Astrid

Associazione per gli Studi e le ricerche sulla Riforma delle Istituzioni Democratiche e sull'innovazione nelle amministrazioni pubbliche

Abstract

For the Constitution of the European Union

Convergences, Divergences, Possible Paths (and a Few Proposals)

The Astrid working group that developed this document was chaired by Giuliano Amato and Franco Bassanini. It has been coordinated by Luigi Carbone. The following participated in the work of the group: Fiorenza Barazzoni, Mario Bellocci, Luigi Carbone, Vincenzo Cerulli Irelli, Mario P. Chiti, Francesco Clementi, Marta Dassù, Giovanna De Minico, Maria Elena Graziani, Gian Paolo Manzella, Cesare Pinelli, Federico G. Pizzetti, Franco Pizzetti, Giulia Tiberi.

The sub-group, which took charge of fiscal issues, was co-ordinated by Augusto Fantozzi. The following participated in the work of the sub-group : Mario Bertolissi, Francesco D'Ayala, Gaspare Falsitta, Andrea Fedele, Piera Filippi, Salvatore La Rosa, Guglielmo Maisto, Gianni Marongiu, Francesco Moschetti, Pasquale Russo.

February 2003

ABSTRACT

The present document is not designed as an addition to the projects for the European Constitution so far presented to the Convention. It is intended rather as a considered evaluation of the proposals advanced, highlighting the points where a fair amount of agreement has been reached as well as the most problematic questions. We have tried to bring out the advantages and disadvantages of the main solutions that have been advanced. The text contains further proposals on some points which have not been fully considered.

PART I – MISSIONS AND OBJECTIVES OF THE UNION

For some time now the Union has been pursuing **missions** that go beyond those indicated in the original Treaties. These are to be stated in the Constitution, now that the phase of the initial construction of the common market and economic integration has been passed: the mission for peace, which leads to be a visible and effective European role in the international community; the mission for the dissemination of civil, democratic values, to be developed by safeguarding and promoting the fundamental rights and freedoms; and a sustainable economic development, able to combine growth of productivity with full employment and substantial social protection in the context of a competitive, innovative and dynamic market economy.

To carry out these missions, it is necessary to **provide the Union with a single legal personality**. This would provide an element of certainty, in that it would **overcome the Union's current "pillar" structure**, without necessarily excluding different decisional procedures for specific areas, and at the same time respecting the allocation of external competence to the Member States.

Another preliminary condition to allow the Union to carry out its missions consists in ratifying the fundamental rights of citizens, as recognized by the Nice **Charter of Fundamental Rights**. This should be included in the text of the Constitution, if necessary by grouping the present articles without any modification of the text.

Consideration should be given to the possibility of constitutionalizing some fiscal principles that can be found in the constitutional traditions common to the Member States and indicated in the paper prepared by Astrid.

PART II – THE UNION'S COMPETENCIES

A rationalised framework of the Union's Competencies

There is strong agreement among Europeans of the desirability in future for "more Europe" where the need for it is mainly felt, but also "less Europe" where its intervention at present obscures or limits responsibilities which should belong to the state or the regions or local authorities: a Europe that is stronger, more united, but less intrusive. To satisfy this need and ensure certainty in relations with the Member States, it is above all necessary to **define in the Constitution a framework disposition of the Union's competencies**, and establish that **on subjects which have not been explicitly assigned to it the competence belongs to the States**.

Distinction should be made between the categories of the Union's competencies, which are:

- **exclusive**, in which it is the Union's responsibility to regulate the whole subject and the Member States may act in these fields only when authorised or required to do so by the Union;
- **concurrent**, in which the Member States may exercise as long as and insofar the Union has not yet done so;
- **shared** (a significant innovation proposed by us), in which the Union has only to establish the fundamental principles of the subject which are binding for the Member States (and for the Regions with legislative powers), who would then remain free to adopt laws which better correspond to specific national or local characteristics. Firstly, this type of

competence would ensure, for the national systems, spaces of legislative autonomy that the Community's traditional concurrent competence cannot guarantee. Secondly, it would give added jurisdictional control over whether the principle of subsidiarity was being respected, as the Court could verify if the Union's intervention had exceeded the limit of the fundamental principles;

- **complementary**, in which the States are competent, and the Union's action is exclusively one of coordination and support of the regulations and policies of the Member States;
- **of coordination of economic and financial policies of the Member States, and the coordination of these with social policies**, to bring together the Europe of Maastricht and the Europe of Lisbon.

Monitoring Compliance with the Principle of Subsidiarity and the Implicit Powers of the Union

We share the idea of the introduction of ***ex ante*** **political monitoring by the National Parliaments** as to whether the principle of subsidiarity is being respected, to which there could be added an ***ex post*** **judicial review** by the Court of Justice. For the political control, there is agreement on the introduction of an "early warning" mechanism that would force the Commission to re-examine and give adequate justification for its proposals, without that seeming to be a right of veto for the National Parliaments.

With regard to the so-called **implicit powers of the Union,** we consider it desirable to maintain the mechanism of article 308 TEC (although strengthening the role of the European Parliament in the procedure) and at the same time to make it possible for the first time for **the powers of the Member States to be re-extended in certain conditions**, thus reversing the present mechanism of article 308 TEC. This solution adopts an intermediate position with respect to those suggested to date, and would emphasize the flexibility of the mechanism.

PART III – INSTITUTIONS OF THE UNION

The Objectives of the Reform

The intervention on the institutions should **counterbalance the two components - supranational and interstate - that express the original double legitimation of the Union:** the **principle of institutional balance** should be preserved, since it has guaranteed the achievement of integration not by suppressing the various national identities but through the creative contribution of each of them and their mutual enrichment. What, however, does need to be **overcome** is **the "incremental method",** by means of an overall institutional reform that would render the Union, in the words of Laeken, "more democratic, more transparent and more effective" and ensure the simultaneous strengthening of all the Union's institutions.

In this perspective, it means **overcoming the present confusion of functions between legislative and executive power** which is the source of the democracy gap of the institutions, the transparency gap in their decision-making procedures, and the delivery gap in their activities, **ensuring respect for the principle of the separation of powers** and a more balanced relation between the European and national institutions, and thus:

- restoring to the European Council its function as a driving force in defining the general political guidelines of the Union;
- investing the European Parliament, the representative House of the European peoples, with the power to deliberate on the entire European legislation and exercise control over the action of the Executive;
- distinguishing the legislative activity of the Council of Ministers from the executive activity: the former would be entrusted to a seat serving as a second representative House of the

member States of the Union (creating an *ad hoc* "Council for Legislative Affairs"), and the latter would be concentrated in a small number of formations of the Council itself;

- defining and reinforcing the role of the Commission as guarantor of the implementation of primary legislation, as institution with exclusive powers of initiative and implementation of legislation and in its role as interpreter of the Union's common interest;
- giving the Court of Justice further powers to resolve disputes between the Union and Member States, and to guarantee the principle of subsidiarity;
- strengthening the links of the National Parliaments with the European institutions, particularly to protect the principle of subsidiarity.

The European Parliament

The representative body of the European peoples should be granted, jointly with the Council for Legislative Affairs, the power to deliberate on the entire legislation of the Union. In this way, except for strictly defined exceptions, the present codecision procedure would have general application, which could take the name of "**legislative procedure**".

The other functions of the European Parliament also need strengthening, particularly the **policy-setting power and parliamentary control over the Commission** (with the possibility of a vote of confidence in the Union's Executive); the function of **inspection** (which should be extended to cover every question of general interest in the Union and to the activities of the sectorial Councils of Ministers); and the function of **control of the implementation of** European legislation (which should be explicitly provided for).

The principle of adequate representation of the various nationalities should lead to the ratification in the text of the Constitution of the single **principle of uniformity of electoral procedure**. The Constitution could also provide for the prohibition of constraints of mandate for members of the European Parliament, as the European political parties are already recognized and given the advantage of strengthening them..

The Council for Legislative Affairs

The Council for Legislative Affairs should be composed of a **Minister** indicated by each State as a permanent member, designated for his **broad and transversal range of competencies,** and who is constantly involved in its activities (such as the Minister for European Affairs, in those countries which have one). The permanent members should be **accompanied**, according to the questions on the agenda, by the **sectorial Ministers** (or by a representative of the executives of the local authorities of each Member State, if this is the competent government as regards a given issue)**, as well as by no more than three National Members of Parliament,** so as to ensure the participation of the National Parliaments in the preparatory decision-making process of European legislation.

The deliberations of the Council for Legislative Affairs should, with strictly defined exceptions, require a qualified majority, to be calculated with the mechanism of the so-called **double majority,** of the Member States and the population of the Union, in place of the system adopted in Nice, regarded by many as complex and difficult to interpret. Finally, as it is to all intents and purposes a second House, it would be advisable to establish that the **sessions** of the Council for Legislative Affairs too should be **always held in public.**

The European Council

There is general agreement on the need to **emphasize the role of the European Council as a driving force** in defining the general political guidelines and to free it from having to deal with questions that are often relatively insignificant or alien to its functions, and that have sometimes transformed it from being an organ of policy-making to a court of appeal for the solution of disputes that have not been resolved elsewhere. There have, however, been **many different proposals** as to how to achieve this aim, in particular with regard to the **reform of the Presidency of the European Council.** These include:

- maintaining the present six-month rotation;

- an "internal" President chosen by the European Council among its members for five years (or for two and a half years, renewable once);
- a presidential team lasting a year composed of the Heads of government of four member States;
- the unification of the post of the President of the European Council and the post of the President of the Commission;
- a full-time President chosen by the European Council for five years (or for two and a half years, renewable once).

A Proposal in Two Phases for the Presidency of the European Council

The above proposals have one or more of the following three objectives in view:

- giving continuity to the activities of the European Council and raising the "political" level of the Union's action;
- maintaining for the individual Member States a strong role in the European institutions and an effective link with their territory;
- guaranteeing that a reinforcement of the European Council does not alter the role and functions of the Commission.

They are all three fundamental objectives.

Is it possible to pursue all of them together, reducing the drawbacks of each of the proposals presented so far? In what follows Astrid tries to give a positive answer to this question.

To **ensure continuity**, the best solution would be that of **a full-time President with a long mandate** (for example, two and a half years, renewable once), with appropriate adaptations to avoid any possible effects of imbalance.

To **maintain a strong role for the States**, it would be possible to establish within the European Council **a presidency *bureau*** consisting of various Prime Ministers chosen on a six-month rotating basis and ensuring that they were representative of groups of countries that were homogeneous geographically, and for size and interests. In this way the interests of each country could be channelled in a Council made up of 25 States, and in this way the creation of political consensus facilitated. To maintain the advantages of equal rotation between Member States further possibilities can be considered, such as appropriate options for the Presidencies of the various Councils and six-monthly meetings of the Heads of State in the capital of a Member State.

As for the relations between the **President of the European Council and the President of the Commission,** their respective responsibilities should be clearly defined in advance, stating that the former is responsible for the whole Councils' activity, so not to encroach on the Commission's activities.

Lastly, this solution does not exclude the possibility of a later unification of the post of the President of the Commission and the post of the President of the European Council (the latter functions being helped by the presidential *bureau*). In the evolution of the institutions the passing of time can settle disagreements and allow the formation of a new stability: Thus we could already **consider the possibility – after two terms of office of the European Parliament – of conferring the Presidency of the European Council and of the Commission on a single person.**

The European Commission

We think it advisable to confirm the Commission's **characteristic as an independent institution**, guarantee its effectiveness, and define its relations with the other institutions.

A limited **number of members of the Commission** is desirable: 25 Commissioners are excessive, given the number of its essential missions and the need for it to work effectively. Members would be chosen on a rotating basis respecting criteria which fully represented the different groups of countries.

The Commission's **monopoly of the right to initiate legislation** should be confirmed, as well as the principle of its **general responsibility for the implementation of Union law** and

for **interpreting the general interest of the Union**. Consequently, the Commission should also be responsible for promoting the coordination of the implementation of the laws as they apply to the Member States, and one way of doing this would be through meetings with the competent authorities of the individual Member States.

One innovative proposal concerns the powers of the Commission in the procedure of **multilateral surveillance of whether Member States are respecting the Union's guidelines for economic policy.** We propose that in place of the simple recommendation provided for today the Commission be able to formulate a specific proposal that the Council can disregard only by a unanimous vote.

For the **choice of the President of the Commission**, election by the European Parliament, followed by approval from the European Council seems the best and most generally shared solution. The risk of compromising the independence of the Commission could be mitigated by providing for a particularly qualified majority for the election.

The Council

The attribution to the Commission of general executive power should be subject only to the exceptions established by the Constitution, where it attributes some executive functions to the Council. The **maintenance of the various Councils of Ministers** seems justified **in only four cases** and only for transversal functions or functions which cannot yet be subject to "communitisation" as they are new to the system of the Union: the **General Affairs Council** (given its role in ensuring the coordination of the activities of the Council with regard to the Union's objectives); the **Foreign Affairs Council** (which should be distinguished from the former to strengthen the Union's foreign policy, together with the introduction of the Union's Foreign Affair Minister); **the Justice, Home Affairs and Civil Protection Council** and the **Ecofin Council**.

In this reorganization of the institutions the functions performed by other Councils of Ministers do not require the existence of any special authority, but should fall under the **general responsibility of the Commission**. The Commission will have power to call meetings with the competent ministers of the member States whenever it seems advisable in particular cases.

The **abolition of the existing Committees** is desirable, with the exception of the Coreper, which is absolutely necessary. At the same time the Commission should be entrusted with the task of identifying the few indispensable Committees, as it is responsible for relations between different levels of government. This would unify the functions of the Committees that were still necessary following the reduction of the various Councils of Ministers.

There are various possible solutions for the Presidency of these Councils: it could be allocated to the different States on a rotating basis or entrusted to the Commission itself.

The Court of Justice and Court of First Instance

The Nice Treaty has already found a satisfactory solution for the new problems of the functioning of the Court of Justice. Nevertheless, greater access to European jurisdiction is necessary, **extending the right of natural or legal persons to bring direct action** against decisions or acts that have a clear and direct effect on them. The **Member States must allow regional and local authorities the right of recourse before the Court of Justice** against acts of the Union adopted in violation of the norms concerning the competence partition and the principle of subsidiarity. To avert the danger of a proliferation of recourses a national filter would be possible, as proposed by the European Parliament.

The Committee of the Regions

The participation of the Committee of the Regions in decision-making procedures concerning the Union's fundamental policies should be developed. To this end **consultation of the Committee during the preparatory decision-making process of European legislation should be mandatory** and it should have the **right to bring direct action** against acts of the Union infringing the competence of regional and local authorities.

Other Institutions

The document also mentions possible interventions on the other institutions of the Union (**European Central Bank, European Investment Bank, the Court of Auditors, and the Economic and Social Committee**).

PART IV – THE ACTS OF THE UNION

The Reform's Objectives

To ensure a genuine simplification of the acts and procedures of the Union in conformity with the concomitant introduction of the principle of the separation between legislative and executive powers, there is wide agreement on the need to:

- introduce a hierarchy of the Union's sources of law;
- standardize executive acts too, asserting their supremacy over administrative acts;
- make more democratic and transparent the decision-making procedures of all the Union's acts;
- avoid prejudicing the need for flexibility in the system.

The New Classification of Union Acts

As regards the **primary sources**, there is now general agreement that it is necessary to replace the current definitions of "regulation" and "directive" with, respectively, "European Union law" and "European Union framework law".

As for the **acts of the Executive**, it has been proposed to accompany decisions with the new typology of "regulations", broken down into purely executive regulations and delegated regulations. These acts would be adopted by the Executive on the basis of a delegated law fixing objectives, scope and terms for the exercise of the delegated power. This instrument would allow Union legislator to concentrate only on the principles of the subject, leaving the regulation of details to the Executive but keeping powers of control over the detailed regulations entrusted to the Executive, thus guaranteeing more flexibility to the system.

The provisions of the EC Treaty still in force would, however, be confirmed in the part which includes recommendations and opinions among the **non-binding and thus non-normative acts**, only to specify that their adoption should respect the acts mentioned above.

It would also be possible to establish the duty to state the reasons on which a decision is based for all the Union's acts, and that the drafting of legislation is in conformity with the principles of regulatory quality.

Legislative Procedure

Once codecision for legislative procedure between Parliament and the Council for Legislative Affairs were generalized, the system would be much simpler than it is at present. Consequently, the Constitution should do no more than regulate the **number of readings** necessary for the approval of a law and the **ways of resolving disagreements** that might arise between the two Houses. The present solution of the Conciliation Committee can be maintained, as long as it conforms to the new principle of the parity of the two Houses.

In any case it would be useful if the Constitution had some provisions for the simplification of acts and for the participation of consultative bodies in framing them.

The Budget

The Constitution should recognize the **principles** that the budget be unitarian, universal and annual, and require the balance between revenue and expenditure as well as the obligation to provide financial covering for expenditure.

For the **procedure**, the Council should have the final say on resources, trade surpluses and the macro-economic parameters, while the European Parliament should have the last word on

allocation of expenditure. Secondly, the distinction between compulsory and non-compulsory expenditure should be abolished, as it has proved a source of complication in practice. There should be a single procedure for expenditure. It would also be possible to write into the Constitution the provision whereby, at the start of every term of office, the Commission proposes the Financial Programming Document to the European Parliament and the Council, a document that has to be later adopted by the Council subject to the consent of the European Parliament.

PART V – RELATIONS BETWEEN THE UNION AND STATES

The Relation between the Union and Member States

The relation between the Union and the Member States should be founded on a **principle of complementarity**, reaffirming the obligation on the Member States to pursue the objectives defined in the Constitution and to refrain from any measure that could compromise their accomplishment. Thus all **rigid forms of opting out are to be excluded**, and the non-participation of a Member State in any strengthened cooperation should be regarded as temporary.

The attribution of legal personality to the Union involves a revision of the **admission** procedure for new Member States. This will take the form of a Treaty between the Union and the applicant State, subject to the approval of all the Member States.

It is also worth considering the advisability of providing for an **expulsion** procedure for extreme cases of the violation of fundamental rights, to be deliberated unanimously. This would be added to the present suspension of the right to vote in such cases. Finally, as a counterbalance to the principle of majority deliberation, provisions should be made for the possibility of **withdrawal**, to be exercised only in the case of Treaty modifications.

The Relation between the Union and Third States

The principle in force, by which the Union can conclude agreements with Third States and international organizations on subjects within its competence is to be confirmed.

Given the attribution of legal personality to the Union, there is the question of **defining who can negotiate in the Union's name.** This could be, depending on the cases and the competences mainly concerned, the Commission or the Council.

There should be a rule on the establishment of forms of association with other States or international organizations in the first part of the Constitution. A network of **special relations between the Union and neighbouring countries** could be established, including closer forms of association too. Special forms of association could also be envisaged with any countries that should leave the Union.

PART VI – GENERAL AND FINAL PROVISIONS

The Principle of Unanimity in the Revision of European Treaties

In outlining the revision procedure of European Treaties article 48 TEU lays down the **rule of unanimity**, as a common will of all the contracting parties is necessary for an amendment to come into force. Different rules can be introduced, but these innovations would have effect solely on the future, in the treaty legitimately modified and ratified according to the unanimity rule in force. Thus there is no legal basis for the various attempts to evade the rule.

The Proposal: Unanimity and Express Withdrawal

Thus unanimity is essential even in the case of one or more States refusing ratification. The correct solution would be the **unilateral withdrawal** of the non-ratifying contracting parties.

This would guarantee the integrity of the original system as established in the treaty between the ratifying parties without integrating the possible non-ratification, which, according to article 48 TEU, would prevent the modifications from coming into effect.

It would be appropriate for the intention to withdraw to be expressed in a special clause, inserted in each National bill for the ratification of the Constitutional Treaty and to be separately approved. It seems correct to believe that the withdrawal will have to take place before the final date envisaged for the ratification. Withdrawal could usefully be accompanied by the activation of **special conditions** for the non-ratifying parties, such as, for example, a condition of privileged association.

The Constitutional Referendum

The referendum is alien to the provisions of article 48 TEU, nor could the modifications under discussion introduce it as a necessary element in the ratification procedure. Any call for a referendum could have force only as an appeal to the national systems. This is not the case should a State regard a referendum as necessary and make its own ratification conditional on a positive outcome to the referendum: that is of legal significance exclusively within the country itself.

How to amend the European Constitution in the future

Unlike the initial approval, later revisions of the new Constitution might not require unanimity.

Both the **possibilities suggested by Astrid** safeguard the participation of the States and of the community institutions in the revision procedure. In one case the European Parliament is the proponent of the revision project, which is then submitted for approval with a favourable vote of 4/5 of the intergovernmental Conference. In the other it codecides the modifications, together with the European Council.