



*Internal Reform and Constitution building Capacities*



**CENTRUM STOSUNKÓW MIĘDZYNARODOWYCH  
CENTER FOR INTERNATIONAL RELATIONS**



**AUSTRIAN ACADEMY OF SCIENCES  
ÖSTERREICHISCHE AKADEMIE DER WISSENSCHAFTEN**

**SWP**

**German Institute for International and Security Affairs**

**Assessing the “Legal Legitimacy” of the Draft Constitutional Treaty**

*Dr Michael Dougan \**

**Introduction**

When invited to assess the legitimacy of the Convention’s work, several possible perspectives immediately spring to mind. One perspective might focus on the composition of the Convention: for example, whether its membership is sufficiently representative of the diverse range of stakeholders engaged in the debate on the future of Europe; or at least whether the Convention’s deliberative procedures offer such stakeholders sufficient opportunities to make their viewpoints known. Another perspective might attempt to assess the various influences brought to bear upon the Convention’s work: for example, whether the public statements from several large Member States on their preferences for the future institutional architecture of the European Union will have unduly prejudiced the Praesidium’s recommendations; or whether the personal bugbears of individual Convention members leave a disproportionately strong impression on the final text. Yet another perspective would be to focus on the relationship between the Convention and the intergovernmental conference: for example, might the Convention process of itself confer upon the Draft Constitutional Treaty such authority that the Member States will then find it difficult to reject or amend substantially its recommendations; or will any new constitutional settlement for the European Union acquire democratic legitimacy only after its renegotiation and eventual approval by the Member States?

However, this paper will focus on a perhaps less obvious aspect of the legitimacy debate: the “legal legitimacy” of the Convention’s work.<sup>1</sup> The

---

\* University of Cambridge. I am very grateful to Eleanor Spaventa for her valuable comments.

Praesidium's Draft Constitutional Treaty contains many good and often bold ideas: for example, full depillarisation coupled with continued differentiation (particularly as regards the CFSP); incorporation of a written bill of rights; the possibility of accession to the ECHR; radical simplification of the Union's legal instruments. Unfortunately, the Praesidium text is let down by its often unsatisfactory legal drafting. Sometimes there is an apparent failure to understand the meaning or significance of important legal concepts. In other places, there is an apparent failure to appreciate the potential legal implications of a given proposal. And sometimes there is an apparent failure successfully to translate new policy ideas into a coherent legal text which will actually achieve what its authors claim to have intended. The following sections will illustrate these problems through examples drawn from across the Draft Constitutional Treaty. It will be argued that such shortcomings of legal analysis and legal drafting threaten the authority and even the credibility of the Convention's work. Left unaddressed by either the Convention or the IGC, they will also undermine the workability of the final Constitutional Treaty. Indeed, far from achieving the sort of clarification and simplification called for in the Laeken Declaration, the Praesidium Draft risks creating new – unnecessary and unintended – problems for the future.

### **Charter of Fundamental Rights and European Convention on Human Rights**

Article 5(1) of the Praesidium Draft provides that the Charter of Fundamental Rights shall be an integral part of the Constitution. The Charter will be set out, according to the Convention's preference, either in Part Two of the Constitution or in a Protocol annexed to the final text. Article 5(2) provides that the Union may accede to the European Convention on Human Rights (though accession shall not affect the Union's competences as defined by the Constitution).

In principle, it is of course a good thing to incorporate a written and legally binding bill of rights into the Union's constitutional fabric – addressing concerns about transparency for citizens who might not otherwise be familiar with the entire corpus of Community law; and issues of legitimacy in relations with third countries whose relations with the Union are often conditioned upon respect for fundamental rights. In principle, it is also welcome that the Praesidium Draft includes an explicit legal basis empowering the Union to accede to the ECHR. Accession would help meet accusations of hypocrisy over the EU's insistence that candidate countries sign up to the ECHR; address fears about divergent interpretations of the same fundamental right by the Luxembourg and Strasbourg courts, with no direct means of redress against the Union when it fails to meet the standards of protection embodied in the ECHR; and provide a more satisfactory legal framework than the current *Matthews* principle, i.e. whereby Member States are held vicariously liable before the ECtHR for Union acts alleged to infringe the standards contained in the ECHR, at least those over which the ECJ has no jurisdiction.<sup>2</sup>

In any case, Article 5(3) of the Praesidium Draft includes a “flexibility clause” permitting the Court to continue identifying new fundamental rights as general principles of Union law – addressing concerns that incorporation of a written Charter of Fundamental Rights could otherwise have had a rigidifying effect upon the types of freedom recognised and protected in an socially and politically dynamic European

---

<sup>1</sup> The text of the Draft Constitutional Treaty as available at the time of writing consisted of the following principal documents: CONV 369/02, CONV 528/03, CONV 571/03, CONV 579/03, CONV 602/03, CONV 614/03, CONV 647/03, CONV 648/03, CONV 649/03, CONV 650/03.

<sup>2</sup> *Matthews v United Kingdom* (Judgment of European Court of Human Rights, 18 February 1999).

Union. However, it is unfortunate that Article 5(3), which purports to codify the Court's caselaw post-*Internationale Handelsgesellschaft*, should refer only to the ECHR and the common constitutional traditions of the Member States.<sup>3</sup> It is true that the ECHR carries special weight in the caselaw of the Court post-*Nold*; but it remains only one of the international human rights documents which may provide inspiration for the general principles of Union law.<sup>4</sup> Is Article 5(3) meant to imply that the Court should no longer look to other fundamental rights instruments promulgated by the Council of Europe; or to conventions adopted by the International Labour Organisation, or the United Nations, to which all the Member States are party? Surely not – which makes Article 5(3) look like an example of loose drafting (apparently based on the equally limp text of current Article 6 TEU).

The Charter has not been included in its entirety in Part One of the Praesidium Draft. This comes as a relief in terms of offering the public a short and comprehensible constitutional text – especially since the Charter involves such a broad range of rights and principles, together with endless cross-references to Union and national laws and practices, which could have given the general reader a misleading impression of the true scope of Union action. Of the two options for incorporation currently on offer, I would prefer to see the Charter as a separate document (not necessarily another “Protocol”, simply “the Charter”) annexed to the Constitutional Treaty. This would avoid any pointless duplication of rights within the Constitutional Treaty itself, e.g. as regards Union citizenship, protection against non-discrimination, and the goals of environmental and consumer protection. It would also be a more elegant way of including the Charter's preamble, which is considered essential to the overall balance of the text, but could otherwise look like a “Treaty within a Treaty”.

Working Group II was understandably reluctant to reopen debate on the substance of the Charter text, as negotiated by the previous Convention and agreed by the institutions, for fear of seeing the whole fragile compromise unravel in rows over provisions such as those contained in the “Solidarity” Chapter.<sup>5</sup> But it is still unfortunate that we will end up with a document that is, in certain respects, unsatisfactory – especially when it comes to the horizontal provisions. We are all aware of the problems which arise from provisions such as Article 51(1) CoFR, which says that the provisions of the Charter are addressed to the Member States only when they are implementing Union law, rather than acting within the scope of Union law; or Article 53 CoFR, on respect for fundamental freedoms as recognised by the Member States' constitutions, which has been widely interpreted as a challenge to the unconditional nature of the principle of supremacy.

Working Group II did propose certain amendments to the horizontal provisions of the Charter – which are not intended to modify the substance of the rights and principles contained therein, but merely to clarify certain elements of the previous Convention's understanding of the Charter, so as to facilitate its smooth incorporation into the Union's constitutional instruments. Several of the proposed amendments seem quite harmless, e.g. as regards Article 51(2) CoFR (to reinforce the principle of conferred powers). Several seem quite unnecessary, e.g. Article 51(1) CoFR (to re-reinforce the principle of conferred powers); new Article 52(4) CoFR (to reinforce the interpretative significance of the Member States' common constitutional traditions); and new Article 52(6) CoFR (to say that full account should be taken of

---

<sup>3</sup> Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

<sup>4</sup> Case 4/73 *Nold* [1974] ECR 491.

<sup>5</sup> CONV 354/02.

national rules and practices, which the Charter already says should be taken into account). However, as observed during the Plenary Debate on the Working Group's report, if these cosmetic provisions make incorporation of the Charter more comfortable for certain Member States, that is perhaps a price worth paying.<sup>6</sup>

More problematic is the proposed new Article 52(5) of the Charter: the provisions of the Charter which contain principles may be implemented by legislative and executive acts taken by the Union institutions, and by acts of the Member States when implementing Union law, in the exercise of their respective powers. Those principles "shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality". Working Party II claimed that this amendment was intended simply to reflect and clarify the distinction drawn throughout the Charter between "rights" and "principles". Presumably, it is meant to address the concerns of certain Member States, that purely aspirational values (such as social assistance in Article 34 CoFR, or legal aid in Article 47 CoFR) might be taken up by the Court of Justice and transformed into directly effective rights enforceable as such against the Member States.

However, the drafting of this proposed amendment is ambiguous. Consider Union (or Member State) acts not specifically intended to implement any given Charter principle, but touching upon a given Charter principle nevertheless: is proposed Article 52(5) CoFR saying that the Court cannot take that principle into account when interpreting such acts, or when ruling on their validity? If so, this would clearly affect the legal substance Charter principles should otherwise have enjoyed upon incorporation of the existing text: according to Article 51(1) CoFR, Charter principles must be observed by the Union institutions whenever they are exercising their powers, and by Member States whenever they are implementing Union law, not just when adopting specific implementing measures. Proposed Article 52(5) CoFR, in its current form, thus goes beyond what is necessary to avoid creating legally enforceable rights to social assistance and legal aid. In particular, it could have a detrimental impact upon the practical significance of the fundamental values contained in the Charter and clearly intended to form part of the policy framework within which the Union institutions must exercise their legislative and administrative discretions across the entire scope of application of the Treaty.

Moreover, the Working Group attempts to draw a clear division between the legal effects of (fully justiciable) rights and the legal effects of (partially justiciable) principles, when the distinction between those rights and principles within the Charter itself is not nearly so clear. Some provisions of the Charter clearly confer rights capable of being directly enforceable, e.g. Article 7 CoFR on respect for private and family life. Some provisions clearly create principles apt merely to be taken into account by the Union institutions, e.g. Article 22 CoFR on respect for cultural, religious and linguistic diversity, and Article 25 CoFR on respect for the elderly. But some provisions are phrased as rights when they might more properly constitute principles, e.g. Article 14(1) and (2) CoFR on the right to education, which "includes the possibility to receive free compulsory education". And some provisions are phrased as principles when they do properly constitute rights, e.g. Article 49 CoFR on the principle of proportionate penalties for criminal offences. Have the Working Group over-simplified the rights / principles distinction – creating an artificial framework to describe the potential legal effects of the Charter, which will have to be superimposed onto a text which is in reality more complex?

---

<sup>6</sup> CONV 378/02.

For these reasons, it would be better not to adopt this amendment, and leave it to the good sense of the Court to delimit the proper legal effects of aspirational principles – as the Court already does satisfactorily as regards provisions such as Article 174 EC on high levels of environmental protection (the basis for Article 37 of the Charter), in *Bettati* and *Safety Hi-Tech*;<sup>7</sup> and Article 153 EC on high levels of consumer protection (the basis for Article 38 of the Charter), in the *Deposit Guarantee Schemes Directive* judgment.<sup>8</sup>

## Principle of Supremacy

Article 9(1) of the Praesidium Draft seeks to draw attention to the fundamental principle (at least of the Union legal order) that the legality of Union acts cannot be judged according to criteria contained in purely domestic sources of law; the legality of any given Union act must be assessed purely against the principles and rules contained in superior sources of Union law itself. In this sense, Article 9(1) fits (albeit awkwardly) into Title III on the Union's competences: it purports to rule out any possibility that national courts might assess the legality of Union acts under principles of domestic law; before going on to set out, *quid pro quo*, certain basic principles governing the legality of Union actions under the Treaty itself (i.e. conferred powers, subsidiarity, proportionality).

However, Article 9(1) of the Praesidium Draft also looks like an attempt to codify the broader principle of supremacy as developed by the Court in its caselaw since *Costa v ENEL*.<sup>9</sup>

The “Cambridge team”, commissioned by the British Foreign and Commonwealth Office to draw up a draft Constitutional Treaty for the European Union, discussed at length the merits and drawbacks of attempting to codify principles such as supremacy in any constitutional text.<sup>10</sup> On the one hand, codification of supremacy could draw unnecessary and unwanted attention to what is a very well-established principle of Community law: consider the scandalised reaction of certain newspapers to Article 9(1) of the Praesidium Draft, then wonder whether some things really are better left unsaid. On the other hand, there is an obvious desire to render more transparent one of the most important principles of the Community legal order / its relationship with the legal orders of the Member States: a constitution which does not mention supremacy might be seen as an incomplete statement of the fundamental tenets of the Treaty system.

But more fundamentally, I am not convinced about the merits of the Praesidium's apparent attempt to codify a principle characterised by sophisticated nuance in the caselaw, and extensive debate among academics. The Praesidium Draft as it currently stands reflects only one body of academic opinion about the principle of supremacy, i.e. that it describes, in the broadest (and blandest) possible terms, the existence of a hierarchical relationship between the Community and the various national legal orders. This hierarchical relationship derives from the idea that the Member States have undertaken obligations binding upon them as a matter of international law; failure to observe those obligations constitutes a breach of the Treaty, and exposes the Member State (e.g. under the First Pillar) to enforcement

---

<sup>7</sup> Case C-341/95 *Bettati* [1998] ECR I-4355; Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301.

<sup>8</sup> Case C-233/94 *Germany v Parliament and Council (Deposit Guarantee Schemes Directive)* [1997] ECR I-2405.

<sup>9</sup> Case 6/64 *Costa v Enel* [1964] ECR 585.

<sup>10</sup> The “Cambridge text” was submitted to the Convention by Peter Hain MP (United Kingdom) as CONV 345/1/02 REV 1. The text was also published as Alan Dashwood, Michael Dougan, Christophe Hillion, Angus Johnston and Eleanor Spaventa, “Draft Constitutional Treaty of the European Union and Related Documents” (2003) 28 ELRev 3.

proceedings under Article 226 EC, and the possibility of punitive fines under Article 228 EC.

However, according to another body of academic opinion, the principle of supremacy has a much more specific meaning, i.e. as a device for settling concrete conflicts between Community and national law. *This* principle of supremacy presupposes: **a)** that national law does actually diverge from the requirements of the Treaty; and **b)** that the relevant provisions of Community law satisfy the threshold criteria for having direct effect, and thus producing independent legal effects, within the domestic orders. If either of these requirements is lacking, the principle of supremacy is inapplicable. If both these criteria are fulfilled, the principle of supremacy requires the national courts / administrations to set aside the incompatible domestic rule and apply instead the relevant Community norm. According to this view, it seems very strange – and potentially misleading – for the Praesidium Draft to have referred to the principle of supremacy without also referring to the principles of direct effect upon which its application depends.

Yet another body of academic opinion would agree that the principle of supremacy performs relatively specific dispute resolution functions between the Community and national legal orders, but need not be linked so closely to the principles of direct effect *per se*: the *Marleasing* duty of consistent interpretation,<sup>11</sup> the *Francovich* principle of Member State liability to make reparation,<sup>12</sup> and the *Unilever Italia* sanction of inapplicability against procedurally defective domestic regulations,<sup>13</sup> can all be interpreted as manifestations of the supremacy of Community over national law. Which interpretation does the Praesidium Draft represent? And was that choice made after considered debate of the options?

Moreover, the simple statement of primacy found in Article 9(1) seems apt to give a misleading impression of what supremacy actually entails in practice. For example, national rules are simply disapplied in concrete cases, in the manner of an individual remedy. They are not rendered “null and void”, since (as the Court has made clear) it lies beyond the competence of the Treaties to interfere directly in the constitutional arrangements of the Member States.<sup>14</sup> Furthermore, national rules are only disapplied insofar as they are incompatible with the relevant Community norm, and can therefore remain fully effective for all other purposes unconnected with the Treaty system.<sup>15</sup> In any case, the *ad hoc* remedy of supremacy in individual cases does not in itself relieve the Member State of its obligation formally to repeal or amend its incompatible legislation so as to conform to the Treaty.<sup>16</sup>

Finally, supremacy understood in its more specific (legalistic) guise properly applies only to the subject matter covered by the existing First Pillar – not to the subject matter of the current Second Pillar. There is therefore a risk that the Praesidium is unintentionally rewriting the rules governing Union-Member State legal relations under the CFSP – by transforming supremacy from an essentially First Pillar doctrine under the existing legal order, into a general Part One principle of the new Draft Constitution, which would then extend across the full range of policy Titles to be contained in Part Two. If the Convention wants to preserve the specificity of the CFSP, even after the abolition of any formal pillar structure, the general principles

---

<sup>11</sup> Case C-106/89 *Marleasing* [1990] ECR I-4135.

<sup>12</sup> Cases C-6 and 9/90 *Francovich* [1991] ECR I-5357.

<sup>13</sup> Case C-443/98 *Unilever Italia* [2000] ECR I-7535.

<sup>14</sup> E.g. Case C-10/97 *INCOGE* [1998] ECR I-6307.

<sup>15</sup> E.g. Case C-226/97 *Lemmens* [1998] ECR I-3711.

<sup>16</sup> E.g. Case C-358/98 *Commission v Italy* [2000] ECR I-1255.

contained in Part One will require more careful consideration and possible reformulation.

It took decades for the Court of Justice to win acceptance from the senior judiciaries of several Member States for an operational principle of supremacy – even in its currently contested and nuanced form. Why risk reopening these old wounds – especially when the Praesidium’s formulation does not accurately capture the existing caselaw? It would be preferable to see Article 9(1) simply deleted from the text.

## **Union Competences**

The Praesidium Draft rejects the idea of establishing an *exhaustive catalogue of specific policy fields* in which the Union can and cannot act. Experience clearly demonstrates that any such catalogue approach would be unduly restrictive, if not simply unworkable: for example, provisions such as free movement and competition law can cut horizontally across virtually any sector of policy, including health care, education, criminal law, property rights etc. The Praesidium text attempts instead to establish *general categories of Union competences* defined according to the basic inter-relationship between Union and Member State regulatory power therein (exclusive, shared and supporting). These general categories of competence would then be linked to specific policy fields contained elsewhere in the primary constitutional instruments, each with legal bases elaborating in greater detail the scope and nature of Union activity (see, e.g. Articles 10(6), 12(2) and 15(1) of the Praesidium Draft). However, the Praesidium text does attempt to list exhaustively the areas of exclusive and supporting Union competence; then leave the category of shared competence as a residual one (offering a purely indicative list of fields which should be considered shared).

The main drawback of the general approach adopted by the Praesidium is the potentially artificial division of organic Community activities into legally discreet policy sectors. EU lawyers are already familiar with legal basis disputes: regulations dealing with both environmental and Internal Market issues had to be adopted under one or other Treaty basis because each used different decision-making procedures for Council and Parliament;<sup>17</sup> directives dealing with both social policy and health and safety in the workplace had to be adopted under one or other Treaty basis because each had a different impact upon the relationship between Union and Member State competence.<sup>18</sup> Any approach which seeks to pigeonhole Union activities into “exclusive / shared / supporting competence” boxes will inevitably incorporate similar tensions.

Accepting these inevitable difficulties, a category approach to Union competences can nevertheless be judged successful if it meets three criteria. First, the general principles describing Union competence need to be detailed enough to be informative and meaningful; yet abstract enough to accommodate wide-ranging flexibility in the Union’s regulatory practice across different policy sectors. Secondly, any attempt to formulate general principles of Union competence should preferably identify exactly where and why they are departing from the existing legal position. Thirdly, general principles of Union competence must be formulated with clarity, so as to avoid creating unintended legal effects.

Unfortunately, it is not clear that the Praesidium Draft meets these objectives: the provisions on Union competence are not necessarily very informative; they do not

---

<sup>17</sup> E.g. Case C-155/91 *Commission v Council (Waste Directive)* [1993] ECR I-939.

<sup>18</sup> E.g. Case C-84/94 *United Kingdom v Council (Working Time Directive)* [1996] ECR I-5755.

always reflect the existing position, or at least explain why they are departing from it; and they risk creating significant but apparently unintended legal consequences.

### *Exclusive Competence*

For example, Article 10(1) defines exclusive Union competence as an area in which only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union. Article 11(1) then states that the Union shall have exclusive competence (inter alia) to ensure the free movement of persons, goods, services and capital, and establish competition rules, within the internal market. This is an extremely controversial proposition, and perhaps the single most glaring legal shortcoming of the current text.

First, Article 12(4) describes the Internal Market as an area of shared competence. This is a very confusing dividing line: after all, free movement is an essential part of the Internal Market. More specifically, the free movement of goods, persons, services and capital is not an objective whose achievement is reserved to the existence of directly effective Treaty provisions such as Articles 28 and 49 EC. It also involves the adoption of secondary measures, under Article 95 EC and parallel legal bases, which improve the functioning of the Internal Market by genuinely contributing to the elimination of obstacles to free movement between Member States.<sup>19</sup> Secondary Community measures which harmonise essential public interest requirements and otherwise impose obligations of mutual recognition upon Member States, as a means of completing the legal framework for the free movement of goods or services, could rightly be considered to fall under both Article 11(1) and Article 12(4) of the Praesidium Draft: are they to be considered areas of exclusive or shared competence? The Praesidium Draft exacerbates the inevitable difficulties of any category approach to Union competences by drawing such artificial divisions between such closely related policy sectors.

The situation becomes even more confused if one considers the definition of exclusive competence contained in Article 10(1) of the Praesidium Draft, i.e. as an area in which only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union. This definition might be well-suited to fields (such as the common commercial policy or monetary policy for Member States which use the euro) dominated by the adoption of secondary legislation. But it seems an inadequate definition for areas (such as the free movement of goods, persons, services and capital) involving directly effective Treaty provisions whose operation does not depend upon the adoption of secondary legislation by the Union institutions.

If we do accept Article 10(1) as our definition of exclusivity, is the Praesidium Draft saying that free movement of goods, persons, services and capital are areas in which only the Union may legislate and adopt legally binding acts? If so, does this not blatantly contradict the idea that the completion of the Internal Market by eliminating obstacles to free movement, through the adoption of harmonisation measures under Article 95 EC etc, is meant to be an area of shared competence under Article 12(4)? And if so, how in turn does this fit with the established caselaw of the Court? Despite the arguments of several Advocates General,<sup>20</sup> the ECJ in its recent *Tobacco Labelling Directive* judgment explicitly confirmed that Article 95 EC is not an area of

---

<sup>19</sup> E.g. Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising Directive)* [2000] ECR I-8419.

<sup>20</sup> E.g. in Case C-233/94 *Germany v Parliament and Council (Deposit Guarantee Schemes Directive)* [1997] ECR I-2405; Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising Directive)* [2000] ECR I-8419.

exclusive competence to regulate economic activity on the Internal Market, but merely confers upon the Union “a certain competence” for improving the functioning of the Internal Market.<sup>21</sup>

In short: by defining exclusivity in terms of legislative competence, then including free movement among the fields of exclusive Union competence, the Praesidium Draft appears (unintentionally) to include the adoption of harmonising measures to complete the Internal Market. This clearly runs counter to the caselaw on Article 95 EC, and creates serious problems of coherency when the Internal Market is also described as an area of shared competence. If free movement really is to be included in the list of exclusive Union competences, the definition in Article 10(1) will have to be modified; and its relationship to the Internal Market as an area of shared competence will have to be clarified.

Secondly, however, I would suggest that – even if limited to directly effective Treaty provisions – free movement should not be included in the list of exclusive Union competences *at all*. The Praesidium approach is thoroughly inconsistent with traditional academic analysis that free movement should rightly be seen as an area of shared competence.

In particular, free movement consists of a complex interaction between directly effective Treaty provisions and national rules regulating the marketplace in the public interest (e.g. on environmental and consumer policy, or public health and the protection of workers). These national rules are clearly adopted by the Member States in the exercise of their inherent competence. It would be absurd to say that any domestic regulation capable of erecting obstacles to free movement and thus falling within the material scope of the Treaty provisions on goods / persons / capital, can only have been adopted under some sort of express or implied authority devolved onto the Member States from the Community institutions. Such domestic rules might well create unjustified obstacles to free movement, and on that basis must be set aside insofar as they apply to imported goods or foreign nationals. But recognising that the Member States can exercise their regulatory competence in a manner which infringes their directly effective Treaty obligations is *not* the same as saying that the Union enjoys exclusive competence over that policy sector as regards the adoption of legally binding acts.

The same is true for competition law. The Court held in *Walt Wilhelm* that Articles 81 and 82 EC are areas of shared competence in which Community and national competition laws co-exist and can apply simultaneously to the same agreement / practice, subject to the Member State’s obligation to ensure that domestic rules do not contradict or undermine the effectiveness of the Treaty rules.<sup>22</sup> Article 83(2)(e) EC expressly empowers the Community to adopt regulations to determine the relationship between Community competition law and national competition law. The Union did so for the first time only when adopting Regulation 1/2003 (which will come into force on 1 May 2004). Even then, Regulation 1/2003 provides only that as regards Article 81 EC, national rules on competition law shall not deviate from the results reached under Community competition law; while as regards Article 82 EC, Member States may continue to apply more stringent domestic rules prohibiting abuses of a dominant position.<sup>23</sup> Neither situation can really be described as one of exclusive Union competence.

---

<sup>21</sup> Case C-491/01 *ex parte British American Tobacco* (Judgment of 10 December 2002).

<sup>22</sup> Case 14/68 *Walt Wilhelm* [1969] ECR 1.

<sup>23</sup> Regulation 1/2003 [2003] OJ L 1/1.

By labelling free movement and competition as areas of exclusive Union competence, the Convention seems to have adopted – without saying so explicitly, and certainly not saying so in the text of Article 10(1) – a definition of exclusivity which focuses on the Treaty’s ability to create directly effective obligations for the Member States, in a manner which interacts with the exercise of their inherent national competence to regulate that policy sector.

Confusion between the competence to regulate, and the obligation to exercise one’s competence to regulate in conformity with the Treaty, is not uncommon. But if this is the approach to be adopted by the Convention, not only would it amount to a radical redefinition of the concept of exclusivity; it would also raise the question of why other fields of Community activity have not also been described as exclusive. After all, equal pay for men and women under Article 141 EC works fundamentally in the same way as free movement of goods, persons, services and capital: imposing obligations for Member States which might render incompatible with Community law certain exercises of *what still remain* national regulatory competences.

It is true that the implications of characterising free movement and competition as fields of exclusive Union competence are not very significant as regards the scope of application of the principle of subsidiarity (since free movement between states / competition rules for the Internal Market would invariably constitute issues better left to the Union than the individual Member States, even if classified as shared competence); or as regards the scope of enhanced cooperation (where the substantive conditions for entering into an enhanced cooperation would make it very unlikely to succeed, even if classified as shared competence). The values at stake here are, rather, accuracy and coherency. On these grounds, the Praesidium Draft would be much improved by deleting any reference to free movement and competition from Article 11(1).

Problems of a different sort arise from the provisions on external Union competence. The Praesidium Draft acknowledges that it would alter the division of competence between Union and Member States as contained in the post-Nice Common Commercial Policy, i.e. by reinstating the principle of exclusivity throughout the expanded scope of Article 133 EC (whereas Articles 133(5) and (6) EC currently qualify the principle of exclusivity in specified matters).

However, the Draft proposes other potential changes to the Union’s external competence which are not so explicitly acknowledged or justified. In particular, Article 11(2) states that the Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, is necessary to enable the Union to exercise its competence internally, or affects an internal Union act. This formulation purports to codify the Court’s *ERTA* caselaw – but in a simplistic and potentially misleading manner.<sup>24</sup>

In particular, the Court held in the *ILO Convention Opinion* that where the Community has exercised or exercises its internal competence to adopt only minimum standards (as in sectors such as social, environmental and consumer policy), the conclusion of international agreements must be a matter of joint rather than exclusive competence with the Member States.<sup>25</sup> Against this background, the categorisation of any implied external competence as exclusive does not fit entirely happily with the definition of exclusive competence contained in Article 10(1) itself, i.e. whereby the Member States should only be able to adopt legally binding acts in the relevant sector

---

<sup>24</sup> Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263.

<sup>25</sup> Opinion 2/91 (*Convention No 170 of the International Labour Organisation concerning safety in the use of chemicals at work*) [1993] ECR I-1061.

if so empowered by the Union. Moreover, even Working Group VII on External Action recommended only that the Constitutional Treaty should indicate that the Union is competent to conclude agreements dealing with issues falling under its internal competences – but that this should in no way modify the delimitation of competences between the EU and Member States.<sup>26</sup>

### *Shared Competence*

Other difficulties arise from the draft provisions on shared competence. Article 10(2) of the Praesidium Draft states that in areas of shared competence, the Union and the Member States shall have the power to legislate and adopt legally binding acts. The Member States shall exercise their competence only if and to the extent that the Union has not exercised its. Article 12(3) further provides that where the Union has not exercised or ceases to exercise its competence in an area of shared competence, the Member States may exercise theirs. Three main comments seem appropriate here.

First, the definition of Union-Member State relations in fields of shared competence seems to have been conceived solely in terms of competence to enact secondary legislation, and does not readily accommodate the crucial interaction between primary Treaty rules and Member State legislation. For example, Article 10(2) of the Praesidium Draft refers to the Union and the Member States having power to legislate and adopt legally binding acts in fields of shared competence. The Member States shall exercise their competence only if and to the extent that the Union has not exercised its. But this does not make clear that, even where the Union has not yet enacted secondary legislation, the Member States must still respect the horizontal obligations imposed upon them by the Constitution, e.g. on free movement of goods and persons. Similarly, Article 12(3) of the Praesidium Draft states that where the Union has not exercised or ceases to exercise its competence in an area of shared competence, the Member States may exercise theirs. Again, this does not fully convey the idea that the Member States must still exercise their competence with due regard to the primary provisions of the Treaty itself.

Secondly, the Praesidium's definition of Union-Member State relations in fields of shared competence seems to have been conceived solely in terms of competence to enact pre-emptive legislation, rather than other types of Community action such as minimum harmonisation. For example, Article 12(3) of the Praesidium Draft states that where the Union has not exercised or ceases to exercise its competence, the Member States may exercise theirs. But in the case of minimum harmonisation, the exercise of Community competence does not extinguish the Member State's ability to exercise its own regulatory powers. Article 10(2) of the Praesidium Draft is perhaps more accurate in this regard: to say that the Member States shall exercise their competence only if *and to the extent* that the Union has not exercised its competence, can accommodate these more flexible forms of legislative intervention. Even Article 11 of the Preliminary Draft Constitutional Treaty is more accurate, when it states that as and when the Union takes action in areas of shared competence, the Member States may act only *within the limits defined by the Union legislation*.<sup>27</sup>

Thirdly, the Praesidium drafting, particularly of Article 12(3), is apt to give the misleading impression that, if the Union acts in an *area* of shared competence (e.g. social policy), the Member State's competence to act in that *area* is thereby

---

<sup>26</sup> CONV 459/02.

<sup>27</sup> CONV 369/02.

superseded. The true situation is, of course, that the Union will adopt acts only in relation to *specific subject-matter* within an overall area of shared competence (e.g. collective redundancies or insolvency of employers) – affecting the Member State’s competence to act only as regards *that specific subject-matter*, not the overall area of shared competence. Again, draft Article 10(2) seems more precise in this regard.

The Praesidium’s wording may well be vague enough to cover these issues – but does it really satisfy the basic requirement of offering a clear and informative definition of the legal relations between Union and Member States in fields characterised by shared competence? Draft Article 11 of the “Cambridge Text” provides a more satisfactory model of how the concept of shared competence can be described in a generic yet accurate manner.<sup>28</sup>

### ***Supporting Action***

Article 10(5) of the Praesidium Draft provides that in certain areas and in the conditions laid down in the Constitution, the Union shall have competence to carry out actions to coordinate, supplement or support the actions of the Member States, without thereby superseding their competence in these areas. Article 15(4) further states that legally binding acts adopted by the Union on the basis of the provisions specific to the areas of supporting action contained in Part Two cannot entail harmonisation of Member State laws or regulations.

This basic definition seems sound. However, various other parts of the Praesidium Draft could be reorganised into a broader and more coherent provision, perhaps entitled “Areas for Supporting, Coordinating and Complementary Action”, Article X, dealing in turn with **1**) areas for supporting action by the Union; **2**) areas for coordination at Union level; and **3**) areas for complementary action by the Union.

Areas for supporting action would cover those listed in Article 15(2) of the Praesidium Draft, i.e. areas in which the Union may take action (such as incentive measures, the exchange of information, identification of best practice etc) supporting the policies of the Member States. For the sake of increased clarity, Article X(1) should also specify that: **a**) the Union will still have power to harmonise national rules falling within the broad policy sectors characterised as areas for supporting action, where another legal basis provides the Union with legitimate competence to do so (e.g. Article 95 EC on the Internal Market); **b**) in any case, the Member States are still bound, within the broad policy sectors characterised as areas for supporting action, by the directly effective horizontal obligations imposed under Part Two (e.g. on free movement of goods and persons).

At the moment, Articles 10(3) and 13 of the Praesidium Draft refer to the Union’s competence to coordinate the economic policies of the Member States. Article 15(3) provides that the Member States shall coordinate their national employment policies within the Union. It is not clear why the coordination of economic policies has been separated out from “complementary competences” in general; and why it is not grouped together more specifically with the coordination of employment policies. These provisions could more neatly be brought together into a new Article X(2), dealing with areas in which the Member States shall coordinate their policies through the Union. Moreover, it seems strange when defining the principles governing Union competences to contain a provision such as Article 13(2) of the Praesidium Draft, i.e. imposing a specific obligation upon the Member States to

---

<sup>28</sup> CONV 345/1/02 REV 1.

conduct their economic policies, taking into account the common interest, so as to contribute to the achievement of the Union's objectives. Surely this belongs more naturally in Part Two, along with the other substantive rules governing the coordination of economic policies.

Articles 12(5) and (6) of the Praesidium Draft currently include, under the heading of shared competence: research, technological development and the proposed new sector on space (where the Union shall have competence to carry out actions, and in particular to implement programmes); and development cooperation and humanitarian aid (where the Union shall have competence to take action and conduct a common policy). In neither situation may the exercise of Union competence result in Member States being prevented from exercising their competence. It is not clear why these sectors have been treated as falling into the residual category of shared competence, when they seem to fit comfortably into the basic definition contained in Article 10(5) of the Praesidium Draft, i.e. that in certain areas and in the conditions laid down in the Constitution, the Union shall have competence to carry out actions (inter alia) to *supplement* the actions of the Member States, without thereby superseding their competence in these areas. Articles 12(5) and (6) could more coherently be grouped together into a new Article X(3), dealing with areas in which Union action will complement without superseding Member State action in the same field.

## **Legal Instruments**

Draft Articles 24-33 of the Praesidium Draft take up the broad recommendations for simplification and rationalisation offered by Working Group IX, by proposing a drastic reduction in the number of basic legal instruments available to the Union institutions; and the introduction of a formal hierarchy among those legal instruments.<sup>29</sup> The Praesidium Draft thus establishes two main categories of Union act: legislative and non-legislative. The basic thrust of these proposals is to be strongly welcomed – but as usual, the devil is in the detail.

### ***Definition of Legal Instruments***

The Praesidium's definition of the Union's basic legal instruments could be improved in several ways.

For example, "European framework laws" as defined under Article 24(1) of the Praesidium Draft are intended to correspond to directives as defined under existing Article 249(3) EC. However, there is one significant difference. Article 249(3) EC states that a directive "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods". Article 24(1) of the Praesidium Draft states that a European framework law shall be a legislative act which "shall be binding, as to the result to be achieved, on the Member States to which it is addressed, but shall leave the national authorities *entirely free* to choose the form and means of achieving that result". The Praesidium's "technical comments" on draft Article 24(1) give no specific explanation for this change of wording. Presumably, it is intended to reinforce the spirit of subsidiarity and the principle of proportionality, as regards the

---

<sup>29</sup> CONV 424/02.

qualitative character of Union legislative activity (an issue raised during the Plenary debate on Working Group IX's final report).<sup>30</sup>

However, this amendment seems misplaced. The "problem" with directives which the Praesidium seems concerned to address, lies in an overly-detailed description of their objectives. But it is unquestioned that the subsequent process of transposition – making the necessary choices as to the form and method appropriate for implementing those objectives into the national legal system – still lies within the prerogative of the Member State. The Praesidium Draft therefore focuses on amending the wrong limb of Article 249(3) EC. In fact, the best guidelines for curtailing the alleged tendency towards prescriptive overkill in directives are those currently contained in para. 6 of the Amsterdam Protocol on the application of the principles of subsidiarity and proportionality – a provision which the Praesidium has just proposed repealing, claiming that it is too detailed for a protocol annexed to the Constitution.<sup>31</sup>

By focussing its attention on the subsequent implementation (rather than the initial content) of directives, the Praesidium Draft may indeed have some very undesirable results. In particular, there is a risk that the very strong wording of Article 24(1) might persuade the ECJ to dilute its current commitment to securing the effective judicial protection of citizens whose Member State has failed to implement a framework law correctly or within the applicable deadline. In principle, there is no necessary reason for this to happen: after the deadline for transposition has passed, the defaulting Member State might still be taken to have forfeited its "entirely free" discretion in implementing at least those provisions of the framework law which are capable of having direct effect, and to have become subject in other cases to the principles of consistent interpretation under *Marleasing* and liability to make reparation under *Francovich*. But in practice, it would be very unfortunate if the Praesidium's proposed change to the very constitutional definition of a directive / framework law were taken as an indication by the Court, e.g. that the criteria for recognising the direct effect of un- or incorrectly implemented directives should be applied more rigorously than at present; or that the duty of consistent interpretation should be discharged by national courts with greater restraint; or that it should be more difficult for claimants to prove that Member States have committed a sufficiently serious breach of their obligation to transpose – any of which would permit Member States to benefit from their own wrongdoing, and depriving citizens of the economic and social benefits envisaged for them by the Union institutions.

Drafting concerns also arise with "European regulations" as defined in Article 24(1) of the Praesidium Draft. These legal instruments are of general application, and shall be binding in their entirety and directly applicable in all Member States. However, they are non-legislative acts, to be used only for the purposes of implementation either of (hierarchically superior) legislative acts, or of certain provisions of the Constitution itself. This latter part of the definition may be too restrictive, i.e. insofar as proposed Article 28 envisages that European regulations may also be used for the purely executive implementation of (still hierarchically superior but non-legislative) European delegated regulations. If so, this would require amendment to draft Article 24(1) – either to cover the implementation of "binding acts" rather than just "legislative acts"; or (better still) to delete the relevant phrase altogether, and leave it to Articles 26-28 of the Praesidium Draft to identify the generic categories of situation in which European regulations may properly be used.

---

<sup>30</sup> CONV 449/02.

<sup>31</sup> CONV 579/03.

## *Parliamentary Supervision Over Non-Legislative Acts*

The Praesidium text envisages that non-legislative acts may be adopted under specific provisions of the Constitution itself (by the Commission, Council and ECB) in accordance with the detailed provisions of Part Two (for an example, see draft Article 11(3) of Part Two of the Constitutional Treaty on the Area of Freedom, Security and Justice). However, draft Article 26 proposes that non-legislative acts may also be adopted in two other categories of situation: **a)** as delegated regulations under Article 27; **b)** as implementing acts under Article 28. In both situations, problems arise over the degree of Parliamentary supervision envisaged by the Praesidium Draft over the adoption of Union non-legislative acts.

Draft Article 27 will permit the legislature, when adopting laws and framework laws, to delegate to the Commission (and the Commission alone) quasi-legislative implementing powers, i.e. to enact “delegated regulations” (European regulations as defined in Article 24) which supplement or amend certain non-essential elements of the parent legislation. The aims of this proposal are: **a)** to encourage the legislature to concentrate on defining only the essential elements of Union legislation; **b)** to permit this primary legislation to be adapted more quickly and effectively to changing circumstances, e.g. in market behaviour or scientific technology. It will also have the effect: **c)** of enhancing the executive powers of the Commission, and thereby increasing its relative importance within the new inter-institutional balance; and **d)** of creating a system for supervision over the Commission’s delegated quasi-legislative activities which lies outside the existing or any future comitology system.

This supervisory system will, in certain respects, be more intrusive than the current comitology system. In particular, Article 27 of the Praesidium Draft sets out the general principles governing direct supervision by the legislature over the Commission’s delegated quasi-legislative activities.

These include, in Article 27(2), a purportedly exhaustive list of the conditions under which delegation may be made. What is strange is that this list envisages control in any event by both Parliament and Council. It does not take into account the possibility that, in the specific cases referred to in Article 25(2), legislative acts might be adopted by the Council alone. One might have expected, in such situations, that the conditions for quasi-legislative delegation to the Commission would also be limited to control by the Council alone. Does this represent a conscious decision by the Praesidium to give Parliament a greater say in control over certain delegated acts than in the adoption of their parent legislation? Or is it another example of drafting which needs to be tightened up, before the Praesidium text can be considered entirely coherent?

In any case, draft Article 27’s substantive criteria governing delegation of legislative powers to the Commission will, of course, invite litigation to clarify, e.g. what are the “essential elements of an area” as regards which there can be no delegation at all. Similarly, it is not clear whether the phrasing “certain non-essential elements” is intended to imply that there really are *certain* non-essential elements of legislative acts which also cannot be delegated. Every word in a constitution should say something significant. If “certain” is important, let it stay. But if not, it should be deleted.

Draft Article 28 sets out the general principle that Member States shall adopt all measures necessary to implement the Union’s legally binding acts. “Legally binding acts” includes both legislative (laws and framework laws) and certain non-

legislative measures (regulations and decisions, including delegated regulations). However, where uniform conditions for the implementation of the Union's binding acts are needed, those acts may confer implementing powers on the Commission; or in specific cases, and in the cases provided for as regards the CFSP, on the Council. Implementing acts shall take the form of European regulations or European decisions (as defined in Article 24; and for the CFSP as also defined by Article 29). They may be subject to control mechanisms consonant with principles and rules laid down in advance by the Parliament and Council in accordance with the co-decision procedure.

On its face, Article 28(3) gives the European Parliament an equal role in the adoption of rules for the supervision of all implementing acts as envisaged under Article 28(2). However, this provision warrants further consideration on three counts.

The first issue concerns Parliament's participation in the supervision of implementing measures adopted by the Commission as regards subject-matter falling under the existing First Pillar, and as currently governed by the Second Comitology Decision. Article 28(3) proposes that Parliament should have an equal role in the future adoption of all comitology rules – not only as regards those legal bases where the adoption of legislative acts is itself governed by co-decision; but also as regards those specific legal bases, envisaged by Article 25(2) of the Praesidium Draft, where the Council will continue to act as sole legislature. In the former case, Parliament clearly has a legitimate right (not recognised under existing Article 202 EC, and only imperfectly accommodated by the Second Comitology Decision) to co-supervise the Commission's implementing activities with the Council. But in the latter case, one might have expected that the Council would continue also to adopt its own control mechanisms for monitoring the Commission's implementing activities. The Praesidium's "technical comments" offer no indication of whether Article 28(3) is deliberately intended to involve Parliament in the adoption of control mechanisms over *all* Commission implementing acts; or whether the intention was merely to involve Parliament in the adoption of control mechanisms over Commission implementing acts whose parent legislation was itself adopted by co-decision. If the latter is the case (and this would seem a better reflection of both the Working Group report and the Plenary debate),<sup>32</sup> Article 28(3) is yet another example of loose drafting that will need to be tidied up to avoid unintended legal consequences.

One might note that, although the Praesidium's proposals create the legal framework for a future reconsideration of the comitology system as it applies to existing First Pillar matters, the draft Articles do not themselves offer any more detailed proposals for reforming comitology (other than a passing reference in the technical comments to Working Group IX's brief thoughts on this issue). In particular, there is no concrete indication that the Praesidium intends to give constitutional status to the Commission's vision of its own role as primary executive organ within the Union's institutional architecture (at least as regards ex-First Pillar matters), e.g. along the lines of the recent proposal for amending the Second Comitology Decision,<sup>33</sup> as regards the purely executive implementation of basic acts adopted by co-decision, so as to reduce all committees to purely advisory status (a vision repeated in the Commission's formal submission to the Convention on the Union's institutional architecture).<sup>34</sup>

The second issue concerns Parliament's apparent right under Article 28(3) to lay down control measures, by co-decision with Council, for the supervision of

---

<sup>32</sup> CONV 424/02 and CONV 449/02 (respectively).

<sup>33</sup> COM(2002) 719 Final.

<sup>34</sup> COM(2002) 728 Final/2.

implementing measures adopted by the Council itself “in specific cases” within the scope of application of the existing First Pillar. It is not clear exactly what situations the Praesidium has in mind here: this could cover not only cases where the ordinary comitology procedures lead the Council to call-back executive powers originally delegated to the Commission; but also exceptional situations where the Council itself might be directly vested with the power to adopt implementing measures under a legally binding Union act within the terms of draft Article 28(2) (e.g. as in the sphere of anti-dumping duties). In the latter case, does the Praesidium *really* intend to propose that Parliament should participate as co-legislator in the adoption of supervisory rules; or indeed, that there should be any particular supervisory rules, other than the Constitution and the parent act itself? Apparently not: the Praesidium’s introduction to draft Articles 24-33 states that “Article 28 establishes the legal basis for the adoption of control mechanisms for implementing powers when these are exercised *by the Commission*”. Further clarification therefore seems appropriate here.

The third issue concerns Parliament’s apparent right under Article 28(3) to lay down control measures, by co-decision with Council, for the supervision of implementing measures adopted by the Council itself within the scope of application of the existing Second Pillar. Again, does the Praesidium *really* intend to suggest that Parliament should participate as co-legislator in the adoption of supervisory rules here; or indeed, that there should be any particular supervisory rules, other than the Constitution and the parent act itself? Surely not: again the Praesidium’s own introductory guide, and in any case basic considerations of inter-institutional balance, preclude any such possibility. Some people may think it strange enough that the Praesidium has not sought to establish a clearer distinction between “European decisions” and “CFSP decisions” – with completely separate legal bases for each, apt to reinforce the specific character of the ex-Second Pillar, and to avoid unintended legal effects. It would then seem equally strange that the Praesidium has not chosen to divide “implementing acts” from “CFSP implementing acts”. Indeed, draft Article 28 demonstrates exactly the potential, feared by many Member States, for a clumsy cross-contamination between the existing First and Second Pillars. Further clarification seems essential here: either by excluding any reference to the CFSP in Article 28(2), leaving its particular legal instruments, including implementing acts, to be defined by the fully drafted out Article 29; or by at least making it clear that Article 28(3) does not apply to implementing acts adopted by the Council as regards CFSP.

In short: the Praesidium Draft’s provisions on Parliamentary control over the adoption of delegated / implementing non-legislative acts seem at best fairly messy, at worst rather controversial. Perhaps these issues should have been considered only *after* the Convention had addressed more fundamental questions about reforming the inter-institutional balance, i.e. the proper division of executive power between the Council and the Commission; and the correct model for supervision of that executive power by the Parliament. For the time being it seems that, once those basic choices are made, the details of draft Articles 24-33 will need to be revisited.

### **Concluding Remarks**

It is easy to be harsh on a document presented by the Praesidium as a draft, open for debate and improvement. Any conclusions are therefore offered in this spirit, as critical but constructive suggestions.

Particularly when compared to the “big questions” facing the Convention – such as rewriting the inter-institutional balance, or recasting the common foreign and defence policies – issues of “legal legitimacy” may appear too technical to sustain the attention of policymakers, or to attract the attention of the popular media. However, there is a genuine risk that the exciting work on the future of Europe being carried out by the Praesidium and the Convention will, in the end, be seriously undermined by its legal drafting.

Sometimes the definition of key concepts is ambiguous or uninformative (as with the provisions on shared competences). Sometimes there is a confusing fragmentation of ideas (as with the provisions on complementary competences). Sometimes the Draft tries to over-simplify very complex things (as with the purported codification of the principle of supremacy; and the distinction between the legal effects of rights and principles within the Charter). But most worryingly of all – and it must be stressed, in the absence of any other explanation from the Praesidium itself – sometimes there is an apparent failure to understand the current legal position, or appreciate the importance of certain legal concepts. This gives rise to several provisions which can only be interpreted as mistakes, and other provisions which threaten to have unintended legal consequences: for example, the inclusion of free movement and competition within the areas of exclusive Union competence; the suggestion that every implied external competence must also be exclusive; and the issue of Parliamentary supervision over the adoption of non-legislative measures.

One hopes that the Praesidium will take on board the need to reconsider its position on these issues, and if necessary redraft the corresponding articles. If not, one fears either that the IGC will find just cause to be sceptical about the value of the Draft Constitutional Treaty presented by the Convention; or that the new constitutional instruments of the European Union will create significant problems of interpretation and implementation which could easily have been avoided by their authors.