convention, initially considered as deprived of legal force, was mentioned in the treaty ; this was seen as a means to narrow the scope of interpretation by the Court. Although several members denounced this concession, seen as a legal heresy because a text written by a non-deliberative body will be imposed upon the Court, they accepted it, making clear that they saw this as ‘the price to be paid to get the Charter in the treaty’.

²⁸ The Nice treaty adapted the former system of weighting votes to the enlarged EU. But the need to take into account the difference of population of the states made the system very complex, with nine categories of states and a majority defined by a threshold of 255 on 345 votes. This is the reason why a large majority supported the idea that this system should be replaced by a simpler ‘double majority’, meaning a majority of states representing at least three fifths of the population.

²⁹ While confirming it accepted the final draft, the representative of the Spanish government confirmed they still disagreed with this point. After the end of the Convention, the Spanish Prime Minister Jose Maria Aznar repeated in the press that he intended to renegotiate this point under the IGC. He maintained this position until the end of the Italian Presidency, contributing to the failure of the Brussels Summit on 12 December 2003, as France and Germany were not ready to renegotiate this aspect of the draft treaty.

³⁰ This argument was often used to reject Giscard’s idea to create a ‘Congress’. It also served against other suggestions made to strengthen the role of national parliaments, as for example on the question of the control of subsidiarity. The same argument was often raised when the reform of the Presidency of the Union was discussed, in order to avoid the creation of a new President of the European Council. See notably Miko Kiljunen (Finnish socialist MP), Plenary session, 24 April 2003.

³¹ CONV 162/02, 24 July 2002, p. 2.

³² CONV 50/02, 15 May 2002, p. 2-3.

³³ A Eurosceptic member like the Conservative MP David Heathcoat-Amory, used it to require less integration : ‘the *acquis communautaire* must be included in any simplification drive. It is no good again promising simpler measures for the future unless we tackle the complexity of the past at the same time’ (Plenary session, 12 September 2002), while the federalist French MEP Alain Lamassoure used the same label to promote more integration : ‘Il s’agit d’une proposition qui est inspirée par cette volonté de simplicité qui nous a animée et qui devrait, en dépit d’une apparence paradoxale, être de caractère consensuel. Il s’agit de supprimer totalement la procédure de l’unanimité’ (Plenary session, 05 December 2002).

³⁴ The fact that the Praesidium did not include all the member states (five were missing) somewhat diminished the legitimacy derived from representativeness. There was also some scepticism as to what “hat” praesidium members actually wore: was Gisela Stuart representing the EP or the British, or Michel Barnier representing the Commission or the French?

³⁵ At the time of writing (December 2003), the Irish presidency had still not announced its plan concerning the negotiation on the Convention’s draft treaty.

³⁶ To be realistic, contrary to other recent Constitutional debates such as that of South Africa or in East and Central Europe, very few actually witnessed the proceedings directly, except for students and the media in the *salle d’ecoute* or the aficionados listening in on the webcast.