

# The Constitution

A provisional commentary by Andrew Duff<sup>1</sup>

**The Constitution enhances the capacity of the European Union to act effectively at home and abroad. It rationalises the legal and policy instruments used by the EU and streamlines decision making. It codifies and entrenches what is valuable in the existing EU treaties, reflecting the latest case law of the European Court of Justice.**

**The Constitution lays down clearly the political objectives of the Union and the values and principles which inform them. It sets out in fairly simple terms the competences of the Union and the powers of the institutions. It strengthens parliamentary democracy and the rule of law.**

**Once ratified, the Constitution will bring the Union greater stability and legitimacy than it has had before. A stronger and more democratic European Union that stands on its own two feet in world affairs is in everybody's interest.**

## The Convention and the IGC

The Constitution was drafted by the European Convention, chaired by Valéry Giscard d'Estaing, made up of government ministers, Members of the European Parliament, members of national parliaments, and the European Commission. The Laeken European Council in December 2001 set up the Convention, which worked from February 2002 until July 2003.

The Convention transformed the constitutional development of Europe: transparent and pluralistic, it reached a fresh and large consensus about how the enlarging Union should be run. The Intergovernmental Conference (IGC), which began in September 2003, accepted the Convention's draft as the basis for negotiations, but later ran into trouble under the Italian presidency of the Council before recovering its nerve under the Irish presidency. The IGC concluded in Brussels late on Friday 18 June.<sup>2</sup> The Treaty establishing the Constitution for Europe will be signed in Rome on 20 November. The work of the European Convention proved to be the basis for the agreement.

## Main features of the Constitution

The Constitution greatly reinforces both the legislative and budgetary roles of the European Parliament. It reforms the Council of Ministers by making it pass laws in public and by prescribing majority voting in place of unanimity over a much wider area. Despite understandable nervousness on the part of some governments, the IGC has accepted that insistence on Council unanimity in a Union of twenty-five and more member states will threaten paralysis.

The Constitution enlarges the number of matters subject to the normal legislative procedure - that is, co-decision between the European Parliament and the Council of Ministers, acting by qualified majority, on a proposal from the Commission (as laid down in Article III-302). There

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<sup>2</sup> CIG 86/04 and Addenda I & II of 25 June 2004. The final version of the Treaty, with revised numbering, is foreseen for late October.

are few exceptions to this norm, although in some special cases use of the legislative procedure is subject to an emergency brake where a member state government might find itself critically embarrassed. QMV is extended to the making of special Council laws in four cases. QMV is also extended to the passing of Council executive decisions in five cases. Overall, decisions in the Union will be easier to reach and gridlock avoided. The possibility of blockage by only one member state, often for spurious reasons, is much reduced if not entirely eliminated.

Widening the scope of QMV plus co-decision is a sign of genuine commitment to reaching common solutions to shared problems in a democratic way. Among the more notable extensions are the reform of the EU's structural and cohesion funds (from 2007, III-119) and the common agricultural and fisheries policy (III-127).

#### *Single market, tax and social security*

The single market would never have been created without QMV. Now, to consolidate it, the Constitution installs the same procedures for energy policy (III-157), and commercial policy (III-217). The Parliament is also given the power of consent over any international agreement that has as its base policy areas covered by the legislative procedure (III-227). The Convention applied the legislative procedure to the multiannual framework programmes in research and technological development (III-149). Despite being challenged at the IGC, this reform found its way into the final text.

The EU has no competence in the field of income tax or national insurance. The harmonisation of policy in the field of indirect taxation remains governed essentially by unanimity. However, the Convention proposed that, with respect to company taxation, turnover taxes and excise duties, and only if necessary for the functioning of the internal market and to avoid distortion of competition, the Council could decide by unanimity to take measures relating to administrative cooperation or to combat tax fraud or evasion according to the normal legislative procedure (QMV plus co-decision) (III-62.2 & III-63). The UK contested these proposals stubbornly - and successfully - at the IGC. The provisions are suppressed.

Even in the area of eco-taxation, the Convention proposed that decisions should be taken by unanimity in the Council (III-130.2). Any change to this decision-making procedure has to be taken by unanimity.

The Constitution also introduces the legislative procedure for the provision of social security for mobile workers (III-21). It does not provide for harmonisation of social security systems. Nevertheless, the UK contested this - successfully - at the IGC by demanding an emergency brake clause whereby any member state may claim that its social security system will be fundamentally affected by the draft measure and thereby suspend unilaterally the legislative procedure. In such circumstances, the European Council will have four months in which to refer the matter back to the Council of Ministers or to ask the Commission to submit a new draft (III-21.2).

#### *Justice and Home Affairs*

The Constitution provides for reinforced integration in the field of justice and home affairs. The normal legislative procedure is extended to frontier controls (III-166), asylum (III-167), immigration (III-168), judicial cooperation in criminal matters (III-171), minimum rules for the definition of and penalties in areas of serious crime (III-172), incentive measures for crime prevention (III-173), Eurojust (III-174), police cooperation (III-176.2), Europol (III-177), and civil protection (III-184). Unanimity in the Council is retained for the establishment of the European Public Prosecutor (III-175) and operational policing (III-176.3).

At the IGC the UK challenged such a wide extension of QMV in this area, suggesting a prevalent threat to the English common law system. It wanted, and got, an emergency brake whereby the normal co-decision procedure will be terminated on the appeal of any one member state which considers that 'fundamental aspects' of its criminal justice system would be affected (III-171.3). The European Council will then have four months in which to refer the matter back to the Council of Ministers or to ask the authors of the proposal (either the Commission or a group of member states) to submit a new draft.

However, the IGC modified this emergency brake by coupling it with an accelerator towards enhanced cooperation (III-171.4). If no progress is made by the European Council or the Council towards the adoption of the framework law within one year, the requisite number of member states will receive automatic authorisation to form a core group.

Exactly the same procedures were applied, for the same reasons, to framework laws establishing minimum rules defining criminal offences and penalties for serious, cross-border crime (Article III-172).

The Convention draft permits the Council, acting unanimously, to establish the Public Prosecutor to act in areas of serious cross border crimes as well as the protection of the financial interests of the Union (III-175). The Italian presidency proposed to limit the Prosecutor to the EU's financial interest, but installed a *passerelle* to widen his scope in future (by unanimous decision of the European Council and consent of the Parliament). However, this *passerelle* was linked to national ratification by all member states, thereby rather negating its purpose. The Irish presidency negotiated successfully at the IGC to remove the unfortunate and unnecessary stipulation about national ratification.

#### *Other matters*

The Convention made provisions for the normal legislative procedure in the fields of cultural policy (III-181), education, youth and sport (III-182), and vocational training policies (III-183) - although in all such cases the harmonisation of national laws is excluded. The same exclusion applies to laws concerning cooperation in public administration (III-185).

#### *Subsidiarity*

The principle of subsidiarity means that the Union should act, in areas that do not fall within its exclusive competence, only when the objectives of the intended action cannot be sufficiently achieved nationally, regionally or locally. National parliaments, which are in any case represented by their own government's ministers in the Council, gain the right to challenge any draft law on the grounds of subsidiarity. The new Protocol on National Parliaments lays down the procedure whereby one third of national parliaments have six weeks to produce a reasoned opinion which will cause the Commission to reconsider any draft law. National parliaments also gain the right to have recourse to the Court of Justice in defence of their prerogatives.

#### *Commission President*

The European Parliament will be able to accept or reject the candidate the European Council puts forward (by QMV) for President of the Commission. Heads of government will have to take into account the result of the European elections and hold 'appropriate consultations' with the Parliament before making their nomination (I-26).

### *Good governance*

The Convention wrote into the Constitution a number of articles spelling out the nature of the Union's representative and participatory democracy, as well as codes of transparency and good governance. The importance of consultation with the social partners and non-governmental organisations is affirmed. The role of the Ombudsman is recognised. One million citizens are entitled to petition the Commission to initiate legislation (I-Title VI).

### *Rationalisation*

The Constitution has reduced and rationalised the number of instruments at the disposal of the Union (I-32). Acts of a legislative nature are European laws or framework law. Acts of an executive nature are European regulations, decisions and recommendations. Acts passed under the legislative procedure are the norm. There are, however, some abnormal acts - mainly Council laws - where the Parliament still plays a subsidiary role.

Progress has been made towards making a greater separation of the legislative and executive powers of the Union, although not as much progress as the Convention wanted. The Council retains an autonomous law-making power in some limited, but sensitive areas, as well as a certain autonomous executive discretion, for example, over CAP prices.

The Constitution establishes a new form of secondary legislation - the delegated regulation (I-35). This enables the legislature (Parliament and Council) to delegate to the Commission elements of legislation that are not essential, whilst enabling either branch of the legislature to scrutinise the work of the Commission and, if necessary, to call back delegated law. This means that MEPs and ministers should be able to concentrate on the essential political choices behind law making, delegating more technical aspects to the Commission.

'Comitology' - the mechanism for managing the implementation by member states of EU law - will be set out in a law, jointly agreed by the Council and Parliament (I-36).

### *Rule of law*

Much to the chagrin of the British, the Constitution unambiguously affirms the primacy of EU law (I-10.1). The European Court of Justice will have enhanced supervision over all aspects of justice and home affairs, and over common foreign and security policy with respect to sanctions. Individuals will now be able to seek redress in the Court against certain regulations of direct adverse concern (III-270.4). The Commission has stronger powers, via the Court, to enforce compliance. And the Court gains competence over the former third pillar, of justice and home affairs.

Member states agree to be loyal to the Union on which, in order to attain specified common objectives, they have conferred certain competences (I-1.1 & I-10.2).

## Competences

The competences allocated to the Union have been much more clearly defined than in the present Treaties into three categories of exclusive, shared, and supporting, coordinating or complementary measures (I-Title III), as follows:

<b>Exclusive (I-12)</b>	<b>Shared (I-13)</b>	<b>Supporting (I-16)</b>
competition rules for internal market; monetary policy (for the eurozone); common commercial policy; customs union; marine conservation <sup>3</sup> .	internal market; area of freedom, security and justice; agriculture and fisheries <sup>4</sup> ; transport and TENs; energy; social policy (as defined in III-104); economic, social and territorial cohesion; environment; consumer protection; public health safety; R & TD, and space; aid and development.	industry; health policy; education, vocational training, youth and sport; culture; civil protection.

The Convention draft spelt out clearly the Union's acquired role in coordinating the economic and employment policies of member states (I-14). The IGC, under UK pressure, came to a more mealy-mouthed formulation. The Constitution lays down the Union's competence to define and implement a common foreign, security and defence policy (I-15). It also lays down the mutual obligation on the EU institutions and on member states to respect each other's respective competences, domestic constitutions and national identities (I-5), as well as to conserve regional, cultural and linguistic diversity (I-3).

A flexibility instrument (I-17) enables the Council, acting unanimously and with the consent of the Parliament, to 'take appropriate measures' to attain one of the objectives set by the Constitution. This provision replaces existing Article 308 (TEC), which only requires the consultation of Parliament.

<sup>3</sup> That is, the fish catch.

<sup>4</sup> That is, enforcement, funding and operation of the single market in fish.

## **Financial system and budgetary process**

There are three elements to the EU's financial system and budgetary process. First, a ceiling is put on the total amount of revenue the Union needs to raise (currently 1.27 per cent of GNI); second, a medium-term strategy puts in place the financial perspectives for the main categories of expenditure (1.12 per cent of GNI in 2004, falling to 1.09 per cent in 2006); and, third, the annual budget is agreed (in 2004, € 111 billion, 0.98 per cent of GNI).

### *Own resources*

Under the Constitution, the ceiling of own resources and the categories of revenue source remains decided by member states acting unanimously, after consultation with the European Parliament. The agreement then has to be ratified in all member states according to their own constitutional requirements (usually, by a vote of the national parliament). The Convention proposed that the modalities of the own resources decision would be enacted by QMV and with the consent of the Parliament. In defence of its rebate, the UK successfully contested that QMV element at the IGC. The IGC establishes that the essential political choices over the own resources system (including the UK rebate) should be made by unanimity, with the Parliament consulted, but that a law of the Council, enacted by QMV and with the consent of the Parliament, should introduce the implementing measures (I-53).

### *Financial perspectives*

The Convention suggested that the multi-annual financial framework (I-54) should be agreed by QMV in the Council and with the consent of the European Parliament, although QMV would not apply until the second round of negotiations following the entry into force of the Constitution (possibly as late as 2017). In its quest for a general corrective mechanism, however, the Netherlands successfully contested that QMV element at the IGC. The Constitution retains unanimity for the financial perspectives, but permits the European Council, acting unanimously, to switch to QMV at a future date (once the Dutch have been satisfied).

### *Budget*

As far as the budget is concerned, an important but arcane distinction between 'compulsory' and 'non-compulsory' expenditure has been removed and the Parliament will have full co-decision powers over the whole annual budget, including the CAP (III-310). The Convention proposed that the Parliament should continue to have the last word on the budget. Faced with the hostility of certain finance ministers to the Convention's budgetary proposals, the Italian presidency tabled a compromise which would deprive the Parliament of the effective last word on the budget but would leave nevertheless the co-decisional nature of the system intact. This was further modified at the IGC under the Irish presidency, on the basis of a proposal from France, but Parliament's prerogatives are successfully preserved.

### *Stability Pact*

Associated with these institutional matters is the sensitive issue of how to deal with the Stability and Growth Pact which is losing credibility as a result of its infringement by some large member states. The IGC did not accept an Italian presidency proposal to enable the Court of Justice to review infringements of the excessive deficit procedure (III-76.12). However, at Dutch insistence, the IGC adopted a Declaration reaffirming its commitment to the Stability and Growth Pact.

The Constitution reinforced the autonomy of the eurozone. For example, the Council decision to allow a new currency to join the euro must be preceded by a positive recommendation from a

qualified majority of current eurozone members (III-92.2). The eurozone will represent itself singly in international monetary system (new Articles III-88, 89 & 90).

### **The Charter of Fundamental Rights**

Part Two of the Constitution contains the Charter of Fundamental Rights which was drawn up by the previous Convention in 1999-2000. The Charter is a modern catalogue of the classical fundamental rights as well as the principles which have guided the development of EU law and policy over the years. Its purpose is to protect the citizen from any abuse by the EU of the power it exercises.

The Constitution makes the Charter binding on EU institutions and agencies and justiciable in the Courts. Respect for the provisions of the Charter will be mandatory for member state governments, regional and local authorities when and in so far as they implement EU law and policy.

The European Court of Justice in Luxembourg will develop jurisprudence in the field of fundamental rights, under the external supervision of the European Court of Human Rights in Strasbourg.

The UK government has fought a rearguard action to dilute the legal force of the Charter. The horizontal clauses were adjusted by the Convention to make clearer the difference between classic rights (for a breach of which the courts have to seek direct remedies) and fundamental principles (which inform the formulation, enactment and implementation of EU law). The IGC added a clause to say that the courts should give 'due regard' to the explanatory memorandum drawn up by the Praesidium of the Charter Convention (II-52.7) – although these explanations are not in themselves justiciable.

The Charter does not give the EU carte blanche to dismantle Thatcherite trade union legislation in the UK. Its field of application is restricted to the competences of the Union (II-51.2); and its judicial scope is limited to laws and executive acts of the EU and by acts of member states when implementing EU law (II-52.5). The right to strike is recognised 'in accordance with Union law and national laws and practices' (II-28). The Union is competent only to 'support and complement the activities of the Member States' in the field of industrial relations (III-104.1); and EU legislation in this area has to be adopted by unanimity in the Council (III-104.3).

### **Common foreign, security and defence policy**

The Constitution makes progress towards making a reality of the Union's common foreign policy. It creates a Union Minister for Foreign Affairs, who will chair the Foreign Affairs Council as well as being a Vice-President of the Commission, with powers to initiate policy. The European Council will decide on the general strategy and mandate the Minister. The Minister will run a new joint administration which will draw on the services of the Commission, the Council and national governments. The use of QMV in the Council is limited to the implementation of consensual decisions of the European Council. Even then, any member state, for 'vital and stated reasons of national policy', may press the emergency brake and veto a decision (III-201.2). The Italian presidency proposed an extension of QMV to simple proposals of the Foreign Minister, but this did not survive the IGC.

The Convention has established the framework for the effective development of a real defence arm to the Union's foreign and security policy (I-40). The Constitution establishes a European Armaments, Research and Military Capabilities Agency in order to rationalise and coordinate arms procurement policies (III-212). It also provides for a coalition of the military capable and

politically willing to form an integrated military hard core whose forces are to be made available to the Union (III-211 & 213).

The Constitution includes a solidarity clause which anticipates that member states will respond jointly in the event of an attack or natural disaster (I-42), as well as a provision for collective mutual defence, in close cooperation with NATO (I-40.7).

The Constitution accords to the Union a formal legal personality in international law (I-6). The same right has been enjoyed by the European Community for many years in commercial and economic matters: its extension will allow the EU to act as one in international negotiations in all fields, including security, and should be a spur to greater effectiveness in the UN.

### **Reform of the Council**

The Constitution makes changes to the organisation of the European Council of heads of government and of the Council of Ministers – although not as significant as the Convention had proposed. Early on in the IGC the Convention's proposal for a separate General Affairs and Legislative Council was annulled. The current system of rotating six monthly presidencies, each with their own cumbersome programmes, is to disappear. A more permanent chair of the European Council will be appointed for a period of at least two and a half years (I-21). He and the President of the Commission will have to learn to cohabit.

As for the ordinary Council, the IGC accepted an Italian presidency proposal that there should be team presidencies of three member states for eighteen months for the ordinary Councils (apart from the Foreign Affairs Council, which will be chaired by the Foreign Minister). The IGC went on to accept an Irish presidency proposal that the three should rotate their chairs every six months. The idea that there should be more rapid rotation of chairs got nowhere.

A more formal multi-annual political programme will be established by the European Council on a proposal of the Commission, having consulted the European Parliament, with which the Commission's annual legislative programme will have to conform (I-25.1).

### **Enhanced cooperation**

The Constitution improves the provisions whereby a group of member states may determine, as a last resort, to integrate more closely than the whole Union in a given policy sector. Authorisation of enhanced cooperation shall be taken by the Council acting by QMV, with the consent of the Parliament (I-43). At the IGC the UK successfully opposed the use of QMV to trigger enhanced cooperation in foreign and security policy (III-325.2). The British were unsuccessful, however, in opposing use of the *passerelle* provision to a widening of QMV within the core group (III-328). This means, in effect, that in areas other than CFSP the core group will be able to integrate as far and as fast as it wishes.

### **Secession**

Any member state that wants to leave the Union may do so in a negotiated way. The Council will act by QMV and Parliament will be required to give its consent (I-59).

### **Future revision**

The European Parliament gains the power to propose future revisions to the constitution, alongside the Commission and member state governments (IV-7.1). Parliament will also have to give its consent to a European Council decision not to summon a Convention to propose future

constitutional amendment (IV-7.3). But all constitutional revision will have to be agreed unanimously and ratified in all member states.

To provide for more gradual constitutional evolution, the Convention proposed to enable the European Council, acting unanimously, to convert abnormal decision-making procedures (mainly, where the Council decides by unanimity) to the normal legislative procedure (I-24.4). National parliaments would be properly consulted about such changes. At the IGC the UK contested this bridging clause, known as the *passerelle*. To accommodate the British, the Italian presidency put forward an amendment to allow any one national parliament to block use of the *passerelle* notwithstanding the unanimous decision of the European Council. Unfortunately, this remains (IV-7a.3).

### **The patriotic questions**

Three inter-related problems upset the equanimity of the IGC. They concern the balance of power between larger and smaller member states both within and between the three political institutions.

#### *QMV formula*

The Convention proposed that the formula for QMV in the Council should be half of member states representing 60 per cent of the population of the Union (I-24). Following heavy quarrelling from Spain and Poland, which both lose out in the pecking order compared to their over-weighty position under the Treaty of Nice, the Irish presidency came up with a new equation of 55/65, but with the blocking minority having to be made up of at least four member states. In addition, in EU-25 the majority will have to comprise 15 member states (which is, in effect, 60/65).

As a further sweetener to the Poles, and as a transitional measure, member states representing at least 26.25 per cent of the population or any three member states may insist on further discussions in order to delay the adoption of a measure by QMV. This version of the notorious Ioannina Compromise takes the form of a Council Decision.

At the IGC there was much talk of a rendezvous clause that would permit a postponement of the switchover to the new system. However, it is now decided that the new system will apply from 1 November 2009.

#### *Commission*

The Convention proposed that, as from 1 November 2009, the European Commission should be made up of 15 members of the college plus non-voting juniors from all other member states, all selected according to the principle of equal rotation (I-25). This is deemed generally to have been an unsatisfactory proposal, not least by the Commission itself. The Irish presidency came up with a superior solution, which is that, as from 1 November 2014, the Commission shall consist of a number of members corresponding to two-thirds of the number of member states, unless the European Council, acting unanimously decides on something else.

The possibility of not referring in the Constitution to any specific number of Commissioners was mooted at the IGC. Other options had included the suppression of the principle of rotation and the inclusion of a rendezvous clause for a decision that would have permitted a delay to the switchover from the present system (one full member of the college of each nationality) to the smaller Commission.

## *European Parliament*

The European Council has established the future size and shape of the European Parliament. The IGC was always going to adjust the number of seats per member state as compensation for a perceived loss of Council or Commission privileges. Unfortunately, the chance was missed by the IGC (and by the Parliament) to agree a logarithmic formula that would have settled the matter in a neutral way for all time. From 2009 there are to be 750 MEPs ranging between 6 and 96 per member state (I-19.2).

### **Entry into force**

The Constitution can only enter into force once it has been ratified by all 25 member states according to their own constitutional requirements (Article 48 Treaty on European Union and IV-8 of the Constitution). A parliamentary revolt, a judicial challenge or a failed referendum will probably delay and possibly scupper the whole Constitution.

In the event of a narrow defeat at a referendum, precedent suggests that a second vote would be held in order to get the right answer. Persistent failure of only one member state to ratify the Constitution would lead to its withdrawal from the Union and the negotiation of a looser form of association (such as the EEA agreement) (I-59). Persistent failure by multiple member states to ratify would leave the Union in deep and possibly terminal crisis.

In order to minimise the likelihood of such a crisis, it would have been prudent for the IGC to revisit the question of how to give effect to the Constitution. Instead, it did not.

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Brussels

12 July 2004