

NOTE

from: Presidency
dated: 11 November 2003
to: Delegations

*Subject: IGC 2003
– Treaty revision*

Background and issues to be addressed

1. The draft Constitutional Treaty contains a number of provisions which are intended either to revise the treaty directly or to allow for its proper functioning or its further development on issues of a quasi-constitutional nature. In addition to the usual general revision clause similar to the current Article 48 of the EU Treaty (i.e. IGC and ratification by all Member States, though with innovations such as the role of a Convention, see Article IV-7), these provisions can be classified according to their content and scope as either specific or general. They are as follows:
 - a) Specific "bridging clauses" ("passerelles") which apply only in clearly defined areas. They mostly provide for a change in decision-making procedures on a particular issue. Several already exist in the current treaties. Activating the clause itself requires a unanimous decision of the Council/European Council after consultation of the European Parliament. Examples include Article III-104(3) (social policy), Article III-130(2) (environment policy), Article III-170(3) (judicial cooperation in civil matters).

- b) General "bridging clauses" which provide for i) replacing unanimity with qualified majority ii) replacing the special legislative procedure with the ordinary legislative procedure (i.e. co-decision) (Article 24). Activating these clauses requires a unanimous decision of the European Council, consultation of the European Parliament, and a process for informing national parliaments beforehand. Their application is limited to Part III of the Treaty, with their precise scope contained in the decision itself.
- c) Specific clauses which provide for quasi-constitutional measures which are either necessary for the functioning of the treaty or which allow for its further development. These require a unanimous decision of the Council/European Council (and in some cases a role for the European Parliament), as well as subsequent approval by Member States in accordance with their respective constitutional requirements. Examples include Article 40(2) (defence policy), Article 53(3) (own resources), Article III-232(1) (electoral procedures).
2. There are a number of delegations which for very different reasons do not accept some of these provisions as currently drafted. On the one hand there are some who consider that the proposed procedures, particularly those in the general revision clause, are too cumbersome and no longer realistic in a Union of 25 (or more) members and therefore wish to see them lightened. Some propose that this should include majority voting (albeit with a high threshold), an approach which raises a number of issues, both political and legal, which would need to be addressed if it were proposed to pursue this option. On the other hand, there are other delegations which stress that political and legal constraints militate against lighter procedures, and as a result several have difficulty in accepting even those provisions which are limited in scope.
3. Against the background of these two approaches, the Presidency proposes the following way forward which takes into account the different views of delegations. If there is sufficient support for this approach, the Presidency will consider how it might be reflected in draft treaty articles.

Possible ways forward

Specific bridging clauses ("passerelles")

4. The specific bridging clauses are in general not problematic insofar as their scope is well-defined. *Any concerns can probably therefore be met by ensuring that these provisions are sufficiently clearly drafted as to be acceptable to all delegations.* Since this is an issue which is related directly to the degree of extension of Qualified Majority Voting, it is proposed that any delegations which have issues they want to raise do so within the more general discussions on QMV.

General bridging clauses

5. On the general bridging clauses the focus of concern for some is that they open the way for important procedural changes, including in some sensitive areas, without the security of a role for national parliaments. Whilst it is of course open to any national government to commit itself to be bound by a position taken by its parliament on such an important issue, some consider that the provisions as currently drafted are not sufficiently transparent or democratic. *One option might be to consider introducing a provision similar to the procedures set out in the subsidiarity protocol stipulating that the clause could only be used on condition that no objections have been raised within a certain period of time by at least one third of national parliaments.* This would be less heavy than full ratification (which would in any case remove the advantages of the clause), but could provide the necessary guarantees of legitimacy and accountability which some delegations are seeking.

General revision clause

6. On the general revision clause, several delegations consider that maintaining the existing procedures is unrealistic in an enlarged Union, and are therefore looking for a procedure which is lighter, although at the same time more limited in scope. Others wish to maintain the current system for reasons of legitimacy and accountability.
7. Given these views, a possible way forward could be to apply different systems for revision according to the subject of the provisions. One could for example envisage a lighter system for amending certain specifically identified parts of the Treaty under certain conditions.

This lighter system could apply to amendments to the Union's internal policies only (i.e. Title III of Part III) and guarantee that such amendments could not increase the competencies conferred on the Union in the Constitution. The procedure might take one of these two forms:

- (i) The first would be: decision of the European Council by qualified majority; approval by all Member States in accordance with their respective constitutional requirements (in full respect of the constitutional powers of their national parliaments).
- (ii) The second would be to reduce the requirement (frequently lengthy) for full national ratification, and introduce instead a "nihil obstat" procedure from national parliaments along the lines of that outlined above for the general bridging clauses. Agreement would still be by common accord, and national parliaments would in effect retain a "veto" over any proposed revisions.
