Andrew Duff, From Amsterdam leftovers to Nice hangovers

Caption: In March 2001, Andrew Duff, Member of the European Parliament and spokesman on constitutional affairs for the Group of the European Liberal, Democrat and Reform Party (ELDR), criticises the work of the 2000 Intergovernmental Conference (IGC) and highlights the need for a new method in order to make better preparations for a new Constitutional Treaty.

Source: The International Spectator. January-March 2001, No 36/1. [s.l.]: Istituto Affari Internazionali. "From Amsterdam left-overs to Nice hangovers", auteur:Duff, Andrew , p. 13-19.

URL: http://www.cvce.eu/obj/andrew_duff_from_amsterdam_leftovers_to_nice_hangovers-en-43ba2dee-8dcf-40a0-ac98-5773522cc882.html

Publication date: 19/12/2013

From Amsterdam leftovers to Nice hangovers

Andrew Duff, Member of the European Parliament and spokesman on constitutional affairs for the European Liberal Democrats (ELDR)

Contented with the outcome of the Treaty of Nice are those governments of candidate countries who now see the green light to membership and who are otherwise uninterested in how the European Union governs itself. Of the existing member state governments, however, only the United Kingdom is unreservedly happy with Nice. That fact alone should cause us to be immensely suspicious. Other member state governments are somewhat shame faced about Nice. Even President Chirac apparently confesses to understand the protests from the direction of both the European Parliament and the smaller states about the shift of the balance of power.

All governments except the British, therefore, attach great importance to Annex IV, now Declaration No. 23 on "The Future of the Union", the text of which will be trodden over again and again in years to come.[1] This document asserts that "important reforms have been decided in Nice" and that no further institutional changes will be necessary before enlargement. It goes on to say, however, that "having opened the way to enlargement", a "deeper and wider debate about the future development" of the Union is called for in order "to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, to bring them closer to the citizens of the Member States". The Nice Declaration identifies four specific questions, *inter alia*, which the future reform process should address: competencies and subsidiarity, fundamental rights, simplification of the Treaties, and the role of national parliaments.

One may be permitted a strong sense of *déjà vu*. As is well known, the Treaty of Amsterdam, which came into force on 1 May 1999, also left a certain number of important and controversial "left over" issues. These had mainly concerned the balance of power between the European Union institutions and the member states but also between the member states themselves.[2]

The Intergovernmental Conference

The Intergovernmental Conference (IGC) was convened under the Portuguese presidency of the Council on 14 February 2000. After 330 hours of formal discussion, the European Council — badly prepared as ever — met in the Acropolis at Nice on 7 December to conclude negotiations. What happened?

It was agreed to extend qualified majority voting (QMV) in the Council to a small number of areas, some more wholeheartedly than others. In only six areas was the extension of QMV matched immediately by the commensurate extension of co decision with the Parliament, the most important of which concerns incentive measures to promote non discrimination (Article 13.2); judicial cooperation in civil matters with the exception of family law (Article 65); and the statute for European political parties (Article 191). There is the promise that QMV will apply in Article 161 on the reform of structural and cohesion funds along with the assent of the Parliament — but only in January 2007, which is immediately after the next revision of the financial perspectives. This means there is unlikely to be any substantive modification of EU spending plans in the medium term.

Under Article 133, QMV is introduced for trade in services and the commercial aspects of intellectual property. But there are also important, and possibly overriding exceptions for (i) the negotiation and conclusion of accords in any area wherever the Treaty insists on unanimity for the adoption of internal rules or wherever the EU has yet to exercise its competences; (ii) where a trade agreement would exceed EU internal competences, notably those requiring harmonisation of EU laws, including cultural, audio visual and educational services, health and social services; and (iii) transport. This very restrictive extension of QMV in trade policy is not accompanied by any envisaged role for the European Parliament, let alone the assent procedure it asked for.

There are three other important additions to the powers of the Parliament, namely that it may take the initiative in charging a member state with a breach of fundamental rights by two thirds majority (Article 7.1

TEU); that Parliament is at last given equal status with the Council, Commission and the member states to challenge the legality of an act in the Court of Justice (Article 230); and that Parliament is given equal status with the Council and Commission in seeking an opinion from the Court of Justice about the validity of international agreements (Article 300.6).

The Treaty of Nice has developed the powers of the Union in only three new ways: establishing Eurojust (cooperation among prosecutors); adding provisions to combat fraud against the public finances; and including social exclusion and modernisation of social security systems as objectives of social policy (although explicitly not the harmonisation of national social welfare systems).

The Charter of Fundamental Rights of the European Union had been prepared outside the IGC by an extraordinary Convention comprised of representatives of member state governments and parliaments, the Commission and the European Parliament. Agreed on 2 October by the Convention, the Charter was jointly and solemnly proclaimed at Nice by the Council, Commission and Parliament. However, at the insistence of the British and with the connivance of others, there is no reference made to the Charter in the Treaty of Nice. This omission will inevitably result in legal uncertainty and political controversy when the Charter begins to be used in the courts.

Under the revised Article 217 the powers of the president of the Commission will include the nomination of vice presidents, the allocation of portfolios and the sacking of members, albeit with the approval of other members of the college.

Nice institutes a major reform of the European Court of Justice (ECJ) and the Court of First Instance (CFI) which should improve working methods and performance as well as enhance the autonomy of the Union's judiciary. Measures include the setting up of separate panels for the CFI, and of special judicial panels for specific class actions; establishing the ability of the ECJ to meet in plenary, a grand chamber or chambers; and the use of QMV for changes to rules of procedure. There will be one judge per member state and eight advocates general appointed for six year renewable terms, with partial replacement every three years. It is worthwhile to note that these reforms were prepared outside the normal IGC process by a "friends of the presidency" group that included the relevant jurists.

The agreement on the Common European Security and Defence Policy is again witness to substantial progress having been made outside the normal IGC. It confirms the EU's take over of WEU. The linchpin of the new arrangements is the Political and Security Committee (PSC) which will be responsible for both Common Foreign and Security Policy and Common European Security and Defence Policy (CESDP) under (the revised) Article 25 TEU, including the formulation of Joint Actions (such as the rapid reaction force). It is stated that the High Representative, Javier Solana, "may" chair the PSC — a crucial decision, unwelcome to France. Despite the establishment of the rapid reaction force as the first example of CESDP, there is still self evident disagreement between France and the United Kingdom about its relationship with NATO. Chirac thinks it is "coordonnée mais indépendante"; Blair thinks it is subsidiary. This old theological dispute is only likely to be resolved in a crisis, possibly on the battlefield, with its outcome determined largely by the US government.

There has been some rationalisation within the Treaties of how to treat the question of differentiated integration. In the first and third pillars (European Community and Police and Judicial Cooperation in Criminal Matters, respectively) there is the added stipulation that closer cooperation must reinforce the integration process. At least eight member states must take part, but all must be encouraged to do so. The provisions will still be employed only as a matter of last resort, and only after a reasonable period of trying to reach agreement between all member states. "Out" member states must not impede the integration of the "Ins", although anything achieved under closer cooperation shall not form part of the overall *acquis* of the Union.

In the first pillar, the national veto on closer cooperation at the level of the European Council is abolished. In the second pillar (Common Foreign and Security Policy), enhanced cooperation can be used to implement a joint action or common position, for example in the field of arms procurement. The UK insisted on the

insertion of a contradictory stipulation that enhanced cooperation in this area "shall not relate to matters having military or defence implications". This should be taken to imply, in case there was any doubt about it, that unanimity shall apply in all defence related matters, but not that there should be no avant garde in defence policy.

In the second pillar, the European Parliament will be merely informed. In the third pillar, it will be consulted. In the first pillar, Parliament is only to be consulted on moves towards the formation of an inner core in areas where unanimity pertains in the Council, for example in social or fiscal policy. As these are exactly the areas where the experiment of closer cooperation is likely first to be attempted (and, in all likelihood, can only possibly succeed), this amounts to a very serious setback for the Parliament.

The size of the European Commission after 2005 will be one per member state at least until the Union reaches 27 countries. Thereafter not all member states will always be able to nominate a commissioner. At that stage, the Council, acting unanimously without consulting either the Commission or the Parliament, will be able to decide on the size of the Commission and to choose its members according to a rotation system yet to be devised "based on the principle of equality" and reflecting demography and geography.

After heated argument, there was yet much confusion as to what had been eventually agreed by the heads of state and government concerning the Council of Ministers. Voting weights in the Council will be reallocated as follows:

Germany, UK, France and Italy 29; Spain 27; Netherlands 13; Greece, Belgium and Portugal 12; Sweden and Austria 10; Denmark, Finland and Ireland 7; Luxembourg 4.

The threshold for a qualified majority on a Commission proposal will be 169 votes out of the total 237. Weighting for the accession states will be as follows:

Poland 27, Romania 14, Czech Republic and Hungary 12, Bulgaria 10, Slovakia 7 and Lithuania 7, Latvia, Slovenia, Estonia and Cyprus 4, Malta 3.

The French presidency at first attempted to give the existing member states more votes than candidate countries of equal size — notably, Spain more than Poland. Although this ruse was stopped as far as the Council was concerned, all the leaders colluded in a comparable stitch up of the candidates when it came to allocating seats in the Parliament.

In the enlarged Union, the threshold for a qualified majority in the Council on a Commission proposal will be 258 votes out of the total 345 — thereby upping the threshold to 74.8 percent from its previous, long standing threshold of 71.3 percent.

A simple majority of member states voting will be required to be in favour when the Commission has made the initiative; and, as at present, two thirds of member states voting will be required to be in favour when the Council has made the initiative. In addition to all this there is an important change made to the Council's voting system whose effect is to weigh the balance of power in favour of Germany. The qualified majority must also comprise, when formally challenged for a verification by any member state, 62 percent of the population of the Union (as compared to the present informal situation where only 58 percent is required). This was Schröder's price for agreeing to Chirac's insistence on keeping the equal numbers of votes.

Illogically, for an IGC that was supposed to streamline decision making, the new arrangement has raised the threshold for QMV at the same time as it increases the weight of the votes. That is why Belgium, Portugal and Finland — as well as the Commission — fought against the deal at Nice until 04.20 on 11 December.

In an equally cynical manoeuvre, the ceiling of 700 seats in the European Parliament, established as recently

as the Treaty of Amsterdam, has been breached: with 27 member states there will now be 732 MEPs. Seats in the Parliament are reallocated as follows:

Germany 99; UK, France and Italy 72; Spain 50; Netherlands 25; Greece, Belgium and Portugal 22; Sweden 18; Austria 17; Denmark and Finland 13; Ireland 12; Luxembourg 6.

This is, supposedly, a good result for both Germany and Luxembourg, who have made no sacrifice. It is bad for the Parliament, which will be blamed for being too big. And it raises interesting questions about the durability of treaty commitments.

The number of seats for the accession states will be as follows:

Poland 50, Romania 33, Czech Republic and Hungary 20, Bulgaria 17, Slovakia 13, Lithuania 12, Latvia 8, Slovenia 7, Estonia and Cyprus 6, Malta 5.

The allocation of MEPs busts the convention that representation in the Parliament should be broadly proportionate to the size of population. For example, the Czech Republic which has more people than Portugal or Belgium will have fewer seats; and there are also more Hungarians than Portuguese. Why this discrimination should be thought acceptable to Budapest and Prague is not clear.

The new arrangements are supposed to come into force in time for the next elections in June 2004. New member states that have signed their accession treaties by 1 January that year will have their allocation of seats reserved for them in the 2004 09 Parliament, which will have approximately 732 MEPs come what may, with current member states (except Germany and Luxembourg) having an inflated number of seats to make up the difference should not all of the 12 accession countries conclude their negotiations in time (which they won't).

In a curious bid to placate Belgium, as from 2002 half of the annual meetings of the European Council will be held in Brussels. When the Union has 18 member states, all the European Council meetings will be held in Brussels. This promises to be fairly trying for *Bruxellois*.

The Declaration on the Future of the Union pronounces that the Swedish and Belgian presidencies of the Council in 2001, "in cooperation with the Commission, involving the European Parliament, will encourage wide ranging discussions with all interested parties; representatives of national parliaments and all those reflecting public opinion; political, economic and university circles, representatives of civil society, etc. The candidate states will be associated with this process in ways to be defined."

The Laeken European Council in December 2001 will adopt a declaration on how to pursue this process, including the questions of (i) how to "establish and monitor a more precise delimitation of competencies between the European Union and the Member States, reflecting the principle of subsidiarity"; (ii) the status of the Charter of Fundamental Rights; (iii) "a simplification of the Treaties with a view to making them clearer and better understood without changing their meaning"; and (iv) "the role of national parliaments in the European architecture". A new IGC will be convened in 2004. Accession states will participate in the new conference; candidate states will be invited as observers.

It is worth recalling that much of what was hoped for at Nice was either ignored completely by the European Council or simply was not discussed in any depth. For example, the distinction between the three pillars still remains fairly strong, and the Community method has not been extended into the second and third pillars. The various opt outs obtained by the UK, Denmark and Ireland especially in the field of justice and home affairs and the asylum and immigration policy are maintained. The cooperation procedure (Article 252), in

which the Council may overrule the Parliament, is retained for some articles, notably in the sphere of Economic and Monetary Union. There is no new legal base in the Treaty for energy supply. There is no hierarchy of legislative acts. The separation of obligatory and non obligatory items in the EU budget remains. And the EU has not been given legal authority to negotiate to become a High Contracting Party to the European Convention on Human Rights.

The verdict

If proof were needed that intergovernmentalism does not work well in the common European interest, we need look no further than Nice. In tackling the problem of failing intergovernmentalism, it is clear that the Union will have to diminish the role and pretensions of the Council presidency and enhance the authority of the Commission, But a deeper response is also needed that focuses on the need to justify and defend the dual legitimacy of the Community method, where member state governments are represented in the Council and the peoples of Europe are represented in the Parliament.

Those who care for the good government of the European Union would be wise to gather quickly around the post Nice agenda. The aim should be to entrench the Community orthodoxy within a European constitution no later than 2004. The constitutional settlement should enshrine the values and objectives of European integration and lay down the decision making procedures whose cardinal feature must be that nothing becomes law unless passed by a majority in both Council and Parliament.

In addition, the Union could develop new sources of legitimacy. It should enhance European citizenship by installing the fundamental rights regime of the Charter at the heart of the Union. It should try to develop the power of Europe's regions as an intermediary source of political authority.

The IGC in 2004 will have to rectify the perversities of Nice. There is no logical reason why QMV plus co decision should not become the norm for all except the most controversial legislation and for constitutional matters. At the next IGC in 2004 the agenda is bound to include proposals, at least from the European Commission and Parliament, to extend the practice of QMV plus co decision to include Article 13.1 on combating discrimination; Article 37 on reform of the CAP; Article 42 on minimum standards of social security provision for people moving within the Union; Article 93 on the harmonisation of indirect taxation; Article 137.1(c) on social security and social protection of workers; Article 175 on environmental policy taxation; and Article 296 on restricting the armaments industry.

During their long arguments at Nice about the balance of power between them, the EU heads of government displayed such a lack of mutual trust that one has to doubt whether they are adequately prepared, for enlargement in a political sense. There was at Nice an all round lack of generosity, not least towards the candidate countries, and, a paucity of long term vision. Nice has soured relationships, especially between France and Germany and between Belgium and the Netherlands.

Like a hangover, things can only get worse before they get better. Recuperation according to the post Nice agenda becomes immediately very important. During 2001 we need to make sure that the Laeken Declaration will properly prepare the ground for the new constitutional treaty by establishing in 2002 a Convention that includes MEPs as well as government representatives and national parliaments. It will be the job of this Convention to prepare drafts for the IGC in 2004.

Such an exercise well handled should not only serve to give the European Parliament a legitimate role in deciding how the Union is to be governed but may also recruit a new generation of national politicians to a better understanding of and commitment to the unification of Europe.

1. Annexed to the article "The Nice Declaration: Time for a Constitutional Treaty of the European Union?", by Bruno de Witte, in this issue, page 29.
2. See The Protocol on the institutions with the prospect of enlargement of the European Union of the Treaty of Amsterdam.