

Document of the European Convention on the functioning of the institutions (10 January 2003)

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The Functioning of the Institutions

Reflection paper prepared by the Convention Secretariat and approved by the Praesidium

1. The Convention's approach has been to treat institutional questions as a function of substantive issues. Competences, instruments and procedures have been addressed on their merits. Key criteria in Convention debates have been simplicity, efficacy and democratic legitimacy, not concern for particular institutional interests. It is important for the Convention's success that this should remain the case. But the capabilities of the Institutions themselves, in the light both of successive enlargements and of their changing roles, need to be assessed against these three criteria. The Laeken Declaration sets out a number of specific questions on this issue under the overall heading of "more democracy, transparency and efficiency in the European Union". A copy of the relevant extract from the Laeken Declaration is contained in an annex to this paper.

2. This descriptive paper, which draws on contributions from Convention members, is intended, by providing objective background, to clarify Convention debate on these issues. It addresses the four existing central institutions – the European Parliament, the Council, the Commission and the Court separately: the European Council, recognised by the TEU, is covered last. The paper concludes by listing some factors relevant to consideration of how to improve the functioning of the institutions. It is not intended to be exhaustive: in order to avoid prejudging the discussions at the 6-7 February plenary session on Social and Regional issues, it does not address the Economic and Social Committee or the Committee of the Regions or, in order to be coherent, other Community bodies such as the Court of Auditors. Furthermore, the paper does not cover the European Central Bank, nor other ideas put forward in the Convention such as making the Convention itself a permanent body or Congress of the peoples of Europe.

3. In describing the current functioning of the institutions, the paper takes into account the institutional changes introduced by the Treaty of Nice (due to come into effect on 1 February 2003). Although the purpose of these changes is to prepare the Union's institutions for enlargement, this paper does not exclude issues related to the further improvement of the functioning of the institutions even where these might go beyond or even replace the Nice provisions.

European Parliament

4. Under the founding Treaties the European Parliament was seen as a deliberative assembly, composed of representatives of the national parliaments, with mainly advisory functions. Since the first direct elections in 1979, the Institution has undergone profound change and now assumes legislative, budgetary and political functions.

5. In the course of successive enlargements the number of Members of Parliament has continued to increase. Under Article 189 TEC, the Parliament shall "consist of representatives of the peoples of the States brought together in the Community". Article 190 establishes the number of representatives per State. The total number is currently 626. With a view to future enlargements the Treaty of Amsterdam had already fixed a ceiling of 700 members of Parliament (Article 189 TEC). The Treaty of Nice raised this ceiling to 732.

6. The legislative, budgetary and political functions of the Parliament have been developed to such an extent as to change the very nature of the Institution but neither the voting rules (the weighting remains the same) nor the representativeness of the Members in terms of ratio of citizens to Members have changed substantially. It has been considered that the terms of the EC Treaty (Article 190) "representatives of the peoples of the States" warranted proportionality being corrected to allow the "appropriate" representation of the least populated States. In fact, the composition of the Parliament has always been the result of a system of degressive proportionality. This type of system produces distortions of representativity. ¹

7. At the Nice Intergovernmental Conference the European Parliament had thus proposed 2 that the number of representatives in the Parliament to be elected in each Member State should be "determined on the basis of populations under a proportional allocation system adjusted by allotting each State a minimum of four seats", subject to an upper limit of 700 seats. (A variation on this proposal, contemplated by the Parliament's

Committee on Constitutional Affairs, consisted of drawing up a scale for all the seats proportional to the population, while allocating a minimum of four seats to the States which would not attain this minimum number of seats by applying the proportional scale). The IGC did not accept those proposals.

8. The Treaty of Nice established a fresh distribution of seats in the Parliament. This is traditional degressive proportionality but with some exceptions (especially in relation to the number of seats allotted to the Czech Republic and Hungary).³

9. The poor turnout in the last European elections, especially in certain countries, is evidence of the remoteness, not to say the increasing lack of interest in European Institutions which are often perceived as being too distant. Some feel that an initial response to this type of problem may be found in the common principles underlying the electoral procedure⁴. (The Parliament had also proposed electing a number of Members of Parliament on the basis of a European constituency via transnational lists. The Commission has recently redrafted this proposal in its recent communication.).

10. Article 190(4) TEC establishes the legal basis for the drawing up "of a proposal for elections by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States". It is this second formula (common principles) which inspired the Council Decision of 25 June and of 23 September 2002. The rules established by this Decision have still to be adopted by Member States in accordance with their respective constitutional requirements⁵.

11. The main aspects of the Decision are as follows:

- proportional-type ballot with some room for manoeuvre for the Member States which may allow balloting for a preferential list,
- choice of the type of constituency by the Member State without adversely affecting the proportional nature of the vote,
- series of incompatibilities with the other institutions and bodies of the Union and with national parliaments,
- constraints as regards the timetable, while complying with traditions concerning the day of the week and the publication of the results of the elections.

12. Article 35 of the Draft Constitutional Treaty (CONV 369/02) provides for a "protocol containing provisions for elections to the European Parliament by a uniform procedure in all Member States". Three options are possible for the content of the protocol to the Constitutional Treaty: (a) insert the text of the Decision of 25 June and 23 September 2002, as such; (b) embody the principles underlying the Decision; or (c) provide for a true uniform electoral procedure.

Council

13. The Council has both legislative and executive (policy-making) functions, each involving different instruments and processes. Working Group IV (the Role of National Parliaments – CONV 353/02) recommended that, when undertaking its legislative function, the Council should meet in open session throughout. This would go further than the European Council's decision in June 2002 to open up to the public the initial (presentation) and final (voting) stages of discussion under the co-decision procedure. In addition, in view of the fact that the legislative work of the Council is currently spread across a number of different formations, so risking an overly specialised approach with legislation taking insufficient account of wider interests, some suggest creating a new Legislative Council to deal only with legislative proposals, either in specific areas or across the full range of Union business.

14. The increasing range and complexity of the issues which the Council has to address have led to less coherence, and in some cases even to conflicting views on the same issues, between different Council

formations. The General Affairs and External Relations Council has proved less able to exercise its historical (albeit informal) role coordinating the work of other Council formations. The European Council in Seville decided to limit the number of Council formations to nine, and to hold separate meetings of the two main areas of activity of the General Affairs and External Relations Council. (Working Group VII (External Action) tended to favour going one step further and formally separating the two formations (CONV 459/02)).

15. The number of Council formations, together with their specific areas of responsibility, is currently decided by the Council. Alternative approaches could be either to assign this responsibility to the European Council, or to fix definitively in the Constitution the number and responsibilities of Council formations.

16. The Council, unlike the Commission and the Parliament, has always had only short term, part-time Presidency arrangements. The rotating system has had the advantage of spreading awareness of the Union, and creating a sense of ownership in Member States. On the other hand, it is difficult for Member States' ministers to cope with the ever-increasing range of complex Presidency tasks, and the lack of continuity will be even more damaging when the period between Presidencies, after Enlargement, exceeds twelve years.

17. Any reform of the Presidency system would need to address the two requirements of stability and adequate representation of all Member States.

18. Enlargement will make it increasingly difficult for the Council to reach agreement on the basis of unanimity. For this reason the Convention is likely to recommend a further extension of Qualified Majority Voting. This increases the importance of the mechanism of vote weighting.

19. The Nice Treaty adopted a new triple system requiring a majority of weighted votes, a majority of members of the Council, and a majority representing at least 62% of the Union's population. This system has been criticised as excessively complex and as making it slightly more difficult to achieve a qualified majority. It has also been pointed out that, since the allocation of votes (like the system for seats in the European Parliament) remains degressive, the views of less populated Member States carry greater weight relative to population than do those of more populated Member States. For these reasons the Commission in its recent communication proposed introducing a double majority system (majority of Member States and population).

Commission

20. The procedure of appointment of the Commission, as amended by the Treaties of Amsterdam and Nice, is now as follows:

- (i) The Council (Heads of State or Government, acting by qualified majority) nominates a candidate for President of the Commission;
- (ii) The European Parliament approves that nomination (simple majority suffices);
- (iii) The Council, acting by qualified majority and by common accord with the President-designate, adopts a list of candidates for the other members of the Commission;
- (iv) the whole college thus nominated is subject of a vote of approval by the European Parliament (simple majority suffices).
- (v) The College is appointed by the Council, acting by qualified majority.

Thus, the President-designate has some say in the choice of the other members of the College, though in practice his ability to oppose candidacies may be limited, as the Treaty of Nice stipulates that the list of designated Commissioners must be "drawn up in accordance with the proposals made by each Member State".

21. Suggestions for changes in these procedures have been made, often with the aim of enhancing the role of the European Parliament. Some suggest reversing the order in which the Council and the Parliament act ⁶.

22. Membership of the College has grown over the years. Originally consisting of 9 members (one national from each of 3, and two from the larger 3 Member States) it currently has 20 (one national from each of 10, and two from each of the 5 largest Member States). Some see the expansion as inconsistent with efficiency; accordingly the Treaty of Nice provides for one Commissioner per Member State; and that, once the Union has reached 27 Member States, there shall, on the basis of equal rotation, be fewer Commissioners than Member States.

23. How the second model is to function has not been determined. Suggestions put forward achieve the reduction either by partial rotation or by permitting a selection by the President-designate of the Commission, on the basis of certain criteria, in liaison with the two other institutions that participate in the appointment of the College. The Treaty already stipulates (Article 213 TEC) that Commissioners shall be chosen on the basis of their competence, and some have argued that selection by the President-designate, taking account of geographical and political balance, might produce the team best qualified for the Commission's key tasks.

24. The larger the College, the greater the need to streamline its structure. Some proposals therefore include a provision for two "levels" of Commissioners; some restrict the right to vote on decisions of the College to only the higher level.

25. Some see a threat to the independence of the Commission in the perception that Commissioners represent states. Others are concerned that if Commissioners, in the enlarged College, are so perceived, College decisions may not be so readily accepted by the majority of the EU population, given the risk that representation in the College may be seen as excessively degressive.

26. In attempting to address this issue, some have suggested that voting in the College on certain matters should require broader majorities. Others have expressed concern that such an approach might undermine, rather than promote, courageous decision-making in the common interest of the Union, and only reinforce the erroneous impression of a College composed of national representatives.

Court of justice

27. Although the successive reforms of the treaties have altered the architecture and functioning of the Court, to date these changes have not brought about the desired results. The number of cases on which the Court is required to give rulings has grown over the last few years. To a large extent, this increase is due to new areas of Union action being added to the Treaties, as well as to successive enlargements of the Union. As a consequence, the Court of Justice has had an excessive workload over recent years, the period between the time an application is lodged and the Court ruling is delivered has grown longer, and the gap between the number of cases brought before the Court and the number of rulings handed down has widened ⁷. Consideration of the future functioning of the Court will also need to take into account possible recommendations from the Convention on such issues as extending the scope of access to the Court by individuals.

28. The Treaty of Nice made some necessary changes to the way in which the Court operates, but these might well fall short of the mark given the scale of enlargement and the requirements of the new constitutional treaty. In addition, some of the amendments provided for by the Treaty of Nice are not immediately applicable, but require a unanimous decision by the Council (such as for the creation of specialised chambers) which will make it very difficult to implement in practice.

29. At present, the Court sits as a full court (15 judges) and in Chambers (3 or 5 judges). After the Treaty of Nice enters into force, the Court will sit as a full court (25 judges), as a Grand Chamber (11 judges) and in Chambers (3 to 5 judges). The Court of First Instance sits in Chambers with three or five judges, although in

some cases it may sit as a full court or consist of a single judge.

30. The Court of Justice comprises one judge per Member State, who is appointed by common accord of the governments of the Member States. The same applies to the Court of First Instance. In practice, each Member State proposes a candidate, who is approved by the other Member States. Some have suggested introducing a "filter" for the proposals made by the Member States, similar to the system for appointing judges to the high courts of the Member States. Such a filter could consist of nominations submitted by the Member States being examined by a committee comprising the President of the Court of Justice and a number of Presidents of national constitutional courts, or by a committee made up of the President of the Court of Justice, the President of the Court of First Instance and the First Advocate-General.

31. Certain decisions relating to the functioning and the organisation of the Court require unanimity within the Council. With the Treaty of Nice, some acts, such as the Court's Rules of Procedure, could be adopted by a qualified majority. It might be considered whether in some instances, in which a unanimous vote is still required for such matters, unanimity might be replaced by qualified majority voting.

European Council

32. The original purpose of the European Council, which brings together (on average four times a year), the Heads of Government/State of the Member States and the President of the Commission (together with Foreign Ministers and a member of the Commission), was to provide an opportunity for Heads to hold informal discussions on issues of common interest (the so-called 'fireside chat'). Whilst this aspect has not totally disappeared, it is obviously difficult to arrange such informal debate in a group of 32, and will be even more difficult at 52.

33. According to the Treaty, the European Council is the body which provides the Union with the necessary impetus for its development and defines general political guidelines. Crucial initiatives have been taken by the European Council, such as the launching of the Monetary Union. However, the European Council seems now much more a forum in which successive Presidencies seek agreement on their preferred objectives and priorities for future Union policy, and attempt to settle dossiers which have become blocked. But this too is difficult, given current decision-taking procedures (no QMV, even for decisions where QMV applies at the level of the Council.)

34. The Seville European Council in June 2002 agreed on a number of operational measures (none of them requiring treaty change) designed to improve the effectiveness of the European Council. The agenda of the European Council is now prepared in greater detail by the General Affairs and External Relations Council. An agenda is formally adopted, and items separated into those which require a substantive discussion and those which do not. Practical arrangements for meetings have also been streamlined, with tighter programming over a shorter period, and smaller delegations.

Principles

35. In considering how best to improve the functioning of the institutions, the Convention may find it useful to consider the following principles:

(a) First, Enlargement challenges the effectiveness of all institutions. Leaving aside subjective judgements about the current effectiveness of individual institutions compared to their past performance, it is an objective fact that Enlargement will impact directly on them, by increasing the numbers involved in decision-making, and hence potentially affecting the capacity of each institution to deliver.

(b) Second, ensuring the effectiveness of each would help all. The Parliament needs effective Council and Commission interlocutors, and a coherent Council co-legislator. The Council needs timely and well-judged Commission proposals; and the Commission needs a Council which can handle them with speed and authority. So improving the effectiveness of individual institutions is not a zero-sum game: all gain.

(c) Third, institutional balance matters. An efficient Commission, reinforced in its independence, and so better able to articulate the common interest and enforce common rules, might be matched by an efficient Council, so configured and chaired as to encourage rapid and consistent decision-taking, and an effective Parliament, with extended power of legislative co-decision. If any of the three became relatively weaker, the overall structure would be weakened. Inter-institutional arrangements must respect the legitimacy of all three, and the necessary balance between them.

(d) Lastly, changes should ideally ensure greater durability. Several of the current institutional provisions (e.g. number of EP seats/Council votes) are such as to require renegotiation each time the Union enlarges. Given the nature of a Constitutional Treaty, the Convention may wish to consider whether these provisions might be so revised as to reflect objective criteria, which could be applied automatically upon future enlargement. But any reform of the functioning of the institutions should be designed primarily to make them work better; to make them better understood and accepted; and to make it easier for EU citizens to identify who is responsible for what.

Annex

Extract from the Laeken Declaration on the future of the European Union

More democracy, transparency and efficiency in the European Union

The European Union derives its legitimacy from the democratic values it projects, the aims it pursues and the powers and instruments it possesses. However, the European project also derives its legitimacy from democratic, transparent and efficient institutions. The national parliaments also contribute towards the legitimacy of the European project. The declaration on the future of the Union, annexed to the Treaty of Nice, stressed the need to examine their role in European integration. More generally, the question arises as to what initiatives we can take to develop a European public area.

The first question is thus how we can increase the democratic legitimacy and transparency of the present institutions, a question which is valid for the three institutions.

How can the authority and efficiency of the European Commission be enhanced? How should the President of the Commission be appointed: by the European Council, by the European Parliament or should he be directly elected by the citizens? Should the role of the European Parliament be strengthened? Should we extend the right of co-decision or not? Should the way in which we elect the members of the European Parliament be reviewed? Should a European electoral constituency be created, or should constituencies continue to be determined nationally? Can the two systems be combined? Should the role of the Council be strengthened? Should the Council act in the same manner in its legislative and its executive capacities? With a view to greater transparency, should the meetings of the Council, at least in its legislative capacity, be public? Should citizens have more access to Council documents? How, finally, should the balance and reciprocal control between the institutions be ensured?

A second question, which also relates to democratic legitimacy, involves the role of national parliaments. Should they be represented in a new institution, alongside the Council and the European Parliament? Should they have a role in areas of European action in which the European Parliament has no competence? Should they focus on the division of competence between Union and Member States, for example through preliminary checking of compliance with the principle of subsidiarity?

The third question concerns how we can improve the efficiency of decision-making and the workings of the institutions in a Union of some thirty Member States. How could the Union set its objectives and priorities more effectively and ensure better implementation? Is there a need for more decisions by a qualified majority? How is the co-decision procedure between the Council and the European Parliament to be simplified and speeded up? What of the six-monthly rotation of the Presidency of the Union? What is the future role of the European Parliament? What of the future role and structure of the various Council formations? How should the coherence of European foreign policy be enhanced? How is synergy between the High Representative and the competent Commissioner to be reinforced? Should the external

representation of the Union in international fora be extended further?

¹ A Luxembourg Member currently represents 72 000 citizens, while a German represents 829 000, an Italian 662 000 and a Swede 402 000.

² Resolution of 13 April 2000 with its proposals for the Intergovernmental Conference.

³ Disparities of representativeness would remain in a Union of 27: a Maltese Member would represent 76 000 citizens while a German would still represent 829 000, an Italian 800 000 and a Swede 492 000.

⁴ It should be mentioned in this connection that the arrangements for cooperation between European and national parliaments, including the idea of a Congress, discussed by the Working Group chaired by Ms Stuart (CONV 353/02), could prove to be effective ways of improving the visibility and public recognition of the European Parliament.

⁵ It should be specified that the Decision is not binding on Member States. In fact, under Article 190(4) "The Council shall lay down the provisions which it shall recommend to Member States for adoption in accordance with their respective constitutional requirements".

⁶ See the Communication from the Commission of 4 December 2002.

⁷ According to the statistics for 2001, preliminary ruling procedures take an average of 22.7 months, and direct applications 23.1 months.