

**Implementing the new
Constitutional Treaty: a
provisional introduction**

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Implementing the New Constitutional Treaty: A Provisional Introduction

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Recently not merely has Andrew Moravcsik urged the Union not to fix its constitutional structure because it was not broken but Richard Bellamy has attacked the establishment of the Convention as unnecessary and premature. However, the reality is that the 'Convention on the Future of Europe' is there and is working hard to revise the Union's structure and its packaging. Indeed, there seems to have been a sea change in thinking about such changes. Previously there was some doubt about risking major alterations which could provide a hostage to fortune during any ratification process. Hence the stress was on simplification 'à droit constant'. However, since the Convention got under way, there has been a general acceptance that constitutionalization, and major treaty restructuring is what is required. This is part of what Dolbey, writing in the *Financial Times*, has called the 'quiet revolution' which has taken place since late February 2002. Hence, it is all but certain that, assuming the Convention successfully completes its work, some kind of constitutional treaty will emerge and be forwarded to the planned IGC.

Nonetheless, there are problems associated with this new development. In fact, it encourages a tendency to concentrate on what is actually in the new document, at the expense of the overall document itself. Obviously the structures, processes and values detailed in the draft are of vital importance. However, they exist in a wider framework and this is often overlooked. Actually implementing any new substantive settlement, is part of this. However, as Bellamy argues there has not actually been a lot of real constitutional thought in the Convention.

Indeed, the assumption often seems to be that drafting is a relatively easy task. General reaction to the Praesidium's first sets of articles shows that this is not so and the point is emphatically underlined by Michael Dougan's paper. In any case there are other technical obstacles to the successful production of a finished and accepted constitutional treaty. Implementing the newly agreed format requires not just agreement on the substantive issues but polishing the text and then getting it through both the IGC and the various ratification procedures. Many of these could conceal real pitfalls. And, in any case, once ratified there is always the question of how the finished text will actually be read in practice.

In other words, the conventional wisdom generally plays down the technical and political problems of creating a new document, getting it agreed by the Convention, accepted by the IGC and ultimately ratified. Hence, as well as looking both at the detailed contents of the initial Praesidium drafts and at precise questions of governance, security and civil rights as was done in the 7 March seminar, it is important to look at the likely overall architecture of the new constitutional treaty and its prospects. Obviously, at this stage it is difficult to be certain about how either of these will develop, but it is certainly worth while trying to introduce some of the often problematical

parameters of implementing a new constitutional settlement for the Union.

In order to help with this, this revised paper largely leaves the detailed contents aside, along with the normative assessments of the future of the Union so commonly made, and seeks to do five other things:

- set the present drafting against the background of treaty reform and simplification;
- look at the Praesidium's initial overall strategy for restructuring the treaties;
- assess how this has been received and interpreted;
- compare the first tranches of articles with the original outline; and
- consider the prospects for the completion of the process.

In other words, the aim is to set out the broader context against which more detailed discussions can be set. What seems to emerge is that the context is still uncertain. The Praesidium has chosen a successful structure for its proposed document, but that there are still many unanswered questions about its contents and prospects.

The Background

The present discussions in the Convention are far from being the first time radical restructuring of the Union's treaties, structures and legal instruments have been considered. In fact the Convention follows on a well established history of such thinking. Underlying such attempts rationalisation have been three beliefs:

That there is a need for technical simplification because there are too many treaties, whose relations are unclear and whose style is hard to follow. Making them more useful and also more stable in the post enlargement Union is a priority. Stability could also be helped by introducing more flexible amendment and ratification processes thus avoiding the disruptive big bang approach of Maastricht and Nice.

That a better treaty (briefer, more approachable and more transparent) would be likely to appeal to uncertain citizens and thus make them more supportive of the Union, ending the post 1992 popular alienation. They would agree with one Convention delegate that the present texts are 'neither credible nor likeable'.

That the problem of the treaties is largely a reflection of the fact that the actual structures and processes of the EU are themselves too rigid and could, with advantage, be simplified.

These ideas have meant that over the last few years there have been a series of developments which have helped to shape the work of the Convention.

i) To begin with, since the European Parliament's 1984 European Union Treaty there has been a tradition of thinking about alternative treaties. The EUT had the idea of replacing the European Community EC by something more coherent and applying only to those states who wanted to go further. This was not formally acted on but it did have an impact. And, by the run up to Amsterdam in the mid 1990s there were renewed ideas of either replacing or rationalising the treaties, as in the reports by Roland Beiber, the Robert Schuman Centre and the Council Legal Secretariat. To an extent these were considered by the 1996 IGC. In the event what emerged was merely the

Amsterdam tidying up and consolidation. Although these have been relatively painlessly accepted, they failed to make a real impact. This was probably because many of those calling for simplification were interested not in giving the treaties a 'wash and brush up' but were using the term as camouflage for demanding radical institutional changes. Hence there was a call for splitting the treaties in the run up to Nice. By this was meant dividing the treaties into a set of principles and a set of policies. This was followed by pressure for 'constitutionalization', by which was usually meant, changing the content, emphasis and status of the treaties. A number of possible ways of doing were tabled by interested parties like the Bertelsman Foundation. Thereafter, the Convention itself also encouraged a further series of 'free lance' constitutions. These have been drawn up by think tanks like the European Policy Centre, by academics such as Touscouz and Dashwood (for the UK Foreign Office), by civil society organizations, by members of the Convention like Badinter, Leinen and Paciotti and, above all, by political movements such as the Greens, the Democracy Forum, the PES, the German SPD and, especially, the EPP. These things have been available to the Convention as it set about its own thinking.

ii) Alongside all this there has also been another process of simplification. This has been part of a general drive to produce better quality ordinary legislation. This involves revising, amalgamating and restructuring basic texts so that EC legislation is focussed and coherent. This underlying drive to improve and simplify legislative processes, instruments and the *acquis* has been, in part, taken up by the Convention's Working Group IX. This has also taken the opportunity, clearly offered by the Laeken Declaration, to look at the types of legal instruments issued by the Union and the political processes in which they are involved. This has reinforced the drive to simplify the Union's founding documents.

iii) Beyond this of course, the Convention Secretariat was working on a detailed paper on treaty simplification to guide the Praesidium. When issued in September 2002 its report defined simplification as making the treaties more approachable and the EU better able to receive new members. It also set out the extent of the treaty base and rehearsed the history of moves towards simplification including the codification and consolidation of texts, and the rationalisation of the institutional architecture and decision making strategies matter. Thus codification, or amalgamating treaties, was needed to cope with amendments to them. Similarly, the treaties needed to be merged and re-divided so as to produce a basic treaty. However, all this demands re-ratification, which is a very risky business in the present mood of popular opinion. Producing a Basic Treaty also raises questions of what its relationship with the many existing treaties would be and what how far might it go in absorbing them? Equally, merging the treaties (*à droit constant*) in the way suggested by the Robert Schumann Centre, the European Parliament and the Council Secretariat, could lead to a voluminous treaty document. It also leaves unresolved the question of whether the EU and the EC should actually be maintained. So the Report passed on some difficult issues to the Praesidium.

iv) Before this there had been a leaked 'non-paper' from the Secretariat suggesting a possible form for the new constitutional treaty. This envisaged one document with eleven sections

covering: Establishment; Objectives; Competences; Citizenship; Institutions; Decision Making; Judicial Control; Finance & Budget; Accords with Third States; Reinforced Cooperation; and General & Final. The assumption was that such a treaty could be created by transferring articles from the TEU and the TEC. Elements which did not figure in new draft could, it was also suggested, be coped with by either a) adding three purged treaties to the basic document, which would be clear but complicated or by b) creating the basic treaty from actually fusing the two treaties, relegating the unused remnants to the status of protocols. This would be more accessible but also quite long.

v) While there were many doubts about the very idea of such a treaty at the time, it soon became clear that attitudes were changing and the idea of a constitutional treaty - previously held at arms length - was, as already noted, becoming accepted even in Whitehall. Former critics seem to have come round to the ideas of Buchanan and the constitutional economists that having a constraining constitution is an effective way of preventing the emergence of a strong central authority in a polity. It also appeared that the previously popular line that no constitution was needed because, legally speaking, the treaties already constituted a constitutional charter for the Union no longer convinced. However, the acceptance of the idea of a new constitutional treaty has meant, again as already implied, that attention has shifted from the principle to the content. In fact questions of amendment, the IGC, relation to other treaties, ratification and status have been somewhat left aside. Even the submission from the joint Legal Working Party, detailed though it is, does not wholly resolve such matters.

The Praesidium and its Strategies

Drawing partly on this background, the Praesidium, at the end of October produced its own draft treaty structure. Although much conventional thinking assumes that a 'constitution' can only take the form of a standard separation of powers Federation, the Praesidium was aware that this would not be universally acceptable. And, since securing a successful and consensus based outcome seems to be an imperative, some thing more moderate and acceptable has to be aimed at. Hence the first draft sought on the one hand to appeal to both ends of the spectrum and, on the other, not to prejudice the work of Convention. Hence its skeletal nature leaves it open to others to suggest insertions, including recommendations from the working groups. However, this rather assumed that there would be no querying of the structure of the treaty. And in this they were largely correct.

The structural strategy adopted is a version of the two pronged/splitting approach pioneered by the RSC and not either of the options canvassed in the non-paper. It thus creates a single 'constitutional treaty', thus subject to inter-governmental ratification. However, what they offer is a 'multi-storey' development of the 'splitting' strategy so much discussed in recent years. This is made possible because the Convention has accepted that there should be the one single organism, enjoying legal personality: the European Union (or, less likely, one of Giscard's other suggestions like 'United Europe'). This would absorb the other communities. However, the number of storeys involved remains undecided because of the uncertainty as to whether the Charter will be a formal Part of the new treaty.

In fact, the one organism's single treaty foundation is, like "all Gaul", divided into three 'Parts', using the term in a more over-arching way than does the present TEC. This variant of the Basic treaty approach provides a short, publicly accessible, introduction and two more technical annexes for professionals to use. And the new treaty would formally replace all the other treaties (presumably including the accession acts). The precise structure is as follows:

The first Part, which would have some fifty articles, would lay down the principles, institutions and processes of a unified Union. This the most clearly constitutional element of the three, and would serve as a political mission statement as well as setting out the broad legal bases for EU action. This is the only part initially provided with a fuller exposition of what might go into the final draft. However, it may be the only Part which would fit into Jack Straw's pocket, always provided that Protocols are not attached specifically to it.

This would be followed by a longer Part II covering the Union's policies and their legal bases whether in full or on an indicative basis, possibly with some detail carried over into annexed 'legacy' protocols. The contents of this Part would exemplify the principles set out in Part I with which its 400 plus articles would have to be carefully co-ordinated. It is here that continuity with the *acquis* and the existing treaties will be at their most obvious. Producing this, and ensuring that there are no residual elements of the existing treaties, is entrusted to a team drawn from the various Legal Services.

The final Part, which is an innovation not found in other Basic/Residue treaty models would be a formal one detailing how the new treaty would come into effect and be applied. It has had less consideration in the Praesidium and least public discussion of all three parts though it hides some very difficult questions.

The various Protocols so far produced, on national parliaments and subsidiarity or hinted at (on electoral procedure) would presumably be attached to the overall treaty and not just its Part I. This would make for simplicity. However, given the political significance, especially in states like the UK, this might not be wise. It could give rise to accusations that their provisions were being deliberately relegated so that they did not have to be used.

Two other innovations are also worth noting. One is that the draft treaty begins with a brief summary of headings of Titles and Articles, suggesting that these will, as per new Swiss one, be used in final version so as to provide a useful handle for readers. The other is that the Praesidium has made its articles 'portmanteau' affairs rather than 'one liners'. Thus Article 1 establishes the EU as an entity, defines it, recognizes its diversity and declares it open. Each of these could have been a separate article. Although this would have made it longer in terms of articles it would not have changed the wordage. And there is a case for saying that a straight forward numerical enumeration would be easier to deal with than 1.1, 1.2 or 1.3 a.

In taking on more of the lineaments of a classic treaty, the text diverged somewhat from the outline suggested in the non-paper. Structurally it elevates the General & Final Provisions into a separate Part III. It also re-arranges Implementation and Citizenship provisions. Similarly it added some new touches where external relations were concerned, as well as trying to

insert some of Giscard's bright ideas.

Responses: Criticisms and Fleshing Out

Partly because of this many critics focussed either on such insertions or what had been left out. The latter response rather overlooked the fact that it as only an outline structure into which new ideas were to be entered as time went on. However, two attempts were made to suggest how the skeleton could, and should, be fleshed out. Yet, overall, there was surprisingly little comment.

The majority of comments tended to attack the draft for leaving out this or that element whether solidarity or gender equality. People thus denounced it as incomplete because it does not include, at this early stage, their pet projects. These have included dual citizenship, the abolition of the pillars, more environmentalism, the ombudsman, the community method in judicial affairs, subsidiarity, full employment and a religious reference. There was however, some welcome for things like the 'exit' clause, special relationship with neighbours and the stress on values. Against this there was some criticism of some of the inclusions such as the suggested new title, the Congress, the longer Council Presidency, the acceptance into the Community pillar of actions conducted by m/s and the specific list of competences. There was unease about replacing treaties as this could expose the *acquis*.

In any case, for some like Voggenhuber it is a backward draft, giving power to the states, while Quentin Peel says that it is elitist. Conversely others have seen it as too 'Federationist'. Indeed, some critics in the UK have denounced it as extinguishing democracy, but usually on the basis of clauses taken over from the older treaties and not from any new insertions. This contrast suggests that the draft is a not unsuccessful compromise.

Nonetheless, it stimulated at least two attempts to flesh out the skeleton, one from EPP and the other - the infamous Penelope - from Prodi's circle.

EPP - This adopts the same structure but changes the order i.e. Citizens & Rights are promoted, to point up values, respect for human dignity and the underlying and overriding nature of the Charter. This included in toto which makes the EPP draft much longer with 119 articles as against the Praesidium's projected 46. It also adds Chapters and Protocols to the structure (plus a DOM-TOM list). The draft estimates that Part II could contain anything between 100 and 400. And the EPP's Articles seem to be even longer. It also has a more integrationist tone and leaves out some of VGE's pet ideas while re-asserting more of Part II into Part I than Praesidium draft. It also restores the Ombudsman, gives more powers to EP and Commission but omits the exit clause. It also requires the convening of a new Convention for any revision. This draft had very limited response although, apparently, it is sometimes cited sometimes by EPP representatives in the Convention.

Penelope - This has received rather more attention even though Giscard was initially caustic about it. And David Sullivan had to push it inside the Convention to get it taken on board. However, it does come with a commentary of sorts. It is not quite as long as EPP, coming in at 105 articles and keeping Part III (Policies) to 110. In fact it claims that it has reduced the treaty

base from 225 to 125 pages. The draft also makes more structural changes than does that of the EPP. It inserts a new Part II for the Charter; adds a new Title III on Powers; and attaches a number of supporting documents. These are a Recognition Agreement to allow it all to proceed; subsidiary Additional Acts (or super-protocols rather like those attached to Accession Treaties) including institutional detail; and several Protocols.

The tone of the draft is rather different from that of the Praesidium. The document is called either a constitution or a Treaty on the Constitution. It also pares down opt outs, leaves out enhanced cooperation and limits states rights whereas there is more stress on solidarity. Thus the Euro Council is reduced to simply a formation of the Council of Ministers. Conversely it keeps the six month rotating Presidency. In terms of detailed contents 'Penelope' suggests more changes such as a Euro tax, the election of the Commission President by the European Parliament and making QMV and (improved) co-decision (plus Community method) the norm in decision making. It also has more on foreign policy but excludes the neighbourhood option. It also defines institutions by functions more than powers and groups the functions into principal, flanking and complimentary. The last involve the EU supporting member states. Finally it brings in different ratification forms and seeks to impose self exclusion through the Agreement. If no they make no Declaration to sign up to this, states will be regarded as having excluded themselves from the new Union. However, they would be eligible to join the EEA. And, if the new treaty has not been approved by a given date, it could be activated by a 5/6ths majority.

This has been used as a point of reference in the Convention when ordinary members want an example. They then ask what does Penelope say. The many other constitutional offerings have not made anything like the same impact. This is, regrettably, true of Alan Dashwood's elegant and politically realistic suggestions. So, overall, the Praesidium draft has been accepted structurally, if not in terms of content and objectives.

Alterations in the First Articles

When the first 16 articles were released in January they were described as a 'clarification exercise', deriving from the legal base, ECJ jurisprudence and the Lamassourre report. This could be taken as suggesting that they were not intended to be final. However, it rather seems as though they are firmer than this even though they are due to be resubmitted after the many amendments have been taken on board. The present tight timetable does not really leave much room for anything but limited adjustments.

Hence the first sixteen articles were followed by a commentary justifying the decisions taken. In any case the first 16 articles made two kinds of changes. Thus, firstly, they included some elements from the conclusions of the Working Groups. Secondly, they altered the structure of articles somewhat. Thus Article 6 becomes 5, allowing the insertion of a new Article 6 on non discrimination on grounds of nationality. A new Article 13 on economic policy co-ordination has also been added, along with the new Article 16 on flexibility or enhanced cooperation.

The Articles came in for much criticism, as shown by the 1040 amendments submitted. Generally neither camp was satisfied by the articles. Thus Federationists want to restore the old style references to ever closer union. Equally they want mention of the EU's existing symbols, further references to values and a reference to religion.

Others, like Hain, call for more bottom up language. In part this was because the draft was not seen as reflecting what the Working Groups had agreed. They also do not want to talk of a constitution or a federal objective, or of dependence on the people, preferring references to High Contracting Parties, not to mention more on cultural diversity, identity and sovereignty. There was also criticism of making the Union responsible for discovering space, which most people think does not need to be discovered. Euro-sceptics seem to have been more positive than might have been expected though there have been calls to pare down the Union's legal personality.

Outside the Convention the articles have been attacked by business interests for threatening competitiveness. Thus Sinn, writing to the Financial Times, claimed that they exhibit the same old interventionist economic ideology and showed no thought about the practical ramifications of their changes. This prompted d'Amato to say it was neither that way inclined nor that innovative. He pointed out that the text was largely confined to restating what is already in the treaties.

The second tranche of articles, which appeared in late February, were both prefaced by a commentary and followed by technical comments. They do not include any details on the articles dealing with the CFSP, PJCCM and Defence. This reflects the inability of the Union to agree what to do over Iraq. The new set commences with number 24 which suggests that the addition of two new articles in the first tranche has not been fully recognized. And while the projected Article 32 on enhanced cooperation has been left out, it is replaced by two new clauses; a new 32 on Principles of legislation and a new 33 on publication and entry into force. It could be that there will be compensating cuts in the later provisions. Or Part I could turn out to be a little longer than planned.

In any case, Article 26 now deals with non legislative acts rather than decision making as such. The articles as presented also show other smaller changes in titling from what had been suggested in the October draft. And Article 33 as now formulated is, as noted, new. Otherwise the subject matter follows the schema laid down in October.

Even more recently there have been two other sets of articles. One of these is a new Article 31 on ensuring the 'Area of Freedom, Security and Justice' filling one of the three gaps left in the second tranche. This is accompanied by the relevant clauses from Part II. This approach will be followed for foreign policy and defence. In any case, assuming there will continue to be five articles in Title VI, on the democratic life of the Union, there could still be a numbering problem since the other set of articles, 38-40, have kept their projected numbers. The three articles are a faithful copy of the original proposals, dealing as they do with resources, principles and procedures respectively.

In any case, the numbering could also be complicated if there were to be any new additions to cover the Charter of Fundamental Rights and Freedoms. And two new protocols on

National Parliaments and Subsidiarity & Proportionality have been tabled. Furthermore new discussion circles looking at reform of the judicial system and budgetary matters have been set up. These could mean more changes to both texts and numbering.

The Question of the Charter

One element that has, in fact, raised a good deal of general interest in the move to a constitutional treaty is how the EU's Charter of Fundamental Rights would be fitted into the new draft. This seems as essential for both legitimacy and constitutional structure. Many see the Charter as the 'heart of the Union' and the 'core of the constitution'. This reflects the way the text has gradually become accepted. Indeed, it has been given somewhat less prominence in the Convention than it got in the aftermath of Nice. Hence it has been agreed that the existing text will not be greatly changed before it is related to the new Treaty. In fact only its final horizontal clauses (51-54) will be adjusted to new situation. However, the Charter is long and also a contested text. It has been said that its language is unclear and needs redrafting before incorporation. Equally, its social elements are controversial. There is also the additional complication of the relationship between the Charter and the ECHR which has more status but is less up to date. Interestingly, the Council of Europe is calling on EU to incorporate the Charter as legally binding; accede to ECHR; to absorb its own *acquis* (so as to create coherent European legal order), to organize organic relations with the Council and to develop a form of citizenship not based solely on nationality. Signing up to ECHR seems to be 'chose jugée', despite the queries raised by Michael Dougan. And the Courts may have something to say on the issue.

The Working Group recognized the binding nature of Charter and decided not to re-open text. It suggested three ways of dealing with it: inserting the whole text; having an ECHR clause or building in a cross reference. Others, however, preferred it to remain as a political declaration with ring fencing to prevent it undermining existing national legislation.

In the first 16 articles the question of whether the Charter should be a new Part II or a Protocol was left open. In any case there may need to be insertions in Part II (or III). The question of the status of the original, unofficial, Commentary to the Charter has not really been raised though it is relevant.

Towards a Resolution?

At present the Convention is debating the 1040 amendments to the first 16 articles, having had to call two extra sessions on 5 and 26 March to do this such was the controversy they aroused. So many changes were put forward that the deadline for submission had to be extended. In fact it needed almost a hundred pages to summarize and tabulate the proposals for alteration submitted by members of the Convention. The second tranche has also, after a slow start, attracted plenty of amendments though not quite on the scale of the more general clauses of the first. Many revisions are also still being suggested to the third tranche, including alterations to the Part II clauses. Equally, the two Protocols have themselves attracted a flood of amendments.

Work on Part II of the Treaty has also moved on apace even though it is, in itself, a massive job. Up to 414 articles could go into Part II, and none of them can be finally settled until Part I is signed and sealed. Hence on the 13 March a joint working group of two representatives of each of the three main Legal Services produced a 357 report. This contains, firstly, a draft Part II amalgamating the TEU and the TEC and secondly, illustrative versions of the existing main treaties showing how they were amended before merger. Although the exercise is described as purely technical, its use of the language of 'constitution' rather than 'this treaty' may not always be seen to be so.

The first document follows the structure of the October proposal. However, it harmonizes the language, deletes some out of date material, and adds the new elements implicitly agreed by the Convention on the basis of Working Group Reports. It also lists those articles of the two existing treaties which have been left out of consideration by the October draft. In theory these will have to be inserted into Parts II or III of the new constitutional treaty. However, this could be a difficult exercise given the fact that many of the presently omitted articles have a place in the *acquis*. However, until the Convention pronounces on things like institutions and voting the question remains open. The report also notes that the clauses on EMU have been set aside to allow for more reflection by both Convention and experts. The second volume of the report is provided simply to help delegates orient themselves in the existing treaties. It will be very useful for commentators.

The aim of all this is to help the Convention. No doubt it will. But it also presents it with a range of questions. The experts make it clear that the October structure has to be revised to take account of the decisions already taken. And there are also lesser matters to be resolved to produce a better Part II text. This involves re-arrangement of clauses in Part II, the possible elimination of frequently repeated phrases such as "on a proposal from the Commission", and other forms of rationalisation.

What this means is that there is still a good deal of work necessary to produce the final text. Whether this can be done between the adoption of a final part I and the submission to the European Council is a moot point. It could also leave a lot of revision to experts. But whereas the work done after Amsterdam was agreed was uncontroversial, it is not clear that this will be the case with any post Convention 'tidying up'. Certainly, if the final text of Part II is as long as it is now, it will take member states some time to digest it. In other words, the proposed timetable still seems to rest on the assumption that writing a constitution is a simple affair, especially when it is a case of producing a text which has to ensure total legal continuity, save where new substantive changes are agreed. It took the Swiss several years to achieve this though they did make an excellent job of it.

This leads to the question of when the work will actually be completed. The Convention itself has several tasks ahead of it. Firstly, It has to agree all the final textual inserts on the elements already presented. Secondly, it has to complete the process of initial presentation. New tranches are due on 3, 15 and 24 April. These are meant to deal, beginning with neighbourhood questions (Title IX) democratic life (VI) and Membership (X) along with Part III. This will leave other external questions (VIII) and

Institutions (IV) until later in the month. Given Iraq and the sensitivity of institutional matters getting a full and agreed set of proposals may not be easy. Thirdly, it has to resolve all the differences arising from amendments from the second and third tranches. Discussion of these will carry on into early May since some time has to be given for submitting and considering amendments. Fourthly, the Convention also has to deal both with the postponed questions of EMU in Part II and, more significantly, the outstanding questions of overall foreign and defence policy in Part I. It is hoped that the informal meeting of heads of government in Athens on 16 April may give the Convention a steer on this.

By the end of April or the beginning of May virtually the whole of Part I should, in theory, have been presented. However, this will be in far from finished form, since not all the post amendment revisions will have been considered, let alone agreed. Initial discussions will be held in May, and only then will amendments come in. So, even at this stage, it may not be possible to complete the updating of Part II since there could be further changes as amendments and other inputs to the later tranches are taken on board. And it has been suggested that the remaining three months are likely to see intense political debate which could reveal the underlying fractures in the Union.

In any case, once all the bits and pieces have been agreed, presumably the Convention will have to look at the resulting document as a whole and decide whether it is coherent and consistent. Sandra Kalniete, one of the members of the Convention, has recently insisted on this. She asked, firstly, that the Convention be informed of exactly when new treaty elements will be submitted. This has been largely conceded. Secondly, she argues that the Convention and the states should have more time for reflection and amendment. Moreover, the former must be able both to consider the draft as a whole and to amend the final version.

Such concerns point to the probability that the inevitable compromises which will emerge, whether in plenary debates or in a 'shuttle' between the Praesidium and the Convention as a whole, will mean that the text is not as short and clear as one might wish. Nor may it be wholly consistent. The way that both the Praesidium and the Convention have proceeded bit by bit, on a thematic basis – something which was queried in the Praesidium, carries with it the risk that the bits may not fully cohere. While at Philadelphia the text was twice referred to a small committee to restyle and co-ordinate, so far no obvious steps have been taken to look at the text as a whole. Yet, with the back benches of the Convention, the member states and other interested parties all pressing specific points on the Praesidium this is not going to be easy to do.

However, it is very necessary. The language used is still very close to that of the existing treaties and cannot be regarded as the approachable text comprehensible by school children desired by Giscard, as experiences with Kentish sixth formers has demonstrated. Moreover, on the one hand, the acceptable, the explicable and the functional will have to be balanced with the Christmas Tree tendency. On the other hand, the decorations may be in clashing colours and need co-ordination. And this could take some time, if it is done. Given both this and the difficulties of harmonizing Part I with Part II, there must be a question as to whether the new document will match up to the

visions of a spanking new constitutional treaty that many want.

All this presumes, of course, that there is sufficient agreement to produce a single, generally accepted text. While the likelihood that the Convention would turn down the Praesidium's final draft is minimal, it could be that some questions have to be left open because of lack of consensus. Equally, it may also be that there are rival versions if the Praesidium's draft does not find sufficient support. There is a strong possibility that, as in the past, the Eurosceptic elements will table their own document. Conceivably those in favour of ever deeper integration could do the same. So there are real questions both as to whether the drafting will actually be over by June and whether the text will be either popular or polished.

Whenever a text is agreed it is due to be presented to the heads of government. The questions are when and what will they do with it? Some claim the present situation is exciting, if chaotic, and can conclude on time despite the fact that the report on the Convention had to be pulled from the March Summit because of the Iraq crisis. However, there are rumours, and demands, that the Convention should take as long as is necessary. Thus Giscard argued that running on into July or even the autumn would not be a problem given that nothing much happened over the summer anyway. And this might allow the Convention to rally behind a single, largely agreed text, rather than having to leave too many options open. Then, on 7 March Gisela Stuart and many East European delegates demanded that the IGC should not start until 2004, in line both with the Laeken Declaration and the need for candidate country parliaments to digest the text before the IGC started.

Twelve days later Andrew Duff and Lamberto Dini struck back by demanding that the Convention finish by June and that the IGC be completed well ahead of the 2004 EP elections. The Greek Presidency seems to have left it to the member states to decide if there would be an extension. Their preference is for a June end although there is now talk of a second summit on 30 June since the Thessalonica agenda is already full. The motivations for this are unclear. It could be a means of preventing the matter dragging on too long and both destabilising things and denying the Italians their desired 'triumph'. It could also be a way of ensuring that there are loose ends which would permit the IGC legitimately to change things.

In any case, ideas of a rapid move to an IGC following on a June Summit are themselves also under threat. The Greek Presidency has set its face against this and, more recently, representatives of the candidate countries have, as noted, demanded that there should be an ample period for reflection, something much desired by the Irish as well. The former do not want the IGC to start before all the entry referendums in South and East Europe have been held. Nor do they want it to end before the ratification process is completed and the candidates have become fully fledged members. To anticipate this they want to be given full status in the Convention once the Accession Treaty is signed on 16 April.

How the IGC handles whatever emerges from the Convention, whenever this and its own start may be, remains unclear. A lot probably depends on exactly what is in the final draft. The governments set up the Convention, have been working hard to get an acceptable settlement from it (hence

their reaction to the first tranche) and have often urged it to complete on time. Hence it is unlikely that they would brutally dismiss it and go their own way, as they did with the 1984 European Parliament Union Treaty. However, it does not follow from this that they are bound simply to rubber stamp what comes out. If there is not sufficient agreement behind the draft, or if there are 'options', then the states will be able to pick and choose. In any case, given that governments, and circumstances, change they could well, in any case, want to put their own polish on a generally accepted text. The impact of Part II on the *acquis* may stimulate changes. Equally, 'minority' reports, whether integrationist or sovereignist, could also encourage the IGC to change things on the grounds that they have to resolve differences inside the Convention. And all this could take time. Moreover, if the IGC goes too far from what the Convention agreed, there could be a backlash.

Beyond this, there is the question of how the Treaty, however amended by the IGC, is actually to be ratified. In theory this will have to be by the normal, unanimous agreement of all the member states, no doubt including the candidate countries. However, Penelope and other versions have raised the question of whether all the Convention's efforts should be put at risk by the possibility of one or two states failing to ratify. The examples of Maastricht and Nice show that the possibility cannot be overlooked. Rejecting the dual effort of Convention and IGC in creating a largely agreed new look for the Union would be a major crisis for the EU

In fact the likelihood of a rejection is compounded, firstly, by the larger number of states involved in the ratification process. Secondly, there is the fact that the new treaty, for all that it sets out to maintain the *acquis*, is likely to be seen as a new departure and one which raises issues of principle like the acceptability of the CAP. Initial reactions show that the public is often unaware of the complicated background from which the draft constitutional treaty, whatever its shape and style, is emerging. So they can often take Convention suggestions as being wholly new and not merely re-stylings of what is already happening. This could adversely affect judgements. Such reactions could present the states with a real challenge. Hence, 'yes' votes cannot be relied on, especially if governments prove as lack lustre in campaigning as they have in the past.

This leads, thirdly, to the fact that the Convention has so far been a somewhat introverted body interesting aficionados more than the general public means that little has been done to address popular alienation from the Union. So far the Convention has lost sight of its obligations to involve the people. Selling it, especially in deeply sceptical Britain, has not been really considered. The rather technical nature of the new draft, especially with its threefold structure and its still very legalistic language, may not appeal. And though there is no great role for citizens in approving it, there will clearly be several referenda. Unfortunately, voters can be influenced by things other than the actual text as Nice showed and this too could be a problem. However, it is another all too often ignored facet of implementation.

Such factors make it surprising that some people, like Mendez de Vigo, are optimistically calling for a general referendum to approve the new treaty instead of the normal procedures. The proposal overlooks the fact that this requires states to accept

outside direction as to their own constitutional rules. It could also be inordinately risky since, firstly, voters could, as already implied, easily use the opportunity to vote it down for collateral reasons. So, secondly, having a referendum does not of itself solve the problem of what happens if one country's voters say 'no'. Getting round this would require new rules.

In fact there has been more attention to the rules for calculating whether or not the endorsement after ratification. Because unanimity cannot be relied on, ideas such as an enhanced majority of states or a process of self-exclusion have been canvassed as a way of avoiding a blockage. Giscard has been taken as hinting at this though, were it to happen, it would be a defeat for his ambitions. And the evidence suggests that this is proving a very difficult issue for the Praesidium to resolve. And the reality is, of course, as Michael Dougan reminds us, that many authorities do not believe that a few states can undo the existing treaties. To do this requires unanimity. It seems unlikely that many states would really give up this ultimate power.

Not surprisingly, it has been suggested that the only way round a blockage by one or two states would be for all the others to secede, leaving the non-ratifiers in a rump Union. Already worries have been expressed about any take it or leave it ratification which would force doubters to leave the Union which they do not want to do. Moreover, this would cause an unseemly wrangle over resources and rights. It would also recreate the confusing situation of the 1960s and early 1970s with Europe divided into two similar but competing organisations. This would hardly achieve the initial aim of the Convention of simplifying the Union and making it more cuddly and acceptable.

In any case, ratification is often a slow process. And this kind of secession would drag it out even further. So it is not clear when any new constitutional treaty could come into effect. Certainly, it is likely that the new Treaty will not come into effect before the next Commission comes into being, so the Nice rules will have to apply, something about which Giscard has expressed regrets.

So, even if the structure proposed by the Praesidium has so far emerged unscathed, a good deal remains unclear about its contents and its political prospects. Simplification and constitutionalization are not always easy bed-fellows and the whole process of implementation is more difficult than many think. Indeed, past experience suggests that there is a further problem, in the way that the text is actually 'read' when it comes into effect. Officials and, especially, the Courts, could easily read it in a different way than those intended by its authors. And the various levels of the proposed new treaty, whatever model is adopted, could well provide openings for this. In other words, the Christmas tree needs to be remembered along with the decorations. So does the fact that, despite the hope of producing a stable and appreciated draft, the European population seems uninvolved in the process.

This suggests that the comparison with Philadelphia is wrong. Not merely is the Convention structurally different and operating to a different time table, but it is also trying to do something rather different, and perhaps technically more difficult. Thus it is much larger, more diverse and more open than its predecessor which makes it hard to produce an agreed text. Again, while the Philadelphia Convention meant consistently for some four

months, the Brussels Convention has been remarkably spasmodic, meeting intermittently over 18 months.

More significantly, it is actually doing something different. It is not moving in another direction and starting largely afresh. The Convention, even if some of its members do not appreciate it, is actually trying to improve the existing settlement but without disturbing the *acquis*. Because the latter symbolizes both a remarkable historical achievement and hard fought bargains amongst the states, it is very hard to move away from it without destabilising the whole venture. And it has fifty years of *acquis* and not just the eleven that the Americans had had.

No doubt some of the issues raised here may seem speculative and technical, and to miss the main point about how the Union's governance, external relations and citizens interests should be organized. Yet, they can have as much impact on the substantive questions as the latter can have on the packaging of the Union's new order. Moreover, they are often politically very significant. So they deserve to be born in mind.

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