

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. Editorial

Federalism by any other name

The draft constitution for Europe produced by Valéry Giscard d'Estaing has infuriated Eurosceptics in the UK and elsewhere for being too federal; those favouring a federal Europe think it does not go far enough. Surely, a pragmatist might think, this must mean Giscard, treading a middle way between the demands of extreme europhiles and europhobes, has got it about right? Not so, it would seem. There are still many unresolved issues to be agreed by the Convention on the Future of Europe and, with less than three weeks to go before he has to present the views of the Convention to the European Council meeting Salonika, Giscard has failed to persuade many of the conventioners that his final draft constitution takes their concerns into consideration.

Representatives of the small countries are unhappy with Giscard's decision to retain the idea of a fixed-term President of the European Council. The proposal has the merit that it might allow for the emergence of a more effective Union than the current system of the rotating Presidency permits. However, the small states, worried by the spectre of a *directoire*, believe that it would weaken their position in the Union. They consider that Giscard has taken too much notice of the large Member States, who favour the idea of a fixed-term President, and that his proposals are insufficiently federal.

A few such as the UK Government's Representative, Peter Hain, seem to be happy with progress: the term 'federal' was removed from the draft thanks to formal amendments proposed by members of the Convention, not to mention Tony

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Blair's dinner with Giscard. Yet, despite the fears of the small states that the proposals are not sufficiently federal and even if the word 'federal' has been removed from the draft, the draft is essentially federalist: the document is, after all, intended to be a constitution, it divides competences between the Union and the Member States, provides for a Court of Justice, whose law will be supreme, and it advocates an elected President. Moreover, Giscard was very quick to assert that 'federal' and 'Community' are synonymous. So, the word has gone but not the concept; another blow for British sovereignty or so the UK media were keen to tell us. And yet, if one looks closely at the draft, much of what is being proposed is already in place.

True, the treaties are not **called** a Constitution, but they essentially perform a similar function. There is already a European Court of Justice and EU law is already supreme: the only change is that politicians and people alike finally seem to have realised this. The concept of an elected President may seem *avant garde* but in practice what is being proposed goes little further than the current situation in which the European Council nominates its choice for Commission President and MEPs give their assent or otherwise. There is scope for the European Parliament to use the revised proposals to maximum effect by refusing to accept any candidate whose political hue did not fit with the majority in the Parliament but a quantum change in the way the Commission and its President are chosen is not inevitable. Since many of the ideas outlined in the draft constitution are already in place, it is not surprising that the draft has received far less coverage in other European states, where citizens and politicians are rather more comfortable with European integration. What has received coverage, however, is the sense among many members of the Convention that the draft does not go far enough towards meeting their demands.

In order to maximise the impact of the Convention's work, Giscard needs to get the vast majority of the 105

members to support his proposals. To date he has not seemed to go about this in the most effective way; he is certainly not renowned for listening to their views. Having now decided to speak to all the members individually he may finally have realised that the Convention needs to be a collaborative venture. There is a fair degree of consensus around a broad package of measures which are essentially federal however they are formally described; where the difficulties remain are in the institutional arrangements. If he is to succeed in producing a draft acceptable to the majority, Giscard will have to show he can reconcile the concerns of the small states with those of the large to which he so far seems to have given preference. If he does so the results of the Convention may well serve as a blueprint for a constitution, if he fails the IGC may well be a protracted affair.

Dr Julie Smith

Head of the European Programme at the Royal Institute of International Affairs and Fellow of Robinson College, Cambridge.

2. May in the Convention

The two outstanding items on the Convention agenda during May were the debates of the reform of the institutions and on external action and defence. In addition to these two major substantive items, one can observe a change in the decision-making dynamics at the Convention. Finally, at the very end of the month the first full draft of the Constitutional Treaty was put on the table by the Praesidium, and it provoked considerable controversy in the Euro-sceptic UK press, and considerable concern amongst many Convention insiders who felt that the draft was insufficiently faithful to the consensus which exists among the majority of Convention members.

As far as the institutional and external action dossiers are concerned, the Convention debated for the first time on 15-16 May the draft provisions on institutions, and external action and defence which had been submitted by the Presidium back on 23 April [CONV 691/03, CONV 709/03], [CONV

685/03, CONV 707/03]. Alongside the draft articles, a large number of amendments had been submitted by Convention members and in the background there were also a number of proposals, *inter alia*, Franco-German proposals, a (revised) Benelux paper and a British-Spanish paper.

As expected, the 15-16 May Plenary displayed the various cleavages at play in the Convention, a varied combination of positions defined on the grounds of institutional affiliation, political visions of Europe, and state size. Rather than attempting to pre-define a *finalité politique*, the debate on the reform of the institutions was played within the co-ordinates of establishing the instruments and procedures to allow decision-making in an enlarged EU of 25 member states. Within these implicitly agreed co-ordinates, the balance between institutions and the interests they represent is the crux of the matter.

At the Convention session, the debate revolved around the novelty of appointing a full-time president/chair of the Council and issues which have become historically, if not necessarily logically, associated with that proposal - such as reducing the size of the Commission and the re-weighting of votes in the Council to incorporate a states/population majority approach. Clearly the strongest opposition to a Council Chair came from the Commission and the smaller countries who feel that such a Chair will weaken the Commission as a guarantor of the common interest, and thus establish dominance from larger countries. On the eve of the Plenary session, Giscard met the small states. He was presented with a letter signed by the government representatives of sixteen small countries who warned that if proposals on a Council Chair were not amended, they would not subscribe to the final consensus and would force the production of alternative texts. If this were to occur, it would amount to the failure of the Convention.

Although it would be inaccurate to portray the network of small countries at the Convention as forming a tightly united front, the basis of a possible

consensus has apparently emerged through the Benelux countries who indicated that they would accept a Council chair under certain conditions, most significantly if the Commission were also reinforced. Denmark and Sweden had already in the past declared themselves ready to accept a Council Chair. Giscard has also shifted in his position and has said it could accept most of a plan put forward by Benelux countries by which all countries would be able to send a Commissioner to Brussels but, as a trade off, only half the Commissioners would be full members with a vote.

Thus it would appear that discussions have moved towards agreement on a two-tier-type Commission, leaving the question to be determined as to how Commissioners could be rotated with only half having a full vote. According to the Convention Chairman, drawing up proposals for guidelines on how the rotation would take place, this rotation should be handled by the Commission president because of the need to have some flexibility in voting arrangements.

However the reform of institutions risks holding up the work of the Convention as a whole. At first sight, the system is seemingly paralysed on one point: the question of qualified majority voting in the Council. The Spanish Government, with support from Danish government, has stated that the Convention will not be able to submit a consensus document text since deep differences remain. Madrid fears that the Convention accepts Giscard's proposal to give more power to the larger member states (Germany, France, UK and Italy) at the expense of medium sized countries such as Spain and Poland, and in particular at the expense of the Nice provisions which are favourable for Spain. The Spanish representative has argued that the definition of what constitutes a qualified majority in the Council is part of the overall institutional package and so cannot be discussed in isolation. The logical conclusion of this approach is the desire to leave most of the institutional provisions unchanged thus handing over the dossier to the IGC to deal with.

Indeed, as Convention vice-chairman Amato has warned, if Convention representatives stick to their entrenched positions not only the issue of Council votes but the whole package of related issues (sectorial ministers against the Council for Legislative Affairs, reduction of the size of the Commission, the issue of leadership in the European Council, etc) could combine and result in the Convention effectively confirming that 'the much maligned Nice conclusions look like the best Europe can do'.

The risk that institutional dossier might break the Convention apart and therefore, that the Convention also fails where IGCs have failed, was a matter that the Convention and its president were well aware of from its earliest stages. The sequencing of the various matters on the Convention agenda was deliberately planned so that to deal with the most divisive issues at the end of the Convention and this to avoid a scenario in which power issues prevented the emergence of consensus in a bulk of areas.

As the Convention has entered into the final phase, not only the pace has increased enormously but different dynamics and some players are becoming crucial. Not only government representatives have become more visible, but also the three-headed Convention Presidency have clearly started to act as relay and broker of consensus among parties. A letter by Chairman [CONV 721/03] called on members to work on building consensus across positions. On a similar line Vice-chairman Amato urged *Conventionals* to avoid the risk of failing to move beyond the unsatisfactory status quo from entrenched positions or because of trying to maintain partial successes reached at Nice. To an good extent, plenaries have become relegated to the dynamics outside the convention *hemicycle*. The debate has moved away from the detailed provisions and has focus on an overall balance in the final text. It is now crunch time for the Convention as the European Council is only a few weeks away.

On the second Plenary in May, 30-31 May, the Convention started

debating the revised draft tabled by the Presidium, as well as provisions on enhanced co-operation, economic governance and budgetary matters including the budgetary procedure and the own resources system. On budgetary matters two discussion circles were set up in March and April 2003. The first discussion circle agreed to overhaul the budgetary procedure, primarily by removing the current distinction made between compulsory and non-compulsory spending [CONV 679/03]. The final report included however various options concerning how the new procedure could operate.

Regarding the debate on the revised draft the mood of the Plenary was critical. Beyond criticisms from individual members, possible rebellion was announced from the leaders of party delegations at the Convention (Brok for the EPP, Duff for the Liberals and Amato for the Socialist Group).

Documents

[Summary of Plenary session of 15-16 May \[748/03\]](#)

[Reforming the institutions principles and premises, 28 March 2003 \[CONV 646/03 CONTRIB 288\]](#)

[Submission by Benelux Countries, The Union's institutions, 8 May 2003 \[CONV 732/03\]](#)

[British-Spanish paper, 28 February 2003 \[CONV 591/03\]](#)

[Letter from the Chairman concerning working methods during the final stages of the Convention, 8 May 2003 \[CONV 721/03\]](#)

[Contribution by Vice-president Giuliano Amato of 4th May in Il Sole 24 Ore \[CONV 75684\]](#)

Press

[The Independent](#)

[Irish Independent](#)

[Le Monde](#)

[Financial Times](#)

[EU Observer](#)

[La Stampa](#)

3. State of affairs

Released by the end of May in successive tranches, the Presidium has finally managed to submit to the Convention a revised draft for all sections except for institutions and a first version of the preamble by 27 May 2003.

More detailed commentary and analysis on the draft will certainly emerge in the following weeks (a section in our website will collect commentary on the drafts) and the Federal Trust is also organising, in conjunction with the University of Kent Centre for Europe a seminar 'Reading the revised draft' on the 5th of June in London (see Events section in this Newsletter).

The reactions to the draft have mostly been critical. Jacques Delors and Commission President Prodi have criticised its lack of ambition. Elmar Brok, leader of the EPP group in the Convention, criticised the draft strongly, especially in view of what he saw as the Praesidium caving in to the bullying politics of certain large Member States, and attempted to refocus the debate on the capacity of the political families within the Convention to find the 'real consensus' amongst its members. It is also a draft that in some of its provisions has lost clarity as some twisting of sentences has started to take place (see for example reference to national identities in former article 9 and now article 5). Its ambition is in any case a fragile one, as the revised draft is not the final Convention draft, but also one which eventually will have to go through the scrutiny of the IGC.

In a swift review, a number of outstanding points deserve brief mention. The revised draft no longer understands the EU as a Union of states and 'peoples' but of states and 'citizens' where citizens is a narrower notion than peoples - as citizen in the EU context equals those who are nationals of a member state.

The revised draft first all reinforces (through its article 1 and the provisions on competences) the approach that a 'constitution' is expressly the result of a deliberate surrender of sovereignty by

member states, in other words, that member states sovereignty is not *derived* from the Constitution but rather member states establish a constitution which lays down the powers of the Union and the member states - apart from institutional architecture and law-making powers, rights and policies. Indeed, the revised draft establishes 'a EU on which the member states confer competences to attain objectives they have in common', thus making the attribution of competences to attain common objectives the defining purpose and nature of the Union. The first draft instead talked of 'a Union within which the policies of the Member States shall be co-ordinated and which shall administer certain competences of a federal basis'. Although it is perfectly understandable that the Convention should avoid language which entails the impression of the dreaded 'super-statory', the disappearance (not simply of the 'f' word) but, more importantly, of references to the exercise and administration of those transferred competences on a federal basis is the disappearance of the recognition in the very first article of the Constitution that the EU exercises its competence in a multi-level fashion across different levels of governance.

Another significant element is the relocation of the provision governing respect for national identities of the member states (referred to previously in Article 1 of the constitution), and the rewording of its definition. Particularly as concerns the respect for constitutional and political structures in the member states, the revised draft is weaker. The wording is more convoluted and the special focus on respect for constitutional and political structures has been deleted.

Secondly, although one could argue that the previous draft of Articles 1-16 (which was released when the conclusions of one or two of the Working Groups, especially the one on Social Europe, were still outstanding) could not incorporate adequately certain questions, especially those relating to social Europe and social values. In the current draft however, the

Presidium prioritises conciseness and legibility over a 'shopping list' approach and opts for reducing the list of fundamental objectives and relocating 'a more specific number of fundamental objectives and policies' to Part III (policies). Even then, equality principles for instance, which should be central to the Constitution (apart from appearing in Part III) have been defined more narrowly than the provisions currently in force in Article 13 EC.

Regarding the incorporation of the Charter of Fundamental Rights, although Peter Hain warned the Chairman that not all matters relating to the incorporation of the Charter had yet been settled [CONV 736/03] the revised draft opts for incorporating the Charter in Part II of the Treaty rather than as a Protocol. Besides being legally binding, the Charter thus gains centrality in the EU constitutional system.

Regarding competences, the new provisions reinforced the notion of conferral first included in the Treaty by Maastricht (although the principle has been implicit in European Community law since the very inception of the Treaties). The Union is thus only competent to act if there has been an explicit conferral of competence. In addition the residual powers clause (competences that have not been conferred remain with the member states) which had been introduced in the first Presidium draft, also stays.

The largest novelty in the competence title, apart from the relocation of the principle of loyal co-operation to article 5, is the linking, for the very first time in the treaty, of subsidiarity to regional and local governance.

On the difficult definition of categories of competences the new draft refines the characterisation made in the first draft, by both redefining the categories used (such as the notion of exclusivity, and shared competence - not defined in residual terms) but also by refining the illustrative listing of competences under each category. Most notably, free movement is relocated as 'internal market to the area of shared competence, and the shared

aspects of public health competence are more strictly defined as 'common safety concerns in public health matters).

Concerning the role of national parliaments probably the most noticeable change is the disappearance of parliamentary scrutiny at the conciliation phase of the co-decision procedure, and the confirmation that national parliaments as such will not be given standing before the Court of Justice to bring annulment actions in cases of breaches of the subsidiarity principle. The Committee of Regions retains the power granted in the first draft to take actions to the Court on the basis of current Article 230 TEC for violations of its prerogatives.

The Congress of the Peoples of Europe remains in the draft even if the commentary acknowledges that 'The secretariat has received a considerable number of amendments to this article. A great many do not relate to drafting but propose deleting the provision'.

Reactions across the EU

[La Repubblica](#)
[The Independent](#)
[e-politix](#)
[Welt](#)

4. Outside the Convention

Probably as a first taste of the 'shuttle diplomacy' to come in the run up to the Salonika Summit, and also in a glaring example of by-passing the Convention, Blair met Giscard to ensure that particularly controversial items for the UK domestic scene, notably the 'federal' word in Article 1, were removed from the draft and to press the case for restrictions on qualified majority voting on certain sensitive items and for the downgrading of the post of 'European Foreign Minister' to reflect continued national control over CFSP.

[EU Observer](#)
[The Independent](#)

In the UK, the release of the revised treaties, rather than encouraging a debate on the provisions, have fuelled a debate on the ratification procedure of the final text. Although some section of the federalist camp have asked for a referendum, the most vocal have been the Conservative party and some sections of the British Press. The government has dismissed demands for a referendum on the grounds that the Convention's draft Constitution will amount to a tidying up exercise rather than a substantial change in the relationship between the Union and its member states. As the EU Constitution made the headlines in the British Press, with eurosceptic voices bounced the rehearsed views on drift of competences and surrender of sovereignty, the UK government has responded defending concessions it had gain on the original draft from the Convention Chairman. At the end of May UK government offered his views on the future of Europe in a speech by the Prime Minister in Warsaw on the future of Europe.

The possibility of a call for a referendum on the future EU constitution is nonetheless shadowed by another item of the British agenda, namely, a future referendum on the euro. The announcement on a postponement of the decision is expected in the first week of June.

[The Times I](#)
[The Times II](#)
[Prime Minister Office](#)
[The Independent](#)
[Prime Minister Speech in Warsaw 30 May 2003](#)
[European Referendum Campaign](#)

An informal Foreign Affairs ministers meeting at Kastellorizo (Greece) agreed to charge the CFSP High representative Javier Solana to design in the following weeks a common defence strategy to face the threats of weapons of mass destruction, terrorism, regional conflicts, and refugee crises. The meeting was also notable for the brief trip made by the Foreign Ministers into Turkish territory.

[Kathimerini](#)

Ministers of France, Germany and Poland met to discuss various items on the Convention agenda. The so-referred as Weimar Triangle supports the creation of the post of a European Foreign Minister.

[French Foreign Affairs Ministry](#)

5. Forthcoming Convention/ IGC timetable

For the Convention, the overwhelming task for the coming weeks is that of reaching a consensus on a text for 20 June i.e. the deadline to submit its conclusions to the Heads of State and Government meeting at Salonika. It remains a distinct possibility that the Convention will continue to have a limited remit after June, especially in relation to what is now Part Three of the Constitutional Treaty, on policies etc.

The IGC is likely to start after the summer break, by the end of September or October. The reflection period therefore is likely to run through the summer break. The length of the IGC remains a matter of speculation and clearly will depend on the extent and degree of consensus which the final conclusions of the Convention manage to achieve. Italian presidency will clearly put at the top of its Presidency priorities the resolving of the Treaty reform process by the end of 2003. At the same time, a number of countries (Sweden, Finland, Denmark, UK and accession states) have asked that the constitution should not be signed before 1 May 2004. A compromise may consist on the participation of accession countries as full members at the IGC, the signing of the Constitutional Treaty within the Italian presidency and the ratification process to take place throughout 2004.

6. Announcements and events

A first reading of the Convention's Constitutional Treaty

Kent Centre for Europe/ The Federal Trust Seminar, 5th June 2-5.15 p.m., London

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constitution@fedtrust.co.uk

Between idealism and cynicism: European citizens and their institutions

London School of Economics, Friday 6 June 2003, 13.30-18.00, Old Building

Contact

M.Bruter@lse.ac.uk

What Constitution does Europe need?

British Institute International and Comparative Law, 13 June 2003, 17 Russell Square London

Contact

info@biicl.org

Wider, deeper, stronger: A Conference on the Enlargement of the European Union

House of Commons, 14 June 2003, London

Info

<http://www.le.ac.uk/politics/info/conferences.html>

EU Law for the 21st Century: Rethinking the New Legal Order

25-27 June 2003 Institute of advanced Legal Studies, London

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Federal Trust/UACES Workshop II: From *the Convention to the IGC*

Confirmed speakers include. Andrew Moravcsik, Charlie Jeffery, Thomas Christiansen, Kirsty Hughes, etc.

10-11 July 2003, British Institute International and Comparative Law, London

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The EU: the first ten years, the next ten years?

UACES 8th Research Conference, 2-4 September 2003 University of Newcastle

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admin@uaces.org

EU Governance and External Relations, University of Mannheim, Germany

10-11 October 2003, Mannheim Centre for European Social Research

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7. Web corner

Federal Trust has become a new Content Partner of EurActiv. On the specific dossier of the Future of EU, EurActive and The Federal Trust will be collaborating by sharing visibility and expertise, and mutual coverage of events and publications.

<http://euractiv.com>

Notre Europe Papers

Petits et grands Etats dans l'Union européenne: réinventer l'équilibre, Paul Magnette et Kalypso Nicolaidis, Etudes et Recherches n°25, mai 2003.

<http://www.notre-europe.asso.fr/fichiers/Etud25-en.pdf>

La nouvelle architecture de l'Union européenne: une troisième voie franco-allemande?, Renaud Dehousse, Andreas Maurer, Jean Nestor, Jean-Louis Quermonne et Joachim Schild, Etudes et Recherches n°23, avril 2003.

<http://www.notre-europe.asso.fr/fichiers/Etud23-en.pdf>

Survey of other sites following the Convention and future of Europe

<http://www.constitutional-convention.net/>

Convention Watch

The Convention Watch is part of the project "From the European Convention to Public Discourse: Debating our

Common European Future" (EUCON) supported by the European Commission within the framework of the PRINCE programme. The EUCON project aims to promote transnational debate on the future of the European Union. EUCON is co-ordinated by the Trans European Policy Studies Association (T.E.P.S.A.).

<http://www.euconline.net/>

8. Become a Friend

If you would like to become a Friend of the Federal Trust or would like to make a donation, please contact

Friends@fedtrust.co.uk