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The Convention on the Future of Europe: the deliberating phase

> "The Euro train is still rushing through the night, and is clearly going to the terminus in the Euro state. I would like to think that our representatives might cast a few of those British leaves on the line to slow it down a little and make the journey more attractive".(John Redwood, Standing Committee on the Convention, 23 October 2002)
> "I not only occasionally scatter British leaves on the track, but I scatter them with the best native Bavarian accent, which is even more effective". (Gisela Stuart, UK Representative on the Convention, in reply)

The Convention on the Future of Europe, chaired by Valéry Giscard d'Estaing, was launched in February 2002 to look into the future constitutional and institutional structure of the European Union.

During 2002 ten Working Groups, established in accordance with the Laeken Declaration of December 2001, reported their conclusions to the Plenary. An eleventh Group reported in January 2003. The Praesidium presented a preliminary draft constitutional text in October 2002 and will now elaborate on this, taking into account the findings of the Working Groups and other contributions to the debate. The Convention is due to report its conclusions by June 2003.

This Paper looks at the Convention process and the Working Group reports. It also considers the UK Government's and Parliament's response to the Working Group Final Reports and recommendations.

Background information on the Convention and early proposals are discussed in Library Research Paper 02/14, *The Laeken declaration and the Convention on the Future of Europe*. Proposals for a European constitution and institutional changes will be considered in forthcoming Research Papers.

Vaughne Miller

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Summary of main points

- The Convention on the Future of Europe, chaired by Valéry Giscard d'Estaing, was launched in February 2002 to look into the future political, constitutional and institutional structure of the European Union.

- The Convention's "listening phase" ended in mid-2002. This was followed by a "deliberating phase", at the end of which the Working Groups presented their final reports to the Convention Plenary.

- Changes to the way the Council of Ministers operated were agreed at the European Council in Seville in June 2002. Institutional questions were not discussed in any detail in 2002 but are now being considered by the Convention.

- The Convention began the third "proposing phase" in January 2003 and is due to report its conclusions to the European Council in June 2003. The recommendations of the Working Groups will feed into the Convention's third phase of work, which aims to consolidate proposals into one constitutional text.

- There will be a reflection period of about six months until the end of 2003. During this period ten of the 13 candidate states whose leaders and parliamentarians have contributed to the Convention are expected to sign accession treaties (in April 2003).

- An Intergovernmental Conference (IGC) will be launched in 2004 to amend the EC Treaties, taking account of the outcome of the Convention on the Future of Europe. The IGC will continue with the full participation of the new Member States, which are expected to accede in May 2004.

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I The Convention Process

A. Method and Timetable

The Convention was launched in February 2002 and its challenge has been to focus discussions among parliamentary and government representatives from the EU and candidate states with a view to producing concrete proposals in a single constitutional text by mid 2003. Following a period of reflection of about six months, this will be taken up by the Intergovernmental Conference (IGC) to be convened in 2004.

Under the chairmanship of Valéry Giscard d'Estaing, the Convention's Praesidium has steered the Convention's work programme through the first two of its three phases and has now embarked on the third and final phase. The first phase consisted of "listening" to answers to the question: "What do Europeans expect of Europe at the beginning of the 21st century?" The listening phase ended in June 2002. The second phase began a two-fold process of examination of ideas (the deliberating phase), considering the "Laeken Declaration" questions on the one hand,[1] and various ideas already in circulation about Europe's future, on the other. The third phase of the Convention's work, which began in January 2003, is the drawing up of recommendations, the "proposing phase," and the presentation of final proposals by June 2003[2]. Mr Giscard d'Estaing has said that recommendations approved in the Convention Plenary will be noted and those provoking differences of opinion will be subject to further reflection within the Praesidium, which will then make proposals aimed at reconciling all points of view.[3]

In October 2002 the Praesidium unveiled a "Preliminary Draft Constitutional Treaty".[4] This was a skeleton draft in three parts (1: constitutional structure; 2: Union's policies and bases for implementation; 3: final provisions), with outline articles but little detail. According to the "roadmap" presented by Mr Giscard to the Convention on 20 December 2002, the Praesidium, having already embarked on an examination of draft constitutional treaty articles in juridical format, will present all Part I treaty articles to the Convention by the end of April 2003. In parallel, an inter-institutional official group from the Council, European Parliament (EP) and Commission will draft Part II articles. The Praesidium hopes that a full text of the draft treaty will be produced by mid-May that will be acceptable to all Convention participants and other parties outside the Convention.

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1 The Laeken Declaration is discussed in Library Research Paper 02/14, 8 March 2002, and the full text of the Declaration can be accessed at http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm.

2 See Giscard's full introductory speech at http://european-convention.eu.int/docs/speeches/1.pdf

3 CONV 331/02, "Summary report on the plenary session", 3-4 October 2002

4 CONV 369/02, 28 October 2002. This and other constitutional proposals will be considered in a separate Research Paper.

Including the inaugural session, 14 plenary sessions have been held to date.[5] The Convention Secretariat has posted on the Convention's official website[6] all speeches submitted to it by Convention members, although these appear in their original languages only. Since the third plenary session in April 2002, the Convention Secretariat has made available a verbatim record of proceedings, but again, only in speakers' original languages[7].

The Convention's timetable for 2003 is as follows:

9 January	Praesidium meeting
16 January	Praesidium meeting
20-21 January	Convention Plenary
30 January	Praesidium meeting
5 February	Praesidium meeting
6-7 February	Convention Plenary
13 February	Praesidium meeting
26 February	Praesidium meeting
27- 28 February	Convention Plenary
6 March	Praesidium meeting
13 March	Praesidium meeting
17-18 March	Convention Plenary
21-22 March	European Council
27 March	Praesidium meeting
2 April	Praesidium meeting
3- 4 April	Convention Plenary
10 April	Praesidium meeting
23 April	Praesidium meeting
24-25 April	Convention Plenary
5-6 June	Last Convention Plenary
(12-13 June	a further meeting is possible)
20-21 June	Thessaloniki European Council at end of Greek Presidency. An Intergovernmental Conference to be called.
1 July	Italy takes over EU Presidency.
December	Rome European Council

5 22 February, 21-22 March, 15-16 April, 23-24 May, 7-8 June 2002, 24-25 June, 11-12 July, 12-13 September, 3-4 October, 28-9 October, 7-8 November, 5-6 & 20 December 2002; 20-21 January 2003

6 http://european-convention.eu.int/default.asp?lang=EN

7 http://european-convention.eu.int/plen_sess.asp?lang=EN

B. Convention Reporting Methods

The Praesidium consists of thirteen members, including the chairman.[8] Originally, no provision was made for a candidate country representative in the Praesidium. After protests from the candidate countries, however, Alojz Peterle, the former Prime Minister of Slovenia, was elected to represent the Central and Eastern European countries (CEECs). He was accorded the status of *invité*, which means that although fully involved in the work of the Praesidium, he has not had the right to vote on or to veto decisions.

In addition to its customary meetings on the eve of plenary sessions, the Praesidium has met several times a month in Brussels. It has guided the work of the Convention by setting agendas and timetables and producing discussion papers.

The Convention's plenary sessions are held in public in the European Parliament in Brussels. Praesidium meetings, on the other hand, are held *in camera*, attended by the Praesidium members and one official (the Convention Secretary General, Sir John Kerr, formerly the FCO Permanent Secretary).

The Praesidium has been criticised by members of the Convention (particularly the EP delegation) for the way in which it has conducted its business. Some thought it wielded too much power, was exclusive and too secretive. In an attempt to overcome hostilities, Mr Giscard introduced several new mechanisms: the Praesidium began circulating minutes of its meetings to all Convention members and a new 15-minute "question time" was introduced in plenary sessions to allow members to raise specific issues with the Chairman. It remains to be seen whether the suspicion with which the Convention views the Praesidium in general, and Mr Giscard d'Estaing in particular, will eventually disappear.

The Convention's general aim remains to produce a single text, rather than a set of options. Although there has been no commitment to publish regular update papers before the Convention produces its final document, Giscard undertook to keep the European Council informed of the body's work. He gave oral progress reports to the Heads of State and Government at the Seville European Council on 21-22 June 2002, the Brussels European Council on 24-25 October and the Copenhagen European Council on 12-13 December 2002.

As from the Praesidium meeting on 16 January 2003, each Praesidium member is now allowed one official with him or her to assist in the technical process of considering draft legal texts. On these occasions the UK Praesidium member, Gisela Stuart, will be assisted by members of the House of Commons Legal Services Office.

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[8] The Praesidium and Convention membership is set out in Library Research Paper 02/14, *The Laeken Declaration and the Convention on the Future of Europe*, 8 March 2002.

C. Convention Costs

The Interinstitutional Agreement on the financing of the Convention[9] has been extended for 2003 to cover the period of the Convention or to the end of 2003 at the latest.[10] The Council will receive €200,000 (approximately £130,000)[11] and the Commission €750,000 (approx. £480,000). This total includes €450,000 (approx. £290,000) for duty travel by the Chairman and Vice Chairmen, accommodation and subsistence allowances, pay and other expenses, mission and representation expenses, and €500,000 (approx. £320,000) for miscellaneous operating expenditure (translations, brochures and publications, studies, hearings and forums etc).[12]

II The UK Parliament and the Convention

A. Reporting methods of the UK representatives

The British Government Representatives on the Convention are Peter Hain (formerly Minister for Europe and now Secretary of State for Wales) and Baroness Scotland, deputising from the Lords. The UK's Parliamentary Representatives are Gisela Stuart and David Heathcoat-Amory, with alternates Lords Maclennan and Tomlinson. The British MEPs on the Convention are Linda McAvan (European Socialist Party), Timothy Kirkhope (Cons) and Andrew Duff (ELDR, Liberal Democrat), with alternates Lord Stockton (Cons) and Neil MacCormick (SNP).

Gisela Stuart and David Heathcoat-Amory have so far published six progress reports, as follows:

- *First Progress Report*, 30 April 2002[13]
- *Second Progress Report*, 20 June 2002[14]
- *Third Progress Report*, 24 July 2002[15]
- *Fourth Progress Report*, 15 October 2002[16]
- *Fifth Progress Report*, 21 November 2002[17]
- *Sixth Progress Report*, 29 January 2003[18]

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9 Official Journal of the European Communities, C Series (OJC) 54, 1 January 2002 p 1
10 OJC 320, 20 December 2002 p 1
11 All sterling approximations are calculated at the average December 2002 exchange rates.
12 Official Journal of the European Communities L Series (OJL) 349 24 December 2002 pp 34-42
13 UP 1505 2001/02.
14 UP 1676 2001/02.
15 UP 1886 2001/02.
16 UP 2125 2001/02.
17 UP 61 2002/03.
18 UP 383 2002/03

These Reports summarise the content of the debate so far and include the texts of the main Convention proposals. They do not consider in any depth their merits, disadvantages or implications.

Since the Convention's inaugural meeting, the UK representatives have appeared before the Commons European Scrutiny Committee (ESC)[19] and the Foreign Affairs Committee (FAC)[20] and the Lords European Legislation Committee and Sub-Committee.[21] They have also reported to the relevant committees in the Scottish Parliament and the Welsh and Northern Ireland Assemblies. The Minister for Europe (initially Peter Hain and then Denis MacShane) has appeared before both Commons and Lords Committees on several occasions.

A motion to set up a Commons "Standing Committee on the Convention" was tabled on 24 May 2002 and the Committee was set up by an Order on 12 June 2002. It consists of members nominated to the European Scrutiny Committee and the Foreign Affairs Committee and the UK parliamentary representatives to the Convention, with the participation of Convention alternates from the House of Lords and other Peers.[22] Peers are invited to contribute fully to the Committee but have no voting rights.[23] Several Peers objected to the Committee because they were not included on an equal basis with Commons Members.[24] Lord Roper commented on the lack of consultation between the two Houses before the innovative Committee was introduced and the poor example it set of "joined-up Parliament"[25]. Lord Peyton of Yeovil believed the Commons had behaved "with deliberate bad manners."[26] The Lords motion on the Committee was agreed with some resistance. The new Committee met on 16 July[27] and 23 October 2002,[28] and is to meet again on 12 February 2002.

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19 Gisela Stuart and David Heathcoat-Amory gave evidence to the ESC on 21 May 2002.

20 Gisela Stuart and David Heathcoat-Amory appeared before the FAC on 18 June 2002

21 All four UK Parliamentary Representatives have appeared before the Lords EU Committee twice and Gisela Stuart has appeared once before an EU Sub-Committee.

22 HC Deb 12 June 2002 c972, at: http://pubs1.tso.parliament.uk/pa/cm200102/cmhansrd/cm020612/debtext/20612-33.htm#20612-33_spnew1. The membership is as follows: Chairman: Mr. Frank Cook. Donald Anderson, Colin Breed, Roger Casale, William Cash, David Chidgey, Michael Connarty, Sir Patrick Cormack, Tony Cunningham, Wayne David, Terry Davis, Jim Dobbin, Fabian Hamilton, David Heathcoat-Amory, Mark Hendrick, Jimmy Hood, Eric Illsley, Anne McIntosh, Andrew Mackinlay, John Maples, Jim Marshall, Bill Olner, Greg Pope, Angus Robertson, Sir John Stanley, Anthony Steen, Gisela Stuart, Bill Tynan, Angela Watkinson.

23 They cannot move Motions, vote or be counted as part of a quorum.

24 For example, Lord Barnett, at HL Deb 24 June 2002 c1064

25 HL Deb 24 June 2002 c1063

26 Ibid c1064

27 See: http://pubs1.tso.parliament.uk/pa/cm200102/cmstand/conven/st020716/20716s01.htm.

28 See: http://pubs1.tso.parliament.uk/pa/cm200102/cmstand/conven/st021023/21023s01.htm

B. Parliamentary Debate and Scrutiny

The Government has not published a White Paper on the Convention, although there have been calls for a White or Green Paper, and for more debates on the work of the Convention and its implications for the UK.[29] Although the Minister for Europe, Denis MacShane and his predecessor, Peter Hain, have appeared before the ESC,[30] Dr MacShane thought "there was inadequate coverage of it [Europe], or discussion of it".[31] During 2002 there were 84 parliamentary questions about the Convention in the Commons and 37 in the Lords. In the Commons, although the Convention was raised in the twice-yearly debates on European Affairs[32] and in adjournment debates on a constitution for Europe,[33] and democracy in the European Union,[34] there was only one Commons debate dedicated to the Convention itself, on 2 December 2002 on a Government motion on its strategy in the Convention.[35] Dr MacShane closed the debate by saying he was happy "to debate this again and again, as necessary".[36] In the Lords a debate was held on a Motion to take Note of the Convention on 7 January 2003.[37]

Looking ahead to the outcome of the Convention, some Peers have been anxious to obtain from the Government a commitment to parliamentary debate prior to UK approval of any constitutional text. Lord Pearson of Rannoch asked:

> […] given the enormous importance of the constitutional issues which are being considered by the convention, will the United Kingdom Parliament be free to accept or reject whatever the convention comes up with, or will it all be subject, as before in the progress of the European Union, to the treaty-making powers of the Royal Prerogative, which make this Parliament into a rubber stamp?

The Foreign Office Minister, Baroness Symons, denied that the British Parliament was "in any way a rubber stamp", and assured Lord Pearson that after the Convention had reported in June 2003, there would be "an opportunity for debate by national parliaments before any treaty is drawn up".[38]

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29 See Commons debate on the Convention, 2 December 2002.

30 E.g. ESC, *Democracy and Accountability in the European Union: the role of National Parliaments* HC 152 xxxiii-II, 21 June 2002, 2001-02; ESC, *The Seville European Council and the Convention on the Future of Europe*, HC 1112-I, 2001-02, 11 October 2002

31 HC Deb 2 December 2002 c 719

32 HC Deb 18 June 2002 cc 159-248, and HC Deb 11 December 2002 cc 299-365

33 HC Deb 27 November 2002 cc 90-113WH

34 HC Deb 9 July 2002 cc 196-218WH

35 HC Deb 2 December 2002 cc 673-723. Michael Moore, for the Liberal Democrats, drew attention to the paucity of debates on the Convention early in this debate, c 694.

36 HC Deb, 2 December 2002 c 723

37 HL Deb 7 January 2003 cc897-986

38 HL Deb 26 November 2002, cc638

III Public Debate

The Government has promoted an awareness campaign on the FCO website, to which members of the public can contribute their views on the future of Europe debate and Convention issues:

> The Government regularly organises or sponsors a number of public events to solicit the views of academics, civil society and the general public. And the EU section of this Foreign Office website has a lot of material on the EU and the UK's place in it, and hosts regular online debates on topical EU issues. The Minister for Europe welcomes comments from the public about the Convention and the Future of Europe debate.
> […]
> Since the Nice Declaration, the Government has been seeking a wide range of views on the future of Europe through regional visits, seminars, radio phone-ins and interviews. The Government representative to the Convention, Peter Hain, has spoken to trade unions, businesses, academics, students and other members of the public about the Future of Europe. He has also participated in webchats and produced video-clips. He has undertaken a number of regional visits, including Edinburgh (November 2001), Northern Ireland (February 2002), South Yorkshire (March 2002), Birmingham (May 2002) and Manchester (June 2002). The Foreign Secretary also visited Edinburgh and Belfast (August 2002). The Minister for Europe, Denis MacShane, has also made a regional visit to Newcastle (November 2002).
>
> There have been other activities focusing on the future of Europe, including a Youth Convention and Europe Day. In addition, the FCO website provides a forum for sending comments directly to the Minister for Europe.[39]

Peter Hain told the ESC that stimulating public debate on the work of the Convention was "quite difficult"[40] and that the subject "becomes anoraky very quickly".[41] Participation in the debate has depended largely on having access to the Internet, however, and the British Government has not organised as many open discussions as some Member States (notably France, where the National Assembly organised a two day debate for civil society groups in 2002).

In a report entitled "Little debate on EU constitution in member states", the *EUobserver* commented on the different levels of debate in the EU, particularly by national parliaments:

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39 FCO website at: http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1020338311691

40 ESC *The Seville Council and the Convention on the Future of Europe*, Minutes of Evidence, 16 July 2002, HC 1112-i, 2001-02, para19

41 Ibid

> In some member states, the national assembly has been a useful forum for debate – particularly in Germany, Denmark, Finland and Ireland. However, in France, Austria and the Netherlands, debate on the future of the EU is generated by the governments, generally the minister for Europe or foreign minister. While France notes that national debate "has scarcely started," Finland finds that "little by little the civil society … has started to activate itself," and in the UK the "most lively debate" is played out in the media.[42]

On media coverage of the Convention, the report concluded:

> While media coverage in the UK tends to focus on the meaning of the terms 'intergovernmental' and 'federal', the German media covers the Convention very well, but offers little profound commentary. France, Finland, Greece. Ireland and Sweden have seen increased media interest since the publication of a preliminary draft constitution last October.[43]

Lord Maclennan, the alternate UK representative on the Convention, told the Standing Committee on the Convention in July 2002:

> The Convention seeks to take account of the views of the public in its work so far as is practicable, but I have to say that it has not been wholly successful, because its resources are limited. Meetings with civil society have taken place, and it is possible to criticise them as not entirely representative of the full range of opinions in Europe. More importantly, the Convention is anxious to engage in those institutional arrangements that are, inevitably, a turn off for the public.[44]

IV Working Groups

A. Introduction

The establishment of Working Groups (WGs) to look at topics identified in the Laeken Declaration and by the Convention was provided for in Article 15 of the Convention's Working Methods.[45] During the Convention's lifetime various documents dealing with particular aspects of its work have been published. In addition to contributions from Member States, candidate states and other participants, the WG reports have provided a detailed account of the discussions on specific issues.

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42 *EUobserver*, 4 February 2003, at: http://www.euobserver.com/index.phtml?aid=9239
43 Ibid
44 16 July 2002 c 014, at: http://pubs1.tso.parliament.uk/pa/cm200102/cmstand/conven/st020716/20716s10.htm
45 CONV 9/02, 14 March 2002 at http://register.consilium.eu.int/pdf/en/02/cv00/00009en2.pdf

Information on the remit, chairmanship and reporting dates of the Working Groups was set out in a Praesidium Note of 17 May 2002.[46] Initially, six working groups were set up to look at the following issues:

> **Group I: subsidiarity**. How can verification of compliance with the principle of subsidiarity be ensured? Should a verification mechanism or procedure be introduced? Should such a procedure be political and/or judicial in character?
>
> **Group II**: **Charter of Fundamental Rights**. If the Charter of Fundamental Rights is included in the Treaty, how should this be done; what are the consequences of accession by the Community/Union to the European Convention on Human Rights?
>
> **Group III**: l**egal personality of the EU**. What would the consequences be of explicit recognition of the legal personality of the EU and of a fusion of the legal personalities of the EU and the European Community? Might they contribute to simplification of the Treaties?
>
> **Group IV**: r**ole of national parliaments**. How is the role of national Parliaments carried out in the present EU architecture? Which national arrangements function best? Should new mechanisms be envisaged at national or European level?
>
> **Group V**: **complementary competences**. How should 'complementary' competences be treated in future? Should Member States be accorded full competence for matters in which the Union currently has complementary competence, or should the limits of the Union's complementary competence be spelled out?
>
> **Group VI**: **economic governance**. The introduction of the single currency implies closer economic and financial cooperation. What forms might such cooperation take?

On 11 July 2002 Giscard announced that the Praesidium would establish from September 2002 four additional Working Groups. These were formally established at the Plenary on 12-13 September 2002, with the following mandates.

> **Group VII: external action**. Defining and formulating the Union's interests; ensuring consistency of its activities; coordinating all available instruments (including development aid, humanitarian action, financial assistance, trade policy, etc.); how to ensure the decision-making process allows the Union to act rapidly and effectively on the international stage; how far the "Community method" could be extended to other fields of action and made more effective, possibly easing unanimity rule; lessons from the experience of the CFSP High Representative post and scope for initiative; necessary resources, including

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[46] Doc. CONV 52/02, at: http://register.consilium.eu.int/pdf/en/02/cv00/00052en2.pdf.

financial ones; how arrangements for the EU external representation could increase its international influence and how to achieve 'better synergy' between the diplomatic activity of the Union and of the Member States.[47]

Group VIII: defence. **W**hat defence remit, in addition to Petersberg tasks,[48] could the Union have? How to ensure Member States have the military capabilities needed to guarantee the credibility of the Union's defence policy? Should there be admission criteria and a pact to comply with (as with EMU)? Should enhanced cooperation be extended to defence matters? How to ensure rapid decision making and coherent planning during crisis management operations, and greater efficiency and economies of scale in arms procurement, research and development; should there be a European Arms Agency?[49]

Group IX: simplification of legislative procedures and instruments. How can the number of legislative procedures be reduced and could some be simplified? (abandoning cooperation procedure; applying the codecision procedure in all legislative matters; extending QMV to all codecision legal bases; simplifying procedures for Conciliation Committee meetings and other possible streamlining; simplification of budgetary procedure: is it necessary to differentiate between the different categories of expenditure?). How could the number of legal instruments be reduced and could they be renamed to indicate their effect more clearly?

Group X: area of freedom, security and justice. How to make the Treaties promote genuine, comprehensive implementation of an area of freedom, security and justice? How to improve instruments and procedures; to identify more clearly criminal law issues requiring action at EU level; how judicial cooperation in criminal matters could be improved. Treaty amendments to define Community competence, particularly for immigration and asylum matters.

Towards the end of 2002 the Praesidium recommended the establishment of a WG on "Social Europe". WG XI, chaired by Giorgos Katiforis, (a Greek MEP, representative on the Convention and a Praesidium member), is a large Group of around 60 members, including the UK's Peter Hain and MEPs Linda McAvan and Lord Stockton. The Group had met six times by the end of January and its Final Report was debated at the second plenary session on 6-7 February 2003.

B. Working Group Final Reports

The Working Groups began to submit their final reports to the Convention in September 2002. The working documents and final reports are on the Convention website at: http://european-convention.eu.int/doc_wg.asp?lang=EN&Content. Below are

47 CONV 206/02.
48 Peace-keeping and humanitarian operations
49 Ibid.

summaries of the main points of the first ten reports, with UK comment, where available, on issues raised in the Plenary debates.

1. Working Group I: Subsidiarity

The principle of subsidiarity was introduced in old Article 3b of the *Treaty on European Union* or TEU (now Article 5), which states that:

> In areas which do not fall within its exclusive competence, the Community shall take action in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

The then Conservative British Government hailed this as a triumph for the nation states, as it presumed action at national level, unless there were good reasons not to. However, the principle is vague and its enforceability uncertain. The British Government has headed calls for a strengthening of the principle and mechanisms to enforce it at EU level.

The Group on subsidiarity, chaired by the EPP MEP, Iñigo Méndez de Vigo, recalled in its Final Report[50] that the principle of subsidiarity was already examined by the institutions participating in the legislative process, as required by the Treaty and its "Protocol on the principles of subsidiarity and proportionality"; also that it is already subject to *ex post*[51] judicial review by the European Court of Justice (ECJ). However, the Group wanted an improvement in both the application and monitoring of subsidiarity, without making decision-making lengthier or more cumbersome, and without creating an ad hoc body to monitor its application.

Improvements should be effective independent of the institutional architecture of each Member State and had to avoid interference with any national institutional debates. As subsidiarity was essentially a political principle and its implementation involved a considerable margin of discretion for the institutions (in considering whether shared objectives could "better" be achieved at EU level or not), the monitoring of compliance with that principle should also be of an essentially political nature and take place *before* the entry into force of the act in question.

The Group also thought *ex ante* political monitoring of the principle of subsidiarity should primarily involve national parliaments. Their monitoring of national governments should be strengthened with regard to the determination of government positions on Community questions.[52] Some thought that an ad hoc mechanism should be established,

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50 CONV 286/02, 23 September 2002.

51 *Ex post*, based on information available afterwards, while *ex ante* refers to information available at the time

52 This view was broadly shared by the Working Group on the role of national parliaments.

enabling national parliaments to be more involved in monitoring compliance with subsidiarity, while ensuring that the mechanism remained flexible and did not result in prolonging or blocking the legislative process. The Group agreed that *ex post* monitoring of subsidiarity should be of a judicial nature and the conditions for referral to the ECJ broadened.

The Group submitted a proposal on three lines:

(a) Reinforcing the "taking into account" and the application of subsidiarity by the institutions participating in the legislative process during the drafting (the earlier the better) and examination phases of the proposed legislative act, with a speedy consultation of all the relevant players. This would necessitate amending the current Treaty Protocol on subsidiarity.

(b) Setting up an "early warning system" of a political nature, intended to reinforce the monitoring of compliance with the principle of subsidiarity by national parliaments. This *ex ante* monitoring mechanism would for the first time involve national parliaments in the European legislative process, enabling them to ensure correct application of the subsidiarity principle through a direct relationship with the law-making institutions. The Group thought the Treaty should stipulate that the Commission should address its legislative proposals directly to each chamber of each national parliament at the same time as to the Community institutions (at present national governments forward proposals to their parliaments).

Within six weeks from the date of transmission, and before the legislative procedure was initiated, any national parliament would be able to issue a reasoned opinion to the Presidents of the EP, Council and Commission on the proposal's compliance with subsidiarity, or draw attention to a possible breach of the principle by the legislating body/bodies. The Group's proposal outlined different procedures, depending on the amount of reaction to a draft from national parliaments, including a re-examination of the proposal by the Commission if a "significant number of opinions from one third of national parliaments" were received. This might result in maintaining, amending or even withdrawing the proposal.

Several Group members thought the convening of the Conciliation Committee (under Article 251 of the *Treaty Establishing the European Communities* or TEC) might also be an appropriate time to involve national parliaments in monitoring subsidiarity. Once convened, the Commission could send national parliaments the Council's common position and the amendments adopted by the EP. National parliaments could give governments their assessment of subsidiarity compliance, but also, within the deadline for the conciliation procedure (six weeks), send a reasoned opinion to the Presidents of the EU's law-making institutions on the application of the principle.

(c) Broadening the possibility of referral to the European Court of Justice (ECJ) for non-compliance with subsidiarity. *Ex post* judicial review carried out by the ECJ on compliance with the principle could be reinforced and should be linked to the early

warning system. Recourse to judicial proceedings would occur only in limited or exceptional cases, when the political phase had been exhausted without any satisfactory solution being found by the national parliament(s) involved.

The Group proposed that a national parliament (or one chamber thereof) which had delivered a reasoned opinion under the early warning system (either at the beginning of the procedure, or in Conciliation Committee proceedings) should be able to refer the matter to the ECJ for violating the subsidiarity principle. The Group also proposed allowing the Committee of the Regions (CoR) to refer a matter on which it had expressed subsidiarity objections (in an Opinion) to the ECJ.[53] It would be for the Court itself to take the necessary organisational measures.

Comment

The British Prime Minister expressed support for an early warning system involving national parliaments in a speech in Cardiff in November 2002: "I welcome this as a practical response to the call I made two years ago in Warsaw for better involvement by national parliaments in European decision-making".[54] In the final analysis, the Government views subsidiarity decisions as a matter for politicians and not judges. Peter Hain told the Commons European Scrutiny Committee (ESC):

> What we did not want to do, and what we have so far avoided […] is the idea that judges could be brought in at any time to make rulings on this issue. It was quite significant that in the working party in which I represented the Government on subsidiarity, the court's Advocate came to give evidence and the court did not want that either, because they knew they were the final court of appeal and they did not want to be brought in on what, for us, was a basic principle: elected politicians should be the arbiters on this matter, not judges.[55]

In the December 2002 debate on the Convention the Shadow Foreign Secretary, Michael Ancram, welcomed the WG's proposals on subsidiarity, but said they did "not go nearly far enough".[56] He agreed that subsidiarity decisions needed to be made by a political watchdog, not the ECJ, and also suggested that "National parliamentarians should be able to intervene on subsidiarity at the level of national Parliaments and through a subsidiarity panel or watchdog".[57] He proposed that subsidiarity reservations "expressed by, say, five

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53 However, a majority of the Group considered that the degree of, and arrangements for, the involvement of regional and local authorities in the drafting of EC legislation should be determined solely within the national framework.

54 Tony Blair, "A clear course for Europe", 28 November 2002, FCO website at: http://www.pm.gov.uk/output/page6709.asp

55 Peter Hain, Evidence to ESC, 20 November 2002, at: http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/uc103/uc10302.htm

56 HC Deb 2 December 2002 c 687

57 Ibid c 688

national parliaments should be enough to halt a piece of legislation".[58] Michael Moore, for the Liberal Democrats, supported the early warning system proposal[59] and, in support of an earlier call by Gisela Stuart for better parliamentary scrutiny mechanisms, he emphasised that national parliamentarians "should not shirk [their] responsibilities in Parliament".[60]

In the Standing Committee on the Convention Mr Heathcoat-Amory expressed some doubts about the subsidiarity proposals:

> Subsidiarity, even if observed, would not cure the democratic deficit. There would still be a blizzard of regulations, often connected in some way with the single market, which engulfed national Parliaments and the people we represent. Therefore, we must get national Parliaments in right at the start of the legislative chain, and the right of initiative must be removed from the Commission. It is scary that 20 unelected people in Europe have the sole right to initiate legislation in Europe. Until that changes, the cynicism and despair felt about democracy in the European Union will persist.[61]

The ESC agreed that new procedures to enforce subsidiarity were needed and sought more information on a possible new definition of the principle, its enforcement as a political or judicial matter, and by whom; and on the proposed role for national parliaments. The Committee was also concerned about the stage in the legislative process at which proposals should be checked for compliance with subsidiarity.[62]

The ESC concluded that a redefinition would not "contribute much to a better application of it".[63] As to whether enforcement should be by judicial means through the ECJ or political means through a second Chamber, the Committee thought:

> Since the principle of subsidiarity is incorporated in the Treaties, it must be capable of being interpreted by the ECJ. However, **we believe enforcement of the principle of subsidiarity should be a political matter**, for two reasons. The first is the practical one that political enforcement is likely to be faster. The second is that decisions on whether the objectives of a policy would be better achieved at a particular level of government are fundamentally political ones.[64]

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58 HC Deb 2 December 2002 c 688

59 Ibid c 696

60 Ibid

61 Standing Committee on the Convention 23 October 2002 c 011 at: http://pubs1.tso.parliament.uk/pa/cm200102/cmstand/conven/st021023/21023s01.htm

62 Select Committee on European Scrutiny, *Democracy and Accountability in the EU and the Role of National Parliaments*, 21 June 2002, HC 152-xxxiii-II, 2001-02, para 108, at: http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-xxxiii/15201.htm

63 Ibid, para 109

64 ESC, *Democracy and Accountability in the EU and the Role of National Parliaments*, 21 June 2002, HC 152-xxxiii-II, 2001-02, para 112

The Committee supported a role for national parliaments in the enforcement process for three reasons:

- Because the EU institutions are not in practice keen on applying the principle;
- Many national parliaments do not have an inherent institutional interest in transferring powers to the EU level and could therefore counterbalance the EU institutions;
- National parliaments are more likely to reflect the views of citizens.[65]

The Committee concluded:

> **We believe national parliamentarians should have a role in determining questions of subsidiarity. […] If cases are referred for decision by another body, we would favour that body being a political or quasi-judicial arbiter or watchdog … .[66]**

The ESC was not persuaded by the EP's view that examination at a later stage in the process would be better because it would "encourage the Council and EP to adopt a cautious approach".[67] An early alert to non-compliance "would prevent much wasted effort, but it could also be possible to scrutinise for subsidiarity problems at the end of the legislative process any changes made to a proposal".[68] The Committee also noted the Commission's commitment to withdrawing proposals "where inter-institutional bargaining undermines the Treaty principles of subsidiarity and proportionality or the proposal's objectives".[69]

The ESC supported greater input by national parliamentarians in examining annual programmes and agendas:

> **Whatever the method, we favour a system in which national parliamentarians could refer items of legislation to a 'subsidiarity watchdog' or other body for examination of compliance with the principles of subsidiarity and proportionality. Meetings of national parliamentarians to scrutinise the Commission's annual work programme from a subsidiarity point of view could also be of value**.[70]

It called for:

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65 ESC, *Democracy and Accountability in the EU and the Role of National Parliaments*, 21 June 2002, HC 152-xxxiii-II, 2001-02, para 113

66 Ibid paras 113-4

67 EP, A5-0133/2002, Lamassoure report, p. 25

68 ESC Report HC 152-xxxiii-II, 2001-02, para 15, at: http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-xxxiii/15201.htm

69 *European governance: a White Paper*, COM(2001) 428 final, 25 July 2001, p 22 at: http://europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf

70 ESC Report HC 152-xxxiii-II, 2001-02, para 134

> **joint meetings of national parliamentarians and MEPs to scrutinise the Commission's annual policy strategy and work programme, question Commissioners on it, and debate it, and would support a similar procedure for the European Council's annual agenda.**[71]

The devolved legislatures are particularly interested in developments in the application of subsidiarity and the debate on subsidiarity has always included a regional dimension. However, the IGC that gave rise to the TEU and the inclusion for the first time of the subsidiarity principle in the EC Treaties ruled out a Treaty base for its application at sub-Member State level. Subsequent IGCs have upheld the view that it is the responsibility of the Member States to decide on the application of the principle at sub-state levels.

The Scottish Deputy First Minister, Jim Wallace, set out the Scottish Executive's views in a debate on the Convention in December 2002:

> […] we need to raise the constitutional profile of the subsidiarity principle, which extends beyond the member states themselves. We will repeat our calls for greater use of framework legislation, which would allow implementing authorities such as the Scottish Executive and the Scottish Parliament to put European Union laws into practice in a way that is appropriate to specific Scottish circumstances. We need the EU to consult sub-member state Administrations at an early stage in the development of legislation and policy. Time that is spent in getting proposals right at the beginning will save considerable time over the piece.
>
> We need greater transparency—for example, through the European Council meeting in public when it carries out its legislative role. There should also be an assessment of the potential financial impact of EU legislation on implementing authorities, compared to the value of benefits. Rather than establish a detailed catalogue of competences, the new constitutional treaty could usefully include a set of principles to govern when and how the EU acts.[72]

The Scottish First Minister, Jack McConnell, set out in more detail the Executive's views on subsidiarity in a speech in June 2002 on "The Future of Europe Debate: a Scottish perspective".[73]

At the Standing Committee on the Convention in October 2002, in reply to a question from Angus Robertson about the application of subsidiarity to sub-State authorities, Mr Heathcoat-Amory supported an extension of the principle in this direction:

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71 Ibid para 140

72 SP OR 5 December 2002, col 16144-5

73 http://www.scotland.gov.uk/about/FCSD/ExtRel1/00014768/page1239857280.aspx

> if there is to be a system of giving member state Parliaments an objection on grounds of subsidiarity, which is welcome although inadequate, that should be extended to give other assemblies and sub-national Parliaments the same powers.[74]

2. Working Group II: incorporation of the Charter of Fundamental Rights

The Charter of Fundamental Rights[75] was officially 'proclaimed' at the Nice Intergovernmental Conference in December 2000 and its future status was left open following disagreement among the Heads of State and Government as to whether human rights guarantees should be enshrined in the Treaty or simply referred to in Article 6, as at present.[76] Some Member States, headed by Germany, favoured a legally binding instrument incorporated into the Treaty and made subject to the jurisdiction of the ECJ. Others, headed by the UK, wanted a declaratory text that would provide a standard for human rights but would not have legal force. There was concern that the Charter might detract from the effectiveness of the Council of Europe's *European Convention on Human Rights*, to which all Member States are parties. The uncertainty over its status has left the ECJ with a creative role with regard to human rights in the Member States, as well as an interpretative one. At present, the Charter is not legally binding, is of uncertain political value and is not internally justiciable because it is outside the remit of EC competence.

The Working Group, chaired by Antonio Vitorino, looked at two main issues: the modalities and consequences of possible incorporation of the EU Charter of Fundamental Rights into the Treaties and those of possible accession of the Community/Union to the European Convention on Human Rights (ECHR). They also discussed the specific issue of access by individuals to the ECJ.

The Group recorded unanimous support for the first option, "for incorporation of the Charter in a form which would make the Charter legally binding and give it constitutional status or would not rule out giving favourable consideration to such incorporation".[77] The majority supported the insertion of the Charter text at the beginning of the future constitutional text in its own title or chapter. This would have to be combined with articles on citizens' rights and the citizenship provisions with constitutional significance contained in the EC Treaty.

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74 Standing Committee on the Convention 23 October 2002 c 016 at: http://pubs1.tso.parliament.uk/pa/cm200102/cmstand/conven/st021023/21023s01.htm

75 The full text of the Charter can be accessed via the Europa site at http://ue.eu.int/df/default.asp?lang=en

76 For background to this debate, see Library Research Paper 00/32, *Human Rights in the EU: the Charter of Fundamental Rights*, 20 March 2000.

77 CONV 354/02, 22 October 2002.

The majority[78] agreed that the whole content of the Charter, which represented a consensus reached by the previous Convention, should be respected by the present Convention, and not re-opened by it. Therefore, with the exception of certain technical drafting adjustments, the Group did not consider modifications of substance. The Group confirmed that incorporation of the Charter would not modify the allocation of competences between the Union and the Member States and confirmed expressly that the protection of fundamental rights by EC/EU law could not have the effect of extending the scope of Treaty provisions beyond the competences of the Union.

The Group wanted the subsidiarity principle to be referred to in the general provisions of the Charter, together with a clause on the scope of the Charter's application being limited, in accordance with its Article 51(1), to the institutions and bodies of the Union, and to Member States only when they are implementing Union law.

The Group agreed that a legally "watertight" referral clause needed to be enshrined in the Treaty, ensuring complete compatibility between the statement of rights contained in the Charter and their more detailed regulation under the EC Treaty, even if this led to the replication of rights between the Charter and other elements of Treaty law.

The Group underlined the importance of the Charter's firm roots in the Member States' common constitutional traditions and in those followed by the ECJ, and proposed including a rule of interpretation in the general provisions, based on the wording of the current Article 6(2) TEU.[79] "Under that rule the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions".[80]

The Group also supported Union accession to the ECHR, but as a complementary measure to incorporating the Charter in a constitutional treaty. Accession would have to be subject to the limiting conditions that it would not affect the competences ascribed to the Union, nor affect the positions Member States have under the ECHR, including their reservations and declarations.

Comment

The British Government's position on the status of the Charter has been set out in its White Paper, *IGC: Reform for Enlargement: the British Approach to the European Union Intergovernmental Conference 2000*,[81] and in a number of parliamentary answers.[82] Its

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78 In several places the report records that two Member State representatives disagreed with the majority view.

79 "The Union shall respect fundamental rights, as guaranteed by the European Convention … and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

80 CONV 354/02, 22 October 2002.

81 Cm 4595, February 2000.

view has been that the Charter was a proclamation and should not be incorporated into the Treaties, which would give it a legally enforceable status. Neither should it extend the legal competence of the EU. In his account of the Brussels European Council in October 2002, the Prime Minister said: "we have made it absolutely clear that [the Charter] should not extend the legal competence or jurisdiction of Europe in any way at all".[83]

Incorporation, but within the boundaries of EC/EU competence, is accepted by the Government, as Peter Hain told the Convention Plenary debate on the WG Report on 3 October 2002. He welcomed the

> … real progress on the adjustments necessary to change the Charter from a political text to a legal text, with which everyone, including the British government can work. We are approaching this matter to try to incorporate it into the Treaties. I wish to stress that it is not just a difficult political issue, but also a technical one.[84]

He emphasized the need for the Charter to be based on, and to be harmonious with, the constitutional traditions of the Member States, indicating that the lack of a written constitution in the UK could be problematic if the horizontal articles[85] were not strong enough.

Mr Blair told an audience in Cardiff in November 2002:

> On the Charter of Rights, I repeat our clear view that though we welcome, of course a declaration of basic rights common to all European citizens and have ourselves incorporated the European Convention on Human Rights directly into British law, we cannot support a form of treaty incorporation that would enlarge EU competence over national legislation. There cannot be new legal rights given by such a means, especially in areas such as industrial law where we have long and difficult memories of the battles fought to get British law in proper order.[86]

Peter Hain told the European Scrutiny Committee:

> [So] the working group unanimously came up with a proposition which was, essentially, British ideas to strengthen the horizontal articles in the Charter that, effectively, in simple terms, stopped it reaching down into our domestic courts and changing our domestic law. That position was endorsed almost unanimously in the plenary. So I do not think that can be unpicked. We still have to see exactly how that might, as it were, come out on the night in terms of its full incorporation into the new constitution, which would have to be the case. We would need to be absolutely clear that, for example, you could not change our strike laws, you

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82 For example, HC Deb, 23 January 2001, c554W.

83 HC Deb 28 October 2002 c 546

84 3 October 2002, at: http://www.europarl.eu.int/europe2004/textes/verbatim_021003.htm

85 These are the articles dealing with the limitation of the scope and application of the Charter, Articles 51 and 52, for example. Vertical articles focus on particular rights.

86 Tony Blair, speech in Cardiff, "A clear course for Europe", 28 November 2002, FCO website at: http://www.pm.gov.uk/output/page6709.asp

> could not change our employment laws and you could not enable an individual citizen who felt they were not getting the housing opportunity they wanted from their local authority to take that local council to court and, ultimately, to the European Court of Justice under the Charter because that is not a role for Europe, that is a matter for national decision-making and, ultimately, for local authorities. We could have had a situation, if the Charter had simply been incorporated wholesale and unamended into the treaties, which would have been a matter of national veto for us. We are still very far from being certain that our concerns in that respect have been fully accommodated, but we have got a major part of the way and a significant change of stance by other European countries and their parliamentarians. So we are in a much more encouraging position than we were.[87]

In the December 2002 debate on the Convention Mr Heathcoat-Amory questioned the Government's intentions with regard to the Charter, to which Mr Hain replied that the Government had achieved a key aim of securing in the draft report "a series of horizontal articles that stop the charter being enforced to change our domestic law."[88]

The Conservatives oppose inclusion of the Charter in any future EU treaty. According to Michael Ancram, the "ways in which human liberties are protected through the ECHR and our national courts are adequate. We therefore believe there is no need for further protection".[89] He continued:

> In particular, the incorporation of a legally binding charter of fundamental rights into a new treaty would lead to a vast increase in the power of the European Union over the member states and of European judges over the political process.[90]

The Liberal Democrats firmly support incorporation of the Charter into a constitutional text "as that is the clearest way of ensuring that citizens understand their relationship with those who govern them, at whatever level".[91] On 21 October 2002 the UK Liberal Democrat MEP, Andrew Duff, an enthusiastic Charter supporter,[92] presented to the EP Plenary a Motion for Resolution which, he said, would be the EP's official contribution to the Convention.[93] The Charter, he maintained, was already much used by the European Ombudsman, the EP, the Commission and even, on occasion, by the Council. It was also an important source of reference for the courts, alongside the ECHR, and for the Member States. However, he thought EU citizens remained uncertain about its scope as a solemnly proclaimed instrument. Furthermore, national constitutional tradition was

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87 Minutes of Evidence to ESC, 20 November 2002, 16 December 2002, HC 103-I, at: http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/103-i/2112002.htm

88 HC Deb 2 December 2002 cc 702-3

89 HC Deb 2 December 2002 c 688

90 Ibid

91 Michael Moore, HC Deb 2 December 2002 c 695

92 He was a member of the Convention on the Charter of Fundamental Rights in 1999-2000 and co-rapporteur for the EP at that time.

93 The EP Resolution was submitted to the Convention as a written contribution by Méndez de Vigo, Hänsch and Duff (CONV Doc. 368/02).

already broad and with enlargement would become "improbably broad". Inclusion of the Charter in the Treaties was imperative, so that what was currently an important source of reference would become a central source.

3. Working Group III: legal personality

At present only the European Community, not the European Union, has legal personality under Article 281 TEC.[94] Article 282 stipulates:

> In each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Community shall be represented by the Commission.

That is to say, only the Community, represented by the Commission, has rights and obligations under international law. The 1996-97 IGC considered granting legal personality to the EU, thereby enabling it to conclude international agreements and represent the Union on equal terms with other international organisations. However, the IGC could not agree, with some Member States anxious about preserving the intergovernmental nature of the Second and Third Pillars.[95]

The Working Group, chaired by the former Italian Prime Minister, Giuliano Amato, decided by consensus (minus one) to recommend conferring explicit legal personality on the Union, which would provide legal certainty and remove the present ambiguity of the EU's identity at international level. The Group proposed two options: either the Union would have a legal personality alongside those of the Community and Euratom, or it could be explicitly given a single legal personality, replacing the existing legal personalities and making the Union the subject of international law. With one exception, the Group supported the latter option, in the interests of clarity and simplicity. The legal services of the Council, Commission and EP also supported this option:

> all emphasized forcefully that explicit conferral of a single legal personality on the Union was fully justified for reasons of effectiveness and legal certainty, as well as for reasons of transparency and a higher profile for the Union not only in relation to third States, but also vis-à-vis European citizens. The latter would thus be encouraged to identify more with the Union, which should respect their fundamental rights and those arising from European citizenship, in accordance with Article 6 TEU and Articles 17 et seq. TEC.[96]

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94 And corresponding articles in the Euratom Treaty and the former Coal and Steel Community Treaty

95 "Common Foreign and Security Policy" and "Justice and Home Affairs" (the latter became "Provisions on Police and Judicial Cooperation in Criminal Matters" under the Amsterdam Treaty amendments).

96 CONV. 305/02, 1 October 2002

The majority of the Group also thought this would pave the way for merging the Treaties and achieving a more coherent constitutional architecture.

The Group considered the implications of a single legal personality for the TEU and the TEC. Merging the two Treaties would not be necessary, strictly speaking, but would be a "logical consequence" of merging the Union's and the Community's legal personalities, "and would accordingly contribute to simplifying the Treaties". Furthermore, if the Community no longer had a separate legal personality, "the rationale for distinguishing between the TEU and the TEC would cease to apply, and that distinction would be a needless complication". Merging the Euratom Treaty was subject to the same rationale, and would also allow many Euratom Treaty provisions that are identical or similar to TEC articles to be deleted. However, this needed further investigation in view of the specific characteristics of Euratom.

The Working Group set out its preference for a new, single treaty to replace the current TEC and TEU (and Euratom where appropriate), falling into two parts:

- a basic part comprising constitutional provisions, either new articles or ones from the present Treaties;
- a second part, which would codify and reorganise all the TEU and TEC provisions dealing with matters not in the basic part (e.g. statutes for the institutions or special protocols for policy areas: internal market, EMU, JHA, CFSP, common policies, etc).

The Group concluded that neither the merger of legal personalities, nor the merger of the Treaties would have, in itself, any effect on the pillar structure, but that the pillar structure would seem outdated, even obsolete, in a new, single Treaty. It would also be a needless complication, since any institutional and procedural features of the two intergovernmental pillars the Convention wanted to maintain could be preserved in the new constitutional treaty.

The explicit conferral of legal personality on the Union would make it a subject of international law, alongside the Member States, but without jeopardising their status as subjects of international law. The Union would therefore be able to use all means of international action (e.g. the right to conclude treaties, right of legation, right to submit claims or to act before an international court or judge, right to become a member of an international organisation or become party to international conventions and the right to enjoy immunities), and this would bind the Union internationally. Explicit conferral of a single legal personality on the Union would not require amendment to the current allocation of competences between the Union and the Member States or those between the current Union and Community; nor to the respective procedures and powers of the institutions regarding the opening, negotiation and conclusion of international agreements.

However, the Group advised some Treaty amendment. In the procedure for negotiating and concluding international agreements (for so-called "mixed agreements"),[97] the Group wanted to maintain the existing distribution of competences between the Member States and the Union, and the respective powers of the EU institutions, but with a Treaty article stating clearly who negotiates and concludes such agreements. This would not be problematic, since it is always the Council (the intergovernmental body) which authorises the opening of negotiations, issues the negotiating directives, and concludes the agreements once they are negotiated. The WG accepted that in cases where mixed agreements came under different pillars, a double Union delegation (e.g. Presidency of the Council or High Representative and the Commission) might take part in the negotiation and conclusion of agreements.

At present, for First Pillar (Community) agreements, the Commission negotiates on behalf of the Community with the authorisation of the Council. A majority of the Group considered that the right to initiate negotiations for agreements on matters under Titles V and VI (CFSP and Cooperation in Criminal Matters) could belong to the Presidency of the Council (possibly extended to the High Representative). In the case of mixed agreements under more than one pillar, the right of initiative would depend on the subject-matter of the agreement, but the present institutional balance should be maintained. However, if the Convention decided to merge the duties of the High Representative and the Commissioner for External Relations (which is one of the options under serious consideration, see below), this new figure would play a role in the opening and conduct of negotiations.

If the EU is able to conclude international agreements, for agreements made under the intergovernmental Titles V and VI, the wording of Article 24 TEU would have to be amended to remove the clause on the provisional application of agreements in States with a constitutional ratification requirement. The Report makes clear that this should not prevent any national parliament from exercising a reserve on the conclusion of such an agreement in the first place "for important … reasons of national policy".[98] Some Group members wanted reference to Article 23(1) and recourse to "constructive abstention". Ratification by national parliaments could be maintained for traditional mixed agreements.

The WG emphasized that the EU would be more effective and credible if it spoke with a single voice and that the Union should express a "common position" at international fora and in its relations with third countries. The Union's representation at international organisations and conferences is currently governed by Article 18(1) TEU ("The Presidency shall represent the Union in matters coming within the common foreign and security policy"), Article 19(1) TEU ("Member States shall coordinate their action in international organisations and at international conferences. They shall uphold the

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[97] Which are based on the cumulative competence of the Union and the Member States.
[98] Article 23(2), TEU.

common positions in such fora.") and Article 302 TEC ("It shall be for the Commission to ensure the maintenance of all appropriate relations with the organs of the United Nations and of its specialised agencies. The Commission shall also maintain such relations as are appropriate with all international organisations"). These provisions allow for separate representation of the Union and the Community. The Group thought it would be more effective to establish Treaty mechanisms to ensure that, as far as possible, the Union expressed a single position and was represented by a single delegation.

Mixed competence agreements imply mixed participation of the Union and the Member States. However, even in these cases the Group suggested a single Union position and delegation, decided on a case-by-case basis, depending on the nature of the organisation and the subject matter of the agreement.

Turning to the role of the Court of Justice, the majority of the Group favoured the ECJ having jurisdiction *ex ante* in Titles V and VI (with the consultative procedure provided for in Article 300(6)), and *ex post* in preliminary ruling proceedings (Article 234 TEC), for annulment (Article 230 TEC) and liability (Articles 235 and 288(2) TEC). However, the Group left further consideration of these issues until later.

The Group noted the increase in EU instruments that were liable directly or indirectly to affect the rights of individuals, and thought it should therefore be possible for the latter to defend their claims before the ECJ.

The Group could see no real justification for excluding the EP from all consultation in CFSP and commercial agreements and a majority supported extending the procedure for consultation of the EP to international agreements concluded on the basis of Articles 38 and 46 TEU and Article 133 TEC.

The Group made various technical recommendations that would follow from the Union having a single legal personality. A sole article would be needed on international agreements, consolidating the existing procedures and maintaining the existing allocation of competences between the Member States and the Union, as well as the respective powers of the institutions. Article 300 TEC (as amended by Nice) could be the basis for this new article, together with the basic provisions of Articles 24 and 38 TEU.

Comment

The Government has cautiously supported legal personality for the Union. Speaking about the Report in the Plenary debate on 3 October 2002, Mr Hain said:

> The report is very convincing on an issue close to my heart: making the European Union easier for citizens to understand. The present distinction between the Community and the Union confuses most people, both those inside the European Union and those from outside who negotiate with us. It seems like complexity for complexity's sake. We need to make sure, however, that we do not lose more than we gain. How do we avoid throwing out the arrangements that allow us to work

> together on important issues? How do we achieve a single legal personality, whilst safeguarding, for example, distinct arrangements for common foreign and security policy?[99]

Mr Hain disagreed, however, with the premise that a single EU representation in international organisations was "either necessary or desirable."

> It is a common policy we need, not a single voice. Let us proceed to a legal personality, but let us do so cautiously. I am all for getting rid of the confusing complexity associated with the pillars, the Community and the Union.[100]

He concluded that the External Action WG needed to revisit some of the proposals in this Report.

In November 2002 Mr Hain told the ESC that a single legal personality would simplify EU negotiations with third parties:

> If you are negotiating an association agreement say with a North African country in the Mediterranean area, effectively you have a whole series of agreements, some of which are with the European Union, some of which are with the European Community, some of which have to be negotiated by the Commission, others of which have to be negotiated with the Council and this is a very confusing way to go about life. Provided that a single legal personality - which meant effectively that in legal international terms there was no distinction between the European Union, it was one body effectively in international legal terms - for example, Common Foreign and Security Policy was communitised, provided that did not mean that aspects of justice and home affairs were communitised, provided that did not mean that the EU became some federal super state then I think we should approach this in a very practical way, let us see what it means not just react in a kind of knee jerk fashion to it.[101]

He was less enthusiastic, however, about proposals to merge the three pillars.[102] He told the ESC:

> If we get rid of the pillar concept […] we can only agree to do so if we can keep certain justice and home affairs areas boxed off as inter-governmental matters along with Common Foreign and Security Policy so that is the way we are approaching it.[103]

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99 3 October 2002, at http://www.europarl.eu.int/europe2004/textes/verbatim_021003.htm

100 Ibid

101 Minutes of Evidence to ESC, 20 November 2002, 16 December 2002, HC 103-I, at: http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/103-i/2112002.htm

102 This had been proposed in the constitutional text drawn up by Professor Alan Dashwood et al, which was commissioned by the FCO and submitted to the Convention. See CONV 345/1/02 REV 1, 16 October 2002, at: http://register.consilium.eu.int/pdf/en/02/cv00/00345-r1en2.pdf.

103 Minutes of Evidence to ESC, 20 November 2002, 16 December 2002, HC 103-I, at:

Mr Hain told the Commons in the December 2002 debate on the Convention that the Government "do not countenance a shift away from the current intergovernmental approach to the EU's foreign and security policy or to defence".[104] He continued:

> […] we have said that we could support a single legal personality for the EU but not if it jeopardises the national representations of member states in international bodies; not if it means a Euro-army; not if it means giving up our seat on the United Nations Security Council; and not if it means a Euro-FBI or a Euro police force.[105]

The Shadow Foreign Secretary, Michael Ancram, said in the December 2002 debate that intergovernmental decision-making for the Second and Third Pillars "must not be absorbed into a single EU structure".[106]

4. Working Group IV: the role of national parliaments

Successive Treaty amendments have tried to tackle the problems raised by national parliamentarians dissatisfied with the failure of the EC legislative process to take their views into account. The problem lies to some extent in the way that national governments inform their own parliaments about EU matters, while the lack of national parliamentary representation at EU level has led to a feeling of alienation and the criticism of a lack of democratic legitimacy in the EU. There have been various proposals for a second EP chamber composed of national parliamentarians, an idea that the British Prime Minister supported, but which has not been favoured by a majority of Member States or the EP. Earlier discussions of this proposal suggested a national parliamentary body might give rise to institutional rivalry and competition with regard to the European Parliament.

Declaration No 13 annexed to the *Treaty on European Union* and Protocol 13 annexed to the *Treaty of Amsterdam* both attempted to involve national parliaments to a greater extent in EU matters. Declaration 23 annexed to the *Treaty of Nice* invited national parliaments to participate in the debate on the future of the Union and the Laeken Declaration proposed specific questions about the role of national parliaments that the Convention should tackle.

WG IV, chaired by Gisela Stuart, looked at three strands:

- the role of national parliaments in scrutinising governments (national scrutiny systems);
- the role of national parliaments in monitoring the application of subsidiarity;

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http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/103-i/2112002.htm

[104] HC Deb 2 December 2002 c 683

[105] Ibid

[106] HC Deb 2 December 2002 c 688

- the role and function of multilateral networks or mechanisms involving national parliaments at the European level.

Ms Stuart presented the Group's Final Report on 22 October 2002.[107] It emphasised in the introduction that:

> the issue was not one of competition between national parliaments on the one hand and the European Parliament on the other hand. Each had its distinct role but both shared the common objective of bringing the EU closer to citizens and thus contributing to enhancing the democratic legitimacy of the Union.[108]

The Group acknowledged the various Treaty attempts to improve national parliamentary involvement in EU activities, but considered that improvements were needed in the ways national parliaments influenced the Council through their governments. The Group emphasised the need for reform of the Council's working methods to make it more open and transparent, in order to being about greater awareness in national parliaments. The Seville European Council in June 2002 had already contributed to this process by requiring open meetings when the Council was acting under the co-decision procedure, but the Group also considered that records of proceedings should be sent within 10 days to the EP and national parliaments, parallel with the transmission to governments. The Group recommended that the future constitutional treaty:

> should specifically acknowledge the importance of the active involvement of national parliaments in the activities of the European Union, in particular by ensuring the scrutiny of governments' action in the Council, including the monitoring of the respect of the principles of subsidiarity and proportionality.[109]

The Group's consideration of national scrutiny systems led it to conclude, not surprisingly, that effective scrutiny of governments' action at EU level depended on the scrutiny arrangements in the Member States, which were a matter for the latter to tackle. It noted that many national scrutiny measures could also apply to sub-state level, subject to the national constitutional arrangements in the Member States. Best practice and minimum standards could be studied with a view to improving scrutiny throughout the Union and an exchange of experiences from several Member States had confirmed that "existing systems vary greatly in their intensity and effectiveness".[110] The Group identified some basic factors influencing the effectiveness of scrutiny, including:

- the timeliness, scope and quality of information covering all activities of the Union;

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[107] CONV 353/02.
[108] CONV 353/02.
[109] Ibid
[110] Ibid

- the opportunities for a national parliament to formulate its position with regard to an EU legislative proposal;
- regular contacts and hearings with Ministers before and after Council of Ministers meetings, as well as European Council meetings;
- active involvement of sectoral/standing committees in the scrutiny process;
- regular contacts between national parliamentarians and MEPs;
- availability of support staff, including the possibility of a representative office in Brussels.

The Group acknowledged that national parliaments did not always make use of the powers they had to scrutinise their governments, a matter that COSAC, the group of parliamentary European Union committees, might consider in the on-going debate on its reform process.[111] The Group suggested that COSAC could "consider drafting guidelines or a code of conduct for national parliaments setting out desirable minimum standards for effective national parliamentary scrutiny".[112]

Turning to the Commission, the Group thought that national parliaments perhaps did not exploit early opportunities to react to proposals at the pre-legislative stage, when the Commission operated a wide consultation process on its drafts by posting documents on the Internet for public information. The Group suggested that consultative documents could be sent directly to national parliaments at the same time as to the Council, and in this context, the Amsterdam Protocol should be amended accordingly.

The Group considered the six-week period stipulated by the Amsterdam Treaty between transmission of a proposal and its inclusion on the Council agenda for adoption (or the adoption of a common position) was "sufficient as a general rule for parliaments to be able to make their views known to governments, provided that they receive information rapidly". However, there was concern about the possibility of "preliminary agreements" being reached in Council Working Groups within this six-week period, before national parliaments had been able to make their views known to their governments. Therefore, the Group thought no preliminary agreements should be acknowledged in the Council, including Working Groups and the Committee of Permanent Representatives

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[111] The acronym is from the French "Conférence des organes spécialisés dans les affaires communautaires".

[112] COSAC submitted a contribution to the Convention at its 27th meeting in Copenhagen on 16-18 October 2002. It welcomed the time being devoted to this issue but did not want the creation of any new institutions. It wanted the Amsterdam Protocol on national parliaments to be "fully applied and strengthened". Reform of COSAC was initiated during the Danish Presidency and at the Copenhagen meeting there was a discussion of Presidency draft proposals and other contributions. COSAC set up a working group (comprising the chairpersons of the national parliamentary European Affairs Committees and of the appropriate EP body, with representatives from the candidate state parliaments as observers) to work on a number of reform proposals to help make it more effective, with a view to completing its work by the end of 2002. At the 28th Extraordinary COSAC meeting in Brussels on 27 January 2003, delegates were frustrated that COSAC had not been able to agree a contribution to the Convention, even on those issues most closely affecting the organisation itself.

(COREPER), during the six-week period. However, the Commission should still be able to present the proposal and the Working Group should be allowed a preliminary exchange of views. The need to maintain an urgency provision should remain, but the reasons for exceptions must be clearly stated (i.e. in line with existing Protocol provisions).

The Commission should transmit its Annual Policy Strategy and annual legislative and work programme, and the Court of Auditors its annual report, to national parliaments at the same time as documents are transmitted to the EP and Council.

The Report recommended a strict observation of existing Treaty provisions on national parliaments but with a clearer status within the Council's Rules of Procedure for parliamentary scrutiny reserves, and a specified time limit for reserves, so as not to block the decision process unnecessarily. It suggested other procedural amendments that would ensure that observance of the Rules was kept in a public record.

The Group also looked at a possible role for national parliaments in controlling the application of subsidiarity and held one joint meeting with the Subsidiarity WG. The Group agreed that respect for subsidiarity was a shared responsibility among the EU institutions and national parliaments, but that the latter "have a central responsibility to advise, scrutinise and hold to account their own government ministers for their performance in Council, especially when considering whether legislation is best adopted at national or European level". National parliaments should be involved early in the process and be in possession of all relevant information for an early insight into planned legislative proposals. The majority of the Group rejected the creation of a new body to monitor subsidiarity, preferring a new, simple mechanism that would not delay the legislative process unnecessarily. National parliaments could, as part of a two-stage monitoring process, consider a draft from the perspective of subsidiarity at the start of the process, but also throughout the process in cases where the text had been considerably amended, possibly with the opportunity to intervene, via their governments, at any stage.

With regard to contacts between national parliaments and with the EP, regular exchanges of information were welcomed as a useful way of discussing best practice and benchmarking in national scrutiny. This practice had already been "instrumental in improving the capacity of national parliaments to deal with EU issues and strengthen the link with the citizens", but the Group thought existing arrangements had not been fully exploited at national or at sub-state level. COSAC's mandate should be clarified, "strengthening its role of interparliamentary consultative mechanism and making it more efficient and focused". COSAC could also provide a platform for contacts between sectoral standing committees in national parliaments and the EP. Although primarily a forum for national parliamentarians, MEPs might also be invited to participate in meetings.

In view of the expanded role COSAC received under Amsterdam with regard to the institutions, the Group suggested that the institutions should also respond to COSAC's contributions, via a Commissioner or an institutional representative, for example, or in writing from the institution concerned.

The Group wanted the Convention to examine how national parliaments could be more involved in shaping the EU's political agenda and strategy as a mechanism for debate, without legislative powers and avoiding duplication of tasks. The Group was divided on the possibility of a new forum or "Congress". They looked at various forms of contacts (specific issues on an ad hoc basis, more systematic cooperation between national and EP committees, ad hoc interparliamentary conferences on sectoral issues such as CAP reform etc). The Group also proposed an annual "European Week", during which national parliaments, the EP, governments and possibly the Commission would try to raise awareness of EU activities.

The Group supported the formalisation of the Convention method, which included national parliamentary participation, in a future constitutional treaty as a preparatory mechanism for future Treaty changes.

Comment

The Report upheld the majority view in other discussions on this subject (at IGCs in 1996 and 2000) that the current system of national parliamentary involvement should be improved, rather than a new body created. The most innovative suggestion was parliamentary involvement in a pre-legislative early warning system that would allow national parliaments to become aware of possible difficulties before formal proposals were made. This implied the possibility of their not being proposed at all. The possible danger would be that some parliaments would simply use an early warning mechanism indiscriminately and virtually automatically, whenever a Commission White or Green Paper contained something they did not like.

Addressing the Standing Committee on the Convention in July 2002, Gisela Stuart emphasized the determination of the Group to increase the legitimacy of the EU by greater involvement of national parliaments:

> It is important to realise that our working group has to consider two debates on democratic legitimacy. The constitution of the United States says "we the people'". The constitution of Germany says "'we the Länder"'. Therefore, there are two lines of democratic legitimacy. One is the direct elected mandate of members and the other is the democratic legitimacy that would arise at the Council of Ministers as the representatives of another body. Those two models have to be accepted as legitimate. Our group was very much encouraged by the president, who, when he summed up the convention session on national Parliaments, challenged us to be quite assertive in ensuring that that role of the direct relevance of national Parliaments is one that we defend. I finish with something that one of the Italian delegates said: within the European Union architecture, Members of the European Parliament are very much the power

> without a face, and National Parliaments have been too long the face without power. I hope that we can reverse that.[113]

In the Convention Plenary debate on the Report on 28 October 2002 David Heathcoat-Amory welcomed the Report because it accepted for the first time the principle that national parliaments should be involved at an early stage in the legislative process. He compared this to the subsidiarity principle, which had in theory been applied since 1993. "If we are saying subsidiarity has not worked, then that is a rather serious state of affairs. It would mean that Treaty texts and protocols have been ignored. If, on the other hand, we are saying that subsidiarity has been working, then this proposal is really rather unnecessary, and does not mean very much".[114] He concluded that, while some advances had been made, there was a need to be "much bolder". He suggested that proposals should be discussed at a first reading in national parliaments, alongside proposals in the EP and other EU institutions.

Although the British Prime Minister had put forward ideas for a new second EU chamber composed of national parliamentarians in his Warsaw speech in October 2000,[115] this was not popular elsewhere in Europe. The EU Committees in the Commons and the Lords[116] were also critical. In a Report in November 2001 the ESC had called instead for "joint meetings of national parliamentarians and MEPs to be placed on a more formal basis with a small secretariat and joint organisation by national parliaments and the EP".[117] The ESC was also disappointed in the Working Group Report for not being "radical" enough. A Committee Press Notice in October 2002 stated:

> Jimmy Hood MP, Chairman of the European Scrutiny Committee, said that the draft report was a major disappointment: "The need for unanimity in the Convention and its working groups and the presence of powerful vested interests has resulted in the more radical proposals being excluded.
>
> "On 'subsidiarity' — in other words, who does what — the draft report provides for national parliaments to convey their views at an early stage, but there is no requirement for any of the EU institutions to take the slightest notice. The emphasis in the report is entirely on ensuring that EU legislation can proceed without delay, whereas the whole point of any 'subsidiarity' procedure is to stop measures which seek to do things that are better done at national level. A real watchdog does not just convey views; it barks, and occasionally bites.

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[113] 16 July 2002 at: http://pubs1.tso.parliament.uk/pa/cm200102/cmstand/conven/st020716/20716s10.htm

[114] http://www.europarl.eu.int/europe2004/textes/verbatim_021028.htm

[115] Text of speech at FCO website, http://www.fco.gov.uk/news/speechtext.asp?4215

[116] ESC Report, 152-xxxiii-II and see also the Lords Select Committee on the European Union, *A Second Parliamentary Chamber for Europe: an unreal solution to some real problems*, HL Paper 48, 2001-02, 27 November 2001

[117] ESC Report, 152-xxxiii-II, Para 143 at: http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-xxxiii/15209.htm#n263

> "The draft report also fails to tackle a number of EU practices which make it hard for national parliaments to hold their own Ministers to account. It does endorse the call for the Council of Ministers to meet in public when legislating, but does not deal with the tendency to revise EU proposals at the last minute and agree them immediately, or the process known as conciliation in which the Council of Ministers and MEPs haggle over the detail of new laws and make decisions on them in private.
>
> "All these matters sound arcane, but they affect the ability of this Parliament to do its job, and ultimately affect people's lives, often in very direct ways. National parliaments are closer to their citizens than any EU institution, and we hope the Convention will take their role more seriously."[118]

Mr Hood clarified his "disappointment" at the Standing Committee on the Convention in October 2002:

> We were disappointed, partly because there seemed to be consensus that increasing national Parliaments' role in the European Union was a way of helping to bridge the gap between citizens and EU institutions. The treaty of Nice listed the role of national Parliaments as one of four subjects to be discussed at the next intergovernmental conference. The Laeken declaration asked questions about increasing the role of national Parliaments, and the United Kingdom Government said that developing the role of national Parliaments in the EU was one of their priorities for the Convention. Even the European Parliament's Committee on Constitutional Affairs accepted:
>
> "the solidity of national democratic frameworks and their closeness to the citizens are an essential asset which can in no way be ignored in pursuing the parliamentarisation of the Union."
>
> In view of all that, it was not unreasonable to expect that the Convention would bring forward proposals that would make a significant difference to national Parliaments' ability to exert influence in the EU, but without creating a new institution, such as a second chamber, and without giving a formal role in the legislative process to national Parliaments. The Select Committee on European Scrutiny, of which I am Chairman, put forward its own ideas in its report entitled "Democracy and Accountability in the EU and the Role of National Parliaments."
>
> Most of the discussion about a new role addressed enforcement of the principles of subsidiarity and proportionality, and my Committee made a proposal. However, we are less worried about the specific mechanism used than about ensuring that objections made by national Parliaments on grounds of subsidiarity have an impact rather than being brushed aside. That is where much of our disappointment arises.
>
> The working group's report, in line with that of the working group on subsidiarity, provides for national Parliaments to object at an early stage. However, there would be no requirement for anyone to take the slightest notice of that objection or to respond to it. The emphasis in the report is entirely on

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[118] ESC Press Notice No.24, 2001-02, 16 October 2002, at: http://www.parliament.uk/parliamentary_committees/european_scrutiny/escpn161002.cfm

> ensuring that the new procedure does not cause any delay in the legislative process. The working group on subsidiarity is right to emphasise that it would be the first time that national Parliaments would be involved in the EU's legislative process, but it seems that such involvement would be without influence. If there is no possibility of delay, the involvement of national Parliaments can be no more than a formality. As I said in a press release:
> "a real watchdog does not just convey views; it barks, and occasionally bites."
> The second disappointment relates to matters that affect the scrutiny that we may carry out in Westminster and other national Parliaments. I am pleased that the draft report recognises that the way in which the EU operates can affect national Parliaments' ability to hold their Governments to account. […] I am also pleased that the draft report stresses the need for greater openness in the Council. However, it ignores such important issues as the need for time for scrutiny before a radically revised text is put to the Council for agreement. It says nothing about the conciliation process, which, with its secrecy and back-room deals, is as much an affront to democratic principles as the Council of Ministers meeting in private. I cite an example of that: the European Parliament agreed not to breach financial ceilings in return for getting an early retirement scheme for the temporary staff of its political groups. Our two alternate members are on the working group on simplifying legal instruments, and I hope that they will oppose any extension of the co-decision and conciliation process, unless it is made much more transparent. The report adopts our suggestion that parliamentary scrutiny reserves should be given formal status in the Council's rules of procedure, but when the decision is by qualified majority voting, it explicitly encourages the Council to go ahead without waiting. Apparently, pressing on regardless is more important than allowing the small amount of time needed for scrutiny.
> There are some good things in the report, such as encouraging the Conference of Community and European Affairs Committees to draw up minimum standards of parliamentary scrutiny, and exploring the possibility of introducing new ways of bringing MPs and MEPs together for discussion. However, it is not clear to me whether anything in the report will significantly increase the role and influence of national Parliaments.[119]

In the December 2002 debate on the Convention Gisela Stuart reiterated her view that national parliaments needed to take their own scrutiny responsibilities more seriously:

> If Parliaments do not wake up to their responsibility and if parliamentarians do not develop a mechanism by which they share their experiences and exchange their views, there will simply be a process of divide and rule.[120]

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[119] Standing Committee on the Convention 23 October 2002 cc 025-6 at: http://pubs1.tso.parliament.uk/pa/cm200102/cmstand/conven/st021023/21023s01.htm

[120] HC Deb 2 December 2002 c 692

For the Opposition, Michael Ancram emphasised that "The importance and role of national Parliaments should be strengthened … and enshrined in any new treaty":[121]

> It must be made clear beyond doubt that the EU has competence or shared competence only where the treaties grant it and that powers not explicitly granted to the EU remain with Member States. The description of and limits to such powers granted must also be clearly defined.[122]

In its report on *European Scrutiny*, the ESC identified a number of weaknesses in the UK scrutiny system which confirmed some of those identified by the WG, including:

- problems in the operation of the scrutiny process, especially breaches of the scrutiny reserve and the time taken to make available documents, Explanatory Memorandums and information requested;
- reluctance of successive EU Presidencies to allow adequate time for scrutiny by national parliaments;
- lack of impact of many of the debates we recommend on documents;
- lack of attention among other Members to the Committee's ongoing written interrogation of Ministers on EU proposals;
- the relationship with outside organisations and individuals; and
- restrictions imposed on us by the House's rules of privilege preventing information being made public soon enough following our deliberations.[123]

The Committee made the following recommendations for strengthening the UK parliamentary scrutiny system:

> (1) Meetings in public
>
> We wish to make as much information public as we can and to meet in public whenever possible, while maintaining the effectiveness of the Committee. We regard this as an important issue, but one which needs further examination. (Para. 41)
>
> (2) Operation of the scrutiny system
>
> The great majority of EU documents and Explanatory Memoranda (EMs) reach us in time, but there continue to be cases where deposit of documents, submission of an EM or provision of information requested by us is delayed. (Para. 44)
>
> We will normally call a Minister to give evidence when we believe the scrutiny reserve resolution has been overridden without good cause. (Para. 53)

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[121] Ibid c 687
[122] Ibid
[123] ESC, *European Scrutiny in the Commons*, HC 152-xxx, 11 June 2002, 2001-02, at: http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-xxx/15202.htm

We do not favour a statutory scrutiny reserve. (Para. 54)

We intend to make scrutiny of the Commission's Annual Work Programme an important part of our own programme, and are considering elsewhere what role national parliaments in general might have in this respect. (Para. 58)

(3) Pre- and post-Council scrutiny

There are difficulties in establishing a systematic approach to pre- and post-Council scrutiny. We have concentrated on improving the quality and usefulness of the written answers we receive on Council meetings. (Paras. 61, 63)

(4) Debates

There is scope for introducing new procedures for debates on EU matters on an experimental basis. However, we also emphasise the importance of debates on the Floor of the House as a way of raising the profile of EU business. (Para. 66)

We do not believe European Standing Committees have yet reached their full potential. (Para. 67)

The style of questioning in European Standing Committees should be like that in select committees, with supplementaries permitted. (Para. 68)

It would contribute to the quality of debate if means were established for making material from outside bodies relevant to European Standing Committee meetings generally available, and we plan to investigate ways of achieving this through the Committee's website. (Para. 68)

The number of European Standing Committees should be increased to five. (Para. 69)

It would be beneficial if DSCs or their Members were more involved in the work of the European Standing Committee covering their Department. (Para. 70)

The motion moved in the House on an EU document should always be that agreed by the European Standing Committee; if the Government does not wish to move it another Member should do so; and in such circumstances a brief explanatory statement by the mover and a Minister should be permitted. (Para. 73)

The Modernisation Committee should consider modifying the application of the deferred division rule to motions on EU documents. (Para. 75)

Provision should be made for us to refer EU documents for debate in Westminster Hall. (Para. 77)

Provision should be made for the European Scrutiny Committee and one or more DSCs to call meetings of a European Grand Committee, which could consider

certain EU documents of wide interest, take pre-and post-Council statements by Ministers and hold general debates. (Para. 79)

The Modernisation Committee should consider the possibility of longer Floor debates on EU documents, incorporating questions to the Minister. (Para. 80)

Increased attention by DSCs to developments in the EU would be particularly valuable because of their high profile. We are well aware of the difficulties facing DSCs in this respect, especially their limited time. (Paras. 81, 84)

We would wish to see DSCs examining Commission Green and White Papers. (Para. 86)

The common objectives for select committees to be established by the Liaison Committee should include consideration of the European Commission's Green and White Papers. (Para. 87)

It would be helpful if DSCs (or at least those in subject areas with much EU legislation) considered appointing a European rapporteur, who could keep a watching brief on developments in the EU and whom we could consult and pass information to. (Para. 87)

We would welcome more debates on the Floor of the House on specific EU matters, such as reform of the Common Agricultural Policy or EU transport policy, which are not tied to the detail of a legislative or other text. (Para. 89)

We are attracted by the possibility of an equivalent of the ten-minute procedure for EU documents. (Para. 90)

(5) Relationship between the scrutiny process and outside organisations and individuals

Public involvement in and knowledge of the Commons' European Scrutiny work is crucial if the Commons is to play the part the Government envisages for national parliaments in the EU. The two preconditions for that are that the House must have sufficient influence on UK Ministers' EU activities to make lobbying it worthwhile and that people must be able to find out easily what EU matters are being considered in the Commons. (Paras. 93-4)

We regard publication of our Reports on a greatly improved web-site as the main way in which we should be disseminating them. In particular we believe people need to be able to indicate their interests and receive automatic notification when a document relating to a particular subject (or Department) appears on our list of forthcoming business or in one of our Reports. (Paras. 95-6)

Other aspects of scrutiny

The Government should relax the confidentiality provision in the concordat sufficiently to be able to indicate in EMs whether discussions have taken place

> with the devolved institutions and, as far as possible, on what subjects. (Para. 106)
>
> We are discussing the possibility of regular meetings with MEPs, perhaps every six months, related where possible to specific EU activity, such as the Commission's Annual Work Programme or a Presidency's priorities, and possibly involving representatives of DSCs. (Para. 107)
>
> The National Parliament Office contributes significantly to the effectiveness of the scrutiny process. (Para. 109)
>
> We propose that certain categories of documents which we rarely or never find to be of legal or political importance should simply be listed periodically rather than deposited. We would expect to receive regular lists of such documents and to be kept informed by Ministers' letters on any broader issues or general developments or trends in respect of Association Councils and Committees and anti-dumping, and we would reserve the right to require the deposit of any of these documents if we considered this necessary. (Para. 111)
>
> We support the Leader of the House's proposal for a Secondary Legislation Scrutiny Committee and for debates on statutory instruments it recommends for debate. (Para. 113)[124]

The Committee supported a redefinition of COSAC's main role "as assisting national parliaments to improve their scrutiny of government activities in the EU, by sharing best practice and information and acting as a strategic body on behalf of national parliaments".[125] The ESC concluded:

> COSAC's agenda should then concentrate on the roles of national parliaments rather than general issues. In addition, COSAC needs to have a small secretariat to facilitate the exchange of information (e.g. on scrutiny problems, in respect of particular documents or more generally), to monitor activities relevant to national scrutiny (e.g. compliance by the Council with the protocol on the role of national parliaments), and to take up procedural matters of concern with the Council Secretariat or the Commission. The Secretariat could also, in co-operation with the EP, organise the joint meetings of national parliamentarians and MEPs discussed above. A precondition for any such reforms is that changes in COSAC's rules must cease to require unanimity.[126]

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[124] ESC, *European Scrutiny in the Commons*, HC 152-xxx, 11 June 2002, 2001-02, at: http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-xxx/15202.htm

[125] ESC, *European Scrutiny in the Commons*, HC 152-xxx, 11 June 2002, 2001-02, Para 150

[126] Ibid

5. Working Group V: complementary competencies

"Complementary competences" is the term used to describe "areas in which intervention by the Community is limited to supplementing, supporting or coordinating the action of the Member States". [127] In these areas the power to adopt legislation is with the Member States, and "intervention by the Community cannot have the effect of excluding intervention by the Member States".[128]

The Group, chaired by the Danish Government representative on the Convention, Henning Christopherson, began by criticizing the term itself, deciding to rename it "supporting measures".[129] The Group thought a constitutional treaty should contain a title covering all issues of competence, and in particular:

- a basic delimitation of competence in each policy area
- definition of the categories of Union competence
- conditions for the exercise of Union competence

It wanted the reference to "an ever closer Union" in TEU Article 1 to be rephrased or clarified so as not to imply further transfer of competence to the Union as an aim and objective of the Union. Furthermore, the future Treaty should contain "a short, crisp and easily understood delimitation of the competence granted to the Union in each sphere of action,"[130] with a separate article making clear that competence should be exercised in accordance with the provisions of the relevant Treaty articles for each policy area.

The Group recommended that supporting measures should be defined in the future Treaty on the following bases:

- they apply to policy areas where the Member States have not transferred legislative competence to the Union, unless exceptionally and clearly specified in the relevant Treaty Article;

- they allow the Union to assist and supplement national policies where this is in the common interest of the Union and the Member States;

- they authorise the Union to adopt recommendations, resolutions, guidelines, programmes, and other legally non-binding acts, as well as legally binding decisions, to the extent specified in the relevant Articles of the "secondary

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[127] CONV 75/02, 31 May 2002, "Mandate of the Working Group on Complementary Competencies", at: http://register.consilium.eu.int/pdf/en/02/cv00/00075en2.pdf
[128] Ibid
[129] CONV. 375/02 REV 1, 4 November2002.
[130] Ibid

> Treaties". Regulations and directives may not be supporting measures, unless exceptionally and clearly specified in the relevant Treaty Article;

- Credits from the Union budget may be allocated under supporting measures.

The Group was divided over defining "exclusive competence," which refers to matters falling under exclusive competence of the Union and in which Member States may only act if authorised by the Union. Should Treaty Articles 3 and 4, which set out the areas of Community activity, be redefined? Some believed exclusive competence should be renamed "Union competence" and that the criteria for classification under "Union competence" should primarily be political. The objective should be to make clear to Union citizens all the areas where the Union should play the leading or exclusive role.

Others in the Group thought that classification under exclusive competence must be based on purely legal considerations because it had far-reaching legal consequences. Only matters where it was essential that the Member States do not act alone, even if no Union solution can be found, should be classified as exclusive competence. The Group concluded:

> A full analysis of the merits of the two views makes them reconcilable. The first view may be met by a rewriting of the tasks and responsibilities of the Union currently described in TEC Articles 3 and 4. It would no doubt be helpful to the general public if the tasks and responsibilities of the Union were described in a manner so that policies that fully or primarily fell to the Union to pursue would be described in a way that made this distribution of responsibility clear.

Another category of "shared competence" would comprise matters that were neither supporting measures nor exclusive competence. Exclusive competence and shared competence should be defined in the future Treaty, in accordance with the existing jurisprudence of the ECJ, and determined in line with the criteria developed by the Court.

The Group recommended that the following matters should be subjects of supporting measures:

- Employment (TEC Articles 125-130)
- Education and vocational training (TEC Articles 149 and 150)
- Culture (TEC Article 151)
- Public health (TEC Article 152)
- Trans-European networks (TEC Articles 154-156)
- Industry (TEC Article 157)
- Research and development (TEC Articles 163-173)

A new Treaty title on competence should contain a chapter on the principles behind Union competence, starting from the general principles of the common interest and solidarity. Under Article 5(1) TEC "The Community shall act within the limits of the

powers conferred upon it by this Treaty and of the objectives assigned to it therein". This is a basic principle of Union law and establishes the basis for the exercise of any Union activity. It also ensures that powers not allocated to the Union remain with the Member States. In the opinion of the Group this principle ought to be expressly stated in the Treaty, thereby establishing an assumption in favour of national competence (it could be argued that Article 5(2), the subsidiarity clause, already does this, but not explicitly). Alongside this, the Group largely supported the elaboration of the principle, currently enshrined in TEU Article 6(3), that the EU "shall respect the national identities of its Member States".

The Group identified two areas of core national responsibilities:

- Fundamental structures and essential functions of a Member State, e.g. (a) political and constitutional structure, including regional and local self-government; (b) national citizenship; (c) territory; (d) the legal status of churches and religious societies; (e) national defence and the organisation of armed forces; (g) choice of languages.

- Basic public policy choices and social values of a Member State, e.g. (a) policy for income distribution; (b) imposition and collection of personal taxes; (c) system of social welfare benefits; (d) educational system; (e) public health care system; (f) cultural preservation and development; (g) compulsory military or community service.

The Group felt that clarifying TEU Article 6(3) would help to safeguard the role and importance of the Member States in the Treaty, while at the same time allowing a margin of flexibility. The Article would not constitute a definition of Member State competence (wrongly implying that the Union grants competence to the Member States, or that Union action may never impact on these fields). However, it would make more visible and more "operational" the existing principle that the Union, in the exercise of its competence, is under an obligation to respect the Member States' national identities. The ECJ might in the future become the ultimate interpreter of the provision, if the EU's political institutions went beyond a reasonable margin of appreciation.[131]

Following discussion of a Commission scheme setting out types of Community interventions according to the intensity of the Community action, the Group recommended that conditions for the exercise of competence (in a general title on competence) should include clauses covering:

- The principle of subsidiarity
- The principle of proportionality

[131] The degree of latitude recognised by the Court to take account of different customs in the Member States

- The principle of primacy of Community law
- The principle of national implementation and execution
- Statement of reasons for the adoption of an act
- The principles of common interest and solidarity.

The Group paid particular attention to Article 308 TEC, the catch-all article allowing for action where there is no specific Treaty base. Most of the Group agreed that a certain measure of flexibility in the Treaty system of competence should be preserved, to allow the Union to deal with unexpected developments and challenges. The majority thought Article 308 should therefore be maintained. Some felt this Article was inherently open to misuse and should be deleted. The Report tackled some of the misgivings about Article 308 in the light of its more frequent use in recent years,[132] adding:

> It was common ground that flexibility should not be founded on a lack of transparency or clarity regarding the allocation of competence to the Union. It was also common ground that a flexibility clause must never give the impression that the Union defines its own competence. The provision has been the cause of concern and controversy in several Member States, especially out of fear that it might undermine the principle of allocated powers. Most members therefore agreed on the necessity of clarifying and possibly tightening the conditions for its use.[133]

There was general agreement that Article 308 should state that it can not serve "as the basis for widening the scope of [Union] powers beyond the general [Treaty] framework" or "be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty", or as the basis for harmonisation measures in policy areas where the Union rules out harmonisation. There was also wide agreement that unanimity in the Council should continue to be required under Article 308 and EP assent or other substantial EP involvement should also be required. Some pointed out that a requirement for unanimity in a Union of 25 or so Member States might discourage its use. The Group thought it might be useful to allow a Member State and the Commission to request an *ex ante* opinion from the ECJ, thereby avoiding deadlock in the Council on the applicability of Article 308. The majority favoured a specific provision enabling a qualified majority to repeal acts adopted under Article 308. The Group thought generally that Article 308 was a provision of considerable constitutional significance, which might best be placed in a general title on competence in a future Treaty.

Comment

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[132] In a Written Answer in July 2002 Peter Hain said that, "Based on information from the European Commission's Eur-Lex database, since 1 May 1997 Article 308 of the Treaty on European Union has been used on 71 occasions", HC Deb 15 July 2002, c1W. See also DEP 02/1846.

[133] CONV. 375/02.

The British Government has favoured a clear set of principles about responsibility, rather than a rigid catalogue of competences. Peter Hain told the Convention plenary in April 2002:

> One suggestion is to define a catalogue of competences. That certainly has the advantage of clarity; everyone would know where they stood. But, it would create a rigid, static, legalistic body of rules which blocked the kind of flexibility that, for example, allowed us to tackle asylum problems at a Community, rather than a nation state, level.
>
> No - our approach should be to set out principles deciding who is responsible for what. In particular, we should make more explicit the understanding that powers not delegated to the EU remain the preserve of the member states. And we need to think carefully how to do this – whether we agree a principle, or we add a precise description of the areas reserved for member states (if we can do so without sacrificing flexibility). Then we should create a political mechanism ensuring that those principles are respected, and brought closer to our citizens by involving national parliamentarians, perhaps alongside the European Parliament, with their judgements enforceable in law.
>
> This means:
>
> Subsidiarity - the EU acting to achieve something the member states cannot do alone, ensuring we can work together to stop terrorists and criminals exploiting loopholes to attack our freedoms and evade justice. But letting us each choose our system of policing, our body of law, our sentencing policy.
>
> Proportionality - taking the lightest and most appropriate action necessary to achieve the objectives of our missions. Let's protect workers through a Europe wide platform of minimum standards, but let's do so in a way that enables people to find work and get off welfare.
>
> This approach allows us to keep the range of instruments to deliver objectives: to choose either detailed legislation when we need a common standard; or framework legislation when we can use different methods to achieve a common objective, or non-legislative methods such as benchmarking or exchange of best practice when local flexibility is needed.
>
> Flexibility, diversity and dynamism are at the heart of the European Union's record of success. But let's be more accountable, more comprehensible. Let's build on our success.[134]

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[134] "Clear Principles, Flexible Systems: the joint missions of the EU", UK Intervention at the Convention on the Future of Europe, 15 April 2002, at: http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391647&a=KArticle&aid=1018885910271

David Heathcoat-Amory, referring to the Praesidium's Preliminary Draft Constitutional Treaty that had been published two weeks earlier, told the Convention Plenary on 8 November 2002:

> I am afraid I do not think we have yet achieved a clear and certain allocation of responsibilities between the European Union and Member States - something which is essential if we are to be an open window to the outside world and fulfil our mandate. If we are going to do that, I think that Part I of the Constitution should contain an accurate and legally watertight delimitation of competencies. Instead we are offered little more than a general list, so that readers of the Constitution will have instead to burrow into the detailed policy articles in Part II in order to discover the actual extent and allocation of the powers transferred.[135]

He was critical of the criteria for using a single market article to adopt legislation. They had become too vague, as practically everything crosses a national frontier at some point and more or less everything could be traded or affect competition. He recommended abolishing the "all-purpose single market articles"[136] and defining better the scope of such measures. He also commented on Article 308, another "rubber" article, which the Group found "had been used for pretty well everything from setting up new agencies to giving balance of payments support to third countries". He believed the EU would have to be very precise and clear in its use of this device.[137]

The European Scrutiny Committee concluded in its *Report on Democracy and Accountability in the EU and the Role of National Parliaments*:

> **A clearer allocation of powers is desirable, especially where powers have been inferred from objectives set in the Treaties, but on its own will have limited impact because of the prevalence of shared powers;**
>
> **There need to be arrangements to review the allocation of powers periodically, with the possibility both of adding new powers and of returning existing ones to the Member States;** we note that the Laeken Declaration mentioned the possibility of 'restoring tasks to the Member States', and that the EP Constitutional Affairs Committee's report suggested some return of powers in respect of agriculture and regional policy to the Member States,[138] although whether the EU institutions will in practice ever be willing to return any powers to the Member States remains to be seen;
>
> **The principle that all powers not transferred by the Treaties to the EU remain with the Member States must be maintained, and it must be made**

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135 http://www.europarl.eu.int/europe2004/textes/verbatim_021108.htm
136 Ibid
137 Ibid
138 EP, A5-0133/2002, Lamassoure report, p. 20

> **clear that the powers of Member States are not derived from the Treaties; but, subject to that, we see merit in a list of powers from which the EU is specifically excluded;**
>
> **'A simpler statement of principles, which sets out in plain language what the EU is for and how it can add value',[139] as proposed by the Foreign Secretary, would be worthwhile.**[140]

The ESC also commented on the term "ever closer union" which has been an aim of the Community since the Treaty of Rome. The Committee's view was that, while this was a legitimate aspiration, it was inappropriate "for a treaty to commit the peoples it covers to such a vague and open-ended process". Its removal from the Treaties would "help to reduce the perception that the EU is engaged in a one-way process towards greater centralisation regardless of what citizens want."[141] In December 2002 Mr Hain told the ESC the Government would "keep pressing for that [its omission] to be part of the final picture".[142]

6. Working Group VI: economic governance

The Group, chaired by the PES MEP, Klaus Hänsch, looked at monetary policy, economic policy and institutional issues, basing its conclusions partly on possible articles in a future constitutional treaty, but also considering other issues less appropriate for a constitutional treaty or not requiring any Treaty change.

Some members of the Group emphasised the importance of a reference to sustainable growth and competitiveness in a future treaty, while others attached more importance to references to "full employment, social and territorial cohesion and progress, and a better balance between competition and public services in a social market economy".[143]

The Group recommended that the current structure should be maintained, whereby exclusive competence for monetary policy within the Eurozone lies with the Community, exercised by the European Central Bank (ECB), and competence for economic policy lies with the Member States, should be maintained. However, the Group also agreed that coordination between the economic policies of the Member States needed to be improved. Some thought that macroeconomic policy should be brought within the shared competences of the Community and the Member States.

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139 Speech at The Hague, 21 February 20

140 Para.102, European Scrutiny Committee 33rd Report, *Democracy and Accountability in the EU and the Role of National Parliaments*, 12 June 2002, 2001-02, at: http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-xxxiii/15201.htm

141 Ibid

142 Minutes of Evidence to ESC, 20 November 2002, 16 December 2002, HC 103-I, at: http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/103-i/2112002.htm

143 CONV 357/02, 21 October 2002

Many Group members thought the tasks, mandate and statute of the ECB should remain unchanged and unaffected by any new treaty provisions. Others thought its mandate should be widened to include the objectives of growth and employment. In a discussion of the accountability and transparency of the ECB, some thought there was scope for improving accountability by enhancing the ECB's reporting procedure to the EP, giving the EP a greater role in the designation of ECB Board members, and providing for the obligatory publication of ECB minutes. Others thought the ECB had already demonstrated a commitment to increased openness and further changes were not necessary.

The Group agreed that, in view of enlargement, Article 10 (2) of the ECB statute relating to the working methods of the ECB's Governing Council, needed amendment. It invited the ECB and/or Commission to propose amendment of this paragraph as soon as the Nice Treaty entered into force.[144]

The Group thought economic policy coordination should be reinforced and that Member States' commitment to decisions taken within the coordination framework at EU level should be strengthened, in particular by increasing the focus on implementation, and by ensuring that national parliaments had a stake in such commitments. However, the issue of how to involve national parliaments was primarily for individual Member States to resolve and should not be part of the future constitutional treaty.

The Group considered the EU's "Broad Economic Policy Guidelines"[145] to be the principal instrument for supporting economic policy co-ordination, because economic policies were a matter of common concern. Members of the Group disagreed as to whether to retain existing provisions or to give the Commission the right to make formal proposals, rather than just a recommendation. They also disagreed over the warning system on implementation. Some thought first warnings on implementation should be issued directly by the Commission to the Member State concerned, with voting on implementation decisions on the basis of a Commission proposal, and excluding the votes of the Member State concerned. The Group wanted the EP to be consulted on the draft Broad Economic Policy Guidelines.

A majority wanted the provisions on excessive deficit procedures (Article 104) to be amended to allow the Commission to issue first warnings on excessive deficits directly to the Member State concerned. The Group agreed that the Stability and Growth Pact[146] was a political instrument to implement provisions and should therefore remain outside a constitutional treaty.

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144 The Treaty of Nice came into force on 1 February 2003.

145 The regular Commission review of economic policy in the Member States

146 Adopted by the Amsterdam European Council in June 1997 to build on and strengthen the convergence criteria used to assess which countries qualify for the third stage of EMU

There was considerable support for including in a constitutional treaty the basic objectives, procedures and limits of the open coordination method, in which the EP and the Commission should also have a role. This should not undermine the flexibility of the method (which is one of its main perceived advantages), nor replace or circumvent Community procedures or policies. Some Group members thought the informal character of the open coordination method would be better preserved by keeping it outside the Treaty.

The Group recommended that Union competence in fiscal policy (Articles 93, 94 and 175 TEC) should be maintained. A majority agreed that some changes should be made to the existing decision-making procedures in order to facilitate progress in the area of fiscal policy. These should not aim to establish unified taxes, nor be concerned with personal and property taxation. The objective should be "to provide for sufficient approximation of rates, minimum standards and tax bases in the areas of indirect and company taxation to ensure that the proper functioning of the single market is not affected by harmful tax competition or serious internal trade distortion".[147]

Comment

The calls for minimum standards and some harmonisation of rates in areas such as corporation tax and VAT will undoubtedly be opposed by the UK, Ireland and perhaps some of the CEECs. In an intervention in the Plenary debate on the Report, Peter Hain acknowledged that there were "real differences of opinion".[148] He continued:

> We, for example, support preserving unanimity on tax and on social security, and we support the current institutional balance on the excessive deficits procedure. These are very important matters for us. Many other Member States share them too, especially those that have to win referenda. I would not like to win a referendum on the basis that income tax is decided here in Brussels.
>
> As the report says, there are other views, I understand that. But there are shared objectives too between those differences. We can agree, for example, to build on the foundations that we have, and they are good foundations. We can continue to build a dynamic, flexible economy offering more and better jobs for all, and by reflecting the present system of economic governance in the new constitutional text we can achieve our goal of delivering practical improvements to the standard of living of millions of Europeans.
>
> We should do so in a way that reflects the values of Europe, the unique social dimension of our European Union. In a skeleton treaty we looked at last week, there is an objective of securing high levels of employment and adequate social

147 http://register.consilium.eu.int/pdf/en/02/cv00/00357en2.pdf
148 7 November 2002, at: http://www.europarl.eu.int/europe2004/textes/verbatim_021107.htm

> protection. I support that objective. The European Union is much more than a market. We can only be a credible force for good in the world if we live by our values, if we protect our citizens at work, support their civil rights and offer equal opportunities for all. But the draft objective is right for another reason: it is balanced. I want us to promote social justice, but a vital part of that justice is the provision of good jobs. The internal market is a motor for higher employment, and better jobs are the key to social justice for all. If we forget that, we will throw away some of the most important achievements of the Union.
>
> I think we can do better. We should aim to secure deeper co-operation on the employment and social challenges we face, and a social dialogue that gives us a genuine partnership. We want reform that will deliver our goal of achieving 70% employment by 2010; reform that promotes employability and helps modernise pensions to provide a secure future for all; reforms that lift families out of poverty. That is what the European Union should stand for and what we must deliver for the next generation: a highly competitive Europe, which is also a social Europe, a Europe of full employment, social justice and social rights.[149]

7. Working Group VII: external action

The Group, chaired by the former Belgian Prime Minister, Jean Luc Dehaene, presented its final report at the Convention plenary on 20 December 2002.[150] It considered all aspects of the EU's external relations, including the Common Foreign and Security Policy (CFSP), trade relations and development programmes. In its preliminary remarks the Group acknowledged that the Union would benefit from acting collectively on the international stage, and this would depend largely on political will and solidarity among Member States. The wide range of policy areas covered by "external action" would require different legal instruments and different arrangements or procedures. It would also require the mobilisation of a range of human and financial resources in a coherent manner, using national resources "to pursue shared EU objectives".[151]

The Group concluded "with a very large consensus"[152] that the Union's overall principles and objectives should be set out in the new treaty. It recommended that the European Council should define the EU's strategic objectives and interests in relation to a country or region, establishing parameters to guide Member States' action. The External Affairs Council would be responsible for implementation and the European Council would carry out a periodic examination of the extent of implementation.

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149 http://www.europarl.eu.int/europe2004/textes/verbatim_021107.htm
150 CONV 459/02, 16 December 2002
151 Ibid, p 13
152 Ibid, p 2

The Group recommended the establishment of a joint European External Action Service, which would pool in one administration the Commission DG for external relations (RELEX), Council Secretariat officials and Member States' diplomats. One person, the "European External Representative" (called rather confusingly the HR, from High Representative, rather than ER throughout the Report), would represent the Union in its relations with third countries, combining the functions of the present Commissioner for External Affairs and the CFSP High Representative (i.e. the Chris Patten and Javier Solana roles). Commission delegations abroad would become EU embassies staffed by officials of the Commission, Council and the Member States. They would come under the authority of the HR and would promote EU foreign policy, as well as provide consular services for EU citizens without their own consulate in those countries.[153]

The Group could not agree on whether the HR would be a member of the Commission or attached to the Council of Ministers, and put forward four options, including a compromise option, which they favoured. The post would be a European Council appointment, with the approval of the Commission President and the assent of the EP. The HR would have a mandate from and be accountable to the heads of state or government. He/she would also chair the foreign affairs Council and be a full member of the Commission, preferably its Vice President. The split reflected the more general division between those who favoured more powers for the Union and the Commission in foreign affairs, and those who wanted Member States to retain control in these areas. The UK and France were opposed to Commission membership, although it has been suggested that both would accept a double-hatted figure if he/she was totally accountable to Member States' foreign ministers.[154]

"Joint initiatives" would be proposed by the HR and the Commission, possibly for approval by QMV. QMV would be used "to encourage a pro-active CFSP"[155] and there would be flexibility provisions, such as constructive abstention. The European Council would agree by unanimity any extension of QMV in CFSP matters. QMV would be used for all areas of commercial policy, including services and intellectual property (except where current restrictions apply on harmonisation in internal policy areas).

Regarding development cooperation policy, the Group recommended simplifying the legal instruments for EU development programme management, with fewer regional and sectoral regulations, and a focus on strategic programming.[156] Many supported integrating the European Development Fund (EDF) into the general EU budget, with improvements to the poverty focus of EU programmes in general and without affecting aid to the African, Caribbean and Pacific (ACP) countries. Development assistance should be part of the "global strategy of the Union with respect to third countries".

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153 CONV 459/02, pp 6-7
154 *European Voice*, 12-18 December 2002
155 Ibid p 7
156 Ibid p 8

The current provisions of Article 21 TEU (EP consultation on the main aspects of CFSP and informing the EP on CFSP developments) were "satisfactory" but the EP's involvement in commercial policy should perhaps be enhanced.

Current financing of the CFSP was "insufficient" and more funds were needed to meet unexpected crises or new political priorities. The new HR should have some autonomy in financing activities related to his/her mandate. The EU budget should finance preparations for urgent civilian crisis management operations, respecting the ceilings set by the budgetary authority.[157] Appropriate procedures should allow the prompt disbursement of funds and action.

With regard to international agreements, the Group recommended a single set of provisions on the negotiation and conclusion of such agreements: the Council would authorise the opening of negotiations, issue negotiating directives and conclude agreements, indicating who would act on behalf of the EU, depending on the subject of the agreement. This would be the case for agreements whose scope fell within both the Community's domain and the current intergovernmental Titles V and/or VI TEU. In these cases the Council would indicate whether the HR and Commission, or the Commission or HR acting alone, under the supervision of a committee, would negotiate on behalf of the Union.

The Union's external representation should be confirmed via appropriate changes in the statutes of international organisations, where the Union should seek a formal status or full membership, but without affecting the membership status of individual Member States. The HR should be mandated with the coordination of Member States' positions in international organisations and conferences, with a view to presenting "visibility, clarity and continuity" in the EU's external representation.[158]

Comment

In his intervention in the Plenary debates on both WG VII and WG VIII Reports on 20 December 2002, Mr Hain was critical of some of the proposals:

> On 'double hatting', the external relations Commissioner and the High Representative, my worries have been strengthened by the criticisms of Javier Solana, who has almost single-handedly won credibility for Europe in global diplomacy, because he enjoys the confidence of governments. Nobody has yet answered the key questions he has consistently posed. Who would mediate in a disagreement between the Council and the Commission? Who would chair the external parts of the General Affairs Council if the High Representative were

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[157] CONV 459/02, p 9
[158] Ibid, p 10

> 'double hatted' with the Commission college role? How can a full member of the Commission college chair a discussion of defence policy? These are questions which we need answers to before we can finally move ahead on this.
>
> In international organisations, I do not see how reducing the number of Europe's seats, from fifteen or more to one in some cases, will give us a stronger negotiating position or ensure that our voice is better heard. What matters is that we use all our representatives, all our voices, to deliver a single message negotiated in advance; because greater coherence in this context is not the same as merger. For example, why create new institutions such as a European diplomatic service and European Union embassies, when we can cooperate much more effectively together in a more practical fashion?
> […]
> On trade and commercial policy, we want to see as liberal a trade regime as possible and we would consider changes to Article 133 to this end. But this raises the issue, which I have discussed with Pascal Lamy, of external agreements leading to changes in internal competence, which we would not want. We need to consider this as we look at the draft articles in the coming months.
>
> Secondly, people have asked, what is the relationship between the Chairman of the Council and the High Representative, the Foreign Minister? The Foreign Minister of Europe would concentrate on detailed negotiation on major foreign policy issues, in the Middle East and Kashmir, the Balkans and so on. The Chairman of the Council could play a much more effective role in a way which we do not use at the moment, in, for example, better preparation for summits with some of the major strategic powers such as Japan, China, Russia, the USA and so on. We do not do these effectively at the present time. The Chairman of the Council, with the President of the Commission and the High Representative, could play a really creative role there, also replacing the rotating presidency, the Council presidency and the G8, working with the President of the Commission and making sure that in world summits for example, on international financial issues, counter-terrorism, immigration or sustainable development - Europe has a much more effective role than the rotating presidency allows it to play at the present time. [159]

The Prime Minister spoke about institutional arrangements for external policy in his Cardiff speech in November 2002:

> As for the institutional arrangements, the appointment of Javier Solana as High Representative has been a great success, thanks to him and Chris Patten. The EU has got its act much more together in the Balkans.
>
> I favour the strengthening of European foreign policy, step by step, from the Balkans, to Europe's "near abroad" and then beyond. In this area, however, the

[159] http://www.europarl.eu.int/europe2004/textes/verbatim_021220.htm

> lead responsibility should remain with the Council of Foreign Ministers. Britain cannot agree to the communitisation of defence or foreign policy. It is not practical or right in principle. Foreign policy can only be built by gathering a consensus among the Member States who possess the resources necessary to conduct it - the diplomatic skills, the bulk of aid budgets, and of course the armed forces.
>
> The powers of the High Representative should, however, be strengthened. He or she should chair the Foreign Ministers' Council, have an independent right of initiative, have control over a bigger budget, be able to strengthen his resources by seconding national diplomats to the Secretariat staff and be represented overseas in common European, not just Commission overseas delegations.
>
> There is an overlap between the work of the High Representative and the External Relations Commissioner. Some have proposed that in future this role should be occupied by a single person wearing a double hat. As Javier Solana has said, this would raise practical problems that we need to debate. My point is simply this. Double hatting cannot be a way, through the back door, of communitising the CFSP. The High Representative's accountability to the Member States, and their responsibility for foreign policy, must remain clear cut. [160]

Peter Hain told the European Scrutiny Committee in November 2002 that a stronger CFSP was needed to enable the EU to intervene more effectively "in resolving matters in our own back yard, such as the Balkans".[161] He emphasized the role of the European Council in decision-making in this area and the need to reform the current six-monthly rotating Presidency, with an "agenda being a matter of an individual Presidency's fads".[162]

He continued:

> So we want to see that position strengthened, given more resources and so on. There is then a question as to how you link it into the Chris Patten figure, the External Relations Commissioner of the Commission, who has all the money and has the important responsibilities for aid and development and association agreements with other countries, and so on. So it is a question of how you co-ordinate those two roles. We are not in favour of a straight merging or a Commission takeover because that would effectively communitise foreign policy. So getting a much more effective CFSP for the European Union will involve strengthening that figure, strengthening the European Council, but it remaining essentially an intergovernmental matter but doing it in a way so that - because foreign policy is a continuum between the hard end, being the military dimension,

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160 "A clear course for Europe", 28 November 2002, FCO website at: http://www.pm.gov.uk/output/page6709.asp

161 Minutes of Evidence to ESC, 20 November 2002, 16 December 2002, HC 103-I, at: http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/103-i/2112002.htm

162 Ibid

> and the soft end, being the aid and development dimension, as we have seen in Afghanistan, for example, only recently - there is a continuum and a continuous linkage between the different roles, but it being a matter ultimately for Member States to decide.[163]

8. Working Group VIII: defence

The Defence WG, chaired by Commissioner Michel Barnier, looked at the EU's defence remit and the credibility of the Union's defence policy. The steps taken by NATO to strengthen the relationship between the Alliance and the EU's security and defence role are explored in Library Research Paper 03/05, *NATO: the Prague Summit and Beyond*, 16 January 2003. The WG Final Report also provides a useful synopsis of developments in CFSP and ESDP since the Cologne European Council in June 1999.

The Barnier Report,[164] presented to the Convention plenary on 20 December 2002, contained two parts. The first looked at the strengths and weaknesses of developments in the European Security and Defence Policy (ESDP) over the last three years, at particular issues and situations, and recent challenges. The second part set out the Group's recommendations, in which it stated that the aim in framing the Union's defence policy "is not to transform the European Union into a military alliance but to provide it with the instruments it needs to defend its objectives and its values and to contribute to peace and stability in the world in conformity with the principles of the United Nations Charter and international law".[165] The Group thought the Petersberg tasks, originally defined as low-level peacekeeping and humanitarian operations, should be expanded to include specific reference to other tasks involving the use of military resources:

- conflict prevention (early warning, confidence and security building measures);
- joint disarmament operations (weapons destruction and arms control programmes);
- military advice and assistance (e.g. cooperation with military forces of a third country or regional/subregional organisation on developing democratically accountable armed forces, by exchange of good practices through training measures etc);
- post-conflict stabilisation;
- support for a third country's authorities, at their request, in combating terrorism

The Group agreed that crisis management operations needed coherence and efficiency. To ensure this, Article 25 of the Nice Treaty should be used, allowing the Council to

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[163] Ibid
[164] CONV 461/02, 16 December 2002, at: http://register.consilium.eu.int/pdf/en/02/cv00/00461en2.pdf
[165] Ibid para 50

delegate political control and strategic direction of an operation to the Political and Security Committee (PSC). The role of the High Representative (HR) should be enhanced by a right to initiate proposals in crisis management issues, although the decision to start an operation would still be taken by the Council (thus keeping it intergovernmental). The HR should ensure coherence between civilian and military aspects of an operation under the Council's authority and be able to take decisions in urgent cases.

There was majority support in the Group for establishing a "modest fund,"[166] based on Member States' contributions, for the preparatory phase of an intended military operation. This would be governed by a financial regulation and subject to political and financial scrutiny.

The majority also supported a relaxation of the rule of unanimity in defence-related matters and "relying more on consent and a culture of solidarity among Member States",[167] given the problems of achieving unanimity with enlargement (and the possible need for more flexibility). An operation would be launched by unanimous agreement but the rules on constructive abstention would apply.[168] Abstaining States would not participate in implementation decisions but could join later. They could participate in decisions having political consequences or ones which would change the original terms of reference of the mission.[169]

The WG noted the diversity among the Member States of capabilities and willingness actively to commit themselves even to peacemaking tasks.[170] Some members of the Group suggested applying enhanced cooperation to defence[171] and relaxing the conditions for the use of this arrangement by making it subject to QMV.

The Group discussed the response needed to the new threat of terrorism and concluded that the situation facing the EU had evolved since the ESDP's early days. This required in response the "combined use of the whole range of instruments available today to the Union, and in particular the Member States (military resources, intelligence, police and judicial cooperation, civil protection, etc.)".[172] There was "broad support" for a "solidarity clause" requiring "recourse to all of the Union's instruments for the protection

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166 CONV 461/02, para 52(d)

167 Ibid para 53

168 Member States not wishing to support an operation actively, in particular those not wishing to contribute militarily, would be encouraged not to oppose the operation, but to abstain.

169 CONV 461/02, para 53

170 Ibid para 54

171 Arrangements set out in the Treaty whereby a group of Member States pursue a particular policy among themselves. Defence cooperation has so far been excluded from this kind of arrangement.

172 CONV 461/02 para 56

of the civilian population and democratic institutions".[173] This would be enshrined in Article 1 of the constitutional treaty and:

> … would enable all the instruments available to the Union to be mobilised (including the military resources and the structures originally set up for the Petersberg tasks, as well as police and judicial cooperation, civil protection, etc.) in actions undertaken within the territory of the Union aimed, in particular, at averting the terrorist threat, protecting the civilian population and democratic institutions and assisting a Member State within its territory in dealing with the implications of a possible terrorist attack. It would therefore be a question of taking advantage of the interdisciplinary character of the Union's approach, in order both to respond effectively to new challenges and to indicate clearly what distinguishes the European Union from a military alliance.[174]

It would not entail an obligation to provide military assistance and would apply to threats from non-State entities, such as terrorists.[175] The Group was generally opposed to a mutual defence commitment, as in Article 5 of the NATO Treaty, which treats an attack on one Member as an attack on all Members. The UK and the neutral states, Austria, Finland, Ireland and Sweden, have opposed this in a future EU treaty, although some thought such an arrangement could be agreed among willing Member States as a form of "closer cooperation".[176] The Group envisaged a pooling of specialized civilian or military civil protection units in joint training or intervention coordination programmes to make intervention in humanitarian disasters more effective.[177]

In considering the development of capabilities, the Group also looked at the possible creation of a European arms agency, and there was support for the establishment of an intergovernmental European Armaments and Strategic Research Agency. The Agency would promote a policy of harmonised procurement by the Member States and support research into defence technology, including military space systems. It would strengthen the industrial and technological base of the defence sector.[178]

There was support for strengthening the Union's military capabilities regarding Member States' commitments to the Petersberg tasks[179] and deeper commitments entered into via "closer cooperation" arrangements.[180] Participating States could "harmonise their military

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[173] CONV 461/02 para 56-7
[174] Ibid para 57
[175] Ibid para 58
[176] Ibid para 63
[177] Ibid para 59
[178] The organisation OCCAR, which is a joint procurement management agency set up by the UK, France, Germany and Italy, has been regarded as a potential vehicle through which a European armaments agency could be established.
[179] Peace-keeping and humanitarian operations
[180] CONV 461/02, para 66. "Closer cooperation" describes an arrangement entered into by a small group of Member States, with the approval of the Council. Under the present treaties, it does not apply in the area of defence.

requirements, share their capabilities and resources and ensure some specialisation of their defence efforts".[181] A mechanism, probably entrusted to the Armaments Agency, was needed to evaluate and improve the ways Member States fulfilled their commitments. This could examine, for example, the proportion of the defence budget to GNP, the proportion of equipment and research expenditure in the defence budget and force preparedness.[182] There was "broad support" in the Group for a Council configuration of the Member States' Defence Ministers which would monitor implementation of Member States' commitments in this area and "adapt the Union's capability objectives to developments in requirements and the international situation". The head of the Agency would report to this Defence Council annually on the development of military capabilities in the Union.[183]

The Group considered the institutional framework for the ESDP, concluding that existing structures needed to be adapted for greater coherence and efficiency. This could be achieved via a political figure in the Council to direct EU action and coordinate Member States' defence efforts. The Group thought that the CFSP High Representative should be given responsibility for Union action in the area of ESDP.[184]

The Report briefly considered the problem of parliamentary scrutiny, suggesting that regular meetings of the relevant committees of national parliaments should be organized, to ensure better exchanges of information and more effective political scrutiny.

Comment

Peter Hain commented in the Plenary debate on 20 December 2002:

> On defence, I strongly support Michel Barnier's report and his call for increased cooperation on capabilities development. We can only back up our foreign policy and be a truly global force, if we have the physical means, the equipment and the manpower. That means more financial resources, as he implied. I welcome the proposal for a solidarity clause to combat terrorism, but the European Union should not be in the business of setting out a territorial defence guarantee, or importing one by reinforced cooperation among some Western European Union member states. We should focus our energies and resources on the common foreign and security policy and the European security and defence policy challenges we face, not duplicate what NATO offers those partners who wish to be part of the collective defence alliance.

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[181] CONV 461/02 para 66

[182] Ibid para 67

[183] In order to support the Helsinki Headline Goal, the EU Capabilities Commitment Conference in November 2000 established a capability dialogue between Member States. One of the conclusions of this process has been the development of the European Capabilities Action Plan (ECAP) aimed at addressing capability shortfalls and identifying specific commitments to the EU Rapid Reaction Force.

[184] CONV 461, para 71

> On operations, the High Representative should have a right of initiative and a stronger role in CFSP generally. Nice set out carefully his role, that of the Council and the Political and Security Committee, and the vital business of conducting military operations where the lives of European Union nationals are at stake. It is essential that Member States, through the Political and Security Committee, retain control of the operations, and that the military chain of command is respected.
>
> In conclusion, two good reports, but greater clarity is needed before we can finally get an agreement on every detail.

Later in the debate, in response to suggestions that the proposals were not ambitious enough, Mr Hain said:

> I would like to be very frank. This is at the limits of our ambition. We are dealing here with issues of national sovereignty; we are dealing here with governments. There are only a few governments who commit any soldiers, and I will not list them for you, but you know who they are. We are not going to continue to do that, we will not do that, unless we have a decisive say in it. That is the reality of the situation, I think it is very important that, when endorsing Jean-Luc Duhaene report, we understand the realities of power here. If we want a common foreign security policy it has to be serious. It cannot be on the basis of the European Parliament passing a resolution which we all think is great but which actually is not implementable. I very much stress that this is at the limits of our ambition: we have got to make it work and get the detail right.[185]

He also ruled out the use of QMV for defence matters:

> We would not want to see QMV used for an ESDP operation: only national governments have the right to commit their armed forces where they might risk their lives. That is an important point. This links back to foreign policy because, as Alfonso Dastis pointed out, foreign policy without soldiers is not ultimately an effective and strong foreign policy. So I do not think we should go any further on QMV at the moment, but we should be ready to use the qualified majority voting we have got, on implementation and so on. We should use this new Treaty provision to allow flexibility of evolution in getting a more effective European role on the world stage.[186]

The British Government has insisted that EU defence policy should be complementary to NATO.[187] The Prime Minister said in Cardiff:

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185 http://www.europarl.eu.int/europe2004/textes/verbatim_021220.htm

186 Ibid

187 Geoff Hoon: the Government's (and the EU's) policy is "that NATO remains the basis for the collective defence of its members," HC Deb 31 October 2002 c 881W

[…] on foreign policy and defence, Europe must be able to speak more effectively, co-ordinate more effectively and act more effectively. This is not only a matter of institutional structure. It is also a matter of will and capability. In Kosovo, though it was a crisis on the doorstep of the EU, 85% of the military assets were American. True, we are now making the peace work; but the blunt fact is that without US participation, the rescue of Kosovo would never have happened. In the Middle East Javier Solana has made a big impact in enlarging our role, but it still does not match the vast amount of money we contribute.

Let me deal with one issue head-on. When it comes to the aftermath of September 11th or Iraq and WMD, the collective European voice is at times hesitant.

In reality Europe knows the importance of the transatlantic alliance. As the NATO Summit showed it remains the bedrock of our security. Even if the existing members of the EU were ambivalent about it - which they're not - the new accession countries are utterly firm. They want the alliance to remain. Period.

To achieve a unified European foreign policy, we need to decide what we are unifying around. In matters of defence and security, they are so fundamental to a nation's sense of itself, there is no institutional fix that can overcome a genuine difference of view.

The essence of unity, in my view, is to regard Europe as it grows in power, as a partner with the United States; not either its servant or its rival. In a sense the United Nations Security Council process over Iraq, involving France and Britain in different ways, showed how that partnership can work. And, as it did in that instance, it requires the United States to take into account of Europe as well as Europe to take account of the United States.

But the orientation of Europe toward the United States is absolutely at the core of whether Europe can become effective in foreign and security policy. We need to be clear about where we stand. I know some European colleagues think I am being unnecessarily difficult over European defence and its relations with NATO. But believe me, unless it is clear from the outset it is complementary to NATO, working with it, adding to our defence capabilities, not substituting Europe for NATO, then it will never work or fulfil its potential.
[…]
I am ambitious for European defence. I do not want to limit Europe's security ambitions to low level peacekeeping. We need to resolve the outstanding issues on ESDP; and we are woefully short of the necessary defence capabilities - and it is that widening gap in capabilities that is the central issue Europe must address.

Again we need more Europe, not less. We need new decision making methods to get better value for money out of European defence budgets: strong peer review mechanisms; a European Defence Capability Development Agency, responsible to and run by the Member States, charged with identifying how capability gaps

> need to be filled and taking forward procurement projects to fill them; and further moves towards more open defence procurement to save on costly national protectionism.[188]

Angus Robertson of the SNP asked the Government about parliamentary scrutiny and Mr Hain acknowledged that the provision of ESDP documentation to the Committee had proved problematic. The FCO was trying to "marry together the way we consult Parliament during NATO operations and the way in which we provide European Union documents to parliaments, which is proving all the more complicated by the fact that some European Union documents to an ESDP operation may originate elsewhere".[189] These issues would be for the Ministers for Europe and for the Armed Forces to clarify.

The European Scrutiny Committee considered the problem of parliamentary scrutiny of the ESDP in its June 2002 Report:

> 147. We regard collective scrutiny of ESDP as essential. We agree with the Government that, since any decision within ESDP to deploy military force rests with national governments, 'the primary scrutiny role should also rest with national parliaments', who could carry out that scrutiny both individually and collectively.[190] The Government rules out the WEU Assembly as not appropriate to scrutinise ESDP.[191] A second Chamber with a variety of roles would not necessarily contain defence and foreign affairs specialists. In this subject area we see no reason for EP participation. We support the proposal for regular meetings of members of the defence, foreign affairs and European affairs committees of national parliaments to scrutinise ESDP.[192]

9. Working Group IX: simplification

Making the legislation process and legislative instruments more accessible and transparent has been discussed at the last two IGCs and has been the subject of a number of reports by the European University Institute in Florence.[193] Some simplification of legislation has been achieved by consolidating the original instrument with subsequent amendments (vertical) and combining several instruments dealing with one issue into one text (horizontal). Obsolete instruments have been repealed. The discussion of Treaty simplification has followed on from that of simplifying legislation. The Amsterdam

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188 "A clear course for Europe", 28 November 2002, FCO website at: http://www.pm.gov.uk/output/page6709.asp

189 "A clear course for Europe", 28 November 2002

190 House of Lords, 11th Report Select Committee on the European Union, 2001-02, HL Paper 71 (II), *The European policy on security and defence*

191 Letter from Baroness Scotland to Lord Jopling, Chairman of Sub-Committee C, Select Committee on the European Union, House of Lords, 10 May 2001

192 Para.147, ESC 33rd Report, at: http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-xxxiii/15209.htm#n263

193 The Institute's publications can be found on its website at http://www.iue.it/RSCAS/

Treaty recast and renumbered the TEU and the TEC, repealing all obsolete Articles, and Declaration 41 (annexed to Amsterdam) called for the process to continue "as speedily as possible with the aim of drafting a consolidation of all the relevant Treaties".

WG IX, chaired by Giuliano Amato, debated its Final Report[194] on 5 December 2002, making the following proposals and recommendations on legal instruments:

- retention of the five classic instruments provided for in Article 249 TEC (Regulations, Directives, Decisions, Recommendations and Opinions), but with the first two renamed 'EU laws' and 'EU framework laws'.

- in Title VI (police and judicial co-operation in criminal matters), renaming 'framework decisions' as 'EU framework laws' and 'decisions' as 'EU laws', and abolishing the 'convention' instrument. No mention is made of 'common positions' adopted under Title VI

- in Title V (CFSP), renaming 'common strategies', 'joint actions' and 'common positions' all as 'decisions', but without affecting the requirement for the first type, common strategies, to be agreed by unanimity and the other two by QMV.

- for 'non-standard' acts, such as 'resolutions', 'conclusions', 'declarations' etc, "simplification should be effected with caution in order to safeguard the flexibility required in the use of such acts".

- the establishment of a threefold hierarchy of: 1. 'legislative acts' (i.e. EU laws and EU framework laws, generally decided by co-decision); 2. 'delegated acts', whereby the Commission could (usually) make regulations under authority given by a legislative act; 3. 'implementing acts', made by Member States or, at the level of the Union, by the Commission.

On legislative procedures, the group recommended:

- changing to QMV those instances where the Council acts by unanimity in codecision.[195]

- increasing the flexibility in the composition of the Conciliation Committee (so as to avoid having a committee of 50 (25 on each side) after enlargement)

- renaming 'co-decision' (possibly as 'legislative procedure'), and making it "the general rule for the adoption of legislative acts".

- abolishing the four examples of co-operation procedure by moving multilateral economic surveillance (Art. 99(3) and (4) TEC) and the prohibition of privileged access by Community and national public authorities to financial institutions (Article 102(2) TEC) to co-decision; and the prohibition of central banks from lending to Community and national public authorities (Article 103(2) TEC) and the harmonisation of coins (Article 106(2) TEC) to consultation.

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[194] CONV 424/02, 29 November 2002

[195] There are three such Treaty bases: Arts. 42, 47 and 151 TEC.

- restricting the assent procedure to the ratification of international agreements and changing other assent Treaty bases to codecision and QMV: Structural and Cohesion Fund rules (Article 161 TEC); amending ESCB and ECB statutes (Article 107(5)TEC); and conferring tasks on the ECB for supervision of credit and other financial institutions (Article 105(6)).

- enhancing inter-institutional discussions on future legislation planning.

On budgetary procedure, the group recommended:

- a Treaty base providing for a medium-term financial planning mechanism incorporating overall budgetary principles and annual resources and expenditure ceilings, within which the annual budget procedure would operate, with the Council having the last word on revenue

- a single procedure for compulsory and non-compulsory expenditure, with the EP having the last word on all expenditure, in accordance with the procedures which currently apply to non-compulsory expenditure

Comment

This is not an area that has attracted a great deal of UK comment so far, perhaps because the general premise is uncontroversial. However, some details of the general proposal, extending QMV to all or most remaining unanimity procedures, for example, are likely to be resisted by the British Government. The Government generally supports Treaty simplification and does not rule out an extension of QMV in areas where it will further British policy. They would like to see obsolete Treaty articles deleted, but have been reserved about simplification proposals which might risk modifying the substance of the Treaty or altering the institutional balance. In an intervention in the Plenary debate on the Report on 5 December 2002, Mr Hain commended the Report, with some reservations:

> Citizens must be able to understand a democratic system, if they are to exercise their powers and rights effectively. So we must simplify the acts and procedures we use to make European law. As we do so, we need to recognise that what matters is the result. Is our legislation better? Have we improved transparency? Have we improved accountability and have we respected the rights of Member States on issues central to sovereignty?
>
> Much of this report reflects those principles. I congratulate you, Mr Amato, and your group for its achievements. I support your promotion of codecision and qualified majority voting as general principles for legislation. But […] the constitutional text needs to note some very important exceptions. I could not support the extension of qualified majority voting to cover social security. In Britain we have sought to link the provision of social security to the taxation system as the best way of promoting prosperity and helping people move out of unemployment, from welfare to work, without falling into the poverty trap. In our system provision for social security is part of taxation. I cannot agree with qualified majority voting for taxation. How could we consider that candidate

> countries could win the referenda of their own peoples if they were handing over taxation to us in Brussels? I cannot imagine anybody in the Convention seriously arguing that point of view and expecting the candidate countries to win their referenda to join us in Europe, as we want them to do.
>
> Similarly, as we consider using codecision in place of other procedures, we must examine each case on its own merits. It will not be appropriate for all our articles. Discussions in Mr Hänsch's group, for example, showed no consensus for changing the procedures on broad economic policy guidelines. There are other areas of high political sensitivity, such as monetary union, the role of the European Central Bank in financial regulation, indirect and other taxes, the common agricultural policy and state aids and competition, where we will have to live with some complexity both to reach agreement and to deliver results.
>
> I commend the group's aim to improve the quality of legislation in its proposals for impact assessments. On the budget we currently have a procedure that, although complex, has been successful in delivering budgetary discipline. Any new system will need to be as successful. I am not yet convinced that the report has found the right formula. We should be looking to imbed Council control of the ceilings within the financial perspective, for those ceilings to be agreed by unanimity, and to devise adequate rules to deal with any failure to agree a new financial perspective.
>
> In conclusion, this report is a key building block for our text. My comments today are part of an initial reaction to a complex and far-reaching piece of work. We need to know more about delegated acts. How might these be used? Would they simplify matters? On the budget, I do not understand the principle of "necessary means". As it is set out, it could mark a fundamental change in the nature of the Union's resources, undermining the ability of Member States to make the final decision about their contributions. Was this really the intention? I have further comments and would be grateful for an assurance from you, Mr Amato, that we will all be given a chance to consider the proposals for simplification in detail over the coming months. We should not rush into final decisions until we have done that.[196]

According to Michael Ancram, the Opposition supports "the aim of clarifying and simplifying the treaties, but not when that entails transferring even more powers to the European Union".[197] He has proposed reducing the various decision-making procedures to "binding laws" and "non-binding recommendations". The former would deal with single market rules and other "essential areas", the latter with all other matters.[198] The Opposition has opposed moves to increase QMV.

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196 5 December 2002, at: http://www.europarl.eu.int/europe2004/textes/verbatim_021205.htm
197 HC Deb 2 December 2002 c 688
198 Ibid

Lord Tomlinson, a UK alternate on the Convention, commented to the Standing Committee on the Convention on the EP proposal to abolish the distinction between compulsory and non-compulsory expenditure:

> In my view, that is impossible. I have made it clear that it would be impossible for any of the national Parliaments to accept that, unless absolute commitments were made in relation to budgetary discipline, agricultural reform and the continuation of inter-institutional agreements leading to financial perspectives that limit the impact of agriculture within the overall budget.[199]

10. Working Group X: security, justice and freedom

The EU's cooperation in an area of "freedom, security and justice" (corresponding roughly to matters within the responsibility of the Home Office in the UK) was, until the Treaty of Amsterdam, split between the intergovernmental Third Pillar of "justice and home affairs", the Schengen Agreement by which 13 Member States, Norway and Iceland gradually abolished border checks, and certain Treaty articles relating to freedom of movement.[200] Amsterdam sought to tackle the institutional difficulties that had arisen from this mixed arrangement by incorporating the Schengen Agreement into the Treaty, and by introducing a new Title IV in the TEC on the free movement of persons, asylum and immigration, which would establish mechanisms and in some cases a timetable for the "progressive" creation of "an area of freedom, security and justice". The rest of the old Third Pillar, a revised Title VI, police and judicial cooperation, would remain intergovernmental, but would move closer to Community arrangements, thus gradually eroding the difference between the two pillars. The European Council in Tampere in October 1999 set out an ambitious political agenda to develop the Amsterdam objectives and these were further developed in the Treaty of Nice. The Seville European Council in June 2002 agreed to develop an integrated system of external border control management to help prevent illegal immigration and the trafficking of persons, arms and drugs.

The Group, chaired by the former Irish Prime Minister, John Bruton, presented its Final Report to the Plenary on 5-6 December 2002.[201] It acknowledged that the events of 11 September 2001 and continuing cross-border crime had underlined the need to look more closely at immigration, asylum and anti-terrorist provisions in the Member States, and had also provided an impetus for more cooperation at EU level. The Group "broadly accepted" two "golden rules", on which their Report was based, namely:

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199 Standing Committee on the Convention 23 October 2002 c 008 at: http://pubs1.tso.parliament.uk/pa/cm200102/cmstand/conven/st021023/21023s01.htm

200 Old Articles 7a and 100c TEC, for example

201 CONV 426/02, 2 December 2002

- A common general legal framework for the current third pillar matters with all provisions concerning an area of freedom, security and justice coming under a single Treaty title. This would mean subsuming police and judicial cooperation on criminal matters into the First Pillar;

- A separation between "legislative" and "operational" tasks, the former largely aligned with the general procedures of EC law and the latter a reinforced coordination of operational collaboration at EU level.[202]

In view of the problems encountered in attempts to fulfil the Tampere objectives, the Group recommended QMV for legislation on asylum, refugees and displaced persons, to replace unanimity, which they identified as the cause of much delay. They thought that a common immigration policy should be an objective of the future constitutional treaty, with a legal base for the Union to take incentive and support measures to help Member States with the integration of legal third country nationals. Provisions for a common visa policy should be brought into a single provision and be subject to QMV. Current Treaty provisions on an integrated system of border management in Article 62(2)(a) should be amended to provide a legal base for measures to give effect to this system.

Overall, the Group recommended providing legal bases for a common asylum system, a common policy on immigration, the integrated system of border management, the principle of mutual recognition of judicial decisions and crime prevention.[203]

The Group thought the approximation of certain areas of criminal law might include minimum rules on elements of criminal acts and penalties for crimes that were particularly serious and had a cross-border dimension, or that were directed against a shared European interest (such as the protection of the Union's financial interests or counterfeiting the Euro).[204]

[202] CONV 426/02 pp 2-3
[203] Ibid pp 4,5,6,8,12
[204] Ibid pp 9-11

Given the difficulties experienced in adopting Conventions (i.e. treaties) in Third Pillar areas, the Group recommended abolishing the instrument of the Convention and replacing the current Framework Decisions, Decisions and Common Positions with Regulations, Directives and Decisions (i.e. the TEC legislative instruments). The Europol Convention would thereby be converted to a Europol Regulation, which could be more easily amended if the need arose.[205] Eurojust should have a Treaty legal base to allow for the development of its tasks and powers, which may include the initiation and coordination of criminal prosecutions, facilitating judicial cooperation and possibly the supervision of Europol investigative and operational activities (the latter with reservations from some in the Group).[206]

Another radical proposal was the extension of QMV and co-decision to include legislation on asylum and immigration, measures of judicial cooperation between Member State authorities (except operational powers of national police forces), criminal matters with a cross-border dimension or directed against the Union's interests, and common minimal standards for the protection of individuals' rights in criminal procedures.[207]

The Group also considered limiting the Member States' right of initiative (shared with the Commission under Article 67 TEC) in Title IV TEC and Title VI TEU by insisting on a threshold of one quarter of Member States for an initiative to be admissible, thus ensuring that the Member State initiatives responded to a general, and not just a national, concern.

The Group agreed on the need for a more efficient way of prosecuting offences against the Union's financial interests, although there was a split over the establishment of a post of European Public Prosecutor for this purpose.[208]

To monitor the implementation by Member States of Third Pillar measures, the Group recommended more effective processes, such as mutual evaluation or "peer review", and giving the Commission competence to bring infraction proceedings before the ECJ in Third Pillar areas.[209] The Group also called for extensive ECJ jurisdiction over current Third Pillar matters.[210]

In a section on the involvement of national parliaments, the Group made a number of proposals:

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[205] CONV 426/02 p 8

[206] *Eurojust* is the European Judicial Cooperation Unit, composed of national prosecutors, magistrates or police officers of equivalent competence. It was set up in accordance with the Tampere European Council Conclusions in October 1999 and given Treaty basis in Treaty of Nice Articles 29 and 31.

[207] CONV 426/02 pp 4,5,7,13-14

[208] Ibid p 20

[209] Ibid p 21

[210] Ibid pp 24-5

- involving national parliaments in the definition by the European Council of the strategic guidelines and priorities for European criminal justice policy, which would involve "substantive debates in national parliaments";

- regular inter-parliamentary conferences on EU policies in this area (especially by joint meetings of EU Home Affairs Committees);

- use of the "subsidiarity early warning mechanism" for certain aspects of subsidiarity in criminal law matters (i.e. where it was questionable whether a crime had a cross-border dimension and was of a "serious nature");

- recognising the continuing role for national legislation through the "exclusive use of Directives" in the approximation of substantive criminal law;

- involving national parliaments in "peer review" mechanisms;

- involving national parliaments in the consideration of Europol's annual reports.[211]

Comment

Peter Hain told the Commons in December 2002 that crime and immigration were "at the top of people's agendas".[212] He continued:

> Tackling those issues is partly a domestic policy matter for national Governments, but there is also a strong European dimension. Moving away from the unanimity rule in some areas of justice and home affairs will enable decisions on such crucial matters as crime, drug dealing, asylum and illegal immigration, for example, to be made more easily, and action to be taken more speedily, to make all of us safer and more secure.
>
> Lifting our veto and agreeing to such common EU decision making on border security measures or a common arrest warrant is not selling out British interests. Quite the contrary, it is common sense. However, we have said firmly and repeatedly that we will not tolerate attempts to take fundamental decisions, for example about taxation and social security, out of the hands of national Governments. Such a move would clearly not be in Britain's interests.[213]

David Heathcoat-Amory, the UK representative on the WG, told the Commons that he was the "only dissident", the "only person who will oppose the recommendations".[214] He warned that if the WG's recommendations were incorporated into a future EU

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[211] CONV 426/02 pp 22-3
[212] HC Deb 2 December 2002 c 682
[213] Ibid c 682
[214] Ibid c 701

constitution, matters that were "of great concern to our constituents: penalties, sentencing, criminal justice procedures, rules of evidence, and whether this country should adopt double jeopardy" would be decided at EU level by QMV.[215] He continued:

> These matters are at the heart of the nation state and of parliamentary democracy; they are about the coercive powers of the state and they raise very sensitive issues of accountability and control. They are about our common law traditions, which differ from those on the continent. Yet it is now proposed that these decisions be transferred upwards to the European Union and centralised there. What is so damaging is that the convention was set up to try to close the gap between the institutions of the European Union and the people of Europe. The European Union is widely regarded as remote and technocratic, but if we remove decisions about criminal justice, sentencing and immigration further away from the electors and from this House, that gap will widen even further, and the democratic deficit will be uncontrollable. Of course, that will play into the hands of the extreme right. Why have elections and change Governments here if it makes not the slightest difference to criminal justice, immigration policy or whatever?[216]

11. Working Group XI: Social Europe

A European social policy began to emerge at the Paris European Council in 1972 and the Commission drew up an action programme which built on three themes: full employment in the Community, an improvement in living and working conditions for labour and an increase in the participation of social partners in the Community's economic decision-making. Several directives in the fields of occupational safety and health and labour law were subsequently adopted. The TEU included a protocol on social policy (from which the Conservative British Government had obtained an "opt-out" during the Maastricht negotiations) and the Amsterdam Treaty provided a new title on employment coordination, as well as a new revised "Social Chapter", which the UK (under the then recently elected Labour Government) adopted.

The Working Group on Social Europe presented its Final Report to the Plenary on 7 February.[217] Its main conclusions were:

1. It welcomed the reference to human dignity in Article 2 of the preliminary draft Constitutional Treaty and recommended the inclusion of the values of social justice, solidarity and equality, in particular between men and women.

2. Article 3 of the constitutional treaty should include in the social objectives of the Union: the promotion of: full employment, social justice, social peace, sustainable development, economic, social and territorial cohesion, social market economy,

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[215] HC Deb 2 December 2002 c 701
[216] Ibid
[217] CONV 516/1/03, 4 February 2003 at http://register.consilium.eu.int/pdf/en/03/cv00/cv00516-re01en03.pdf

quality of work, lifelong learning, social inclusion, a high degree of social protection, equality between men and women, children's rights, a high level of public health and efficient and high quality social services and services of general interest.

3. The existing competences of the Union in the social field were adequate, but the Group suggested these could be clarified, and that action at EU level should focus on issues related to the functioning of the single market and/or areas with a considerable cross-border impact.

4. The Group wanted specific competence extensions in the area of public health, along with a possible re-drafting of Article 16 TEC to enable EC/EU legislation in the field of services of general interest.

5. The Group broadly supported inclusion in the Treaty of the open method of coordination, so as to clarify the procedures and respective roles of those involved, provided it could not be used to undermine existing Union or Member State competence.

6. The Group supported a streamlining of the various economic and social coordination processes, with the procedures formalised in the Treaty.

7. The Group agreed that the Nice compromise with respect to authorising the Council to unanimously seek a changeover into codecision and QMV for Article 137(d), (f) and (g) should be upheld in the future constitution, leaving 137(1)(c) subject to unanimity. A "strongly expressed minority opinion" was opposed to any automatic extension of QMV to social security and employment relations, while a majority of the Group could envisage moving towards a QMV system. The Group agreed that better clarification of the scope of Union action would facilitate general use of QMV. In this context, the scope and language of Article 137 could be updated and modernised. Most members of the Group wanted codecision with QMV to be applied to Articles 13 and 42 TEC

8. The Group recommended that the role of the social partners be recognised explicitly in the constitutional treaty, that adequate consultation provisions should be included and that the existing arrangements for negotiation of social agreements should be enhanced. Civil society organisations should also be given a role, especially in combating social exclusion.[218]

Comment

[218] Adapted from COMV 516/1/03

In the Plenary debate the subject of QMV was probably the most controversial. Peter Hain and the Irish European Affairs Minister, Dick Roche, were particularly firm in their resistance. Peter Hain did not want more labour regulations and he thought the current Article 16 TEC concerning services of general interest was adequate and should not be amended. The QMV provisions under the Nice Treaty ought to be given time to be put into practice. He drew particular attention to the situation in the UK:

> In Britain tax and social security are closely linked to make it easier to move from welfare to work, so we cannot accept any more QMV here. And the truth is that unanimity has not prevented Europe from adopting key social legislation. Nor has anybody provided any evidence that an additional extension of QMV will deliver more jobs or higher social standards.[219]

He thought that existing arrangements for unanimity in Article 42 TEC (social security measures relating to migrant workers) worked well and did not need to be changed. Article 13 TEC (allowing the Council by unanimity to take action to combat discrimination) had not been seriously discussed in the Group, and should not be transferred to QMV.[220] Mr Hain also rejected the Group's conclusion that measures under Article 137(1)(g) (minimum requirements on conditions of employment for third-country nationals legally residing in Community territory) were closely linked to Article 63(4) (measures defining the conditions under which third-country nationals resident in a member state may reside in other member states),[221] and should therefore be brought together under a new version of Article 63(4), using QMV and codecision.

The British Conservative MEP, Lord Stockton, agreed that QMV should not be extended, but that this should not preclude an extension of codecision. Timothy Kirkhope wanted a "sociable Europe" but not a "social" one and less EU intervention. He warned that attempts to further a social Europe would constrain national cultures and social agendas.[222]

V The devolved Legislatures and the Convention

The Laeken Declaration was silent on the matter of the role of regional authorities in the future European architecture. However, one of the eight Contact Groups established by the Convention looked at the topic of regions and local authorities in Europe. On 30 January 2003 the Contact Group of Regional and Local Authorities held a meeting attended by participants from the Committee of the Regions, European regional and local

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[219] Intervention by Peter Hain, Convention Plenary 6 February 2003 at: http://european-convention.eu.int/docs/speeches/7039.pdf

[220] If it were, provision of free bus passes to pensioners in the UK could in theory be threatened.

[221] The UK, Denmark and Ireland have an opt-out from this.

[222] There is a useful summary of the Plenary session on the European Policy Centre website at: http://www.theepc.be/europe/strand_one_detail.asp?STR_ID=1&REFID=1056&TWSEC=Convention%20Intelligence&TWDOSS=

authorities, the Congress of Local and Regional Authorities of Europe, and from individual regions and towns. Their aim was to take stock of the Convention's discussions and prepare for the Plenary on 7 February 2003, at which the regional and local dimension was debated.[223]. A Praesidium discussion paper on the regional dimension had also been submitted to Convention.[224]

In a separate initiative, a number of European regions and nations, including Scotland, have agreed three political declarations (Flanders, Liege and most recently, the Florence Declaration) on the contribution of the regions to the debate on the future of Europe.[225]

The European Scrutiny Committee thought the Convention should discuss the involvement of sub-Member State authorities in the EU.[226] The ESC noted the conclusions of the Commission (in its Governance White Paper)[227], the EP (in the Constitutional Affairs Committee Report)[228] and the Scottish Parliament's European Committee report in December 2001 on the subject of partners of the Union.[229] The Scottish Committee also set out its views in a *Report on the Future of Europe* in December 2002.[230]

The Westminster Committee concluded that it "would not support new rights which undermined the position of Member States by making sub-Member State authorities their competitors in the EU".[231] It emphasised that the EU should not intervene in the internal organisation of Member States and that there were "still unanswered questions about how the proposal for partner regions of the Union status might work in practice".[232]

Angus Robertson has criticised the Government for not raising the status of the devolved assemblies at the Conventions:

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[223] An account of the discussion can be found on the Europarl website at: http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+PRESS+BI-20030207-1+0+DOC+XML+V0//EN&L=EN&LEVEL=2&NAV=X&LSTDOC=N#SECTION1

[224] CONV 518/03 at http://register.consilium.eu.int/pdf/en/03/cv00/cv00518en03.pdf

[225] The Flanders Declaration can be accessed on the Scottish Executive website at: http://www.scotland.gov.uk/about/FCSD/ExtRel1/00014768/page613505512.aspx. The Liege Declaration can be found at: http://www.scotland.gov.uk/about/FCSD/ExtRel1/00014768/page1570566240.aspx.

[226] ESC 152-xxxiii-II, 2001-02, para 165 at http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-xxxiii/15210.htm#note298

[227] *European Governance: A White Paper*, COM(2001) 428 final, 25 July 2001 at:

[228] EP, 2001/2024 (INI), Lamassoure report (draft), p. 20

[229] European Committee 9th Report 13 December 2001, *Report on the Governance of the European Union and the Future of Europe: What Role for Scotland?* Volume 2 Evidence, Minutes and Official Report, SP Paper 466 Session 1 (2001) at: http://www.scottish.parliament.uk/official_report/cttee/europe-01/eur01-09-vol02-02.htm#02

[230] European Committee 6th Report 4 December 2002, *Report on the Future of Europe* SP Paper 705 Session 1 (2002) at http://www.scottish.parliament.uk/official_report/cttee/europe-02/eur02-06-01.htm

[231] ESC 152-xxxiii-II, 2001-02 Para 165 at: http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-xxxiii

[232] Ibid para 165

> Does [the Minister for Europe] acknowledge the disappointment of many in Scotland, Wales and Northern Ireland that the UK Government have never argued in the convention for the right of devolved legislatures or Executives to have direct access to the European Court of Justice? Does he not find it slightly inconsistent that the UK Government are arguing for greater transparency and democracy at EU level, which I am sure everyone supports, yet intergovernmental relations within the UK between the UK Government and the devolved Administrations are confidential and secret?[233]

Dr MacShane replied:

> The EU is an association of sovereign states and it is right that one state speaks for the constituent elements within it. There is the same problem in Spain and France. I think that the hon. Gentleman should park his nationalism and start speaking for Europe.[234]

The Secretary of State for Scotland, Helen Liddell, also replied to criticism from Mr Robertson, stating that the Scottish First Minister was "very much involved in the debate on the future of Europe" and "taking a leading role".[235] She maintained that Scotland benefited "much more from being part of the United Kingdom's representation in Europe" on the Convention and pointed out that the UK was "not just well represented by the Scottish Executive in Europe, but that a considerable number of the UK Ministers who represent us in Europe are Scottish".[236]

Peter Hain gave the Government's position on the regional dimension in the future European architecture in evidence to the ESC in November 2002:

> This is an important matter and it has not been easy to arrive at a settled position. The Secretary of State for Scotland with my agreement as Minister for Europe has established a working group with the devolved administrations to see whether there is a consensus in this area and in due course we will see whether there is. I think there are a number of principles that we can set out. One principle being advanced by some regions of Europe is an automatic right of access by regional institutions to the European Court of Justice and we are not keen on that and nor for that matter are the Scottish Executive[237] or the Welsh Cabinet. They are not interested in that idea. I think everybody recognises that European regions - which as I say includes nations - are playing a more and more important part in

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233 HC Deb 5 November 2002 c 140
234 Ibid
235 HC Deb 9 July 2002 c 728
236 Ibid
237 "The Scottish Executive's Deputy First Minister was not enthusiastic about direct access to the ECJ, on the practical grounds that a political process for remedying subsidiarity problems would be quicker", Para.166, ESC 33rd Report, at: http://www.publications.parliament.uk/pa/cm200102/cmselect/cmeuleg/152-xxxiii/15210.htm#n302

> the new Europe and we need to try and look ahead to see what future role might be played. Companies increasingly decide not to just to say invest in Britain but to invest in a particular region of Britain compared with a particular region of Germany or France according to the competitiveness and the opportunities there. Likewise as the world has got more global there is a growing assertion of local and regional identity and Europe needs to reflect that. Now whether that is achieved through giving a greater role to the Committee of the Regions is certainly one matter under consideration but if your Committee, Chairman, has any thoughts on that I would be interested. The Committee of the Regions has not been very influential. There is an oddity about it, also, that it contains both local authorities and European regions. I think it is important local government retains its influence into the European Union in its own right but whether that should always be the case that they sit together in the same body with the regions assuming much greater importance is an issue to be discussed.[238]

Gisela Stuart told the Standing Committee on the Convention:

> We in the Convention are keen to ensure that the mechanisms of regional devolution in each country are effective. We do not think that it would be right for the Convention to tell the Spaniards how to deal with Catalan, the Germans how to deal with the Länder, or the UK what its relationship with Scotland should be. Those decisions must be devolved.[239]

The Scottish Parliament debated the Convention in December 2002. The Deputy First Minister and Minister for Justice, Jim Wallace, introduced the debate, saying:

> We have sought to play a full part in the future of Europe debate. We are consulted on and contribute to the United Kingdom's position at the convention and I am pleased with the constructive working relationship that we have enjoyed in the life of the debate so far.[240]

During the debate there was some disagreement, particularly from SNP members, over the role of Scottish Ministers in promoting Scottish interests in Europe generally and at the Convention in particular.

VI Conclusion

The Convention has an ambitious agenda and its members are by no means all supporters of the process or its objectives. Some, such as the Dane, Jens-Peter Bonde, are perhaps

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[238] Uncorrected evidence to ESC Qu. 46, 20 November 20023 at: http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/uc103/uc10302.htm

[239] Standing Committee on the Convention 23 October 2002 c 040 at: http://pubs1.tso.parliament.uk/pa/cm200102/cmstand/conven/st021023/21023s01.htm

[240] SP OR 5 December 2002, col 16141, at: http://www.scottish.parliament.uk/official_report/session-02/Col16141

trying to apply the brakes on further moves towards European integration, while others, such as Andrew Duff, are more enthusiastic.

Among the UK parliamentary representatives, there is a wide divergence of views, which they acknowledge as positive.[241] David Heathcoat-Amory expressed criticism of the work of the Convention in July 2002:

> I hope that the Convention will start to make the necessary hard choices. To date, there has been a slight tendency to reel off generalised demands, usually for more powers for everyone. All the existing institutions and vested interests have made eloquent cases for more powers for themselves. The European Commission wants more powers in the field of foreign policy, security, economic co-ordination and even taxation. The European Parliament wants more powers. Most member states want to retain a degree of intergovernmental decision-making. Therefore, the Council of Ministers must retain or extend its status. There is also a general agreement that the Parliaments of member states must be brought more into decision-making. That cannot all happen at once. Something must give and choices are necessary.
>
> I arrived at the Convention concerned about the democratic deficit. After five months I am truly alarmed, partly because I do not think that the matter is being addressed seriously enough. There are certain basic requirements for any system of government. Decisions should be taken by people who are visibly accountable. It is also important that the people affected by those decisions—the public—should know what is going on and should be able to influence the outcome by making representations. Indeed, in extreme cases when enough people disagree, they must be able to change the direction of policy and remove the people responsible.[242]

Gisela Stuart and Lord Maclennan were more positive about the work of the Convention and its progress. Lord Maclennan thought the Convention was "working well" and noted: "There have been several examples of the processes being adapted to take account of suggestions made by rank and file members and alternates, such as myself".[243]

At the October 2002 meeting of the Standing Committee Mr Heathcoat-Amory was still "disturbed by the direction of events, as they overturn several of what I believed were established British cross-party views".[244] He pointed to agreement by the Convention on a single EU legal personality, a single institutional structure, EU responsibility for

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[241] See interventions by Gisela Stuart and David Heathcoat-Amory at the Standing Committee on the Convention, 16 July 2002, c 017 at: http://pubs1.tso.parliament.uk/pa/cm200102/cmstand/conven/st020716/20716s10.htm

[242] David Heathcoat-Amory, Standing Committee on the Convention, 16 July 2002 cc 005-6, at: http://pubs1.tso.parliament.uk/pa/cm200102/cmstand/conven/st020716/20716s10.htm

[243] Lord Maclennan, Ibid c 008

[244] Standing Committee on the Convention, 23 October 2002 c 006 at: http://pubs1.tso.parliament.uk/pa/cm200102/cmstand/conven/st021023/21023s01.htm

negotiating agreements in intergovernmental areas, a legally binding Charter of Fundamental Rights and EU accession to the ECHR. He then commented:

> What is surprising is that the Government recently resisted all those developments. They resisted a written constitution, strongly supported the intergovernmental pillars, and opposed the European Union's having a legal personality. They also promised us that the charter of fundamental rights of the European Union would not be made legally binding.[245]

The Convention's mandate is not itself to adopt a constitution for Europe, but to offer ideas on EU Treaty reform and on how to bring the EU closer to its citizens. The Laeken Declaration suggested that there might be a need for a European constitution to achieve these aims. The Convention is due to report its conclusions to the European Council in mid-June 2003. Mr Giscard d'Estaing would like to conclude with one recommendation, not a series of options. A Praesidium preliminary draft constitutional treaty is on the table, and this will be fleshed out in the coming months with a view to completing a final draft by Easter 2003. The Praesidium has already presented its first 16 re-drafted articles to the Convention.[246]

Mr Heathcoat-Amory has called for a number of different options, "some of which it may even be appropriate to try out with the public through referendums".[247] Lord Maclennan sought to clarify the rationale behind the preference for a single proposal: "The Convention is convinced that it will have little effect if it simply advances a range of options for further debate".[248] He also considered the kind of text that would be agreed:

> The document may be called one thing or another, but my guess is that at the end of the day it is not what it is called that will matter because if there are those who do not wish for any constitutional document they will not be satisfied by it being called a treaty if it is in fact a constitutional document. The outcome will probably be what has been referred to as a "chapeau" treaty, which will be a statement of broad principles that will involve changes and reform while not being a consolidating treaty. It is clearly beyond the capabilities of the Convention to seek to go into the small print of the very bulky documents that presently constitute the constitutions of the communities.[249]

The final text will inevitably involve political issues which will be resolved at the level of an Intergovernmental Conference and ratified by the Member States in accordance with their constitutional requirements. It could be argued that the IGC method, provided for in Article 48 TEU, is secretive and remote from EU citizens. One commentator has noted the unsatisfactory nature of a return to the IGC, which has "failed to satisfy citizen

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[245] Standing Committee on the Convention 23 October 2002 c 006
[246] CONV 528/03, 6 February 2003
[247] Standing Committee, 16 July 2002 c 011
[248] Ibid c 012
[249] Ibid c 012

expectation" in the past.[250] On the other hand, this method might be regarded as more democratic, since it involves the unanimous agreement of the elected leaders of Member States.

Some have argued the case for a more democratic endorsement through a Europe-wide referendum on a future EU constitution.[251] The French Foreign Affairs Minister, Dominique de Villepin, believes it is important "to have a foundational act that would see all the peoples of Europe reunite on the same day backing simultaneous referenda in the EU on the future Constitution."[252] The Italian Deputy Prime Minister, Gianfranco Fini, also favours a referendum to approve the outcome of the Convention, suggesting that this might be combined with EP elections in June 2004. On 5 November 2002 Dutch MPs supported by 72 to 70 votes a motion for a non-binding Europe-wide referendum on the Convention constitutional text, or failing this, a national referendum on the specific constitutional changes affecting the Netherlands. National referendums are likely to be held in Denmark and Ireland, and the Portuguese Prime Minister, Durão Barroso, may also agree to hold a referendum on the constitutional text if it introduces major changes affecting Portugal's sovereignty.[253] In Germany there has been pressure from the opposition Christian Social Union (CSU) to hold a referendum on the Convention text, but the use of the referendum at federal level is limited to state boundary changes.[254]

Issues surrounding ratification of the Convention outcome were not addressed in the Laeken Declaration but they may have to be tackled by the Convention if its conclusions are to have the legitimacy that previous Treaty changes have sometimes been seen to lack.

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[250] Jo Shaw, *Notes on the Praesidium's Preliminary Draft Contitutional Treaty*, 6 December 2002, at: www.fedtrust.co.uk/eu_constitutional

[251] This idea also has the support of various organisations concerned about the constitutional implications of the Convention's work. The organisation Democracy International hosts the "European Referendum Campaign" website at http://www.european-referendum.org/.

[252] *EUobserver*, 23 January 2003, at: http://www.euobserver.com/index.phtml?sid=9&aid=9076

[253] Ibid

[254] A proposal to change the German Constitution to allow referendums at federal level was rejected in June 2002, when the requisite two-thirds majority was not obtained in the *Bundestag*.