

Communication from the Commission, A Constitution for the Union (17 September 2003)

Caption: Opinion of the European Commission delivered on 17 September 2003 following adoption by the European Convention on 13 June and 10 July 2003 of the draft Treaty establishing a Constitution for Europe. The Commission considers that the draft should provide the basis for the work of the Intergovernmental Conference (IGC), taking the view that the IGC's task should consist of improving, clarifying and finalising the draft Constitution.

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Commission Communication: A Constitution for the Union (Brussels, 17 September 2003)

Opinion of the Commission, pursuant to Article 48 of the Treaty on European Union, on the Conference of representatives of the Member States' governments convened to revise the Treaties

Introduction

The “draft Treaty establishing a Constitution for Europe” prepared by the Convention is designed to replace the Treaties on which the Union is based, and thus follows a constitutional course. It is therefore a key step in European integration, which still preserves the achievements of 50 years of integration. The institutional architecture remains essentially rooted in the Community method, the scope of which has been extended.

The Constitution will represent the culmination of a broad and profound debate on the future of the Union, set in motion by the Nice European Council, which has proved a very fruitful enterprise. Convened by the Laeken European Council to examine the essential questions concerning the future development of the Union and to seek various possible responses, the Convention has exceeded expectations by formulating a draft Constitution for Europe.

More specifically, but without being exhaustive, the Commission is pleased to see that the draft Constitution:

- fundamentally changes the structure of the Union: in particular, it bestows a single legal personality on the European Union and hence merges the Union and the European Community¹; it gets rid of the “pillar” structure of the Union; and it incorporates the Charter of Fundamental Rights into the Constitution and gives it binding legal force;
- introduces a large number of reforms which improve the way the Union works: especially, it extends the scope of the codecision procedure for the adoption of European laws and makes provision for the Council’s work to be fully transparent where it is involved in lawmaking; it maintains the necessary flexibility in what is a more sophisticated and balanced system for assigning competences to the Union; it replaces the complicated definition of what constitutes a qualified majority, as decided by the Treaty of Nice, with the simpler and more democratic formula of the double majority; it enshrines the Commission’s right of legislative initiative and the principle of the interinstitutional programming of the Union’s work; it rationalises and clarifies the Union’s instruments for action; it strengthens arrangements for monitoring compliance with the principles of subsidiarity and proportionality, and enhances the role of national parliaments in the European integration process;
- strengthens the Union’s means of action: in particular, it extends the Community method to the entire area of freedom, security and justice; it creates the office of Minister for Foreign Affairs, who will be both a Member of the Commission and the recipient of a Council mandate, which will enable the Union to develop more consistent and more effective external action and external representation; it revamps the provisions concerning the common foreign and security policy; it develops the common security and defence policy and enables those Member States wishing to do so to enhance their capacity for action within a common framework.

The Commission welcomes the Convention’s achievements and therefore takes the view that the draft Treaty establishing a Constitution for Europe must constitute the basis for the work of the Intergovernmental Conference, which will be convened pursuant to Article 48 of the Treaty on European Union.

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The Thessaloniki European Council decided that the draft Constitution was a good basis for starting the Intergovernmental Conference (IGC) and that the Constitutional Treaty should be signed by the Member States of the enlarged Union as soon as possible after 1 May 2004. If this timetable is to be met, and more generally with a view to maintaining the political momentum created by the Convention, it will be essential for the IGC not to disturb the overall balances built into the draft Constitution and not to start rediscussing all the questions that the Convention has already looked at in detail and on which it has reached a consensus. The Intergovernmental Conference cannot, however, be deprived of its political responsibility which is to allow the Heads of State and Government to present the Constitution for ratification. Some aspects of the draft Constitution show clearly that the outcome is not the finished product. The Commission has a responsibility to indicate what these aspects are.

It is the Commission's view that the IGC's task should consist of improving, clarifying and finalising the draft Constitution.

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It is possible to improve the draft Constitution on a limited number of points without upsetting the general balance.

For example, the approach advocated for the composition of the Commission, which does not appear to be viable in the light of the way the Commission really operates, should be reexamined and modified by the IGC, but without reopening other institutional themes. With equality for all the Member States in terms of the composition of the Commission being a settled point in the Convention, it must be possible to find a form of composition which is better suited to the dictates of legitimacy and effectiveness of Commission action.

Likewise, the IGC should be capable of strengthening the decision-making capacity of the Union by further reducing the unanimity requirement. It should be possible to overcome the doubts expressed by the representatives of certain governments during the Convention's work by taking a targeted and precise look at the relevant provisions during the IGC.

Finally, by virtue of the fact that it replaces all the provisions of the current Treaties and, in particular, rewrites the provisions on external action and the area of freedom, security and justice, while adopting the Treaty provisions on policies wholesale, the draft Constitution has inevitably become a lengthy and fairly detailed document. It will be vital to establish procedures for more flexible revision of the less essential provisions.

In the sphere of economic governance, the Constitution should allow those Member States whose currency is the euro to coordinate their economic policies more closely via Union procedures.

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The draft Constitution also contains some imprecise and ambiguous wording. There must be no misunderstandings about the constitutional text that the Member States are gearing themselves to sign. During the ratification period, and afterwards, we must be able to give explanations which are agreed by all as to the significance of whatever provisions are adopted. The IGC will therefore have to examine any questions that the delegations might raise on the meaning of certain texts. The IGC's job will also be to ensure that the new or recast provisions of the draft Constitution are fully consistent with those which have been taken over without detailed examination.

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Finally, the Intergovernmental Conference will have to finalise the texts of the Constitutional Treaty. The Convention was brought into being to examine the essential constitutional issues, and it was neither prepared nor equipped to formulate provisions covering the whole area of Union primary law. So the IGC will have to adopt a Constitution which is couched in a language and set out in a way that is accessible to the people, but which still meets all the technical and legal requirements of a treaty which has to be ratified by all the Member States, after a referendum where necessary.

The Convention deliberately left it up to the IGC to examine the other primary law texts of the Union (including the protocols and accession treaties). As the Constitution is designed to replace all the Treaties on which the Union is based, the IGC will have to give all the necessary attention to this point. The Commission will be happy to provide technical input here. *Annex 5* of this Opinion contains some comments on this matter.

I. Commission: Composition and decision-making

1. The composition of the Commission was undoubtedly one of the trickiest issues facing the Convention. The solution will have a direct impact on the authority with which the Commission plays the role bestowed on it by the founding fathers, and henceforth enshrined in the Constitution — i.e. to act as the guarantor of the common interest, and to be the driving force for integration and the executive of the Union. The fact is that, in a Union of 25 or more Member States, there is no simple formula for guaranteeing the legitimacy and effectiveness of Commission action, both of which are essential if the Commission is to carry out its work properly.

Since the Amsterdam Intergovernmental Conference, the composition of the Commission has been the subject of debate between the supporters of a Commission made up of one national from each Member State and those who favour a leaner Commission. As part of an overall compromise settlement, the Nice Intergovernmental Conference opted for the eventual introduction of the second solution, but it did not lay down precisely how many Members the Commission should have.

2. The Commission feels that the specific response advocated by the draft Constitution — having a Commission made up of one Member from each Member State with different voting rights — is complicated, muddled² and inoperable, and combines the disadvantages of the aforementioned two alternatives in that it may threaten the basis of collegiality, which is equality for all Members of the Commission. This approach is liable to be poorly received by the public and to make ratification more difficult. Additionally, as regards the status of non-voting Members, the draft Constitution leaves open a large number of questions which are essential in terms of the day-to-day functioning of the Commission³. Irrespective of the answer to these questions, it shows the weakness of the proposed system. Indeed, if the members without voting rights manage a portfolio, one cannot see how they could effectively exercise their responsibilities without being able to participate to the collective decision. And if they don't have a portfolio, one wonders what their role within the College could be.

The Commission's fear is that the solution proposed by the draft Constitution, with "first" and "second"-category Members of the Commission, might affect the legitimacy and effectiveness of the Commission. It is necessary and possible to improve the draft Constitution, bringing with it the additional benefit of a major simplification in the wording of the relevant provisions.

These changes must be based on maintaining the principle of equality of all Members of the Commission in terms of preparing proposals and taking decisions; this has from the very start been an essential element in the legitimacy of Commission action. The changes must also reflect the need for a more realistic and operational form of organising the Commission's decision-making procedures.

3. The Convention has decided that the Commission should be made up of one national from each Member

State. The Commission feels that each Member ought to have the same rights and obligations. As the solution advocated by the draft Constitution was itself the result of very strong opposition from a large majority of members of the Convention to the idea of a slimmed-down Commission, this alternative is the only one that ensures that all national sensitivities, cultures and identities are factored into the Commission's deliberations.

4. The current rules on decision-making within the Commission enable it to operate effectively with 20 Members, as *Annex 1* shows. However, to enable a future Commission made up of as many Members as there are Member States to continue to do so, some measure of structuring of the College will be necessary. The fact is that it is not necessary, in terms of maintaining collegiality, for all the Members of the Commission to be involved in all the decisions adopted on behalf of the Commission.

The Commission therefore proposes to generalise and formalise the decentralisation of decision-making within the Commission, by structuring the College into a number of Groups of Commissioners, while taking whatever steps are necessary to guarantee collegiality and consistency of policy. The required amendments to the text of the draft Constitution are contained in *Annex 2*.

The College, embracing all the Members of the Commission, would address only the most important issues and would therefore have only a limited number of decisions to take. Other Commission decisions would be taken by the Groups of Commissioners, each of them acting in fields which are proper to their competences within the general guidelines laid down by the College.

5. The details of this system and the share-out of competences between the Groups and the College would have to be laid down in the Commission's rules of procedure in compliance with the principle of self-organisation of each institution. An example of rules to this effect is given in *Annex 3*.

II. Reducing unanimous voting in the enlarged Union

6. The four previous IGCs extended voting by qualified majority very substantially and the Convention added a few more cases.

However, it is the Commission's duty to issue a clear warning to the Intergovernmental Conference that the progress made is not enough to enable the Union to attain all the aims set by the draft Constitution. The draft Constitution gives the European Council the option of deciding that an area in which the Council takes decisions on a unanimous basis will henceforth come under the rules for qualified majority voting (Article I-24(4)). But this "passerelle" also requires a unanimous decision from the European Council and experience has shown that the general arrangements of this type introduced by the Maastricht and Amsterdam Treaties have never been used.

7. In the draft Constitution, there are still numerous provisions for unanimous voting in the Council or similar decision-making arrangements (consensus within the European Council or agreement by the governments of the Member States). It would be unrealistic to ask for all these to come under qualified majority voting and would not moreover be appropriate, given the great diversity of the cases in question. In certain fields, the Constitution will need to be revised to enable the Union to operate effectively.

However, various options for reducing unanimous voting are available, depending on the nature of the legal bases concerned:

– In the first place, the Commission takes the view that, for some legal bases, immediate transition to qualified majority can and must be made (e.g. Articles III-8 (combating discrimination), III-10 (the right to vote in European and municipal elections), III-191 (OCT association), III-221 (financial cooperation with third countries), III-227 (signing up to the European Convention on human rights));

– However, in some cases, unanimous voting is due to the fact that the Union's authority has been defined in

wide terms; more precise demarcation of the Union's authority should, in some cases, enable unanimous voting to be dispensed with (e.g. taxation in connection with the operation of the internal market, i.e. modernising and simplifying existing legislation, administrative cooperation, combating fraud or tax evasion, measures relating to tax bases for companies, but not including tax rates; the aspects of free circulation of capital linked to the fight against fraud; taxation in respect of the environment; certain aspects of social security; certain measures concerning passports; and the European public prosecutor's role in safeguarding the Union's financial interests);

– Sometimes, unanimous voting is foreseen for areas of new or recent competence, where the Member States understandably wanted the initial pan-European measures to be adopted with everyone's agreement. For legal bases of this kind, provision could be made for a move to qualified majority voting on a specific date (e.g. Articles III-170 (family law), III-176 (police cooperation)).

8. The Commission hopes that the Intergovernmental Conference will manage to further reduce the use of the veto, making use of the various options outlined above.

However, there will no doubt be cases where this will not be possible, especially in the institutional domain. Although there are also clear-cut cases where qualified majority voting should be introduced (e.g. Articles III-84 (appointing the members of the board of the ECB), III-232 (MEPs' statute), it is understandable that certain decisions require universal agreement, such as determining the composition of the European Parliament or the language rules for the institutions.

Nevertheless, the Commission requests the Intergovernmental Conference to do what is necessary to prevent the enlarged Union being paralysed by a national veto. Several options are conceivable: replacing unanimity by reinforced qualified majority voting or a new definition of unanimous voting according to which, after a certain period of deliberation by the Council and discussion within the European Council, opposition from one or two Member States could no longer prevent the Council from adopting a measure for which the Constitution specifies unanimity.

9. The Commission would like to draw the Conference's attention to budgetary provisions in particular. It noted the strong opposition of some governments' representatives at the Convention to abandoning unanimous voting under Article I-53 on own resources and Article I-54 for setting the first financial framework to be adopted after the Constitution enters into force. However, it is clear that maintaining unanimity, even provisionally, is liable to quickly make negotiations extremely difficult, whereas a fair outcome for everybody could be arrived at by qualified majority voting. The Commission therefore takes the view that the veto should be abolished in this area.

III. Revision of the Constitution

10. The outcome of the Convention testifies to the merits of this new approach to revising the Treaties. The Commission also hopes that the Intergovernmental Conference will quickly arrive at an overall agreement on the Constitution and that the Constitutional Treaty will be signed and then ratified as soon as possible after the Union's enlargement.

But European integration will not stop there. The Union will take in further members. It will have to take action in a constantly changing world and meet new challenges. Over the coming years, the way the Union operates, its policy objectives and the means for implementing them will have to be modernised and adapted to changing circumstances.

The Convention has made no change to the current rule underlying the Treaties, which is that any revision, even a minor one, of a primary law provision requires unanimous agreement from the governments of the Member States and subsequent ratification by all the Member States according to their respective

constitutional rules (Article IV-7). This is true not just of the 465 articles of the Constitution but also of all the protocols ⁴.

This state of affairs could lead to total paralysis of the Union and eventually to a loss of interest on the part of the Member States and citizens as regards this form of integration, in favour of less effective models of cooperation or even cooperation between only some Member States.

The Commission feels that it is crucial for the IGC to open the way towards procedures for revising the Constitution which are more flexible, albeit subject to clearly defined definitions. It would point out that Article 95 of the old ECSC Treaty, which was ratified by all the Member States, provided for a more flexible procedure for revising non-essential provisions. This procedure was, moreover, used in 1960.

11. The European Council should be able to make amendments to Part III of the Constitution, deciding by a 5/6 majority of its members, following approval by the European Parliament and a favourable opinion from the Commission; unanimity would remain a requirement in cases where the proposed amendment would alter the Union's competences or the balance between the institutions.

These revisions would not be subject to ratification, but the national parliaments should be involved ahead of any decision taken by the European Council, by way of the role they would play in a Convention and by dint of their watchdog role vis-à-vis government action. It would be up to the Court of Justice to ensure that the conditions for a more flexible form of revision were met.

In more general terms, the Commission suggests that an in-depth political analysis should soon be conducted on the question of setting up a constituent body with representatives from the Member States' governments and parliaments, and the European institutions.

IV. Economic governance

12. In its communications to the Convention, the Commission advocated strengthening economic policy coordination so as to ensure the conduct of sound public finance policies, necessary for the establishment of a sound economic framework, thereby promoting growth and employment. To this end, the draft Constitution's provisions on the Union's economic and monetary policy need to be improved further, in particular by giving the Commission a right of proposal for the preparation of the broad economic-policy guidelines.

13. Although the time when the euro will be the currency of all the Member States is probably still a long way off (in view of the enlargements yet to come), this should remain the goal. The relevant provisions should therefore be collated in a section on "transitional provisions", which should become entirely obsolete on the day when the euro becomes the currency of all the Member States.

This transitional section should specify the effect of the fact that the euro is not yet the currency of some Member States, enable economic policies in the euro zone to be coordinated more closely and set out the obligations and the rights of the Member States "with a derogation".

The Ministers of Finance of the euro zone must be able to meet and take decisions as the Ecofin Council for the euro zone. The modus operandi of the Governing Council of the European Central Bank and the operational decision-making framework for monetary policy should be reviewed to ensure that decisions remain effective in a euro zone that is set to expand.

V. Clarification of the draft Constitution

A. Institutional provisions

- The President of the European Council -

14. Despite its reservations on the matter, the Commission does not propose to bring into question the compromise which the Convention reached after prolonged debate. It does feel, though, that the Intergovernmental Conference should draw the necessary conclusions by inserting provisions concerning the status of the President of the European Council ⁵.

At any rate, it is vital to maintain the balance of the President of the European Council's role defined by the Convention. Any extension of duties over and above the task of chairing meetings of the European Council and representing the Union in the context of common foreign and security policy activities would inevitably change the institutional architecture agreed in the Convention and create confusion as to how responsibility was shared. More particularly, the President of the European Council should not perform the task of organising the Council's work, particularly with the European Council set to become an autonomous institution vis-à-vis the Council ⁶. Someone who is not accountable for his/her action to any parliamentary assembly cannot exert influence over the *modus operandi* of the Council, which is supposed to be transparent and democratic.

- Presidency of the different Council formations -

15. The Convention has decided to do away with the current system of a six-monthly rotating Presidency of the Council involving all the Member States in turn. However, it has not expressed a clear view on the new system, except as regards the Foreign Affairs Council, which will be chaired by the Minister for Foreign Affairs.

The way in which the Presidency of all the Council formations will be organised is crucial if the Council is to work correctly in the Union and if the sharing of tasks among the institutions, especially in the executive field, is to be done properly. The IGC should clarify and examine this issue in detail and, in particular, consider whether it would not be simpler for the Constitution to stipulate that each Council formation elect its own President from within its ranks.

16. Even if relieved of the external representation of the Union, exercising the function of President of a Council formation will be a heavy load for a minister who will also have national duties to carry out. The Commission therefore feels that the term of office of a President of a Council formation should be limited to one year ⁷.

Having a longer period would increase the likelihood that the President's period of tenure will include an election or a ministerial reshuffle, resulting in the opposite effect to what the reform is seeking to achieve.

17. With the disappearance of the six-month Presidency system with representatives of one and the same Member State, the need to ensure consistency of action by the various Council formations will become even more pressing than it is today.

The task of maintaining the consistency of the Council's work should be entrusted to a body with representatives of the governments of all the Member States and the Commission, namely the General Affairs Council, as provided for in the draft Constitution, and not to a bureau or a conference of presidents of the various formations (which would in any case be difficult to organise on a practical level).

The Commission proposes that the General Affairs Council responsibilities should not encompass all the Council's lawmaking activities, but should be confined to managing general affairs and, above all, ensuring that the Council's action is consistent in the context of the Union's interinstitutional planning.

- The Minister for Foreign Affairs/Vice-President of the Commission -

18. One of the draft Constitution's major achievements was to create the office of Minister for Foreign

Affairs/Vice-President of the Commission, with a view to improving the consistency of the Union's external action in all fields, regardless of the decision-making procedure provided for in the Constitution (either the Community method or the Common Foreign and Security Policy procedure).

In the field of common foreign and security policy, the Minister for Foreign Affairs/Vice-President of the Commission acts alone, as mandated by the Council; to this end, he or she formulates proposals for the Council and carries out Council decisions. He/she is, in addition, a full Member by right of the Commission, and holds the rank of Vice-President, with special responsibility for coordinating other aspects of external action; he or she has the same rights and obligations as the other Members of the Commission, is involved in decision-making in all fields and shares collegial responsibility for Commission action.

19. If the Commission is structured into Groups of Members, the Minister for Foreign Affairs will chair the Group of Commissioners responsible for external relations. This is the group which will have responsibility for strict compliance with procedures, so that the Council, the Commission and the Minister can each play effectively the role assigned to them by the Constitution. At the same time, though, this Group will be an ideal forum within which the consistency of the Union's external action can take on concrete form.

A draft declaration appended to the draft Constitution provides for the Minister to be assisted by a European External Action Service, which will embrace the Union's delegations in third countries and to international organisations. The draft declaration requires the Council and the Commission to agree on how this Service should be set up. Those questions are essentially of an administrative nature and should therefore not be regulated in the Constitution.

For the Commission, the essential point is that the European External Action Service should not be separate from the other institutions of the Union and should be able to carry out its work in close conjunction with all the Commission departments.

- Legal review -

20. A legal review of the draft Constitution will take place to ensure that discussions within the Intergovernmental Conference are based on a text which is clear and legally correct. This is essential. Indeed the Commission considers that the choice between which provisions have to feature in Part I of the Constitution and those which can be contained in Part III is not always balanced ⁸, and the reason for sticking to the "single institutional framework" (article I-18) and for the absence of two institutions (the Court of Auditors and the European Central Bank) from this framework is not always clear. There are omissions ⁹, and the kind of language used sometimes lacks the necessary legal precision ¹⁰.

This legal review will indicate whether the texts still contain ambiguities on which the IGC should be forming an opinion.

B. The Union's policies

21. As far as its citizens are concerned, the Union is meaningful only in as far as it implements its policies. The Commission thus endorses the approach of the draft Constitution, which does not confine itself to setting out fundamental rights and institutional structures but which contains, in Part III, a set of provisions governing the Union's policies and defining its goals and the resources available for implementing them.

The Convention examined closely the provisions on the Union's external action and the area of freedom, security and justice. It produced draft articles completely rewriting the originals. As far as the other policies are concerned, the Convention confined itself to reproducing the provisions currently featuring in the EC Treaty, with only a few alterations. On the basis of the work done by experts from the Legal Services of the European Parliament, the Council and the Commission, the texts of the EC Treaty have been tailored to fit the new institutional framework (particularly the provisions on procedures and instruments) but have remained basically unchanged.

22. In certain areas, the text dates back to the 1957 Treaty of Rome. In others, it has been amended repeatedly, which does not make it any more accessible. The result is that the provisions on policies as featured in Part III of the draft Constitution (apart from the areas rewritten by the Convention) form a lengthy, uneven and complicated whole which is drafted in a variety of styles and, above all, has been superseded by the reality of current policies. The provisions on agriculture thus reflect the ideas of the 1950s on growth and security of supply, and are far removed from the key elements of the CAP reform designed to encourage production of high-quality food whilst respecting environmental imperatives and developing the countryside by means of diversification. The concept of sustainable development — which the Convention highlighted as one of the Union's aims — does not appear in the provisions on environmental policy. By contrast, the draft Constitution contains a number of provisions which are obsolete or irrelevant ¹¹.

During the process of writing a constitution for the Union, provisions on policy should therefore be simplified and updated.

The Commission has started to prepare the ground for overhauling the provisions on the Union's policies without, however, disturbing the political balance or extending the Union's powers, and could present its proposals to the Conference if requested. However, the Commission fears that the timetable decided upon for this Intergovernmental Conference will not be sufficient to completely rework these provisions.

This situation constitutes one more important reason for enabling the Constitution to be revised more flexibly in the way that the Commission has proposed (see point III above). If the provisions on policies are not rewritten at this time, the Union should be given the possibility of doing so in coming years. If the rules were too inflexible, much of the Constitution, the Union's flagship text, would carry these defects for many years to come.

23. Failing a complete overhaul, the Intergovernmental Conference should at least clarify some provisions and should make all the Constitution's provisions consistent, particularly by reflecting fully the provisions of Part I, on which the Convention focused a great deal of attention, in Part III, which it did not revise.

- Consistency between the Union's aims and policies -

24. There is a certain amount of dissonance between the Union's goals, which the Convention has revised (Article I-3), and the aims of some policies which have not been reviewed. This gives rise to a problem of consistency with regard to drafting of the provisions and also potentially in interpreting their legal scope. The legal bases for implementing these policies are generally linked to the aims which they are intended to achieve. The IGC should therefore verify whether the Union's general objectives and more precise policy objectives are consistent. The Commission takes the view that sustainable development, in particular, should become a key aim in the Union's policies, and that the goals of the common agricultural and fisheries policies should be revised to reflect the new approach more clearly. In addition, the Commission draws attention to the option of agreeing a Protocol making implementation of the Constitution's objective of sustainable development more concrete.

- Consequences of classifying competence -

25. The Commission holds the view that the IGC should ensure that the provisions of Part III are consistent with the approach followed by the Convention in classifying competence.

The Convention decided that two areas which were previously matters for complementary competence, namely the common safety concerns in public health matters and research, should henceforth be areas of shared competence. Article I-14 also provides that the Union may adopt initiatives to ensure coordination of Member States' social policies. However, the texts of Part III on these policies have not been adapted accordingly.

As a result, the Commission invites the IGC to empower the Union to adopt measures with a real impact at European level to combat communicable diseases (such as SARS) and “bio-terrorism”, and to prevent serious risks to human health. It also holds the view that the Union’s authority to create a proper European research area should be clearly anchored in the Constitution.

- Streamlining of procedures -

26. The Convention greatly streamlined and simplified the Union's procedures. In general, the results of these changes are reflected in Part III, but in some cases, they could be made even more efficient and consistent. The Commission draws the IGC’s attention in particular to the three cases explained in *Annex 4* of this Opinion.

VI. The public's endorsement of the draft Constitution

27. Although the Convention's deliberations were transparent and civil society organisations were heavily involved in them, the general public was not well engaged about the process under way and the Constitution that was being drafted. This is liable to jeopardise the successful outcome of the process. All the political players and the institutions need to make an effort to maintain contact and communicate with civil society and the general public throughout the two stages to come (the Intergovernmental Conference followed by the ratification process in each Member State).

The type of document being drafted, and the political, constitutional and electoral processes it entails, places a heavy responsibility on the Member States vis-à-vis their citizens and their need to be informed. The authorities must therefore, without fail, make a great effort now to build upon the action taken so far by the European institutions to promote public debate, information and communication on the future of the Union, especially as they have the resources and channels to get the message across. These initiatives must also involve the regional and local levels. The Commission, for its part, will sustain its own endeavours, in cooperation with the other institutions, to support public debate and information.

It would be highly conducive to enlisting public support for the European project if all the Member States were to organise simultaneously the ratification - be it parliamentary or popular - of the Constitution.

Annexes

Annex 1 — Decision-making at the Commission

Every year, the Commission adopts some ten thousand decisions, but less than 3% are adopted by the College following debate at the weekly meeting of the Commission and around 30% by written procedure (*see table below*). Clearly, these are the most important decisions, but the fact is that the overwhelming majority of decisions are adopted by other procedures.

The Commission’s rules of procedure currently provide for four procedures:

- “oral procedure”: decisions are taken by the College at its weekly meetings;
- “written procedure”: decisions are deemed to have been adopted by the Commission where, on expiry of a set period, no Member has entered a reservation on a proposal he or she has received in writing; where such a reservation has been entered, the decision is taken by oral procedure;
- “empowerment”: decisions are taken by one or more Members of the Commission, who are empowered to take management and administration measures on the Commission’s behalf;
- “delegation”: decisions are taken by a Director General to whom the Commission has delegated the adoption of management and administration measures on the Commission’s behalf.

For decisions taken on the Commission’s behalf by empowerment or delegation, collegiality is assured by

dint of special measures, more especially the limitations and conditions imposed on empowerment or delegation, the interservice consultation procedure, and the fact that all Members of the Commission are informed of decisions taken.

A further important element in understanding the way the Commission operates is that all decisions are based on a proposal from a Member of the Commission but, generally speaking, the Commissioner making the proposal will first of all seek agreement from whichever colleagues are most concerned with the subject area in question. As a result, proposals for decisions already reflect the views of the Commissioners who are most closely concerned. By the same token, the use of an empowerment by a Member of the Commission is often subject to the advance agreement of one or more of his/her colleagues.

In addition, the Commission has set up a number of internal working groups of Commissioners with connected portfolios (e.g. the Group of Commissioners responsible for external relations). At present, these groups have no decision-making powers, and are just convenient ways of having certain subjects examined by whichever Commissioners are most closely concerned.

Consequently, although all Commissioners are involved in one way or another in all the Commission's decisions, the very great majority of decisions are taken *de facto* by only a limited number of Commissioners, and in some cases by just one.

[La prise de décision à la Commission](#)

Annex 2 — Proposals for the composition and organisation of the Commission

Amendments to Article I-25 of the draft Constitution

“1. (unchanged) ¹²

2. (unchanged) ¹³

3. The Commission, including the President and the Minister for Foreign Affairs, shall be made up of one national from each Member State.

The Commission shall be structured in Groups of Commissioners covering its main spheres of competence, in accordance with its rules of procedure.

4. Decisions by the Commission shall be taken, without prejudice to the following paragraph, by a majority of its Members or adopted by a Group of Commissioners or by one Member who is authorised to take decisions on its behalf.

The Commission shall decide by a majority of two thirds of its members to adopt its rules of procedure, specifying how Members are authorised and when a matter can be put before all the Members of the Commission for a decision.

5. The Commission shall work within the political guidelines laid down by its President who will decide, without prejudice to paragraphs 3 and 4, on its internal organisation in order to ensure that the Commission's activities are coherent, effective and have the support of all its Members.

The President shall allocate the Commission's responsibilities to its Members and may reshuffle their portfolios during his term of office.

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

A Commission Member shall resign if asked to do so by the President.

6. (paragraph 4 unchanged) ¹⁴

7. The Commission, as a College, shall be responsible to the European Parliament.”

Amendments to Article I-26 of the draft Constitution

“1. (unchanged) ¹⁵

2. The government of each Member State, except those of which the President and the Minister for Foreign Affairs are nationals, shall draw up a list of three persons, representing both genders, who are deemed qualified to perform the duties of a Member of the Commission.

The President shall choose one person from each of these lists to become a Member of the Commission. The President, the Minister for Foreign Affairs and the other Members of the Commission so designated shall be subject collectively to a vote of approval by the European Parliament.

3. After approval by the Parliament, the Commission shall take up its duties from the 1 November following the date of the European Parliament elections. The Commission’s term of office shall be five years.”

Amendments to Articles III-250 to III-256

In Articles III-251, III-252 and III-253, the expression “European Commissioners and Commissioners” should be replaced by “Members of the Commission”. Articles III-250, III-254, III-255 and III-256 must be deleted since the substance of these provisions is contained in Articles I-25 and I-26 as amended.

Annex 3 — Example for the organisation of the Commission

The Commission could be organised in accordance with the following principles:

- The Commission will create Groups of Commissioners.
- Each Group will be made up of at least seven members; apart from the President, no Member of the Commission can be a Member of more than three Groups.
- The composition of each Group will be decided by the President, who must take account of the responsibilities of each Commissioner and the need for the Group to represent the entire College.
- The Minister for Foreign Affairs shall chair the Group of Commissioners for the Union’s external activities. The Chairpersons of the other Groups shall be appointed by the Commission, on a proposal from the President, from among the members of each Group.
- The College will regularly conduct policy guideline debates and adopt the following decisions:
 - the most important decisions set out in the rules of procedure (e.g. annual programme, draft budget for the Union, financial perspective and referral of judicial proceedings),
 - decisions put on the agenda of the College by the President or by the Group responsible for the matter in

hand where, in view of the importance or the specific nature of the decision to be taken, it ought be discussed by all the Members of the Commission,

- any decision which a Member of the Commission considers, after taking note of the draft decision of the competent Group, should be discussed by the entire Commission.
- Other Commission decisions are to be taken on its behalf by the Group of Commissioners responsible for the matter in hand.
- The decisions of the Groups of Commissioners are to be taken by a majority of their members.
- Draft decisions taken on behalf of the Commission by the Groups of Commissioners are to be communicated in good time to all the Commissioners who have the right to submit written comments for the attention of the Group of Commissioners concerned.

Annex 4 — Streamlining of certain procedures

As explained in point 26 of the Opinion, the Commission requests the IGC to examine in particular the following points:

- Common agricultural policy -

In Article III-127, the draft Constitution quite rightly distinguishes between legislative agricultural policy measures (adopted by legislative procedure) and non- legislative ones, although the latter are adopted directly under the Constitution, which provides that regulations and decisions are to be adopted by the Council upon a proposal from the Commission (paragraph 3).

However, Article III-127, paragraph 3 should also provide for the European Parliament to be consulted in the interests of consistency with the laws and framework laws adopted on agriculture and to prevent the Parliament from being at a disadvantage vis-à-vis the current situation.

Moreover, an addition should be made to the effect that the measures implementing the Council's regulations and decisions are to be adopted by the Commission. As the draft Constitution has already differentiated between legislative and non-legislative measures, conferring upon the Council the authority to adopt the most important of the latter, there is no reason for the Council to reserve for itself, in the Constitution, the power to implement its own measures. Article I-36 allows the Council, as is already the case, to give itself implementing powers in secondary legislation, in specific and duly justified cases.

- Coordination of social security systems -

Regulation 1408/71 set up a system for coordinating social security systems. It is currently based on Articles 42 EC (for employed workers) and 308 EC (for self- employed workers and other persons covered by social security schemes). The procedures provided for under these articles are different (Article 42: codecision, Article 308: consultation of European Parliament), but both require a unanimous decision by the Council. The Convention repealed the requirement for unanimity for Article 42 (the wording of which is reiterated in Article III-21 of the draft Constitution) because this legal basis provides for the codecision procedure.

Since the personal scope of Regulation 1408/71 is wider than employed workers alone, Article III-21 has been extended to self-employed workers. However, these amendments cannot actually take effect because

Article III-21 does not cover all the persons who benefit from Regulation 1408/71 (e.g. students and civil servants) and Article 308 (now Article I-17) will still have to be invoked. The Commission requests the IGC to word Article III-21 in such a way that, in future, it forms the sole legal basis for amendments to be made to Regulation 1408/71.

- Research policy -

Article III-149 provides for a multiannual framework programme for research and technological development to be established under European law, i.e. by the legislative procedure. By contrast, the specific research programmes are to be adopted by the Council under paragraph 4 of Article III-149 upon a proposal from the Commission and after consultation with the European Parliament. The multiannual framework programme and the specific programmes form a whole which is presented and adopted as an overall package. It would therefore be logical to provide for the same procedure, namely the legislative procedure, to be applied for adopting all the research programmes.

Annex 5 — Comments on finalising the draft Constitution

The Commission hopes that the Constitutional Treaty will be signed - as the Thessaloniki European Council hoped it would - as soon as possible after 1 May 2004. It shares many people's view that 9 May would be an entirely suitable symbolic date for the ceremony.

However, it will not be enough for the Conference to adopt the draft Constitution drawn up by the Convention, improved and clarified where necessary, since it does not cover all the primary law of the Union (including the accession treaties and numerous protocols) yet repeals and replaces the basic treaties (Treaty of Rome and Treaty of Maastricht). Much still needs to be done before a complete and finalised text of the new Constitution of the Union is available.

The work which lies ahead is largely technical and legal, and could be done by the three institutions' legal services. But on some issues, political decisions still have to be taken. This involves a wide range of issues, prompting the Commission to make the following comments.

- Treaties -

The Convention left it to the Intergovernmental Conference to draw up the Protocol on the list of treaties and acts to be repealed (Article IV-2).

In order to be able to do so, the IGC must first examine in full the four foregoing accession instruments (1972, 1979, 1985 and 1994). The vast majority of the provisions of these instruments are obsolete since the transitional periods have passed, but some of them and the protocols attached to them are still in force. Some of the provisions, especially those covering exceptions or special rules for certain territories, could prove to be politically highly sensitive. The provisions which the IGC considers still to be relevant will have to be incorporated in the Constitution or attached in a Protocol. The Commission recommends that this opportunity be taken to rewrite in a single Protocol all the provisions governing the territorial scope of the Constitution and the specific rules for certain territories which are presently contained in a variety of instruments.

The IGC will have to examine what amendments need to be made to the most recent accession treaty (2003), a large number of whose provisions will still be current when the Constitution comes into force, in order for it still to have effect despite the fact that the legal framework to which the accession treaty refers will have been replaced by the Constitution.

- Protocols -

Drawing up a list of protocols which should remain applicable may prove to be an even more delicate political matter. Over 30 protocols are attached to the EC and EU Treaties at present. Some of them are of a general nature (such as the statutes of the Court of Justice, the ESCB, the ECB and the EIB) and others govern very specific issues or establish a Member State's position vis-à-vis the general treaty provisions. As far as the latter are concerned, the IGC should assess whether they should be maintained.

However, it is not enough to establish a list of protocols which must be upheld: the IGC will have to align the texts of these protocols with the Constitution. This is not merely a matter of replacing the references to the treaties but also of examining whether all the provisions of the protocols are in line with the new rules of the legal order created by the Constitution and the procedures and types of instruments it provides for.

The Commission would like to draw attention in particular to the protocols on free movement of persons and integration of the Schengen acquis in the Union's framework. Since the chapter on the area of freedom, security and justice has been completely rewritten, these protocols must also be revised in their entirety. The Commission recommends that this opportunity be taken to simplify and streamline the legal regime for Schengen so that it is no longer a form of reinforced cooperation but the legal norm which Member States that currently have special regimes can benefit from — if they wish to maintain the practical effect of the current protocols — by means of a simple exempting clause with an opt-in. In any case, the Commission takes the view that it is not possible to uphold exemptions which are based on differences in the legal nature of a rule alone (international law or Union law) and not on the application or non-application of the rule's substance.

- Declarations -

The Intergovernmental Conference must also examine the declarations made when previous treaties were signed by the Intergovernmental Conference or unilaterally by one delegation. Many of these no longer apply or have been superseded by events. Nevertheless, some of them are still meaningful. Unlike protocols, declarations do not have binding legal force and can therefore not be amended, repealed or upheld: once the provisions of the treaties to which these declarations referred are repealed, they have no further relevance. The question facing the IGC is therefore whether it wants new declarations with the substance of some of the old ones and, if so, how they are to be worded. The same question arises with regard to unilateral declarations, although the Commission strongly recommends to the delegations to make as few of these as possible. A large number of declarations is liable to give a false impression of the Constitution's scope and might be poorly received by the public when the Treaty is being ratified.

- Euratom Treaty -

The Convention drew up a Protocol repealing several provisions of the Treaty establishing the European Atomic Energy Community (Euratom). It was drafted on the assumption that the legal personality of this Community would be merged with that of the Union, but the Convention decided to propose that a separate legal personality be upheld for Euratom, failing, however, to make the amendments to the protocol this change in approach would require. In the absence of any provisions on the joint institutional framework for the Union and Euratom, of any provision equivalent to the current Article 305 EC and of provisions on the revision and scope of the Euratom Treaty, the legal framework of the Euratom Community remains incomplete and the legal relationship between the Euratom Community and the Union based on the Constitution has not been settled.

- Other aspects of finalisation of the Constitutional Treaty -

The Convention also left it to the Intergovernmental Conference to draft two more protocols:

- Protocol on structured cooperation on defence (Article III-213)
- Protocol establishing conditions under which the institutions' acts remain in force (Article IV-3).

As regards the latter, which is crucial to legal certainty and which must be drawn up in such a way as not to be subject to legal challenge, the Commission recommends that the IGC direct the legal services of the three institutions to prepare a draft jointly and to ask the Court of Justice for an opinion on it.

Finally, the Intergovernmental Conference will have to assess the general balance of the Constitution. The draft Constitution repeats some provisions (especially those in the Charter) and there are inconsistencies between the provisions in Part I and Part III. Part I has long articles on implementing certain policies (see Articles I-39, I-40, I-41 and I-56), and provisions relating to a single policy are dispersed throughout the Constitution, making it more difficult to follow, running the risk of contradictions and leading to repetition. The Commission also thinks that some of the institutional provisions now contained in Part III deserve a place in Part I of the Constitution.

¹Except for Euratom.

² Especially the distinction between the “Commission” and the “College”, and between “European Commissioners” and “Commissioners”; the concept of “European Commissioner” sometimes covers all the members of the “College”, including the President and the Minister for Foreign Affairs (e.g. in Articles I-25(4) and (5), III-250, III-251 and III-253) and sometimes just the other 13 members of the College (e.g. in Articles I-25(3), I-26(2), III-252 and III-254).

³ Are the “non-voting Commissioners” Members of the Commission, or to put it another way: what are their rights? May they attend meetings of the College, and take part in discussions within the College? May they suspend a written procedure? Are they empowered to take decisions on behalf of the Commission? Can they be given specific responsibility for an area of activity involving the right to give instructions to a Commission department (“manage a portfolio”)? What is the nature of their relations with the President (who is, according to the text, personally responsible for their activities, in direct contradiction to the principle of collegiality, in spite of the fact that the Convention rejected proposals for introducing the individual political responsibility of Members of the Commission)?

⁴ There are a very limited number of exceptions (e.g. Articles III-289, III-299 and III-76 (13)).

⁵ In the same way as for the Members of the Commission, the Constitution should include provisions concerning nationality, the duty of independence, a ban on any other professional activity, and arrangements for replacement in the event of death or resignation.

⁶ The IGC should draw the requisite conclusions from this change, by providing for legal protection vis-à-vis European Council acts equivalent to the kind of protection which already exists for acts of the Council, particularly by making appropriate changes to Articles III-270 and III-272.

⁷ Including for the “Euro Group”, whose Presidency mandate should coincide with that of the Presidency of the Ecofin Council.

⁸ For example, Article I-20 (3) states how many times the European Council is to meet each year, whereas the rules concerning decision-making by the European Parliament and the Commission, which are essential for the way these institutions are run, are in Part III (Article III-240 and Article III-255); a reference to the European Investment Bank should have been included in Part I.

⁹ For example, the draft Constitution contains no transitional provisions for the composition of the Commission between entry into force of the Constitution and 1 November 2009; there are no rules on the conditions for appointment and exercise of the mandate of the President of the European Council (e.g. nationality and independence). It is also a pity that the draft Constitution does not take over the constitutional elements of the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, such as the independence of MEPs and the list of incompatibilities.

¹⁰ For example, Article I-22(2) and Article I-24 give the impression that the Council is made up of Member States, whereas in fact it is made up of members who represent and act on behalf of the governments of their countries.

¹¹ For example: Article III-141 and Article III-56(2)c, on the division of Germany, or Article III-109 which provides that the “Member States shall endeavour to maintain the existing equivalence between paid holiday

schemes”.

¹² «The European Commission shall promote the general European interest and take appropriate initiatives to that end. It shall ensure the application of the Constitution and steps taken by the Institutions under the Constitution. It shall oversee the application of Union law under the control of the Court of Justice. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid in the Constitution. With the exception of the common foreign and security policy, and other cases provided for in the Constitution, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.»

¹³ «Except where the Constitution provides otherwise, Union legislative acts can be adopted only on the basis of a Commission proposal. Other acts are adopted on the basis of a Commission proposal where the Constitution so provides.»

¹⁴ «In carrying out its responsibilities, the Commission shall be completely independent. In the discharge of their duties, Members of the Commission shall neither seek nor take instructions from any government or other body.»

¹⁵ «Taking into account the elections to the European Parliament and after appropriate consultations, the European Council, deciding by qualified majority, shall put to the European Parliament its proposed candidate for the Presidency of the Commission. This candidate shall be elected by the European Parliament by a majority of its members. If this candidate does not receive the required majority support, the European Council shall within one month propose a new candidate to the European Parliament, following the same procedure.»