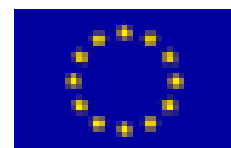


**From the Convention to the IGC:
Mapping Cross-National Views
towards an EU-30**



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"Reforming the EU Institutions - Challenges for the Council"

**THE COUNCIL AS ACTOR ON THE INTERNATIONAL
SCENE**

by

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presented to the conference

REFORMING THE EU INSTITUTIONS: CHALLENGES FOR THE COUNCIL

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This short paper illustrates and discusses briefly the provisions of the draft text of the Constitution proposed by the Praesidium that concern the EU's Common Foreign and Security Policy (CFSP) and particularly the role of the Council in the conduct and development of CFSP. The focus will be on the major changes that the Praesidium has proposed to introduce in the CFSP realm. The paper also tries to identify the most critical aspects of the Praesidium proposal with particular regard to the CFSP issues on which the debate in the Convention has concentrated and that may become central matters of discussion even in the intergovernmental conference.

The general question is whether and to what extent the proposals currently under discussion at the Convention can increase the effectiveness and consistency of the Union external action and particularly CFSP. The implications that some proposals may have for the overall institutional architecture of the Union and the general equilibrium between its main institutional bodies, notably between the Council and the Commission, also need to be examined carefully. In particular, the prospective creation of a “Ministry of Foreign Affairs” would have a considerable impact on the Union’s institutional balance.

The first part of the draft text includes general provisions concerning specifically CFSP as a distinct policy area. Indeed, the view prevailed within the Convention that the CFSP could be classified neither as a shared competence nor as a supporting action and should therefore be dealt with in a separate section of the first part of the treaty.

A first important aspect of the general provisions concerning CFSP is the emphasis on the one hand on the need for the Union to cover all areas of foreign policy and security issues, on the other on the obligation on the member states: (i) to comply fully with Union’s CFSP positions and actions and (ii) to consult one another on any CFSP issue of general interest. This includes the obligation to provide prior information on any national foreign policy position or action. The wording of the text reflects the effort to strengthen the obligations of the member states in the CFSP area. Indeed, after the failure of the EU Council to reach a common position on Iraq, the debate has concentrated on how to ensure that in future crisis situations rapid and effective consultations take place within the EU possibly leading to common positions and actions. In this regard, the stronger insistence in the text on the obligations that the member states undertake in the field of CFSP may be helpful. In practical terms, however, since CFSP is not a justifiable policy area – the European Court of Justice can be hardly given a power of sanction in the field - the power of initiative attributed to the new institutional bodies with CFSP responsibility is much more important. This applies, in particular, to the Minister of Foreign Affairs, but also to the envisaged power of the proposed new full-time President of the European Council to convene an extraordinary meeting of the Council if the international developments so require.

This power of the President and the large power of initiative assigned to the Ministry of Foreign Affairs can be important tools to oblige the member states to early reciprocal consultation and early action so that a repetition of the Iraqi failure can hopefully be avoided.

A second crucial problem relates to the decision-making procedures within the Council on CFSP matters. Indeed, the current debate is focusing on this aspect. As a matter of fact, while many members of the Convention have spoken in favour of establishing qualify

majority voting as a general rule also for CFSP, others want to maintain unanimity. Taking note of these divergences, the Praesidium has chosen to retain unanimity as the general rule, proposing a limited extension of the cases when majority voting will apply.

The draft treaty, like the current one, includes a provision regulating constructive abstention. Also qualified majority voting will continue to apply to decisions concerning the implementation of common actions. There is nothing substantially new in these provisions. It is worth noting, however, that in a previous draft the Praesidium had proposed the application of qualified majority voting for the decisions that the Council takes on the basis of a joint proposal presented by the Minister of Foreign Affairs and the European Commission. This would have been a significant improvement. The power of initiative of the Minister of Foreign Affairs would be reinforced substantially by his/her right to oblige the Council to decide on his/her proposals by majority voting. Unfortunately this crucial provision has been replaced with another establishing that the Council decides by majority voting on an initiative that the Minister of Foreign Affairs takes only after a request from the European Council. Compared with the previous draft, this means in practice, a significant weakening of the capacity of the Minister of Foreign Affairs to press the Council to take a common position or action. It is therefore advisable that the original text proposed by the Praesidium be re-established even if, according to the new formula adopted by the Praesidium, the Minister of Foreign Affairs will not make joint proposals “with” the Commission but with “the support of” the Commission.

It is worth noting that an important new provision allows the European Council to decide by unanimity that the Council should vote by majority voting in cases other than those listed in the Treaty. This so-called “ passerelle clause” may offer an important opportunity to extend the scope of majority voting to the CFSP area through a simplified procedure, i.e. without the need to pass through the complicated and lengthy procedure regulating the revision of the Treaty. However, since the European Council would have to take its decision on the extension of qualified majority by unanimity, it is highly doubtful that the passerelle clause would ever allow for a substantial change in the CFSP decision-making. A compromise but more convincing solution would be to introduce a sort of super-qualified majority for CFSP so that at least the veto of a single country or a group of countries representing a very limited portion of the EU population could be prevented.

Concerning the right of initiative, the main and quite important innovation is that it is attributed not only to the member states but also to the Minister of Foreign Affairs. When submitting a proposal to the Council the Minister of Foreign Affairs will have two options: to

act on his own or seek the Commission's support. He/she would have to follow the latter course of action when areas of external relations other than CFSP are involved.

In sum, the Praesidium has introduced only limited innovations concerning CFSP decision-making rules. For this reason, the new provisions proposed for the various forms of flexibility appear to be quite important. Important new provisions relate to enhanced cooperation. In particular, in the CFSP context enhanced cooperation is no longer restricted to the mere implementation of a joint action or a common position. Moreover, as in the other policy areas, the Praesidium has proposed to drop the possibility of rising a matter related to enhanced cooperation before the European Council. It is also worth noting that the new general provisions for enhanced cooperation also apply to CFSP, including the new minimum threshold for participation, which the Praesidium has proposed to set at one third of the member states.

In fact, one can wonder whether the mechanism for enhanced cooperation can have a real relevance for CFSP because, independently from the provisions regulating enhanced cooperation, the Council has been given the power to entrust the implementation of a common action to a limited group of member states.

It must be added that the general provisions for enhanced cooperation do not apply to the defence policy. In this area, the draft proposed by the Praesidium calls for other forms of closer cooperation involving a limited group of countries. This includes what has been called "structured cooperation" which would involve member states willing and able to undertake mutual commitments in the defence area. It must be noted, however, that the provisions concerning structured cooperation has been criticised by many members of the Convention as they see the risk of establishing a sort of variable geometry which may jeopardise the unitary character of the Union institutional set-up. Another new form of flexibility in the defence field is the close cooperation that some countries may establish as regard mutual defence - until the Council decides to establish common defence. This would imply incorporating into the Union framework the commitment to mutual solidarity that some countries have already undertaken in case of an armed attack.

Looking at the new institutional set-up proposed by the Praesidium, a first set of problems concern the representative duties of the President of the European Council. He/she would be empowered with the task of ensuring the external representation of the Union at the highest level. Arguably, the creation of an elected President with such tasks may contribute substantially to increasing the continuity and consistency of the EU activities as well as provide it with a more effective leadership. Moreover, contrary to what several small states

fear, with a full time elected President , the risk that the larger states establish directorates to take by themselves the key CFSP decisions is likely to decrease. In fact, if the presidency should continue to be attributed according to the current rotating system, the big states would be even more inclined to act as a directorate bypassing the EU institutional framework. By contrast, a full-time elected President could be able to oblige them to discuss CFSP matters in the appropriate institutional contexts.

On the other hand, the risk is widely felt of a possible overlap between the competencies of the President of the European Council and those of the Foreign Ministry and the President of the Commission. The Praesidium has to some extent taken into account this concern by adding in the last version of the draft Treaty that the President of the European Commission should ensure external representation without compromising the role of the Minister of Foreign Affairs or the President of the Commission. But it seems clear that there remains a risk of a possible overlap of roles.

More generally, the relationship between the President of the European Commission and the Minister of Foreign Affairs needs to be further clarified, considering, just to make an example, that, according to the last version of the draft Constitution Treaty, it is on the request of the European Council that the Minister of Foreign Affairs takes the initiatives on which the Council decides by majority voting.

As for the Council itself, the Praesidium has elaborated two major reform measures. First, it has proposed to establish a specific Foreign Affairs Council, keeping it separated from the General Affairs Council. This proposal is in tune with the tendency to distinguish between coordination activities and foreign affairs activities that had already emerged at the Council of Seville. The second important proposal is that the Foreign Affairs Council be chaired by the Minister of Foreign Affairs. Some have criticised this proposal arguing that it would be difficult for the Minister, to push through proposals within a body of which he/she is also the chairman. On the other hand, the view has prevailed within the Praesidium that a different chairman of the Foreign Affairs Council could weaken the position of the Ministry of Foreign Affairs or give rise to institutional rivalries. It is also important that, as chairman of the Council, the Ministry of Foreign Affairs has the power to convene extraordinary meetings in cases that require a rapid decision. In general, the chairmanship of the Council is an element that can substantially reinforce the power of initiative of the Minister of Foreign Affairs.

Apart from the power of initiative and the chairmanship of the Foreign Affairs Council, the Ministry of Foreign Affairs would have many other tasks to perform. The question thus arises whether his or her workload would be too heavy.

The Minister will have extensive external representation tasks including that of expressing the Union's position in international organisations or at international conferences. He/she will have also an important consultative role with regard to the establishment of the various forms of enhanced cooperation and will have the task of informing regularly the EP and all Council members of their developments. More generally, he will have an overall responsibility for ensuring coordination and consistency between the various aspects of the Union's external action.

It is also worth noting that the special representatives of the Council who are responsible for dealing with specific issues or geographical areas will be, according to the proposal of the Praesidium, placed under the authority of the Ministry of Foreign Affairs. Currently, the special representatives are formally not under the authority of the High Representative of CFSP, Javier Solana, but report directly to the Council. So, there is an effort to streamline the structure of the Council, which has to be welcomed.

At the same time the draft treaty continues to assign a major role to the another body of the Council, the Political and Security Committee, which will be in charge of regularly monitoring the international situations and, not less important, will be responsible for the political control and strategic direction of crisis managing operations. It will also have an important role in policy formulation. In particular, it will have the right to deliver opinions to the Council. Indeed, one of the key problems to be addressed is the functional relationship between the Policy of Security Committee and the Ministry of Foreign Affairs, taking into account that the latter, according to the text elaborated by the President,, will have an important role in identifying the means to be used for the various EU missions.

Finally, the Minister of Foreign Affairs has the task of keeping the European Parliament regularly informed about the developments of CFSP.

It is not clear how a single figure, even if supported by a large staff, can perform all these functions in an effective way.

Another important question is if the Minister of Foreign Affairs will be able to forge a functional working relationship with the President of the Commission, since he/she will receive guidance from the Council on all CFSP matters but, at the same time, as a member of the Commission, he/she will be subjected to the Commission rules for the actions he/she will undertake on all other aspects of external actions. The Minister of Foreign Affairs will

inevitably have a stronger position within the Commission - of which he/she will be one of the Vice-Presidents—and thanks to his quite strong power of initiative, which is largely independent from the Commission, may acquire a strong political weight. It is unclear how this can be reconciled with the power and responsibilities of the President of the Commission, which the Praesidium has proposed to increase even further.