

# EU Constitution Project Newsletter

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In line with the Federal Trust's aim to enlighten the debate on good governance, this Newsletter reviews the current reform process of the EU from the standpoint of the work of the Federal Trust's project on Constitutionalism, Federalism and the Reform of the European Union (the 'EU Constitution Project'). The Newsletter looks at current developments in and outside the Convention and also covers the UK debate. Finally, it provides information about relevant events and publications.

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## 1. Guest Editorials

The European Union stands at the brink of a major decision on its political future - what several commentators have described as an Ackermanian constitutional moment in its history - as to whether it will enact a European Constitution. Over the past two years, a great deal of political energy has been spent in debating and designing proposals for such a constitutional document. In the coming months, Europe's political leaders will decide collectively whether to endorse and recommend a final version of this document and individually whether to consign it to a popular vote or other form of national ratification. How and why has this moment come about?

A range of different reasons and objectives have been put forward for adopting an EU constitution. These include (a) grounding and enhancing the legitimacy of the EU through a constitutional process which would allow for a kind of democratic or citizen baptism of the European polity; (b) simplifying and consolidating the EU's tangled documentary foundations by incorporating its complex *acquis* in a single comprehensible constitutive text; (c) limiting definitively and reining in the creeping powers of the EU; (d) marking the historic and symbolic significance of the reuniting of Europe which the next enlargement is set to bring about; and (e) strengthening the external unity, identity and representation of the Union to the outside world. Clearly there are many other possible objectives and reasons for adopting an EU constitution, and further, not all of these listed above are mutually exclusive. However, it is certainly possible to argue, when we examine the

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results contained in the draft treaty establishing a European Constitution which was presented for the IGC this year, that one rather than another of these objectives is more clearly and obviously achieved by the text.

In fact, of the many different objectives suggested, there have arguably been two primary competing reasons which explain the decision to draft and adopt a constitution: the first being to strengthen the internal legitimacy and democratic functioning of the EU, and the second being to strengthen and enhance the external unity and identity of the EU. And while the political rhetoric surrounding the establishment of the Convention and the drafting of the constitutional text focused primarily on the first of these objectives, the process has arguably produced a text whose main achievement is the other. Other than the incorporation of the Charter of Rights, the most striking features of the draft constitution are those which are oriented to the outside world and which, albeit by centralizing and strengthening some of the institutions internally, aim to enhance and strengthen the EU's international identity: the conferral of single legal personality of the Union, the move to a longer-term presidency of the European Council, the creation of the post of foreign minister, and the considerable overall enhancement of the role and power of the European Council.

Thus, while the problems of democracy, decision-making, closeness to the citizen, and the balance of power between the EU and its states and regions preoccupied much of the work of the Convention, the most notable features of the final text are not those which try to deal with its internal crises, but rather with the EU's external face. Whether this has happened through design or otherwise, the draft constitution arguably represents a step in the EU's attempt to counter the prospect of a unipolar world.

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The draft Treaty proposed by the Convention on the Future of Europe is ambitious in conception and in scope, but notably cautious in content. No surprise, perhaps: with such a wide range of views to accommodate, it was bound to be a compromise, and its authors have, understandably, kept a keen eye on what is likely to be negotiable. The text may yet change a little in the IGC, but its main features can already be discerned.

First, the document is best understood not as a draft constitution, but as a draft Treaty. The contracting parties are nation states and they remain the main locus of authority and legitimacy. It is the member states – not Europe's citizens – who are the principal actors in Europe's script.

Second, the draft testifies to the essentially modest nature of the Convention exercise: this is no attempt to rethink the Union from first principles. Fashioned, as it has been, from materials as disparate and unwieldy as the *acquis communautaire*, how could it be otherwise?

Third, the European Union will remain an entirely *sui generis* construction – a hybrid with both intergovernmental and supranational characteristics. As such, it will continue to disappoint those on either side of the debate who hanker for a perfection situated outside the here and now and the piecemeal accretions of history.

Fourth, to the extent that it alters at all the overall institutional balance and the relationship between the Community institutions and the national capitals, it can probably be agreed that it tilts power toward the latter, albeit marginally. Certainly there are some federalist or supranational features: the European Parliament, for example, would acquire co-decision with the Council on *all* policy areas subject to majority voting in the Council. The EU would acquire its own public prosecutor with the power to investigate and prosecute serious cross-border crime. Majority voting would be extended to most aspects of asylum and immigration policies. And the Charter of

Fundamental Rights would be incorporated into the Treaties.

But the draft is more notable for what it does *not* change. For example, the national veto is maintained on tax, foreign policy, and the key components of national social security and criminal justice systems. What is more, several of the proposed reforms can be seen as *strengthening* the role of the nation states. The proposal that the Presidency should be assumed by an individual, rather than a country, as at present, and to make that person 'elected' by the European Council, is widely seen as altering the institutional balance in favour of the Council – an essentially *intergovernmental* body – at the expense of the European Commission. The proposal that one third of national parliaments should be able to demand a review of a Commission proposal if it risks violating the subsidiarity principle, and the new right of appeal to the ECJ for parliaments, the committee of the regions and individuals against alleged infringements of subsidiarity, represent significant concessions to domestic opinion in the member states (though it should be pointed out that such arrangements are perfectly consistent with 'federalism'.) Crucially, the Convention has rejected the idea that the President of the Commission should be directly elected by Europe's voters. Instead, the EP would merely be asked to vote on one candidate chosen by the European Council. If the legitimacy and authority of the Commission President do not emerge enhanced, neither does the Commission's putative role as representative of the EU on the international stage: the new EU Foreign Minister – merging the aid and diplomacy tools – will be answerable to the Council, not to the Commission.

Fifth, the draft does not offer a significant improvement over the status quo in terms of the Laeken objectives of efficiency, democracy and transparency. Many or most of its provisions can probably be placed under one of these headings without any intellectual gymnastics. But these principles, when applied, are either trade offs against one another (e.g.

democracy v. efficiency) or are inherently contentious. They cannot be invoked in the clear-cut way which would give the Treaty overwhelming moral force or popular appeal. There is no fast track to legitimacy on offer – nor could there be.

Some will regard these cautionary notes as too fatalistic. They see the Convention's draft as an opportunity missed. But such misgivings are overwhelmed by the political reality which now stares us in the face, and which is sending Europe's leaders into denial. For we now have a state of affairs in which governments appear unable to secure public endorsement for a proposition via a national plebiscite. Sometimes – in Denmark, in Ireland – the situation has been retrieved at the second attempt. Even that no longer looks like a safe assumption. With the eurosceptics' ability to conjure up ghosts, just imagine if the draft Treaty were more controversial...

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## 2. October at the IGC

The IGC had four meetings this month, two with Heads of State or Government (4 and 16/17 October), and two at Ministerial level (14 and 27 October). The Italian Presidency of the IGC has conducted a considerable amount of agenda-setting through its use of questionnaires, most of which have been focused on institutional issues. 'Non-institutional' questions have been limited, particularly vis-à-vis Part III of the draft Constitution, and Part IV issues will not be broached until November. Defence was discussed at the European Council – but it isn't due on the IGC agenda until November. (See Parallel Events for a discussion of European defence issues.)

The Italian Presidency convened the first meeting of the 2003 IGC on 4 October in Rome. The Heads of State and Government opened the IGC with a positive expression of intent. In the Rome Declaration, they confirmed "the importance of the commitment to

endow the European Union with a constitutional text based on the equality of its States, people and citizens that assures the efficacy, consistency and efficiency of Europe's role in the world and take up the Convention's Draft Treaty as a good basis for starting in the Intergovernmental Conference." A good basis it may have been, but unsurprisingly, the devil was in the details.

The first part of the draft Constitution to be excised was the Legislative Council, on 4 October. Pundits and naysayers cried that the entire draft would be unravelled and that an unwelcome precedent was set by this action – one French diplomat said, "the first brick in the wall has fallen." Discussion ranged inconclusively on a number of other topics, including the rotating Council presidency and the Foreign Minister (see below for more detail).

On 13 October, on the occasion of the GAERC meeting, foreign ministers prepared for the meeting of EU leaders in the European Council (16-17 October) and discussed a number of IGC matters, including the Commission size and the Foreign Minister. On the Commission, the UK, and the original 'Six', France, Germany, Italy and the Benelux, supported the proposal in the draft Constitution: that of 15 core Commissioners with voting rights. However, a majority of countries, particularly the small countries and the candidate countries, supported a change which would give each country one Commissioner, all with full voting rights. The Commission is also against the draft Constitution's proposal, as it fears a 'two-tiered' Commission would undermine its collegiate nature. There was no resolution, and the debate was postponed.

The next meeting was in Brussels on 16 and 17 of October. Proposals distributed by the Italians for discussion touched on Council formations and Council presidency rotation issues. Vote-weighting and qualified majority voting were also on the agenda for debate (see below). In an all-time first for

European integration, Chancellor Gerhard Schröder asked President Chirac to represent Germany at the meetings on Friday, as the German delegation had to return to Berlin for a critical domestic vote. Although some heralded this alliance as a step in the breakdown of nationalism, others, such as Hans-Gert Pötering, felt it was "a provocation to small EU states" by the Franco-German axis.

The final meeting of the month, on 27 October, saw foreign ministers put aside some differences – only to highlight others, notably the extension of qualified majority voting and non-institutional issues, many related to the Union's finances and economic and financial policy. Qualified majority voting was the main topic on the agenda. The draft Constitution proposes QMV for a number of additional areas, including justice, asylum and immigration. Austria was concerned about losing its national veto in matters of judicial co-operation; the UK and Ireland were against the introduction of QMV in some areas of fiscal and social policy. The Italian Presidency believes that there is scope for extension in some matters (transport and environment). Countries were asked to submit non-institutional questions – including those related to Part III of the draft Constitution – by 20 October for debate on 27 October. The meeting touched on budgetary issues, following the circulation of a proposal by Ecofin ministers to limit the role of the European Parliament in determining how the budget is spent. One major non-institutional issue that has yet to be tackled is the desire of some countries for a reference to Christian values or Christianity in the preamble of the Constitution.

Clearly, the IGC is not as open as the Convention process – the public has little access to the discussions between governments, as the horse-trading takes place behind closed doors. All of the official documents are online, however, and the fact that the draft Constitution, in its final form, may be the subject of a referendum in many countries is sparking Europe-wide interest and debate. The

questions to keep in mind over the next two months will be: how does this IGC compare, in transparency, efficiency and outcome, to previous IGCs, and what is the future of the IGC method?

### *Poland and Spain play Nice together*

Spain and Poland released a Communiqué on 30 September putting forward a common position on an aspect of the institutional package: the relative weight of Member States in the Council. Spain and Poland believe that Nice closed the institutional chapter once and for all. According to both countries, the Convention did not have the mandate to alter hard-fought compromises nor to impose any obligations, as it was, first of all, a preparatory body not a constitutive assembly. According to both delegations, the Convention, rather than trying to find possible solutions to resolve real problems in the functioning of the institutions, opted for trying to alter the relative weight of Member States in the institutions.

Thus Poland and Spain insist in keeping their relative weight in the Council and reject the formula produced by the Convention which favours those Member States with large populations. The Convention formula simplifies the voting rules agreed at Nice by proposing that the Council decides when a simple majority of states (half of the Member States plus one) and 3/5 of the total EU population (60%) is in favour; however, this double majority formula reinforces the population factor in the building of majorities. If changes are made, the influence of large countries with only a medium population size would be considerably reduced.

Various alternatives have been floated to accommodate the Spanish and Polish views, such as granting Spain and Poland more seats in the EP. Alternatively they could ask for the modification of the percentage of minimum population to form qualified majorities (a minimum of 60% of the population in the Convention draft). Thus, Spain and Poland could request

that this minimum is reduced (so that it would facilitate the search for agreements) or otherwise to increase it (so that it is easier to promote blocking minorities). Finally, there is of course the side-payment alternative. Indeed, the battle for European Funds is likely to mark the debate on this issue (see Parallel Developments). Although strictly speaking these two processes are separate, budgetary and treaty revision processes have been connected in the past.

Addressing the European Affairs Committee of the German Bundestag, Chancellor Gerhard Schröder openly made the link between the upcoming debate on the financial perspectives of the Union and the timely ending of the IGC. Schröder is reported to have promised more funds to Spain and Poland if they abandon the fight to obtain as much power as the larger member states. At the same time, however, Germany is clearly putting pressure on them to be co-operative as Spain and Poland have much to lose from the forthcoming negotiation of the financial perspectives 2007-2013, notably the budgetary allocations for structural and regional actions.

More recently, the demands for maintaining the Nice arrangements regarding the definition of qualified majority in the Council have been joined by Austria.

[Euractiv](#)

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### **Foreign Minister**

The proposed position of Foreign Minister is the amalgamation of two existing roles: the High Representative for CFSP and the Commissioner for External Affairs. Beyond the potential inherent in combining these two positions, no new powers will accrue to the Foreign Minister. Nonetheless, the issue has become somewhat contentious.

Seemingly, according to the Presidency, "The basic concept of the double-hatted Foreign Minister has not

been called into question by any delegation." This statement may have been overly sanguine. The UK, for example, would like the Minister to be responsible only to Member States. In fact, the UK doesn't want the Foreign Minister to be a 'minister' at all - but rather a 'representative' or a 'secretary'. The UK was supported by Sweden and Denmark.

All is certainly not clear, for example: Where does the Foreign Minister stand in the case of a conflict between the Council and the Commission? Will the Foreign Minister be able to vote in the Commission? National foreign ministers have the ability to aggregate and co-ordinate different national actors, including economic, cultural and political interests. Can (or should) this be accomplished on a European level where a Foreign Minister is responsible to both the Council and the Commission, and a European Council President may also be acting in international affairs? Where should the diplomatic service be located to guarantee the coherence of EU external action? Any proposal the Italians may present in November would have to provide acceptable answers to these remaining questions.

[EU Observer](#)

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### **Team Presidencies**

The questionnaire and responses circulated in advance of the October 16 meeting of the IGC dealt in close detail with the issues of Council formations and the presidency of the Council of Ministers. Team presidencies were suggested as a possible solution to those countries which opposed the system as outlined in the draft Constitution (Article 23.4: 'the Presidency of Council of Ministers formations, other than that of Foreign Affairs, shall be held by member State representatives within the Council of Ministers on the basis of equal rotation for periods of at least a year'). In reviewing the responses of the countries, a majority of countries supported the team presidency idea (mainly accession countries) while a considerable number were open to the idea in principle. Germany and Ireland

would prefer to accept the draft Constitution as it stands, and Portugal would like to see the current 6-month rotation system continued.

Introduced by the Italians to address the concerns, mainly of smaller countries, the Team Presidency could consist of 3 Member States for 18 months or 4 Member States for 24 months. Austria made it clear in its questionnaire response that a new model must "provide a clear added value to the present system." Reports coming from the October 27 meeting of the IGC indicate that other countries may be taking Austria's cue. France, Belgium and Luxembourg apparently would prefer sticking to the current system (6-month rotation) rather than introducing a complicated team presidency.

The Italians remain positive that team presidencies will provide an acceptable compromise – we will have to wait until the November 'conclave' to discover how the chips will fall...

[EU Observer](#)

[Country responses to Questionnaires](#)

### Progress of the IGC

Without question, the Italians (with the backing of crucial players: Germany, France and the Benelux) have staked a great deal on completing the IGC by December. The Italian Presidency plans to present a 'comprehensive, ambitious compromise proposal' in late November. The summit on 12 December will be what *La Repubblica* has referred to as a 'moment of truth' – at which point countries will have to take a stand.

In the meantime, however, the Italians have been under some criticism for the manner in which the IGC has been conducted. In a speech on 22 October to MEPs in Strasbourg, Berlusconi outlined the theory behind the Italian Presidency's negotiating strategy. In the first phase, the questionnaires should aid in assessing the positions of the various governments and allow the Italians propose a compromise solution – the 'second phase' package which will be presented

to the foreign ministers at the meeting of 28-29 November. At a third 'endgame' phase, a joint compromise on the various elements of a (now re-balanced) package will have to be found. To this point, one can argue, there is not much new compared to how IGCs have worked in the past. However, the Italian Foreign Affairs Minister Franco Frattini's remarks suggest a new type of Community rhetoric at an IGC: the 'interest of Europe is not merely the sum of the interests of the member states,' and one should not see the result as 'those who have won and those who have lost', but only the achievement of the 'community interest.' In previous IGCs, the 'Community view' was weakly represented by onlookers to the IGC, such as the EP or Commission. In this IGC, the draft Constitution itself, as a pre-existing compromise document, is providing a rallying point for 'community interest'. Furthermore, Frattini has also called on the Member States to maintain a 'high degree of self-discipline'. In practice, this has materialised in President Berlusconi holding bilateral meetings with all delegations and inviting each country representative to indicate 2 or 3 issues on the EU Constitution they consider most important or which constitute national 'red lines'.

Although in theory this 'process of synthesis' should produce results, it has already drawn complaints. The Prime Minister of Luxembourg, Jean-Claude Juncker, and the Prime Minister of Belgium, Guy Verhofstadt, both remarked after the October 16 meeting that there was a large amount of repetition of countries' positions, without much movement towards a solution. An EU official told Reuters – "this is the same discussion as last time. Not a thing is happening here." Frattini maintained that this process would permit both an open discussion and transparency on the respective national positions.

This month has seen disagreements without resolution at the IGC. However, how deep are these disagreements? As mentioned earlier, on 13 October, there was a discussion on the composition and size of the Commission, with a majority of countries preferring one

Commissioner per country, and Germany, among others, wishing to stick with the draft Constitution's 15. Yet this week, Schröder has intimated that perhaps Germany may compromise on the issue. On economic and financial issues, if the Ecofin's leaked document holds true, a broad consensus has so far been achieved among ministers, including a common position concerning the decision-making process of the Eurogroup. On the issue of voting weights, it may be that Spain will accept some sort of side payment to achieve agreement. Even though the concept of team presidencies hasn't been accepted by all Member States, the Italian Presidency is banking on the idea that it will be accepted as a 'best choice' in a package deal. These examples highlight the fundamental nature of these types of negotiations – that the end result is a package. And no matter how the disagreement looks on any individual issue, it must be taken in a broader context. Usually, it is the pressure of midnight hour make-or-break negotiations that pushes an acceptable package to the fore. With some talk of continuing into the spring, one wonders when - or if - that pressure will ever come to bear.

[EU Observer](#)

[Euractiv](#)

[La Repubblica](#)

[Le Monde](#)

### 3. Referendums: To Ask or not To Ask?

In the 1960s, Charles de Gaulle said: "Europe will be born on the day on which the different peoples fundamentally decide to join. It will not suffice for members of parliaments to vote for ratification. It will require popular referendums, preferably held on the same day in all the countries concerned." His words are being echoed by various referendum campaigns all over the EU25; however, not all political leaders are listening.

This month has seen an increase in the volume of the siren song of the referendum. Part IV of the draft Constitution (Article IV-8.1) states that

the Treaty "shall be ratified by the High Contracting parties in accordance with their respective constitutional requirements." Of course, different Member States have different constitutional requirements: Ireland, for example, is constitutionally required to hold a referendum; Germany, at the other end of the spectrum, is barred from holding national referendums. One question that has not been much discussed is whether different methods of ratification could have future legal ramifications from country to country concerning legitimacy and individual rights. Could an Irish citizen who voted in a binding referendum on the Constitution have a different relationship to Europe than an Austrian whose Parliament ratified on her behalf?

Some countries, which do not have what academic Simon Hug refers to as 'required/binding' referendums, are nonetheless proposing to hold referendums on the Constitution, such as Portugal, the Netherlands and Luxembourg. This appears to be a contrary position to that suggested by the Maltese Prime Minister, Mr. Fenech Adami. He implied that there is a private agreement between those countries not constitutionally bound to have referendums, that there should not be a referendum on the new Constitution. In response to a question that the UK may be colluding with other countries, as per Mr. Adami's suggestion, the Prime Minister's Official Spokesman said the decision not to hold a referendum in the UK had been taken 'purely and simply' in terms of this country. Notwithstanding the PM's firm stance on this issue, calls for a referendum in the UK continue to be put forward. (On the referendum debate in the UK, see below.)

Countries' internal debates are receiving Europe-wide attention - especially as pro-referendum campaigns and websites use the actions taken by other countries to bolster their own cases. (See, for example, [www.vote-2004.org.uk](http://www.vote-2004.org.uk) in the UK.) In Sweden, an MP and former MEP, Sören Wibe, is demanding a referendum. However, though under pressure, the Prime Minister, Göran Persson, has replied that "When the people vote in

national elections they also vote on EU issues, and it is immensely important that we retain Riksdagen's responsibility and do not shift issues from there to more or less permanent referenda." Parliament will most likely have the final say in Sweden, as most Swedes don't want a referendum, anyway. The issue remains unresolved in Finland, as changes may have to be made to the Finnish constitution in order to implement a new European Constitution. In the Czech Republic, Prime Minister Vladimir Spidla announced on 7 October his cabinet would put forward a bill allowing for a referendum on the Constitution. On the other side, Prime Minister Adami has said that it is 'inconceivable' that Malta hold a referendum.

These threats, or promises, of referendums may be figuring as bargaining pieces in the IGC debates themselves. Polish Prime Minister Leszek Miller has threatened to hold a referendum on the draft Constitution if Polish concerns about voting weights are not answered. Of course, as over 81% of Poles want to have a referendum on the Constitution regardless, his threats may not serve to intimidate. Nonetheless, diplomats do fear the ramifications of another 'petit oui' - or the necessity of a 'second-time round' vote.

In May, Jacques Chirac said "I am logically in favour of a referendum. It would be the only legitimate way". In fact, he made an election promise in 2002 that any European Constitution would be adopted by a referendum. However, in October, things appear to have changed. Chirac now suggests that it would be best to see how things evolve in the IGC before making a commitment to a referendum. In a recent French poll, 74 % surveyed supported a referendum on the Constitution. The French Prime Minister Jean-Pierre Raffarin has said that "a real European cannot not want a referendum" - a statement which encouraged those agitating for a referendum. The issue has become a major political football, as Chirac is conducting a consultation period with all of the main parties. His canvas of opinions ended on 29

October - but no announcement, for or against a referendum, has yet been made. It is unlikely he will decide until well after the November conclave.

There is continued interest in a Europe-wide referendum on the Constitution, but the possibility that all Member States would hold referendums on the same date is becoming increasingly unlikely. The greater issue is the fact that the draft Constitution does not expressly provide an answer to what happens should one or more countries reject it. And many diplomats are already wondering what would happen if only one small state were to reject the Constitution? As Lamassoure has said, "a no from Malta is not going to have the same impact as a no from France." However, at the moment it appears that unanimous ratification is envisioned as a necessary precondition to the Constitution entering into force. According to its indicative timetable, the IGC will not address the issues of ratification, or future amendment, until 18 November.

[EU Observer](#)

[Prime Minister's Official Spokesman](#)

[Simon Hug, \*Voices of Europe\* \(2002\)](#)

[EU Observer](#)

["Transnational Democracy in the Making"](#)

[EU Observer](#)

[EU Observer](#)

[Euractiv](#)

[Le Monde](#)

[Le Figaro](#)

#### 4. The UK Debate

The position of the UK government vis-à-vis the IGC was set out in the White Paper published on 9 September. (See Newsletter [issue no. 6](#), October 2003.) On 20 October, on behalf of the Prime Minister, Jack Straw presented the Government's report on the progress of the IGC to the House of Commons. He reiterated the Government's commitment to the IGC process and spoke at some length on the subject of European defence. (See [Parallel Developments](#).)

On 20 October, the Lords' Select Committee on the Constitution produced

a report on the Draft Constitutional Treaty for the European Union. The Committee is "of the view that the draft Constitutional Treaty will, if implemented in UK law, have a constitutional impact on the United Kingdom." The Lords have outlined roughly 15 areas which they feel could impact the UK constitutionally, from Article I-10, the 'primacy' clause, to the potential for limitations on national legislation, due to the nature of 'shared' competences (Articles I-12, 13 and 16). They go no further in providing a value judgement as to the meaning or scope of this potential impact. The Report will be debated in the House on a day yet to be finalised.

However, their comments could be seen as in opposition to the position presented by the Blair Government, which maintains that, in the words of Jack Straw: "The fundamental relationship between the United Kingdom and the EU will not be altered." In other words, the Convention was merely a 'tidying up' exercise. The Government have been using this rationale to support their claim that there is "no case for a referendum."

At the moment, the UK is not going to have a referendum on the new Constitution. However, the referendum debate has been fuelled by the reports that the Queen is becoming 'concerned' and that Blair's senior advisor on Europe, Sir Stephen Wall, said that Blair's decision not to hold a referendum was 'untenable'. The Prime Minister's Official Spokesman said that Wall's remark was taken out of context.

[Prime Minister's Official Spokesman](#)

[Telegraph](#)

[BBC News](#)

[Select Committee, Ninth Report](#)

## Commentary on a referendum in the UK

Until 1975, it was generally thought that a referendum in Britain would be unconstitutional since Parliament was sovereign. In that year, however, Harold Wilson's Labour government decided to hold a referendum on whether Britain should stay in the European Community,

which she had entered in 1973, on the terms renegotiated by the government. The referendum was held not for reasons of grand constitutional principle, but to avoid a split in the Labour Party between pro-Europeans and antis.

That, so far, has been our only national referendum. But there have been referendums on devolution in Scotland, Northern Ireland and Wales, on a mayor and strategic authority for London, as well as local referendums. In addition, referendums have been promised on whether we should join the Euro and on the voting system for the House of Commons. There is therefore a precedent for holding a referendum on the draft European constitution.

Most of the referendums that have been held so far have been concerned with transferring the powers of Parliament, either 'upwards' towards Europe, or 'downwards' towards new devolved authorities. There is a rationale for this in terms of liberal constitutional thought. For voters trust their MPs with legislative power, but give them no authority to transfer that power. 'The Legislative', Locke claims in his *Second Treatise of Government*, "cannot transfer the power of making laws to any other hands. For it being but a delegated power from the People, they who have it cannot pass it to others."

Should there then be a referendum on the European constitution? That depends on whether it transfers major powers from Parliament to the European Union. The *Daily Mail's* notorious headline, 'Stop This Tyranny' implies that there is such a major transfer. My own view, by contrast, is that the constitution does little more than codify existing Treaty arrangements. Few, however, are aware of these arrangements. The *Daily Mail*, for example, argued that the constitution would render European law superior to that of the member-states, unaware that this has been the position since the case of *Costa v ENEL* in 1964 before Britain joined. I find my view reinforced by the recent conclusion of the House of Lords Select Committee on European Union that "the separation of powers in the European Union is going

to shift from the Commission *in favour* of the member states if the proposals are adopted" (my emphasis). Indeed, the constitution is, to my mind, insufficiently radical and does far too little to democratize the European Union. But, if the House of Lords Select Committee is right, then there is no case for a referendum on the new constitution.

This conclusion does not, however, solve the basic problem of Britain in Europe. For we remain the only member state which has still not reconciled itself to membership. After the 1975 referendum, Prime Minister, Harold Wilson declared "that 14 years of national argument are over." This declaration, however, proved premature, and many of those who want a referendum on the new constitution do so because they want to claw back ground which they believe to have been surrendered by previous governments when signing the Single European Act or the Maastricht Treaty.

In October, I was asked to take part in a debate at Oxford on the new European constitution. The debate was entitled, 'The End of Britain?' A similar debate in France, Germany or Italy would not have been given a similar title. How can we lance the boil of Euroscepticism which so poisons the constructive efforts of the Blair government in Europe? At some stage, so it seems to me, the referendum of 1975 will have to be replayed and the British people will have to come to a definite decision on whether they wish to play a full part in European affairs, or whether they prefer the politics of isolation.

Professor Vernon Bogdanor  
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## 5. Parallel Developments Defence

During October, developments on the defence dossier took place largely outside the IGC discussions, which strictly speaking, have not yet started to examine defence issues. Nonetheless, October saw a substantial change which will affect the prospects of an eventual European defence capability.

The UK position on structured co-operation and defence has altered in the past month to one of wary acceptance. On 17 October, in a meeting with Jacques Chirac, Prime Minister Tony Blair agreed to allow the UK to join an avantguard group on defence. Spain followed suit. The first signs of a British shift were made at the trilateral Franco-German-British meeting in Berlin on 18 September (see Newsletter issue no. 6, October 2003). The first evidence of a new three-headed defence avantguard could be seen in the visit of the Ministers for Foreign Affairs of France, Germany and Britain to Tehran to persuade Iran to sign the Nuclear Non-Proliferation Treaty. However, the initiative was viewed with suspicion by other large and small Member States.

The first idea of the formation of a defence avantguard group was made by Belgium, Germany, France, Luxembourg in April this year (see Newsletter issue no. 2, May 2003) when public opinion across the EU demonstrated against intervention in Iraq. A European defence without the UK would not be 'coherent' according to observers, yet at the same time, the UK and Spain would only accept a European defence if it did not challenge NATO and US policy.

Neither the UK, Spain, nor the American administration, support the Franco-German idea of establishing a European headquarters with command capacities beyond strategic planning which could conduct operations outside NATO. The UK defends European action under the 'Berlin Plus' agreement with NATO, when and where NATO as a whole does not want or can't act (as in the case of Macedonia). A NATO meeting was called on the request of the US on 20 October to discuss whether European initiatives undermined the Atlantic link. Tony Blair has accepted the idea of a EU strategic military planning cell but not a command headquarters separate from NATO. In his Parliamentary Speech, Jack Straw stated that the "Government believe in a strong Europe and a strong NATO." He said, "it obviously makes sense for

EU nations to strengthen Europe's contribution to the alliance and to enable Europe to act in circumstances where NATO does not want to. However, it would not make sense, and it is unacceptable to us, for the EU unrealistically to aspire to provide a territorial defence commitment for Europe."

Beyond the possibility of a mutual defence clause, what looks increasingly feasible is the possibility of structured co-operation in defence issues. The Convention inserted in the draft Constitution provisions for the launch of such co-operation (Articles I-40, and III-213). Many issues remain unresolved surrounding the establishment of structured co-operation, such as the clause in the draft constitution by which those countries who belong to the hard core of structured co-operation from the beginning would be able to decide in the future by which criteria new members could be admitted to the group (Article III-213.2).

[The Independent](#)

[Hansard, Commons Debates, 20 October Columns 375-391](#)

[The Guardian](#)

[The Financial Times](#)

[Downing Street Newsroom](#)

### Immigration

The urgency of common EU action on immigration was highlighted again this month, when dozens of illegal immigrants died trying to reach Italy from Africa. Nevertheless, Commission plans for a quota system as a means of fighting illegal immigration look set to founder due to the sensitivity of the issue. One idea discussed at the Council meeting on 16-17 October is that decisions on how many people to admit and from what country could be taken at national level, but with the Commission playing a co-ordinating role.

However, the inability of Member States to agree on sensitive issues was again evident with France, Germany and Finland, among others, opposing the plan, arguing that the issue must remain a Member State competence.

While the UK is willing to consider the idea, the Government wants first to see how the system would work in practice. Even the Italian Presidency's own government coalition is divided on the issue.

On 20 October, Ministers from France, Germany, the UK, Italy and Spain met in the French town of La Baule to discuss new plans for the creation of a "European security zone" for protection against illegal immigration via the Mediterranean Sea. It seems that the desire of some Member States to forge ahead with the European integration process was again in evidence. Nicolas Sarkozy, the French Interior Minister, justified the restricted meeting by pointing out the difficulty of reaching agreement within a group of 25 EU states. The group of 5, he said, "is a pioneering group at the centre of Europe which is allowing itself to progress more quickly towards operational objectives". Issues of Justice and Home Affairs are on the agenda for next month. It will be interesting to see how their proposals are received when the group puts forward its plans at the meeting of EU interior ministers in November.

[President Berlusconi's Address to the plenary session of the European Parliament.](#)

[EU Observer](#)

[EU Observer](#)

[Liberation](#)

### Stability Pact

In advance of the meeting on 27 October, EU finance ministers proposed some major revisions to the text of the draft Constitution. Concerns ranged from the increase in the EP's power, to a desire to keep national vetoes on the EU's spending programme. They also oppose those provisions that could extend the Commission's role in policing the stability and growth pact. This month has seen France and Germany in trouble with before the Commission - 'les mauvais élèves' France and Germany have yet again broken the rules governing the EU's stability and growth pact. Of course, as France

received a (fourth) chance, it is likely that the Commission will also be lenient with Germany. Italy, in the form of Berlusconi, has suggested that the “3 % should not be taken as an absolute value beyond discussion.” However, it is clear that certain more compliant countries are getting annoyed.

In the IGC, the Member States’ responses to the finance ministers’ proposals varied – it is perhaps not surprising that the Benelux countries were totally against all of the suggestions. The Netherlands, among other countries, has had to implement painful economic changes to stay in the stability and growth pact. Germany is also against the proposals – but then again, the Commission has yet to determine whether or not Germany will be fined for its deficit of 4.3 %.

The Italian Presidency was not pleased by the ECOFIN ministers’ contribution – their suggestions on major constitutional redrafting took place outside of the IGC debate and without sanction from either the Presidency or the Member States. Frattini has said that there can be no more unilateral contributions – ECOFIN cannot be allowed “privileged status.” Interestingly, the ECOFIN agreement was pushed by the Italian Finance Minister Tremonti. Could there be fissures in the Presidency? Will the IGC take into considerations the recommendations of the new report from the WEU?

[EU Observer](#)

[Independent](#)

[EU Observer](#)

[Financial Times](#)

[The drafting suggestions made by the ECOFIN ministers](#)

[Euractiv](#)

## Franco-German Regional Rapprochement

Beyond the ‘Gerhard Chirac’ quips of the *Figaro* on 17 October, Franco-German friendship continues apace. Jean-Pierre Raffarin has met with Gerhard Schröder in Poitiers to advance co-operation between the French regions and the German Länder. The

summit was titled “Länder and Regions, actors for re-enforcing Franco-German co-operation in an enlarged Europe.” Prime Minister Raffarin reassured concerned onlookers that even if Paris and Berlin make their co-operation a ‘priority’ – it is not a ‘directoire’. Raffarin explained that “Franco-German relations are a motor [but] a motor which is ready to have more cylinders added.” Aside from alleviating the worries of the smaller EU countries, perhaps Raffarin’s words indicate that the Franco-German alliance, which in the past has been able to set the European agenda and act as the engine of integration, may no longer be able to do so in a Europe of 25.

The Spanish secretary of state for foreign affairs, Ramon Casares, has said that “as far as foreign policy goes, the French-German axis is just not indispensable anymore. They cannot pretend it is, and they cannot speak for Europe.”

The possibility of a joint ratification of the draft Constitution was floated at the summit – France and Germany ratifying on the same day; it appears that President Chirac will have the final say.

[Le Figaro](#)

[EU Observer](#)

[International Herald Tribune](#)

## 6. Forthcoming Issues

November will be a critical month for the future of the draft Constitution. The upcoming IGC schedule includes the ‘Ministerial Conclave’ on 28, 29 (and possibly 30) November, as well as a morning meeting on 18 November. Certain issues, which have yet not been broached, will have to be tackled – including Part IV of the draft Constitution (revision and ratification procedures).

The Italian Presidency will submit a proposal in advance of the conclave which will attempt to provide a compromise position on many of the contentious issues, without ‘watering down’ the original draft Constitution. The Irish will be closely monitoring events: should the Italians fail in their efforts, the Irish Presidency will have to undertake far more than mere

‘nettoyage’.

[See the IGC indicative timetable.](#)

## Budgetary issues (2007-2013)

The Commission is expected to produce a Communication by late November 2003 setting out how the future budget should be structured. A formal proposal will then follow by May or June 2004. Thus the Commission’s proposals for the financial perspectives may be discussed as early as December 2003, and certainly before formal accession takes place.

Strictly speaking, the preparation of the EU financial perspectives (2007-2013) and Treaty revision process are two separate processes with separate calendars and procedures. Nonetheless, the linkage between both has been a recurrent feature at successive Treaty reforms. This classic link has started to appear at the IGC.

The connection between Treaty reform and budgetary issues in the current round of reform is defined by the context of enlargement, and in particular by the stark budgetary and political implications of the continuation of some common policies (CAP, Cohesion and Structural Policy) if they go un-reformed. The possibility to raise the ceiling to 1.24% of GDP of the Union seems not on the agenda, and the mood is one of reduction. In other words what will be the budget for the period 2007-2013 bearing in mind the budgetary implications of enlargement, and who will pay for it?

The Commission has started the preparation for the forthcoming financial perspectives (2007-2013) – which currently are adopted by unanimity and thus (if unchanged) in 2005 would have to be adopted by the unanimity of the 25. The Commission is running a number of seminars on budgetary issues, such as: the EU budget ceiling, ceilings in budgetary contributions, the duration of the financial perspectives, changes in the budget headings. Also on the table is the British rebate (by which the UK can reduce its net contributions by 2/3). In 1999 net contributors succeeded in reducing their contribution to the

'cheque britannique' at the expense of Italy and France. But if unreformed, the situation may lead to accession countries paying for the British rebate.

So what to reform? On the income side, a number of proposals are on the table, such as proposals for a European tax, or a part of VAT to serve the Community budget. However, reform seems to be especially focusing on the expenses side. On the other, no major reform of CAP is expected as agreement between Chirac and Schröder was made a year ago in Copenhagen (namely that up to 2013 the growth of agricultural expenditure will be limited to 1%). Thus, the Structural Funds appear as the most likely item to be reduced. Enlargement puts a strong pressure on the current eligibility criteria of the Structural Funds to the point that if criteria go unreformed, a large number of regions will automatically become eligible - with all its budgetary implications - as well as leaving those regions which are currently eligible (that is regions where GDP per capita is lower than 75% of Community average) automatically excluded.

The Commission has launched a consultation process ahead of its expected proposals for the reform of the Cohesion and Structural Funds. These are due by the end of December - thus 'happily' coinciding with the expected endgame phase of the Treaty revision process.

## 7. News from the Constitution Project

### Call for Papers

UACES/Federal Trust Study Group: Workshop III: What Union after the IGC 2003/4?

Tuesday 16 December 2003, British Institute of International and Comparative Law, London

The third Workshop of the UACES/Federal Trust Study Group on 'The Convention and the 2004 IGC' is timed to provide an assessment either of the progress made at the IGC before its endgame, or of its output - which is expected to take the form of a

Constitutional Treaty.

In line with previous Workshops in the series, the Federal Trust welcomes contributions from different analytical perspectives in the themes listed below.

1. 'Achieving Balance? Institutions and Member States' aims to assess the output of the IGC and the changes it may make to: the inter-institutional balance; the small and large countries balance; and the relations between old Member States and the Accession States.
2. Coping with diversity? Challenges in the field of defence, economic governance and the future reform of the Union.

If you would like to contribute a paper to this Workshop, please send an abstract (300 words max.) before 17 November 2003 to [constitution@fedtrust.co.uk](mailto:constitution@fedtrust.co.uk). Where it proves impossible to include a paper, an opportunity to table the paper at the Workshop will be given. This may be of particular interest to Postgraduate students, whose attendance at the Workshop is facilitated through payment of 50% travel expenses by UACES.

### New Federal Trust Website

The Constitution Project and the Federal Trust announces the launch of its updated website at [www.fedtrust.co.uk](http://www.fedtrust.co.uk)

The new layout of the site, which is now easier to navigate, will give visitors a better view of what the Federal Trust's work is about. New visitors will find it easier to source information, and regular visitors will be able to follow the developments in the various Trust projects.

We hope that you find the new website accessible and informative. Feedback is always welcome and can be emailed to [webmaster@fedtrust.co.uk](mailto:webmaster@fedtrust.co.uk)

### Publications

This month one new paper has been added to our Constitutional Online Papers collection by Dr. Maureen Covell, from Simon Fraser University, Canada, entitled 'European Union Constitution-making in Comparative Perspective'.

Contributions to this series are welcome. See details on our website (Constitutional Online Papers), and contact the editors at [constitution@fedtrust.co.uk](mailto:constitution@fedtrust.co.uk)

Prof. Jo Shaw has given evidence to the House of Lords Select Committee on European Union on the draft Constitution.

[Prof. Shaw written Evidence](#)

Anna Verges and Lars Hoffmann have contributed a chapter entitled "The Reform of Treaty Revision Procedures: the European Convention on the Future of Europe" to *The State of the Union*, Vol. 6, edited by Tanja Börzel and Rachel Cichowski, and published this month by Oxford University Press.

### EUSA Membership

This month the Federal Trust has become an institutional member of the European Union Studies Association (EUSA), a scholarly and professional association based in the US, focusing on the European Union, the ongoing integration process, and transatlantic relations. Check out the EUSA website at [www.eustudies.org](http://www.eustudies.org)

## 8. External Events

### European Scrutiny Committee

5 November the European Scrutiny Committee will take evidence from Rt Hon Jack Straw MP, Secretary of State for Foreign and Commonwealth Affairs on the IGC on the draft treaty establishing a constitution for Europe. This evidence session will take place at 2.45 pm in Committee Room No. 8, House of Commons.

### Enquiry on the role of the ECJ

The EU Select Committee (Sub-Committee E Law and Institutions) is conducting an enquiry on The role of the European Court of Justice under the new Constitutional Treaty for the European Union. On 12 November evidence will be given by the Parliamentary under-secretary of State,

Home Office. Contact: 7219 31 94

Foreign Press Association, London.

**European Question Time**

12 November, 6pm

Canterbury Business School Lecture Theatre, University of Kent, Canterbury

This event is organised jointly by The Federal Trust and the Kent Centre for Europe. Contact: [kcf@kent.ac.uk](mailto:kcf@kent.ac.uk)

**Seminar: The European Convention by Richard Corbett MEP (PES)**

14 November, 12.30-2.00pm

School of Law, University of Manchester

Contact: [jshaw@man.ac.uk](mailto:jshaw@man.ac.uk)

**UACES Research Students Conference**

18 November, King's College, Strand, London

<http://www.uacesstudentforum.org/>

**The First Annual Conference on European Law**

21-23 November, Ljubljana, Slovenia

European Law Academy, Trier, Germany and Institute for European Studies, Ljubljana, Slovenia

Contact: [info@evropski-institut.si](mailto:info@evropski-institut.si) or see [www.evroski-institut.si](http://www.evroski-institut.si)

**Single Source Europe Conference**

The Single Source Europe (SSE) Conference, 28-29 November at the

SSE is a new project of the Federal Trust which aims to assist think tanks and research institutes from Central and Eastern Europe in their efforts to disseminate their English language material to audiences throughout the EU. Single Source Europe is funded by the European Commission and will involve the setting up and maintaining of an online portal for Central and East European think tanks and research institutes.

Admission to the Conference is free and granted on a first-come first-served basis. Contact Dora Klountzou:

[dora@singlesourceeurope.com](mailto:dora@singlesourceeurope.com)

**A North East Regional Assembly: Building new relationships after devolution**

5 December, Durham

Federal Trust Seminar organised in conjunction with Durham Business School Centre for Public Policy

Contact: [ulrike.rub@fedtrust.co.uk](mailto:ulrike.rub@fedtrust.co.uk)

\*\* Final note from the Director of The Federal Trust:

For a reminder why the European Union, for all its faults, is better than what preceded it, please read the obituary of Christabel Bielenberg in The Times of 4th November.

[The Times](#)

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