



Internal Reform and Constitution building Capacities



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The Community method vs. Intergovernmental method in the European Constitution

Blurred definitions

This paper aims to throw light on the evolution of the European Constitution with a view to changes in what is called the Community method or intergovernmental method respectively. It will lay the ground by recalling the main elements of the two procedures and by pointing to underlying principles for the functioning of the European Union as well as criticisms which are commonly levelled at the two methods. The following section will present the positions of various actors in the reform process regarding changes to the system in general. The next part will then look at the results of the Convention in the field of Justice and Home Affairs (JHA) as they are discernible so far.² The paper will conclude with some preliminary recommendations for the remaining work of the Convention.

The term ‘Community method’ describes a decision-making procedure that ascribes particular roles to the European institutions and involves a particular kind of interaction between them. Going beyond the decision-making procedure itself, the term is often used to designate a particular relationship between the institutions. Thus, it is not a clearly prescribed process but

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² At the time of writing, draft articles for all parts of the future Constitution had been published by the Presidium, except those relating to the institutions and the Foreign and Security Policy. Commentaries by delegates had been submitted and initial debates on the articles had already taken place.

rather represents a collection of characteristics that together are typical of the 'Community method'. The main elements of the Community method may be summarised as follows:

- The European Commission has the monopoly for initiating legislative procedures; it also plays a major role in taking Member States to court for failing to implement decisions
- The Council of Ministers decides by qualified majority voting; amendment of Commission proposals is only possible by unanimity
- The European Parliament is a full partner in the legislative process via the co-decision procedure
- Member States and the EU institutions can take a case to the European court

As opposed to this, the intergovernmental method assigns only a reduced role to the European Commission which has to share the right of initiative with Member States. Also, the European Council decides by unanimity under this method, thus giving each Member State a right of veto. The European Parliament is only consulted.

Typically the Community method is linked with issues of the 'first pillar' and the procedures of Art. 251 TEC, and the intergovernmental method applies to the second and third pillars. However, this is a rather ideal-typical link. In reality, Community method and intergovernmental method co-exist in various degrees and the picture is rather more blurred:

First of all, the Community method itself has changed over time, the role of the European Parliament has been extended, a greater number of treaty provisions have come under QMV. What is more, a wide interpretation of the methods allows one to even view the mere inclusion of Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA) into the European Union as progress for the community method (Maastricht Treaty). For its proponents, the inclusion of the issues in the framework of the Union was a first step to allowing Community structures and institutions to participate in the policy process – albeit only marginally. Furthermore, it was expected that the two pillars would eventually be transferred to the first pillar, thus fully applying the Community method.

The blurring between the methods is therefore as old as the Union itself. In fact, when the Maastricht Treaty introduced the two new pillars for Union policies, their relationship to the first pillar and the Community method remained unclear. Some saw these two pillars as permanent alternatives to the Community method of the first pillar, others preferred to see the arrangement as temporary. Passerelles were to facilitate the transfer of powers and functions to the Community.

The Treaty of Amsterdam shows most clearly how 'third pillar issues' were formally brought into the framework of the first pillar, but also illustrates the blurredness of the Community method and intergovernmental method: most issues continued to be subject to a shared right of initiative and unanimity voting. The European Parliament was only to be consulted.

Measures regarding the controls on persons at the borders, the crossing of the external borders, the freedom of travel for third country nationals were to be decided upon by unanimity, after consulting the Parliament and on a proposal from the Commission or a Member State. This was also foreseen for all measures on asylum, on refugees, immigration policy as well as those relating to the legal residence of third country nationals in a Member

State.³ Only after a unanimous vote in the Council could these measures be transferred to the procedure under Art. 251 TEC.

This meant that only the measures concerning the list of third country nationals requiring a visa to enter the Union and the provisions for a uniform format for visas could be initiated by the Commission only and decided upon by QMV in the Council. Even here, the European Parliament only had the right to be consulted, thus was not a full partner. The only automatic move to Art. 251 was foreseen for procedures and conditions for issuing visas and rules on a uniform visa.

The Treaty of Nice did not constitute a major change, but extended the automatic transfer to co-decision and QMV for a number of measures. In the TEC, the only significant change is that measures concerning asylum and those regarding minimum standards for the protection of refugees are decided by the procedure of Art. 251 – provided that the Council has agreed unanimously on the basic rules for the issue area. Judicial cooperation in civil matters is subject to co-decision and QMV without this condition (except the rules on family law). The changes to the TEU mainly concentrate on measures relating to cooperation of justice authorities and Eurojust.

This account of treaty arrangements as compromises between various methods shows that it is difficult to equalise the Community method with the first pillar. Nevertheless, the Community method can be defined ideal-typically with equal participation of Council and European Parliament in the legislative process and a central role for the Commission as initiator of Community acts and as guardian of the Treaties.

Ultimately, the differentiation between Community method and intergovernmental method refers to a variation of influence of the Community institutions and the Member States on policy outcomes. Even in its purest form, the community method leaves considerable influence with the Council and thus the Member States. However, only the intergovernmental method formally allows one Member State to block a decision it is opposed to. The decisive difference is therefore that the community method might theoretically force a Member State to have to implement measures it is vehemently opposed to. (The Luxembourg Compromise prevented this from happening in practice, however.) Various temporal or functional combinations of the two methods are conceivable and – as the above example shows – have also been practiced. Thus, the decision for the application of the community method or some variation thereof is always also a symbol and reflection of the willingness of Member States to transfer competence to the common level.

The extension of the use of the Community method is both criticised and advocated for a number of reasons. Actors' positions are dependent not only on individual interests regarding the ability to influence common policies, but also on past experiences and diverging views on the primary principles for governance in the European Union. The following outlines the main arguments put forward regarding the usefulness or danger of the two methods.

Fundamentally speaking, the two methods are related to two diverging views of the nature of the European Union. Intergovernmentalists view the Union as a club of states who only have come together for mutual benefit. The Union's institutions should only have powers to ensure the implementation of common decisions. If no unanimous vote can be achieved, then no common decision can be taken. Integrationists claim that the Union has gone beyond a club of states and has become a community where common gains will always exceed individual

³ A few of these were exempted from the limitation of a five-year period.

losses of influence. The Union institutions strive to achieve a common good out of the diverging individual interests. It is therefore necessary, to have an institution such as the Commission act beyond the immediate interests of Member States. Furthermore, the European Parliament as an elected representative body ought to be a decisive part of the decision-making process.

Effectiveness –

The intergovernmentalists in governments tend to favour this method for its effectiveness since it is ultimately only the Member States who have to negotiate and agree. They also argue that once an agreement is found, it is sure to be implemented. There is an obvious reference to the need for cooperating states to retain vital areas of sovereignty so that, it is argued, a right of veto has to be preserved. Intergovernmentalists thus place their effectiveness claim in the context of their interpretation of sovereignty.⁴

The supranationalist school claims that effectiveness is achieved through bringing all interested parties into the process – thus equalising effectiveness with legitimacy to some extent. This involves not just governments of member states, but also includes a vital role for the Commission representing the common interest and for the European Parliament as the only directly elected body. Analysts have also pointed out the relative efficiency of the co-decision procedure when compared to the cooperation procedure: “Much analysis predicted that co-decision would not work effectively. On the contrary, we observe a procedure that is shorter than co-operation with regard to efficiency, and which, with regard to the substance of European legislation, enables Parliament to set the EU policy agenda on an equal footing with the Council.”⁵ They furthermore see the community method as more effective because it removes the danger of blockages of decisions by removing the veto and thus avoids policy failures. Often, proponents of the supranationalist school point to the argument that efficiency, thus output, leads to visible results of Union policies, which then in turn lead to expectations of gains of actors who are ready to cooperate more. A positive cycle of output is achieved. Lastly, advocates of the community method tend to point out that the possibility of QMV can avoid cooperation outside the Community framework.

Legitimacy –

Intergovernmentalists claim that only national governments can adequately represent their national populations. The way of reaching agreement in the community method takes place between too many bodies and in too many groups. They think that this leads in fact to a democratic deficit, where administrative procedures in the Commission often influence the outcome too strongly. The opacity of the process is therefore strongly criticised. Some critics have also claimed that the EP is not really representative of the European populace due to the fact that election participation is low and decreasing.

As mentioned above, supranationalists value the possibility to include more interested parties into the process. They argue that the intergovernmental method allows for relatively too much influence of national executives in the Council, who – acting in Brussels and not in their national ministries - are hardly subject to political and parliamentary control. Supranationalists also commonly point out that the system of checks and balances between the institutions in the community method works well. They therefore criticise any change to the relative weight of institutions, for example also the extension of the role of the European Council which now often decides about policy details rather than guidelines. In the same vein,

⁴ It has to be remarked, however, that no European government can be purely attributed to one or the other group. The British government, usually considered more intergovernmentalist, readily accepts the importance of the role of the Commission and Parliament for negotiating agreement or improving laws. Similarly, countries that have been perceived as more supranationalist over time, also hold that there are areas of national sovereignty they are not ready to pool (yet).

⁵ Andreas Maurer, „The legislative powers and impact of the European Parliament“, *Journal of Common Market Studies*, vol. 41 no. 2 (2003)

they argue that a shared right of initiative between the Commission and Member States would allow a group of states to dominate the decision-making process.

Clarity/Visibility –

The clarity of the process is often emphasised by proponents of the intergovernmental method. The decisive actors are clearly identifiable since final decisions lie with the ministers/heads of state. Thus responsibility for agreement or obstruction can be clearly attributed. The number of actors involved is limited. Supranationalists criticise giving too much weight to the Council since it is often a secretive institution where the deals between governments are not clear. They therefore argue that only the Community method can offer the necessary openness and transparency of procedure via the European Parliament. Furthermore, neo-functionalists have pointed out that only the community method induces real compromise and solidarity over time. It is a process of ‘cumulative negotiation’ which allows for the search for a general European interest.⁶

The above has shown that there are widely diverging interpretations of what the various methods can achieve for the Union. The particular objectives various actors aim to achieve naturally depend on their expectations and understanding of the Union as such. While legitimacy, effectiveness and democratic accountability are all central values for the actors in the debate on decision-making procedures, their interpretation of how this is to be achieved differs widely. This was also the case in the debates surrounding the European Convention and its drafting of a Constitution.

Actors’ positions

The following outlines the position of important actors in the reform process. The Convention has proven as an incentive for governments, European institutions and civil society actors to put forward their views on the necessary future structures and processes of the Union, not least of all on the future decision-making procedures and on the relationship of the Union institutions. The following will shortly retrace the main positions of national governments and Community institutions. These have been most vocal in asserting their views in public.⁷

As shown above, the pronouncement for a particular decision-making procedure is often linked with the achievement of fundamental goals for the European Union. However, the various objectives such as efficiency, legitimacy and strength were linked to very different arrangements for the decision-making process – and thus put to use for the differing agendas of policy makers.

The indicators most commonly mentioned by the actors for assessment of community method or intergovernmental method were:

- Right of initiative
- Unanimity/QMV (ability of individual member state to influence)
- Influence of European Parliament
- Interaction/balance between the institutions
- Openness of processes

⁶ Cf. Helen Wallace and Wallace, William. *Policy-making in the European Union*. Oxford: Oxford University Press, 1996, p. 32.

⁷ This is not to deny that individual members, representatives of national governments, have made significant contributions to the debate and that the final result will most likely owe a lot to the work of such members. However, these are more difficult to attribute to any particular grouping and are therefore omitted here in favour of representatives of national governments and of the European Parliament.

The EU institutional actors, the European Commission and the European Parliament, proved natural allies in favour of strengthening the Community method in the future constitution – since both stand to gain from such an evolution. The European Parliament passed a resolution based on a common report by Jo Leinen (SPE) and Mr Méndez de Vigo (EPP) in November 2001⁸ in which it clearly pronounced itself for extending the Community Method. Criticising a ‘drift towards intergovernmental methods’ and emphasising the requirements of democracy, legitimacy, transparency and effectiveness, the Parliament majority proposed amongst other:

- making QMV in the Council and codecision involving the European Parliament the general principle
- openness of Council deliberations and decisions concerning European laws
- electing the Commission President by the European Parliament
- eliminating the distinction between obligatory and non-obligatory expenditure, thus giving the EP a say in approving the entire budget
- incorporating CFSP into the Community pillar
- merging police and judicial cooperation in criminal matters with judicial cooperation in civil matters, thus bringing the area into the Community framework
- Integration of Eurojust and Europol into the Community framework
- Full jurisdiction of the Court of Justice in the whole area of JHA

The large political groupings in the Parliament agreed in their favouring of the Community method. The political constellation did not pit the political parties against each other, but set the proponents of more influence of the Community institutions against those favouring the current institutional balance or even reduction of Community influence. Increased influence of the European Parliament was commonly justified by the fact that the assembly is the only directly representative European institution. Increased powers in the decision-making process therefore reflected a desire to heighten responsiveness to citizens and to deepen democracy whilst increasing effectiveness. The contributions of EP members to the Convention such as draft constitutions all emphasise the relative weight of the EP and the Commission. With regard to the balance of the institutions, MEPs tended to point out that democratic control over the Commission had to be increased if the Commission gained new rights.⁹ Members also asked the Commission to clarify how its lack of democratic legitimacy could be encountered.

The European Commission also used the opportunity of the ongoing reform process to declare itself in favour of the Community method and its extension. The Commissions Barnier and Vitorino contributed to the debate in the Convention with a background paper on the Community method, laying out in detail its main elements, distinguishing it from the methods used in the second and third pillar and giving examples of concrete experiences with the community method. Pointing to the efficiency of the method while being democratic and legitimate, they call the Community method the essential element for the good functioning of the European Union.¹⁰

The Commission referred to ‘traditional’ values in the integration process to justify this position: Only the community method allowed small and large member states to “contribute

⁸ European Parliament (2001), European Parliament resolution on the constitutional process and the future of the Union (2001/2180 (INI))

⁹ „Barnier: Commission does not seek more powers“, euobserver.com, 28 May 2002 (accessed 15 April 2003).

¹⁰ European Convention, „Contribution présentée par MM. Barnier et Vitorino membres de la Convention: „La methode communautaire“, CONV 231/02, 3 September 2002.

on an equal footing”.¹¹ Furthermore, the community method assured transparency of decision-making, mainly due to the involvement of the European Parliament; it also facilitated the coherence of actions with the basic principles of the Union system as well as with other actions; the method allowed the synthesis of sectorial interests via the mechanisms of preparation and consultation which occurred in various stages of the process.¹² Thus, the Communication of the Commission on the institutional architecture from December 2002 highlights the need for a number of changes:¹³

- The Commission should have an exclusive right of initiative in the whole legislative field, implemented within the framework of interinstitutional planning
- The co-decision procedure ought to be applied to the adoption of all European laws
- The Council ought to vote with qualified majority as a general rule (double majority)
- In sensitive cases, enhanced majorities should facilitate the abandoning of the unanimity rule (to be used for example to maintain flexibility along the lines of present Art. 308 TEC)
- The budget process is to be changed so that the division between compulsory and non-compulsory expenditure is abandoned. EP and Council ought to decide in the co-decision procedure, with enhanced majorities in both bodies.

With regard to JHA, the Commission points out that police cooperation ought to be subject to the same rules as other areas, thus effectively come under the community method. Framework decisions by the Council on planning, modalities and extent of coordination of national police ought to be subject to reinforced majorities. Keeping unanimity in areas of JHA would be a “recipe to block everything”, said Commissioner Vitorino.¹⁴

In a reflection paper on the functioning of the institutions, intended as a basis for a plenary discussion in January, the Praesidium of the Convention also put forward deliberations that touch upon the Community method.¹⁵ Although cautiously mostly only laying out the current situation and common criticisms directed at this system, the Praesidium seems to make recommendations by emphasising a number of problems: Citing the need for more effectiveness of all institutions as well as the importance of institutional balance, they suggest extended powers of co-legislation for the European Parliament, a Commission reinforced in its independence and a Council able to take fast and coherent decisions. They also draw attention to the Commission proposal of extending QMV. They also point to the fact that settling of dossiers in the European Council has become difficult due to the decision-making procedures that do not allow QMV.

The individual Member States have differing ideas about the role of the European Union itself, as well as its relationship to the Member States. This also resulted in different propositions on the reform process. The following presents the positions of the UK, as a traditionally hesitant country with regard to more integration, France and Germany, who have been very active in presenting common contributions to the Convention and the Benelux states, who represent the position of smaller Member States to some extent.

¹¹ „Sidelined Prodi only shows his weakness“, Times Online, 13 November 2001 (accessed 15 April 2003).

¹² Cf. CONV 231/03, op.cit.

¹³ European Commission, „For the European Union: Peace, Freedom, Security“, 11 December 2002, COM (2002) 728 final/2. The ‚Penelope-Project‘ presented by Romano Prodi goes in a similar direction with regard to the suggested changes to the community method.

¹⁴ Agence Europe, 1 April 2003, p. 13.

¹⁵ European Convention, „The Functioning of the Institutions“, CONV 477/03, 10 January 2003.

The **British government** has emphasised its view of the European Union as a cooperation of sovereign nations.¹⁶ While affirming that Britain wants a strong, effective and democratic Union, Prime Minister Blair pointed to the fear of a European superstate to illustrate the limits of British willingness to cooperate. Thus, efficiency and accountability are emphasised in British visions of a reformed Europe.

The Prime Minister has acknowledged the need to “integrate more” in his speech, i.e. in the area of fight against organised crime or illegal immigration – even with regard to defence and security policy. An extension of QMV is acknowledged in general, although the PM pointed to national red lines, such as the British one on national control over taxation. Also, Prime Minister Blair has said that communitisation of much of JHA is conceivable. Similarly, the Foreign Secretary, Jack Straw, has emphasised the need to introduce QMV in asylum matters and more effective decision-making for co-operation of national police.¹⁷

However, Blair refused to transfer any part of defence or foreign policy to the Community method. With regard to a reform of decision-making methods, peer review mechanisms and a European Agency for developing capabilities are suggested.

The preferred role of the Commission is one of ‘enforcer’, seeing to the implementation of decisions. Thus, the British have not put much emphasis on enlarging the Commission’s right of initiative in general. Instead, the Prime Minister has emphasised the fact that Britain does not wish to “sanction any dramatic departures from the Community model”, referring to the need of an impartial Commission. Its President should therefore not be elected by the Parliament.

The role of the European Parliament is seen to “improve legislation” – reminding of the role of the House of Lords rather than the House of Commons. Although silent on an extension of co-decision in general, Prime Minister Blair has pronounced himself in favour of giving the EP a say in all annual decisions on the budget. Generally speaking, supranational institutions are therefore needed for effective implementation of decisions, rather than for making them.

Summing up the **British and Spanish positions**, Peter Hain and Ana Palacio made a contribution to the Convention emphasising the following points:¹⁸

- Extension of Commission right of initiative in JHA and in proposing the multiannual strategic agenda
- Strengthening the role of the Commission to enforce compliance
- Application of co-decision and QMV to *some* new areas
- Enhanced role of EP to limited degree (oversight of implementing legislation via ‘call-back’, holding Commission to account, involvement in planning European Council’s strategic agenda)
- EP to have a say in all annual decisions on budget

Germany’s government, represented in Convention by Prof. Dr. Glotz and then by Foreign Minister Joschka Fischer, has taken a different position from the UK. Although also referring to the need of democratic legitimacy and ability to act, Minister Fischer has pronounced

¹⁶ Tony Blair, „Speech on Britain and Europe“, Cardiff, 28 November 2002.

¹⁷ „A Constitution for Europe“, Jack Straw on the website Britain and the EU, 11 October 2002.

¹⁸ European Convention, „Contribution by Mrs Ana Palacio and Mr. Peter Hain, members of the Convention: „The Union institutions“, CONV 591/03, 28 February 2003.

himself clearly for an extension of the Community method. In his intervention in the Convention on 5 December 2002, he emphasised the following points:¹⁹

- The co-decision procedure has to become the general rule for legislative action in the Union. Exceptions are only allowed on the basis of clear criteria.
- Qualified majority voting in the Council also needs to be introduced as the usual procedure for all decisions (including foreign and security policy)

These points were reiterated again by the State Secretary Hans Martin Bury in March of 2003 when speaking on the legislative acts of the Union.²⁰

Germany and France have presented a number of common positions in the Convention, one of which has directly addressed the question of the role of institutions. In the common French-German contribution to the Convention²¹, the Foreign Ministers refer to the European Union as a union of states, peoples and citizens and a political organisation as a federation of nation states. With regard to the future of the Community method and the intergovernmental method, the contribution emphasises the necessity of institutional balance and makes the following points:

- The Commission ought to have the right of initiative and the task to ensure implementation
- The Commission President is elected by the EP and confirmed by the European Council (both voting by with qualified majority).
- Decisions of the Council are generally to be made by QMV
- All extension of QMV in the Council is to be linked to co-decision with the EP
- The EP ought to decide on all or parts of income of the Union

With regard to reform in JHA, France and Germany have proposed far-reaching measures relating to all parts of the policy field. They proposed the change to QMV for all parts, except for those core areas which are characterised by strong national traditions. Those are to keep unanimity.

France's Foreign Minister has emphasised the importance of clarity and simplicity of the Union structures (similar to the UK) as well as of efficiency and democratic accountability. However, the conclusions which are drawn with regard to the necessary reform of structures are different from those in Britain. The Community method is clearly embraced, with QMV as a general rule – but softened for the ‘areas of shared sovereignty’ in the current second and third pillar. The original institutional balance with the European Council fixing the general political orientation, the Council adopting decisions on that basis and the Parliament co-legislating (in future on the whole budget) ought to be preserved.²² In a common contribution with the **Netherlands**, the French position is modified towards a clearer support of the community method:²³

- Extension of the right of initiative for the Commission (all legislative functions of the Council, multi-annual strategic programme, Open method of coordination)
- Reinforcement of the powers of the Commission for implementation of legislation

¹⁹ „Intervention von Bundesminister Joschka Fischer in der Plenartagung des Konvents am 5. Dezember 2002: Vereinfachung der Instrumente und Verfahren“, website of the German Foreign Office.

²⁰ „Erklärung von Staatsminister Hans Martin Bury in der Plenartagung des Konvents am 17. März 2003, website of the German Foreign Office, (accessed 10 April 2003)

²¹ European Convention, „Beitrag, der von den Mitgliedern des Konvents Herrn Dominique de Villepin und Herrn Joschka Fischer übermittelt wurde“, CONV 489/03, 16 January 2003.

²² „Discours sur l'Europe du Ministre des Affaires étrangères“, website of the French Foreign Ministry, www.diplomatie.gouv.fr/actu/article.asp?art=30071 (accessed 16 April 2003)

²³ „Contribution franco-néerlandaise à la Convention: renforcement du rôle de la Commission“, website of the French Foreign Ministry, www.diplomatie.gouv.fr/actu/article.asp?art=33644 (accessed 16 April 2003)

- Reinforcement of the control function of the Commission in the stability pact and of the coordination function in social and economic policy.

The **Benelux countries** have also issued a memorandum on the future institutional framework. In it they emphasise – apart from legitimacy and transparency – the need to respect the equality of small and large Member States, and view the Community method as the best way to safeguard this balance. Their main points favour “strong common institutions (...), the Community method and (...) strengthen(ing) those institutional elements which can best further the common interest.”²⁴

- Commission President is to be elected by the EP with a 3/5 majority, and confirmed by the Council with QMV
- Commission has to have the exclusive right of initiative in all legislative matters; can be asked by Council and EP to introduce a proposal; needs to justify if it does not respond
- Community method to be fully applied in most areas (including fight against crime, asylum, migration, judicial cooperation in civil matters)
- Open legislative meetings of Council
- Extension of co-decision procedure for EP to all legislative matters
- Full decision-making powers (together with Council) for the whole spectrum of expenditure
- Commission responsible for regulatory measures to implement; Member States responsible for enforcement
- European Council is to provide the general policy guidelines and approves multi-annual programme on the basis of Commission proposal

A similar emphasis on institutional balance, equality between Member States, a strong role for the Commission in initiating and implementing legislation, and co-decision and QMV as a norm can be seen in a common proposal from **16 members of the Convention**.²⁵ This proposal rejects the so-called ABC proposal by Aznar, Blair and Chirac for electing a permanent President of the European Council and fears that such an arrangement would upset the balance of the institutions and the equality of Member States.

The above has shown that the positions of the various actors differed markedly on the role they wish to assign the common European institutions. This depended not only on their views on the nature of the European Union as such, but also on their perspectives as to which system allowed a small country to influence decisions on a more equal footing. Yet others, such as Germany and France, presented fairly far-reaching proposals with the intention to keep the reform dynamic going, but also in order to be able to influence early on the results of the Convention in their favour.

The following will present preliminary results from the Convention and draw first conclusions as to the future of the Community method in the final draft of the future Constitution.

²⁴ „Memorandum of the Benelux: A balanced institutional framework for an enlarged, more effective and more transparent Union“, December 2002.

²⁵ The representatives came from Cyprus, Hungary, Denmark, Austria, Sweden, Latvia, Czech Republic, Slovakia, Bulgaria, Portugal, Lithuania, Estonia, Ireland, Slovenia, Malta and Finland.

cf. European Convention, „Contribution submitted by Mr Michael Attalides, Mr Peter Balazs, Mr Henning Christophersen, Mr Hannes Farnleitner, Ms Lena Hjelm-Wallén, Ms Sandra Kalniete, Mr Jan Kohout, Mr Ivan Korcok, Ms Maglena Kuneva, Mr Ernani Lopes, Mr Rytis Martikonis, Mr Lennart Meri, Mr Dick Roche, Mr Dimitri Rupel, Mr Peter Serracino-Inglott, Ms Teija Tiilikainen, members of the Convention: - "Reforming the Institutions: Principles and Premises", 28 March 2003, CONV 646/03

The future constellation of elements of the Community method and intergovernmental method – first results from the Convention

The final result of the Convention's work will be ready by the end of June – if all goes according to the timeline. It is therefore too early to make an assessment of the overall place the Community method has been accorded by the Convention. Nevertheless, work has progressed far and there are already a number of documents to indicate the final direction. The following will concentrate on Justice and Home Affairs in order to show how the proposed changes to the decision-making process and institutional balance affect the details of a particular policy area.

The Working Group on Freedom, Security and Justice under the chairmanship of John Bruton has presented its final report on 6 December. The overall aim of the working group was to bring simplification and clarity to this area where issues are currently distributed across the pillars. The group worked under strong public demands for more Union activity and results in the area of Justice and Home Affairs, particularly the fight against crime and terrorism. Its deliberations represent a step ahead in embracing the Community method for Justice and Home Affairs. However, the final report should not be interpreted as a total departure from accustomed methods. A number of suggestions retain elements known from the intergovernmental method, such as a right of initiative for member states and unanimity in the Council regarding a number of issues in police and judicial cooperation. The group's main conclusions include:²⁶

- A common legal framework for the issues currently covered by the 1st and 3rd pillar with special features maintained for police and justice cooperation
- Common legal instruments for all measures in the policy field (ref. to results of working group on simplification)
- General application of the co-decision procedure
- QMV for all measures now in the first pillar
- Extension of QMV to many issues now in the third pillar
- Retaining unanimity for aspects considered essential to national sovereignty (e.g. the creation of Union bodies)
- Right of initiative for 1/4 of Member States
- Extension of the competence of the Court of Justice to cover the whole policy area

Thus, the suggestions for the areas of asylum, refugees, immigration and visa ask for the application of the Community method – except for the fact that Member States are to maintain a right of initiative also in this field. The issues relating to police and justice cooperation retain distinctive elements of the intergovernmental method, most particularly the retaining of veto for Member States.

With regard to implementation and maintenance of standards, the group suggested more extended use of 'peer review' mechanisms. This is in fact contrary to the Community method – which would stipulate the close involvement of the Commission for reasons of coherence of implementation.

The draft constitution

²⁶ Cf. European Convention, „Schlussbericht der Gruppe X ‚Freiheit, Sicherheit und Recht‘“, CONV 426/02, 2 December 2002.

The draft constitution represents a fundamental change to the extent that the co-decision procedure will become the rule (Art. 25 part I). The modalities with which EU framework laws and EU laws will be decided (QMV or unanimity) are to be specified for each policy field.

The draft articles on Justice and Home Affairs, which were drawn up by the Convention Praesidium following the final report of the working group and presented to the plenary on 17 March, took up the broad lines defined by the working group.²⁷ The fact that the working group report already represented a compromise facilitated the incorporation of its results into the draft constitution. The main suggestions are:

- Creation of a common legal framework called ‘Freedom, Security and Justice’
- The same legal instruments for all legislative acts in the policy field (Art. 31, part I)
- co-decision becomes the rule (art. 24 and 25, art. 31 part I)
- QMV becomes the rule for JHA, including
 - dealing with Eurojust and Europol (art. 19 and 22),
 - asylum and immigration (art. 11 and 12),
 - judicial cooperation in civil matters (art. 14),
 - a list of crimes of a serious nature and with transborder dimension (Art. 17).
- exceptions where unanimity is needed:
 - approximation of certain elements of criminal procedure (if not listed in art. 16),
 - areas of crime which are not specifically listed in art. 17;
 - adoption of legal acts regarding family law (art. 14 (3))(QMV only for parental responsibility);
 - creation of office of European Public Prosecutor (Art. 20);
 - enactment of legal acts for operational cooperation between authorities responsible for internal security (Art. 21);
 - acts enabling national authorities to operate on another state’s territory (Art. 23)
- General right of initiative for the Commission
 - shared with Member States (1/4) in judicial and police cooperation in penal matters (Art. 31 part I and Art. 8 part II)
- Mutual recognition as a basic principle for cooperation in civil and penal matters (Art. 31, part I and Art. 1 part II)
- Enhanced accountability to national parliaments (art. 3)
- Council to define modalities of review of implementation (Art. 4); this is a reference to the ‘peer review’ mechanisms recommended by the working group
- Extension of competence of European Court of Justice; but national public order exemption for judicial cooperation in criminal matters and police cooperation Art. 9 (does not follow majority of working group)

The Justice and Home Affairs draft articles do represent the next step ahead from the Nice Treaty in the sense that further communitisation of issue areas is foreseen (immigration or transborder crimes of a serious nature). Remarkable is the suggestion to extend of QMV and co-decision to Europol and Eurojust. The remaining areas of unanimity are relatively numerous and reflect the reticence of Member States to relinquish their veto which was already visible in the discussions of the working group. The debate on the drafted articles has

²⁷ European Convention, „Raum der Freiheit, der Sicherheit und des Rechts, Entwurf von Artikel 31 des Teils I und Entwurf von Artikeln des Teils II“, CONV 614/03, 14 March 2003.

also shown that the question of extending QMV is the most controversial one. Looking at the amendments shows the whole bandwidth between support for the suggestions and proposing even more QMV, and rejection of any extension of majority voting in this area.

Some remarks of delegates of the Convention point to the possibility of a trade-off between policy fields building up. For example, Alain Lamassoure from the EP argued that freedom, security and justice was meant to be an area of significant progress for the Union. Although there were important reservations from some members, the overall direction of the argument seemed to accept the application of the normal legislative procedure to JHA. Given strong national opposition to extension of the Community method in foreign and security policy by some Member States, a dynamic might be established which ends up extending QMV in JHA significantly but provides only limited progress for CFSP.

As regards the right of initiative, the proposals seem to perpetuate an old controversy. The draft articles suggest keeping a shared right of initiative for judicial and police cooperation in criminal matters. On the one hand, the suggestion takes up the old pillar structure, thus not entirely progressing to the integrated legal framework. On the other hand, the general rule is that the Commission ought to have the sole right of initiative since it has the role to represent the common interest. The chairman of the working group concluded after the discussion that the threshold of one quarter of Member States for initiating legislation was reasonable and the result of a compromise achieved in the working group.

The discussion of the draft articles showed that there were also important differences of opinion with regard to the right of initiative. While some welcomed the proposals as a way to keep significant Member State influence, others criticised that one could not ask for more European intervention in JHA but then propose conditions that made that impossible (Frans Timmermans, representing the Dutch parliament). The MEP Andrew Duff emphasised that it was the role of the European Commission to ensure coherence in the policy field and that its role was therefore a precondition for co-decision to work. Also the Commissioner responsible for Justice and Home Affairs, Antonio Vitorino, emphasised that the right of initiative of Member States needed to be compatible with co-decision.

The necessity to use the community method also surrounded the suggestion for a European Public Prosecutor (EPP) to be set up by unanimity. A great number of speakers asked for QMV for the establishment of an EPP, saying that the likelihood of its being set up under unanimity was small.

Some debate also surrounded the suggestion of QMV for asylum and immigration. Although the large majority of speakers was in favour, some differentiation of opinion could be noted: While the German representative Teufel was of the opinion that only minimum standards ought to be agreed and that it was the task of the Member States to decide on access to the labour market, the German Foreign Minister Fischer wanted to go further than simply establishing minimum standards. The representative of the British government, Peter Hain, emphasised the need to complement EU internal policies in this area with stronger external action.

The right of national parliaments to participate in evaluation mechanisms was also subject to some discussion. Although this takes away some powers from Member States, as John Bruton acknowledged, the article was generally accepted. However, a number of members argued that there was no need to have special rules for chapters 3 and 4 (judicial and police

cooperation on criminal matters) and that the general threshold of one third of national parliaments for initiating procedures to evaluate non-compliance ought to be kept.

Conclusions

As the lively debate on the drafted articles on JHA shows, considerable willingness from Member States is needed to achieve compromises in this area. However, the draft also shows that on the whole, the Convention is ready to make a considerable advancement in this area.

As regards the role of the European Parliament, the change to co-decision as the general legislative procedure seems to be a useful step ahead. Decision-making in the Union is ultimately a process of negotiation between actors which gives more or less formal power to the various institutions. Initially, the EP represented a form of 'interference' with the negotiating procedures and rounds of the 'cartel of elites'.²⁸ However, in a dynamic perspective, the EP has increasingly been able to change the shape of the negotiating structure to a triangle. None of the actors indicated that they were interested in fundamentally reversing this trend. Thus, the new general legislative procedure is also a recognition of the important role of the EP.

Although the general discussion of the application and extension of the community method showed a certain dynamic between groups of actors (Community institutions, small countries, large countries, new Member States), such a clear division could not be detected with regard to JHA. Thus, also the British government favoured an extension of QMV in this field while a German representative argued to limit Union competence to setting only minimum standards. Community institutions (Commission and Parliament) argued for even greater extension of the Community method. Incidentally, recent developments such as the initiative of 16 countries arguing for the extension of the Community method and equality of Member States also show a general trend towards more support for the role of the Commission.²⁹

As regards the extension of the Community method in the field of Justice and Home Affairs, a number of amendments to the draft could be suggested:

The necessity of article 31 can be questioned. With its special provisions, it seems to point to an unnecessary emphasis on the old pillar structure and could be incorporated at appropriate places in other sections of the constitutions.

The requirement for unanimity might be loosened for some of the areas in which it still applies. For example, the establishment of a list of crimes, for which then the normal legislative procedure is applicable, seems not very useful given that always new forms of crime appear. For those not included in the list, the unanimity rule would apply. It would be more useful to apply QMV throughout.

As regards the shared right of initiative, it is important to eventually give the Commission the sole right of initiative. A period of transition (5 or 7 years) ought to be considered. Alternatively, a condition ought to be introduced in which the Member States can only act if the Commission has been inactive on a certain issue. Also a 'sunset clause' has been proposed by Danuta Hübner, which would mean that an initiative of Member States would become void after three months of it not having been voted on.

²⁸ Cf. Wallace and Wallace, p. 33.

²⁹ Nevertheless, solutions will have to be found for problems with the Commission such as its functioning (comitology and democratic deficit) and its future size.

In conclusion, the draft articles on Justice and Home Affairs and the debate in the Convention show that there is a considerable willingness to communitise the area. Creative proposals to points of disagreement have been made and the working group has achieved significant progress. The overall institutional balance in this policy area has been improved by the proposals. The working group has already found compromises on a number of difficult issues which are likely to also hold up in the Intergovernmental Conference. Nevertheless, the Convention ought to be encouraged to confront in its final draft some of the criticism it has received regarding the reticence to extend QMV fully or at least to provide a perspective for complete participation of the European Parliament and abolition of the veto of Member States.

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