

REPORT

from : Chairman of the Working Party of IGC Legal Experts

dated : 25 November 2003

to : Intergovernmental Conference

Subject : ***2003 IGC: editorial and legal adjustments to the draft Treaty establishing a Constitution for Europe and to the Protocols***

- Presentation of the outcome of proceedings of the Working Party – CIG 50/03

1. As instructed by the Presidency of the IGC ¹, a Working Party of Legal Experts has carried out a "legal verification" of the draft Treaty establishing a Constitution for Europe, drawn up by the European Convention ². The Working Party was chaired by Mr Jean-Claude Piris, Director-General of the Council Legal Service and Legal Adviser to the IGC, and in his absence by Mr Giorgio Maganza, Director in the Council Legal Service.
2. The Working Party worked on the basis of a document prepared by the IGC Secretariat with the assistance of the Council Legal Service (CIG 4/03), in which legal improvements to the draft were suggested. It also discussed suggestions made by members of the Working Party. The Working Party went on to examine the Protocols annexed to the existing Treaties, on the basis of documents prepared by the IGC Secretariat, with the assistance of the Commission (CIG 41/03, CIG 48/03 and CIG 49/03).

¹ Letter of 29 September 2003 from Mr Frattini to the Ministers for Foreign Affairs of the Member States of the European Union and to the acceding States, the candidate countries, the European Parliament and the Commission.

² Text submitted to the President of the European Council by the Chairman of the Convention in Rome on 18 July 2003, at the end of the Convention's proceedings (CONV 850/03).

3. The Working Party held 15 meetings (on 9, 10, 15, 20, 21, 24, 29 and 31 October and on 5, 6, 10, 14, 18, 19 and 25 November 2003).

The outcome of proceedings is set out in CIG 50/03, which contains the draft Treaty establishing a Constitution for Europe, and in Addendum 1 thereto, which contains the Protocols to be annexed to the Constitution.

In view of the political sensitivity of the provisions on Council formations (Article I-23), the Commission and the Union Minister for Foreign Affairs (Articles I-25 to I-27 and III-250 to III-253), the common foreign and security policy (Article I-39 and Articles III-193 to III-209 and III-215) and the common security and defence policy (Article I-40 and Articles III-210 to III-214), the Working Party of Legal Experts confined itself to minimal, horizontal adjustments, basically following the drafting conventions which it had agreed on elsewhere.

The overall result merely reflects the legal drafting approach taken by the Working Party of Legal Experts and in no way affects the option available to delegations of raising any political issues.

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4. In the course of its discussions, the Working Party agreed to suggest legal and drafting improvements, including the following:

- achieving legal and editorial consistency between the different parts of the draft Constitution through greater legal consistency in provisions (e.g. deletion of needless cross-references or repetition, insertion of necessary cross-references, repositioning of some articles or paragraphs ¹, etc.) and more consistency in the wording used (e.g. a standard method for drafting legal bases, use of the same term to express the same idea, etc.);
- making good some omissions (e.g. through the addition of other cases in which an Institution may submit a proposed act to the legislator, the insertion of a fuller definition of the scope of a challenge to the legality of an act, the addition of a reference to laws or framework laws as instruments in the legal basis on the association of the overseas countries and territories and in that on the outermost regions, or the addition of a reference to the applicable voting rule in all cases in which the European Council adopts a binding legal act, etc.);
- the correction of legal inaccuracies (e.g. those relating to the composition of the Council, the principle of representative democracy, review of the legality of acts suspending certain of the rights deriving from membership of the Union, etc.).

¹ The following provisions have been repositioned:

- Article I-10(1) is moved to Article I-5a;
- Article I-10(2) is moved to Article I-5(2);
- Article I-16(3) is moved to Article I-11(5);
- Article I-24(4), first subparagraph, is moved to Article I-33(4);
- Article I-24(4), second subparagraph, is moved to Article I-22(4);
- Article III-64 is moved to Article III-65a;
- Article III-84 is moved to Article III-289a;
- Article III-85 is moved to Article III-289b;
- Article III-192 is moved to Article III-186(1);
- Article III-242 is moved to Article III-239(3);
- Article III-280 is moved to Article III-281(3);
- Article III-284 is moved to Article III-281(2);
- Article IV-1 is moved to Article I-6a;
- Article IV-9 is moved to Article IV-7a.

5. The Working Party also agreed to suggest total recasting of most of the final provisions contained in Part IV, more specifically the provisions entailed by the repeal of the existing Treaties. It accordingly suggests:
- the addition, in the preamble, of a reference to succession between Treaties and to legal continuity of the "acquis communautaire";
 - the combining, in a single Protocol, of the various transitional provisions scattered throughout the draft Constitution (e.g. the date of effect of a number of rules relating to a new composition or a new voting procedure for certain Institutions and bodies, and their composition or other rules applicable in the period between the entry into force of the new Treaty and that date, etc.);
 - the addition of transitional provisions not drawn up by the Convention, with a view to ensuring succession between the existing Treaties and the future Treaty establishing the Constitution and, in particular, legal continuity of existing Institutions, bodies, offices and agencies, the "acquis communautaire", ongoing proceedings, etc.
6. These improvements were approved by mutual agreement, in accordance with the rule established at the beginning of the Working Party's discussions.

However, the Spanish and Polish delegations stated that the transfer of the various transitional provisions scattered throughout the draft Constitution to the "*Protocol on the transitional provisions relating to the Institutions and bodies of the Union*" raised issues of political expediency for them. They could therefore go along with the legal drafting approach taken by the Working Party only if those issues of political expediency were resolved.

The position of the above two delegations is reflected in footnotes in CIG 50/03, as well as in a special presentation of the Protocol on transitional provisions in Addendum 1 to that document (in which the version of the Protocol drawn up under the supervision of the Legal Adviser to the IGC, which reflects the Working Party's legal drafting approach, is preceded by the version of the Protocol proposed by the Convention, without any drafting adjustment).

7. The Convention text has been left unchanged, without any comments, in a number of areas in which the IGC Secretariat had suggested legal improvements but mutual agreement could not be reached, because of opposition by one delegation or a very small number of delegations.

The Conference's attention is, however, drawn to four such areas, where the draft Constitution as it currently stands is legally incorrect ¹:

- (a) final recital of the preamble to the Charter of Fundamental Rights (Part Two of the draft Constitution). For reasons of legal certainty and transparency, it is suggested that a phrase be added at the end of the recital to point out that the explanations concerning the Charter which were prepared by the Praesidium of the Convention that drafted the Charter have been updated on the responsibility of the Praesidium of the European Convention; otherwise, the current text would be inaccurate. The following addition is supported by the great majority of delegations (the German, Austrian, Belgian, Luxembourg and French delegations opposed it, as they considered that it raised issues of political expediency): "*(...) the explanations prepared at the instigation of the Praesidium of the Convention which drafted the Charter **and updated under the responsibility of the Praesidium of the European Convention***".

In addition, since the text explicitly states that "*the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared at the instigation of the Praesidium of the Convention which drafted the Charter*", it would be legally inconceivable for the text of such explanations not to be available to those courts and to Union citizens; it is therefore suggested that the explanations be made universally accessible by ensuring that they are published in the "C" series of the Official Journal of the European Union;

¹ These areas are mentioned in footnotes to CIG 50/03 (see pages 68, 125, 182 and 224).

- (b) Article III-88(1) (legal basis allowing the adoption of specific measures for the euro area): It would seem legally incorrect not to specify the Institution which is to adopt the measures, i.e. the Council, or the procedures to be applied by it, as appropriate, according to the content of the decision to be adopted. The addition shown below is supported by the vast majority of delegations: "*1. In order to ensure that economic and monetary union works properly, and in accordance with the relevant provisions of the Constitution, the Council shall adopt, in accordance with whichever of the procedures referred to in Articles III-71 and III-76 is appropriate, measures specific to those Member States ~~which are members of the euro area~~ whose currency is the euro shall be adopted: (...)*". Only the United Kingdom and Sweden delegations were opposed and suggested different wording.
- (c) Article III-209 (rule on non-interference between CFSP procedures and procedures for other policies): This paragraph, which does not pose any substantive problems for delegations, should be reworded in such a way as to make it more precise and legally secure. Its aim is to spell out a rule designed to prevent the Council, in the context of its powers under the CFSP, from adopting acts affecting other areas of Union activity. With the abolition of the pillars, the competences enabling the Council to act are all, without distinction, Union competences. The idea is therefore to protect not competences but the procedures and powers of the Institutions which continue to differ between the CFSP and other policies (broader powers for the European Parliament, the Commission and the Court of Justice). The following draft is endorsed by virtually all delegations (only the Spanish delegation is opposed to it). "*The implementation of the common foreign and security policy shall not affect the **application of the procedures and the extent of the powers of the Institutions laid down by the Constitution for the exercise of the Union** competences listed in Articles I-12 to I-14 and I-16. Similarly, the implementation of the policies listed in those Articles shall not affect ~~the competence referred to in Article I-15~~ **the application of the procedures and the extent of the powers of the Institutions laid down by the Constitution for the exercise of the Union competences under this Chapter.***";

(d) Article III-305(1) (access to EIB documents): Since the draft Constitution drawn up by the Convention provides that, in the case of the ECB, public access to documents shall be granted only for its administrative activities, but not for its banking activities, the same provisions should apply to the European Investment Bank. An addition of this kind is supported by almost all delegations (only the Swedish delegation is opposed to it).

8. Finally, it has been suggested that the Conference should consider the question of how the articles in the draft should be numbered. The system adopted by the Convention (whereby the Arabic numeral of each Article is preceded by the Roman numeral of the Part to which it belongs, reverting to 1 again for each Part) gives rise to a great deal of confusion, particularly when numbers are read out aloud and then interpreted into a number of different languages (e.g. "I-10" and "110" or "III-142" and "342"). From the point of view of legal certainty, transparency, simplicity and ease of use, it would thus be preferable to use continuous numbering in Arabic numerals throughout the text of the Constitution (from 1 to 465).

A large majority of delegations endorsed the proposal for renumbering continuously throughout, provided this was accompanied by the Roman numeral of the relevant Part, so that the distinction between the four separate Parts of the Constitution could be maintained.

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