

# Institutional Structure: A Delicate Balance

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Articles EC 189 ff.; EU 4; Draco I-18 ff.<sup>1</sup>

The inter-institutional balance of power within the EU is central to the new constitutional order. It is not therefore surprising that this topic, which is dealt with in Title IV of Part I of the Constitution, was contentious. This was evident in the process employed at the Convention. The Convention's general three-stage methodology of listening, examination, and proposal was not applied to the deliberations about institutions. There was no Working Group. The Convention discussions about institutions only began formally in January 2003. The Praesidium submitted its proposals to the Convention in April 2003.<sup>2</sup> Full discussion of the draft articles concerned with institutions only occurred in the plenary session on 15-16 May 2003.<sup>3</sup> There was no second reading in plenary about these articles. The Praesidium opted instead for consultations with the four constituent groups, governments, MEPs, National MPs, and the Commission, which took place on 4 June 2003.<sup>4</sup> Formal text of the revised articles on the institutions only became available on 10 June,<sup>5</sup> a mere three days before the concluding session on 13 June.<sup>6</sup>

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<sup>1</sup> All references in the text are to the Convention's Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution's provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

<sup>2</sup> CONV 691/03, *Institutions*, Brussels 23 April 2003; CONV, *Summary Report of the Plenary Session – Brussels 24 and 25 April 2003*, Brussels 30 April 2003.

<sup>3</sup> CONV 748/03, *Summary Report of the Plenary Session – Brussels 15 and 16 May 2003*, Brussels 27 May 2003. See also, CONV 709/03, *Summary Sheet of Proposals for Amendments relating to the Union's Institutions*, Brussels 9 May 2003.

<sup>4</sup> CONV 770/03, *Part I, Title IV (Institutions) – Revised Text*, Brussels 2 June 2003; CONV 771/03, *Consultations with the Component Groups*, Brussels 2 June 2003.

<sup>5</sup> CONV 797/03, *Revised Text of Part One*, Brussels 10 June 2003.

<sup>6</sup> CONV 814/03, *Summary Report of the Plenary Session – Brussels 11 and 13 June 2003*, Brussels 19 June 2003.

This short piece cannot deal in detail with the many issues concerning the institutional provisions of the Constitutional Treaty. It is designed to be a brief guide to the relevant issues.

#### THE EUROPEAN PARLIAMENT AMONG THE WINNERS

The *European Parliament* emerged as a ‘winner’ from the Constitution. The Commission has retained in general terms its ‘gold standard’, the right of legislative initiative, Article I-25(2). The EP and the Council both partake in the consideration of legislation and do so now on an increasingly equal footing. The EP and the Council are said to jointly enact legislation, Articles I-19(1) and 22(1). The co-decision procedure under which such laws and framework laws are jointly enacted is now deemed to be the ordinary legislative procedure for the making of European laws and framework laws, Articles I-33(1) and III-302. The reach of this procedure has been extended to cover more areas than hitherto, including agriculture and fisheries, asylum and immigration law, and the structural and cohesion funds. This treatment of legislative power is to be welcomed. It is generally accepted that the co-decision procedure has worked well. It allows input from the EP, representing directly the electorate, and from the Council, representing state interests. Article III-302 provides a framework for a deliberative dialogue on the content of the legislation between the EP, Council and Commission. The extension of the ordinary legislative procedure to new areas is a natural development, building on what has occurred in earlier Treaty reform. It enhances the legitimacy of Union legislation and its democratic credentials by enabling the EP to have input into the making of legislation in these areas. The EP is also accorded powers in relation to the new breed of delegated regulations, Article I-35(1). In the European law or framework law by which power is delegated to the Commission it may be stipulated that the European Parliament or the Council may revoke the delegation, or that the delegated regulation may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the law or framework law.

#### NO LEGISLATIVE AND GENERAL AFFAIRS COUNCIL

There were two contentious issues concerning the *Council*. The best known was of course the dispute about voting rights within the Council which caused the collapse of the European Council discussions in December 2003. This was resolved through a delicate and complex compromise in the first half of June 2004, embodied in the new version of Article I-24. Less publicly prominent, although significant nonetheless, were the disagreements about the formations within the Council. The solution in the Draft Constitution was to have a Legis-

lative and General Affairs Council (LGAC). This was not accepted by the IGC, which re-wrote Article I-23. There is instead a General Affairs Council, GAC, with the task of ensuring consistency in the work of the different Council formations. The GAC prepares meetings of the European Council and ensures their follow-up. This is now to be done in liaison with the President of the European Council as well as the Commission. There is to be a Foreign Affairs Council. The European Council will take, by qualified majority, the decision concerning the list of other Council formations.<sup>7</sup> A necessary consequence of discarding the Legislative Council is that each Council formation will deliberate and vote on legislation within its respective area. Meetings of Council formations will therefore be divided into those dealing with legislative and those with non-legislative functions. The Presidency of the Council formations, other than that of Foreign Affairs, is to be held by Member State representatives in the Council on the basis of equal rotation, in accord with conditions established by a European decision of the European Council acting by qualified majority. To the Constitution is added a Draft Decision on this matter which will be adopted when the Constitutional Treaty enters into force. It embodies in essence a 'team system' for the Presidency of Council formations, other than Foreign Affairs. The latter is chaired by the Minister for Foreign Affairs, appointed by the European Council and sitting also as vice chair of the Commission. This office represents an important innovation, whose practical definition is however unclear and can only be left to development of practice.

#### THE MIXED FORTUNES OF THE COMMISSION

The Commission had mixed fortunes in the constitutional deliberations. It had come to favour the idea that its President should be elected since this would enhance its legitimacy and thereby strengthen the claims of the Commission President to be the President of the Union as a whole. The EP was as expected in favour of an indirectly elected Commission President. It was however always doubtful whether the Member States would be willing to accept a regime in which they surrendered total control over the Presidency of the Commission to the EP. The Member States have, unsurprisingly, not been willing to surrender this power. Article I-19(1) states that the EP shall elect the President of the Commission. The retention of state power is however immediately apparent in Article I-26(1). The European Council, acting by qualified majority, after appropriate consultation and taking account of the elections to the EP, puts forward to the EP the European Council's candidate for Presidency of the Commission. This candidate shall then be elected by the EP by a majority of its

<sup>7</sup> *Ibid.* IGC revised Article I-23(4).

members. If the candidate does not get the requisite majority support, then the European Council puts forward a new candidate within one month, following the same procedure. The result is that the Commission President is indirectly-indirectly elected.

The Commission was especially unhappy with the Convention proposals concerning the composition of the Commission, in particular the divide between voting and non-voting Commissioners. It regarded the relevant provisions as ‘complicated, muddled and inoperable’.<sup>8</sup> The Irish Presidency of the IGC brokered a compromise. The first Commission appointed under the new Constitution will have a Commissioner from each Member State, as well as the President of the Commission and the Union Minister for Foreign Affairs, Article I-25(5). After the end of this first term of office, the Commission is to consist of members including the President and the Minister for Foreign Affairs, corresponding to two thirds of the Member States, unless the European Council acting unanimously decides to alter this figure. Selection is to be based on a system of equal rotation taking account of the state equality principle and the demographic and geographic equality principle taken over from the Convention draft. Thus unless the European Council decides otherwise the net effect is that there will be a slimmed down Commission in the medium term, and all members thereof will have voting rights. It should however also be noted that the changes made by the IGC give the Council and the European Council a greater role in the appointment of the Commission than hitherto, Article I-26(2).

#### ENHANCED POWERS OF THE EUROPEAN COUNCIL

The powers of the *European Council* were enhanced by the constitutional settlement. The Commission had hoped that its President would become the President of the EU either de facto and/or de jure. It would on this view have become the main locus of executive power within the EU, and the Presidency of the European Council would continue to rotate on a six-monthly basis as it had done hitherto. In fact, the Constitutional Treaty has opted for a regime of shared executive power. A central feature of this regime is the extended term for the Presidency of the European Council. Article I-21 stipulates that the European Council shall elect a President, by qualified majority, for two and half years, renewable once. The five-year Presidency of the European Council will undoubtedly increase the power of this body, more especially because Article I-

<sup>8</sup> Communication from the Commission, *A Constitution for the Union, Opinion of the Commission, pursuant to Article 48 of the Treaty on European Union, on the Conference of Representatives of the Member States’ governments convened to revise the Treaties* COM (2003) 548 final, para. 2.

20(1) enables the European Council not only to provide the Union with the necessary impetus for its development, and define its general political directions as hitherto, but also to define its priorities. The power of the European Council and its President is further enhanced because Article I-23(2) provides that the General Affairs Council shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the Commission *and* the President of the European Council. The regime of shared executive power is exemplified by Article I-25(1) which provides, *inter alia*, that the Commission shall initiate the EU's annual and multi-annual programming with a view to achieving inter-institutional agreement with the other players. The fact that the European Council's tasks are defined so as to include setting the priorities for the Union makes it impossible to argue in legal terms that this programming should be the exclusive preserve of the Commission. It should also be recognised that these legal provisions are 'delicately balanced' and give comfort to the Commission as well as to the European Council. Thus while the priority-setting task of the European Council is not limited by the adjective 'general', it can equally be argued that the European Council cannot go so far as to initiate its own formal multi-annual programme, since this would then trespass on the Commission's power of initiation over such matters. In that sense, it is for the Commission to 'factor in' the European Council's decisions about priorities into the annual and multi-annual programming the initiation of which remains its preserve.

#### QUESTIONS FOR SCHOLARSHIP AND PRACTICE

1. Will the creation of a Legal Affairs Council, proposed by the Convention but refused by the Intergovernmental Conference, reassert itself through practice?
2. Will the Minister for Foreign Affairs overcome his split institutional affiliation?

#### LITERATURE

- P. CRAIG, 'The Constitutional Treaty: Legislative and Executive Power in the Emerging Constitutional Order', *EUI Working Paper No. 7* (2004)
- P. CRAIG, 'European Governance: Executive and Administrative Powers under the New Constitutional Settlement', forthcoming

