



CENTRE FOR EUROPEAN REFORM

*policy brief*

## The CER guide to the draft EU constitution

- ★ EU governments have begun an ‘inter-governmental conference’ (IGC) that will result in a constitution for the EU. A draft constitution was drawn up by the Convention on the Future of Europe, and the draft forms the basis for negotiations at the IGC.
- ★ The draft constitution would make several improvements to the existing institutions, making them somewhat easier to understand and more transparent. The proposed reforms would also give the EU a more solid external representation. However, the draft does not go far enough to ensure that the Union can work smoothly with 25 or more member-states. Nor would the constitution make lines of democratic accountability much clearer.
- ★ At the IGC, EU governments could improve the details in the constitution text. However, they should resist the temptation to unravel the central compromises of the draft constitution.

For the fourth time in little more than a decade, the EU is trying to overhaul its institutions and policies. The EU’s previous attempts, which culminated in the treaties of Maastricht in 1992, Amsterdam in 1997 and Nice in 2000, were less than fully successful. Citizens still perceive the EU as overly complex and bureaucratic. Decision-making procedures are too complicated, and policies are often ineffective. With ten new members set to join the Union in May 2004, the imperative for reform has become overwhelming.

The European Convention, made up of government representatives, national parliamentarians, MEPs and the European Commission, prepared a draft ‘constitutional treaty’ for the EU. Valéry Giscard d’Estaing, the Convention’s president, presented the draft constitution to EU leaders at their summit in Thessaloniki, June 2003. The Convention’s final document now serves as the basis for discussions at the inter-governmental conference (IGC), which will work out the definitive text of the EU’s constitution.

As it stands, the draft constitution is a carefully crafted compromise between the Convention’s ‘federalists’ and ‘inter-governmentalists’, as well as between the large and the small countries. It contains a raft of practical reform proposals. For example, the various treaties that determine the EU’s organisation and policies will be consolidated into a single constitutional treaty. The EU – currently a confusing amalgam of several legal entities – will gain a ‘single legal personality’, which will make it easier for the EU to negotiate and ratify international treaties.

However, the draft constitution is less successful in ensuring that the EU becomes a more democratic and transparent organisation. The draft is a long and often confusing legal text, and the average citizen will still find the EU hard to understand. It preserves many of the EU’s complex structures and procedures, which are the result of political deals struck over the past half-century. Moreover, several governments will attempt to unravel many of the draft’s provisions in the IGC.

## WHERE WOULD POWER LIE?

The draft constitution makes the **division of powers** between the EU's institutions and member-states much clearer than in previous treaties. It states explicitly that the Union draws its powers from the member-states, rather than the other way around. It defines where the EU can and cannot act. The constitution names just five areas where the Union has exclusive powers: competition rules within the single market; monetary policy for the eurozone members; common commercial policy; customs union; and conservation of marine biological resources under the common fisheries policy. The Union already possesses exclusive powers in all these areas.

The document also proposes measures to improve the **efficiency** of the EU's institutions. The European Council, which is made up of the heads of state and government and the president of the European Commission, meets quarterly to set the Union's broad strategy and priorities. At present, the **presidency of the European Council** – like that of the many sectoral councils of ministers – shifts from one member-state to another every six months. This 'rotating presidency' is widely recognised as an inefficient system: each country uses its stint in the chair to promote its own pet projects, while countries outside the EU find the constant change in leadership confusing.

As a result, the Convention proposed that an individual, rather than a country, should chair the European Council. The draft constitution provides for the European Council to elect a president for 2.5 years. The president's main task would be to "drive forward" the work of the European Council, "ensuring proper preparation and continuity" and "cohesion and consensus" within it. The European Council president would also represent the EU externally "at his level", for example by visiting President Bush to discuss major international issues. The European Council president cannot "hold a national mandate", so serving heads of government are excluded. But candidates for the job could include former prime ministers or foreign ministers.

The Commission and many of the EU's smaller member-states dislike the plan for a European Council president – partly because the Commission president would no longer be able to claim to speak for Europe on the international stage. The appointment of the new president would confirm that the EU's foreign policy and grand strategy rest with member-state governments, represented in the European Council, rather than with the Commission.

Many smaller member-states suspect – rightly – that this new post would enhance the influence of the European Council, which is dominated by the big countries. This could weaken the European Commission, which the smalls see as the champion of their interests. The smaller member-states are divided, just like the larger ones, on whether deeper EU integration is desirable and, if so, in what areas and at what pace. But they all want to preserve the institutional balance between the Council and the Commission. That is why, alongside a strengthened European Council, the EU needs a stronger Commission, to maintain institutional balance.

**The Commission** derives its legitimacy in part from the fact that every member-state nominates a commissioner. In the draft, each member-state retains that right, but in future only 15 of the 25 commissioners would have a vote. The right to vote would rotate among the member-states, with small states having that right as often as large ones. Nonetheless, many small states are lobbying hard to retain the right to nominate a 'normal' commissioner with full voting rights. The proposed reform in the Convention's draft is designed to ensure that the Commission can work effectively with 25 or more commissioners after enlargement. Unfortunately, the draft constitution delays the implementation of this reform until 2009 (after the completion of the Commission's next term). So the next Commission will be a college of 25 voting members, and probably more fractious and weaker than one in which the president managed a smaller and more cohesive team.

The Convention also proposed that the European Parliament should 'elect' the Commission president. MEPs would vote on a candidate chosen by the European Council by majority vote, "taking into account" the European Parliament election results. This proposal is only a modest improvement on the current procedure, which pays no regard to the election results, and would do little to enhance the legitimacy of the Commission president.

The CER proposes instead that the European Council should shortlist three candidates, from the parties which perform best in the European elections. A Congress comprising MEPs and national parliamentarians could then vote for the Commission president. Giscard himself floated the idea of a Congress, which has the merit of involving national parliaments in EU business, but it was dropped from the final draft.

The draft proposes a **simpler system for voting** in most areas of EU policy-making – foreign policy

and tax are the main exceptions – to replace the complicated ‘qualified majority vote’. Under the new rules, a measure would pass if a majority of member-states which also represented at least three-fifths of the EU’s population was in favour. This would be a more democratic system, for it gives people living in big countries an equal representation to those living in small ones. Unfortunately, this new system would only take effect on November 1<sup>st</sup> 2009. Spain and Poland insist on delaying the reform because they want to keep their over-weighted votes for use in the next round of EU budget negotiations.

The draft constitution also aims to enhance **democracy** in EU decision-making. Under its provisions, the **Council of Ministers** and the European Parliament would have an equal say in EU law-making. Co-decision would apply to all policy areas that are subject to majority voting in the Council, which means that a proposal cannot pass until both the Council and the directly elected **European Parliament** vote in favour. The constitution also proposes the establishment of a ‘general affairs and legislative council’. As currently drafted, this provision is unclear. But it seems to mean that the various sectoral councils (comprising farm ministers, industry ministers and so on) would pass laws acting under the umbrella of the ‘general affairs and legislative council’. The constitution suggests that this council would debate and vote on issues in public, allowing journalists and citizens to see what position their national ministers take. That would make the system more transparent, and also make it clear to the public that most decisions in the EU are taken by elected politicians, not bureaucrats.

Instead of the current system of a six-monthly rotating presidency, Giscard proposed that different member-states would chair the various sectoral councils for a period of at least a year. For example, the French farming minister might chair the agriculture council, but an Irish minister could chair the industry council at the same time. In Brussels-jargon this is known as ‘team presidencies’. The exceptions to this new arrangement are that the foreign ministers’ council would be chaired by the person who holds the new post of EU foreign minister, and the euro group would appoint a chair to serve for 2.5 years.

The draft constitution tries to ensure that **national MPs** become more directly involved in European affairs, by providing for a more systematic exchange of information between EU bodies and national parliaments. The draft proposes a special

procedure whereby one-third of national parliaments could demand a review of a Commission proposal if it risked violating the subsidiarity principle (which states that decisions should be taken at the lowest appropriate level of government). A protocol to the Constitution makes clear that member-states, national parliaments, regions and individuals can ask the European Court of Justice to rule on whether individual pieces of EU legislation respect the subsidiarity principle.

Although these proposals are sensible, the Convention should have gone further in its efforts to enhance democracy. We would give national parliaments the chance to endorse – or reject – the EU’s annual work programme, which is drawn up by the European Commission. Each commissioner could present the programme to his or her national parliament, which would then debate and vote on it. If a majority of national parliaments rejected the work programme, the Commission would have to revise it, taking into account MP’s objections.

One area in which the draft constitution offers clear benefits to EU citizens is the protection of human rights. The draft incorporates the **Charter of Fundamental Rights** as its second part. The Charter is designed to protect citizens against EU laws which might infringe their basic rights, for example the right to privacy. But the draft constitution sets clear limits to the Charter’s application. Thus the Charter could not be used to strike down purely national laws. And many of the economic and social rights in the Charter – including the right to strike – are hedged with the proviso that they apply only “in accordance with Union law and national laws and practice”. The draft also includes a clause that makes it clear the Charter gives no new law-making powers to the EU.

### CHANGES TO EU POLICIES

On **economic policy**, the draft constitution does little more than consolidate the EU’s existing powers. It would not fundamentally alter the EU’s approach, which is primarily based on the ‘co-ordination’ of policies. The member-state governments would remain in ultimate control of their budgetary, employment and social security systems. They would also retain a veto on all tax matters. However, the draft would permit the Council – acting unanimously – to introduce majority voting in the limited area of combating tax evasion.

The draft constitution would grant formal powers to the **Euro Group** – the committee of eurozone finance ministers, which at present meets only on an informal basis. In future, the Euro Group alone

would vote on issues relating solely to the single currency, such as enforcement of the EU's fiscal rules. The outline of these fiscal rules, currently enshrined in the **Stability and Growth Pact**, would form part of the new treaty. The draft foresees a more flexible approach to the Pact, for example by taking into account public investment spending and the long-term sustainability of public finances – similar to the budget rules applied in Britain by Gordon Brown, the chancellor.

Like previous treaties, the draft constitution encourages EU member-states to work together to create more and better jobs. Co-operation in this context involves member-states sharing information, setting benchmarks and employing peer pressure to improve performance – a process known as the 'open method of co-ordination' in EU jargon. The Commission and the Council would not gain any new powers to dictate member-states' employment policies.

Similarly, the draft would give the EU no significant new powers in the area of social policy. The EU already requires its member-states to protect certain minimum rights of workers, such as non-discrimination between men and women. The Council of Ministers has long been able to adopt some minimum standards, especially for health and safety, by a majority vote. But decisions on the key issues of **social security** and the protection of workers would still require unanimity in the new constitution.

The member-states, rather than the EU, would remain responsible for their own national **pensions** systems. EU countries have started a useful process of comparing notes on their pension reform efforts. Like previous treaties, the new constitution explicitly prohibits both the EU and its member-states from rescuing any member-state in financial trouble. This 'no bail-out' clause also applies to national pension systems.

The draft constitution has passed up the opportunity to propose reforms to the **European Central Bank**, presumably because the euro system is still in its infancy. The draft confirms the independence of the ECB and provides only broad guidelines on its decision-making rules and monetary policy targets.

In **foreign policy**, the draft constitution proposes the establishment of a new post of EU 'minister for foreign affairs'. The basic idea is to merge the roles of Javier Solana, the High Representative for foreign policy, and Chris Patten, the commissioner for external relations. Such a reform should ensure

that the EU's two external relations tools – broadly, diplomacy and aid – work in tandem in future. The draft makes it clear that the new foreign minister would be an agent of the Council of Ministers, whose meetings on foreign affairs he or she would chair. The EU foreign minister would be directly answerable to the member-states, not the Commission.

Some people worry about a 'loyalty clause' contained in the draft which says that "member-states shall support the Union's common foreign and security policy actively and unreservedly". In fact, those words are taken from the Maastricht treaty of 1992. The crucial question about EU foreign policy is: who takes the decisions? The answer is national governments, voting unanimously in the Council of Ministers and the European Council.

The draft does not extend the Commission's powers over foreign policy and it explicitly preserves every country's right to wield a veto. At the beginning of 2003 the vast majority of EU member-states – including the UK, France and Germany – indicated that they could accept more majority voting on foreign policy. However, the UK and France subsequently back-tracked on this position and the draft retains the unanimity principle. A veto from a single country – such as Malta, Luxembourg or Cyprus – could still block an important policy on which all the other 24 member-states agree. The preservation of the unanimity rule is a recipe for inaction.

In the CER's view, majority voting should apply to all foreign policy questions. But, to allay the concerns of London and other capitals, we would allow the unanimity principle to remain in place for proposals that come from the member-states. On the other hand, the governments should accept that proposals from the EU's foreign minister be subject to a 'super qualified majority vote'. Super QMV requires a higher threshold than for normal majority voting: to pass, proposals would need the support of 66 per cent of EU member-states (instead of the usual 50 per cent), representing 60 per cent of the EU's population.

The CER proposal would also allow member-states to veto decisions in exceptional circumstances, for matters of 'supreme national importance'. But any government that invoked this 'emergency brake' would have to explain its motives to the European Council. The aim of this compromise proposal would be to strengthen the role of the EU's foreign minister and speed up decision-making on foreign policy. However,



unanimity should always apply to decisions with military consequences, in our view.

The draft's main innovation in **defence policy** is that member-states could choose (but would not be obliged) to sign up to a 'mutual assistance' clause, which would allow an EU country that comes under external attack to ask for help – including the military sort – from other members. Some EU countries with strong transatlantic ties, including the UK, the Netherlands and some of the new members, argue that the EU does not need a mutual assistance commitment since NATO already provides adequate defence guarantees.

The draft constitution also foresees a new 'capabilities agency' to co-ordinate defence technology research, and encourage the harmonisation of arms procurement procedures. Furthermore, the constitution would allow a smaller group of member-states to co-operate more closely on military matters, to improve the EU's overall military effectiveness. This makes sense, given that EU countries have very different military capabilities.

The draft constitution also makes some cautious but sensible proposals in the field of **justice and home affairs**, which includes immigration, asylum and internal security. For example, the draft would extend majority voting to most aspects of **asylum and immigration** policies. The exception is that member-states retain the right to decide the number and types of work visas they issue, rather than having a system of EU-wide quotas for work permits. The draft simplifies the legal basis of Europol, the European police office, and gives national parliaments a role in supervising its activities. It would also permit the EU to tie the national border guards more closely together, which would secure the EU's external borders more effectively – a step that is very important now that the EU has removed most of its internal border controls.

The draft constitution would allow the EU to establish a **European public prosecutor**, who would be able to investigate and prosecute serious cross-border crimes – such as terrorist acts – and fraud involving EU funds. All member-states would have to agree unanimously to establish the prosecutor and there is no deadline for taking a decision. Giscard's text gives the EU a very limited ability to align national definitions of certain cross-border crimes, and to lay down minimum standards for court procedures and the use of evidence. Majority voting would be extended to decision-making in

these fields. This provision is controversial because countries such as the UK, Ireland, the Netherlands, Denmark and Sweden would prefer to stick to unanimity for all decisions on criminal law.

### IT'S NOT OVER YET

The draft constitution proposes a number of useful reforms to the EU's existing treaties. But further improvements are needed, and the current text is still just a draft. The member-states are haggling over the final text in the IGC, which could take up to six months. Once the member-states have reached an agreement and signed the new constitution, they will submit it to their parliaments for ratification. Several are planning to hold referenda. If any of the 25 members rejected the constitution outright, the EU would be forced to hold another IGC to resolve remaining disagreements.

Even assuming that ratification goes smoothly, the process could take 12 to 18 months, which means that most of the reforms now under discussion would not come into effect until 2006 (and some, such as the new majority voting procedure, not until 2009). The enlarged EU with 25 members will have to function on the basis of its existing complex decision-making procedures for at least another two years.

More importantly, the current draft constitution shows that the EU has not yet fully woken up to the implications of enlargement. The proposed reforms do not go far enough. They will not ensure that the Union will be able to function smoothly with 25 or more members. There is still time for debate and the IGC may yet come up with more radical reforms. But many governments are now in defensive mode, seeking to reduce the impact of the proposed reforms, rather than to deepen them.

The member-states should not unpick many of the compromises reached in the Convention. The draft constitution would in many ways make the EU easier to understand, more transparent and more efficient. But the Union would remain complicated and very hard to love.

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*October 2003*

# The Convention and the future of Europe debate

*The CER is a think-tank devoted to improving the quality of the debate on the future of the European Union. It is a forum for people with ideas to discuss the many social, political and economic challenges facing Europe. It seeks to work with similar bodies in other European countries, in North America and elsewhere in the world.*

*The CER is pro-European but not uncritical. It regards European integration as largely beneficial but recognises that in many respects the Union does not work well. The CER therefore aims to promote new ideas and policies for reforming the European Union.*

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