

The European Convention faces tall hurdles on the home stretch

Claus Giering and Janis A. Emmanouilidis

The reform Convention has reached the home stretch. After 16 months of work, a promising result seems possible. However, the Convention dawdled through the initial period of its proceedings, and thus central power-related issues must now be resolved at the last minute in order to come up with results that are not only satisfactory, but in fact compelling. The basic precondition for this is a complete document that does not provide for alternative options in the case of controversial key issues. With regard to its contents, a successful European Constitution must take its bearings from five salient points. The future basic European document must create an identity, make the list of the EU's tasks clearer, guarantee a high quality of political leadership, ensure that a larger Europe will be able to take action, and facilitate the future development of the Constitution.

The five most important proposals submitted by the Convention are . . .

- the fusion of the present Treaties into a single document and the assignment of a legal personality to the EU;
- the prominent incorporation of the Charter of Fundamental Rights as Part Two of the Constitution;
- the introduction of a President of the European Council elected by the Heads of State and Government who will lend continuity, visibility and coherence to the representation of the EU externally and internally;
- the envisaged reduction of the number of Commissioners, since this will allow the Commission to remain manageable even with 25 and more member states and to assign appropriate tasks to its members;
- the decision to employ qualified majority voting in the Council and the adoption of the co-decision procedure as the standard legislative procedure.

The five most negative aspects of the proposals submitted by the Convention are ...

- the sheer size and the structural complexity of the draft and the numerous repetitions and overlap between the various sections, since this in the end makes it more difficult for citizens to read and comprehend the Constitution;
- the imprecise distinction between constitutional and non-constitutional provisions, and thus a lost opportunity to amend the latter in the future on the basis of a less complex procedure;
- the insufficient delimitation and ambiguity of the competence categories as a basis for a durable and clear division of competences between the EU and its member states;
- the vague definition of the division of labour between the President of the European Council and the future EU Foreign Minister, since the lack of a clear assignment of roles will weaken Europe's ability to exercise influence, its credibility and its visible presence in the world;
- the right of the European Council to submit nominations for the post of Commission President, since this will counter the significance of European elections as an act which enables citizens to decide and exercise democratic control.

1. Creating identity

Making the European project more accessible to EU citizens is a central goal of the current reform process. A comprehensible basic document is thus of greatest importance if citizens are to be able to identify with Europe. Here the Convention has made a number of important decisions. These include

- the fusion of the present Treaties into a single document;
- the assignment of a legal personality to the EU;
- the prominent incorporation of the Charter of Fundamental Rights as Part Two of the Constitution.

However, on account of the language employed and due to its structural complexity, EU citizens will probably find it difficult to identify with this mega-Treaty as their Constitution:

- It was impossible to produce a short and clear constitutional document. A publication of Part One is not enough to provide EU citizens with a clear-cut

picture of the EU as a constitutional community. In fact, the rights, duties, aims and limits of the European Union become apparent only after one has read more than 460 articles.

- In addition to this a number of essential provisions concerning the role of national parliaments, the principles of proportionality and subsidiarity, which not only have an influence on EU legislation, but are also of special interest to EU citizens, have for no good reason been relegated to protocols. This makes it very easy for the upcoming intergovernmental conference to add further provisions and amendments in the shape of protocols and once again to create an impenetrable thicket of provisions and clauses.
- Furthermore, on account of the incorporation of the Charter of Fundamental Rights as Part Two of the Constitution, there is a considerable degree of overlap with the provisions of Part One, above all with the titles on *Fundamental Rights and Citizenship* and on *Democratic Life*. This weakens the structural clarity of the text. Furthermore, differing formulations may well lead to legal uncertainties.

2. Clarifying the list of tasks

A clear-cut division of labour is an indispensable precondition for a clear list of tasks. Thus the delimitation of competences between the Union and the member states must above all strike a balance between competing centripetal and centrifugal forces. However, in order to be able to meet future challenges, such a delimitation of competences must not be permitted to curtail unduly the Union's room for manoeuvre and its ability to develop in a dynamic manner.

- In this sense, it is a progress that Part One now categorizes the order of competences. It stipulates the policy areas in which the EU has exclusive powers, the tasks which are shared by the Union and the member states, and the areas in which the EU may only act in a complementary or supportive capacity. Special regulations have been devised with regard to the coordination of economic and employment policies, the common foreign and security policy, defence policy, and the area of freedom, security and justice.
- As a result of this list there is greater clarity with regard to the division of labour between the EU and the member states. However, in practical terms it could lead to a continuation of the pillar structure, with an additional pillar built around the open coordination in the area of economic and employment policy.
- Furthermore, since the categories have not been clearly defined, they do not constitute a durable and clear-cut distribution of competences. On the contrary, the relevant provisions, which clearly state who may take action in which policy area and which means are to be employed, are regulated in Part Three of the Constitution. Moreover, the opportunity was missed to determine basic rules for the various categories which sufficiently limit the extent and depth of Union

action. The principle of case-by-case empowerment, according to which EU competences are transferred from the member states, continues to predominate and makes the categories in Part One look like rhetoric, and not like a legally enforceable constitutional principle.

3. Providing for leadership

The power to take action in a Union of 25 and more states will largely depend on the ability of the political leadership to define strategic goals and to encourage their implementation in day-to-day politics. The future power structure of the EU must equally live up to both the community and intergovernmental strands of the EU's legitimacy, as a combination of both states and citizens. In this difficult area the Convention's proposed Constitution is in a position to push for some progress:

- A positive feature is the introduction of a President of the European Council elected by the Heads of State and Government. The President's role will be to prepare and chair European Council meetings, issue reports on the results of the meetings, and to ensure, at his level, the external representation of the EU. This will lend continuity, visibility and coherence to the internal and external representation of the EU.
- Furthermore, the foreign policy profile has been enhanced by the establishment of the position of a European Foreign Minister with powers going far beyond those currently enjoyed by the High Representative.
- The envisaged decrease in the number of Commissioners is a genuine breakthrough. Even if the reduction will come into force only after 2009, it will ensure that the Commission will continue to be manageable with 25 and more member states and that appropriate tasks can be assigned to its members.
- Linked to this are the additional powers given to the Commission President when determining the division of labour inside the Commission, since he will thus be able to shape the Commission on the basis of factual considerations and not merely on the grounds of national proportionality.

However, as was already the case in Amsterdam and Nice, the tallest hurdles that have to be overcome before agreement can be reached are with respect to the reform of the most prominent institutional bodies:

- A weak President of the European Council runs the risk of becoming a marionette. A position at the top of the European Council which is not appealing enough to attract energetic personalities will do little to improve the quality of leadership and external representation of the EU. It should not be a matter of symbolism, but of greater output efficiency in the European Council. And this is especially important whenever EU member states can act only on the basis of a compromise on the highest political level.

- The envisaged reform might especially in the area of foreign policy lead to considerable disagreement on the question of competences between the President of the European Council and the new Foreign Minister.
- Furthermore, the Foreign Minister has a hybrid role, which he could also interpret to the disadvantage of the Commission. He might come into a situation in which he uses all foreign policy resources in the interest of the European Council and not of the Commission college. At the same time, the Commission must continue to do its duty without having any real influence on the political goals and on the leadership. On the other hand, a clear-cut assignment of responsibility which does justice to the real distribution of power would reduce the widespread practice of putting the blame on others in cases of failure or claiming undue credit in cases of success.
- The balance of power between the institutions is above all called into question by the fact that the President of the European Council and the Commission President are in the final analysis both appointed by the European Council. Instead of giving the European Council the right to propose a candidate for the post of Commission President, the latter should be elected by the European Parliament and his appointment subsequently confirmed by the Heads of State and Government. This is the only way in which it will be possible to enhance the legitimacy and power base of the Commission and its President, to encourage the personalization of European politics, and to increase the significance of European elections as an electoral act with which EU citizens can exercise democratic control.

4. Enabling the EU to take action

The Union's ability to act not only requires political leadership, but also effective mechanisms and procedures in order to implement strategic declarations of intent swiftly and appropriately in day-to-day politics. In the light of these demands the proposals of the Convention point in the right direction:

- The decision to employ qualified majority voting in the Council and the adoption of the co-decision procedure as the standard legislative procedure is a decisive success. Exceptions to this rule, when Council decisions are to be taken on the basis of unanimity, will have to be explicitly listed. In the end this will substantially improve the enlarging EU's ability to act. Moreover, it will help prevent unjustified crossover deals, for example, between milk quotas and tax issues.
- Another positive development is the fact that a „General Affairs and Legislative Council“ will together with the European Parliament be responsible for adopting EU legislation. Most importantly, the fact that one Council formation will be

responsible for adopting EU legislation can prevent different ministerial formations from taking contradictory decisions.

- Of particular importance are those proposals of the Convention which stipulate that the European Parliament will on the expenditure side receive full budgetary powers, and that the budget, legislation and democratic control are thus part of a clearly structured bicameral system.
- In spite of this positive assessment, the EU's potentials cannot of course be fully harnessed as long as numerous important decisions can be vetoed by each and every member state. For this reason, on the home stretch, it is a matter of applying qualified majority voting in the Council to as many policy areas as possible.

5. Facilitating further development

The ability to permanently reconcile dynamism and stability is decisive for the endurance of the European Constitution. Thus the Constitution must on the one hand define a basic consensus, and on the other create the prerequisites for innovation and institutional adaptation.

- In this context, it should be emphasized that the draft Constitution specifies and expands the basic principles of flexible integration originally introduced into the Treaties in Amsterdam and Nice. The provisions governing the flexibility instrument of enhanced cooperation are combined in a more comprehensible manner and now apply in an unrestricted form to the Constitution as a whole. Moreover, two new instruments of differentiation have been introduced in the area of the common defence policy. On the one hand, the draft Constitution envisages a „structured cooperation“ for those member states whose military capabilities fulfil higher criteria. On the other hand, the draft Constitution provides the possibility of „closer cooperation“ in the area of mutual defence.
- Furthermore, steps must be taken to ensure that the Constitution drafted by the Convention and adopted by the Heads of State and Government can in fact come into force. On this point the draft proposals submitted by the Praesidium envisage that the Constitution will have to be ratified by all member states before actually coming into force. If the Constitution is ratified by four-fifths of the member states within a period of two years after it has been signed, and there are difficulties with ratification in certain member states, the European Council is to discuss the issue. In contrast to this procedure, it should be clearly stipulated that, for those states which have given their assent the Constitution should come into force, even if some individual member states have failed to ratify. Thus, the Constitution should enter into force once it has been ratified by a predetermined number of states which represent a minimum number of EU citizens. If individual states or their

citizens repeatedly reject the Constitution, they would have to consider relinquishing their membership of the EU.

- From a historical perspective the most dramatic fact is that it has proven to be impossible to gather all constitutional provisions in one document and, conversely, to treat all the non-constitutional provisions separately. Thus, the opportunity has been missed to provide the EU with the ability to amend the latter on the basis of a less complex procedure. Instead a complicated procedure for revising the Constitution remains in place. A fact which in an EU of 25 and more member states could in the long term prove to be very counter-productive.

Some of the systemic faults are already so firmly entrenched that it is impossible to change them. This is true above all concerning the size, the structure and the procedures for amending the Constitution. But the Convention still has the opportunity to overcome a number of hurdles before the proposed Constitution has to prove its worth in the arena of the intergovernmental conference. Only there will it become apparent whether the framework of the Constitution is stable and sufficiently compelling enough to be able to survive the pressure from member states to change the Convention's proposal.