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**The Constitutional Treaty:  
Legislative and Executive Power in the  
Emerging Constitutional Order**

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# The Constitutional Treaty: Legislative and Executive Power in the Emerging Constitutional Order

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The inter-institutional balance of power within the EU is central to the new constitutional order. It is central when viewed from the perspective of legitimacy/democracy, and from the perspective of efficacy. It is not therefore surprising that this topic, which is dealt with in Title IV of Part 1 of the Constitution, has been contentious. This paper begins by examining the process in the Convention for deliberation about the institutional aspects of the Draft Constitution. This is followed by discussion of the changes that relate to legislative power. The focus then shifts to executive power, which was perhaps the most contentious aspect of the institutional discussion. The paper concludes with some thoughts about accountability in the emerging constitutional order. There will then be a brief postscript taking account of the failure of the Brussels European Council in December 2003.

## **Part 1: Process**

The contentious nature of the discussions about institutions was evident in the process employed at the Convention. The Convention's three-stage methodology is well known.<sup>1</sup> There was the listening stage from March till June 2002, when the main emphasis was on general statements concerning the missions of the Union. This was followed by the examination stage, in which Working Groups considered particular topics. This exercise occupied the latter half of 2002. There was then the proposal stage, in which the Convention discussed draft articles of the Constitution, normally on the basis of proposals emanating from the Working Groups.

The process was very different in relation to institutions. There was no Working Group. It was felt that the issues were too contentious to be dealt with other than in plenary session. This is reflected in the fact that the title on Institutions was empty in the original preliminary Draft Constitution. It was a room without content. The Convention discussions about institutions only began in earnest in January 2003. It rapidly became apparent that there were serious divisions of opinion between the larger and the smaller states, with the Commission lining up with the latter group. The absence of a Working Group on institutions

did not however lead to more detailed deliberation in the plenary sessions of the Convention. Full discussion of the draft articles concerned with institutions only occurred on May 15-16 2003, and this revealed the serious differences of view on central issues. The Praesidium, in the light of this, realised that it needed more time for reflection and therefore did not make any amendments to these articles in its initial global draft of May 28 2003. There was no second reading in plenary about these articles. The Praesidium opted instead for consultations with the four constituent groups, governments, MEPs, National MPs, and the Commission, which took place on June 4 2003. Formal text of the revised articles on the institutions only became available June 10, a mere three days before the concluding session on June 13. It is clear moreover that the Praesidium, and the Secretariat, exercised considerable power in deciding on the ultimate content of these provisions of the Constitution and in deciding which amendments should be adopted.

The Convention process in relation to institutions can obviously be criticised. It should however be placed in perspective. This may not serve to justify the process in this respect, but it does help us to understand what occurred. It was not at all self-evident that the Convention would seek to draft a Constitution at all. Many of the Member States felt that it might be nothing more than a high-level talking shop, which produced recommendations.<sup>2</sup> It nonetheless quickly became evident that the Convention had more far-reaching aspirations to produce a formal constitutional document. The decision to postpone discussion of institutions is readily explicable. It was clear to all that this topic would be divisive. If it had been placed on the agenda in the latter part of 2002, then it would have over-shadowed the work undertaken on other issues. It might well have undermined the entire constitution-making process. The contrast with what occurred is instructive. The Convention, via Working Groups, concentrated on important issues, such as the Charter of Rights, competences, legal personality and the like. There were differences of opinion on these matters, but they were less marked than those on institutions. Progress on these matters allowed the Praesidium to publish the preliminary Draft Constitution in the autumn of 2002. This may well have been a skeletal document. It did however reinforce the sense that the Convention really was going to produce a constitutional document, and allowed the key national players to absorb the idea.

This strategy also enabled discussion about institutions to take place ‘off-line’ in 2002. The issue of the institutional division of power was like Banquo’s ghost, ever present, lurking in the background. As Grevi notes, the key phrase in shaping the formal Convention agenda for 2002 may have been ‘everything but institutions’, but the key phrase for the

debate in other circles was ‘nothing by power’.<sup>3</sup> Heads of state, national parliaments, Community institutions, and interest groups all contributed to this debate.

The debate continues, notwithstanding the fact that the Convention has placed its document before the IGC. How far the Member States seek to alter the constitution remains to be seen. It is however clear that certain of the institutional provisions remain contentious, and these have occupied most of the IGC’s time of the thus far. The nature of the controversies will be analysed in the ensuing discussion.

## **Part 2: Legislative Power**

### **1. Legislative Power and the EP**

It is clear that the European Parliament has emerged as a ‘winner’ when one considers the entirety of the Draft Constitution. This is apparent when one considers the provisions concerning legislative power.

In relation to primary legislation, inter-institutional balance, as opposed to separation of powers, has characterised the relationship, de jure and de facto between the major players: the European Council, the Council, the European Parliament and the Commission. The importance of this balance was stressed yet again in the documentation to emerge from the Convention concerning Title IV.<sup>4</sup> This institutional balance is readily apparent in relation to the legislative process. The Commission has retained in general terms its ‘gold standard’, the right of legislative initiative.<sup>5</sup> The EP and the Council both partake in the consideration of legislation and do so now on an increasingly equal footing. The EP and the Council are said to jointly enact legislation.<sup>6</sup> The co-decision procedure under which such laws and framework laws are jointly enacted is now deemed to be the ordinary legislative procedure for the making of European laws and framework laws.<sup>7</sup> The reach of the co-decision/ordinary procedure has been extended to cover more areas than hitherto. The new areas brought within the purview of the ordinary legislative procedure are also significant. These include agriculture and fisheries,<sup>8</sup> asylum and immigration law,<sup>9</sup> and the structural and cohesion funds.<sup>10</sup>

This treatment of legislative power is to be welcomed. It is generally accepted that the co-decision procedure has worked well. It allows input from the EP, representing directly the electorate, and from the Council, representing state interests. Article III-302 provides a

framework for a deliberative dialogue on the content of the legislation between the EP, Council and Commission. The extension of the ordinary legislative procedure to new areas is a natural development, building on what has occurred in earlier Treaty reform. It enhances the legitimacy of Union legislation and its democratic credentials by enabling the EP to have input into the making of legislation in these areas.

The EP is also accorded powers in relation to the new breed of delegated regulations. A European regulation is a non-legislative act of general application for the implementation of legislative acts and certain specific provisions of the Constitution.<sup>11</sup> It may either be binding in its entirety and directly applicable in all Member States, or be binding as regards the result to be achieved, on all the Member States to which it is addressed, but leaving the national authorities entirely free to choose the form and means of achieving that result. This therefore provides for secondary European laws, which are binding in their entirety and directly applicable in all Member States, and secondary European framework laws, which are binding as to result, but which leave the Member State discretion as to implementation. European laws and framework laws may delegate to the Commission the power to enact delegated regulations to ‘supplement or amend certain non-essential elements of the European law or framework law’.<sup>12</sup> The objectives, content, scope and duration of the delegation shall be explicitly defined in the laws and framework laws. The delegation may not cover the essential elements in the area, which shall be reserved for the law or framework law. The conditions to which the delegation is subject shall be determined in the law or framework law, and that these may consist of the following possibilities.<sup>13</sup> The European Parliament or the Council may decide to revoke the delegation; or the delegated regulation may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the law or framework law.<sup>14</sup>

There is much to be said in principle for the clearer delineation between primary laws and other legally binding norms. The fact that the Draft Constitution tackled the hierarchy of norms in Title V is therefore to be welcomed. There are, however, important issues left open by these provisions, which will have a marked impact on the overall institutional balance of power within the EU.<sup>15</sup>

## **2. Legislative Power and the Council**

It is clear that the Council has a co-equal role in the legislative process with the EP. The Draft Constitution provides that the Council will jointly enact legislation with the EP,<sup>16</sup> and this will for the most part be pursuant to the ordinary legislative procedure. The Council's role in this regard has not been contentious.

### *(a) Council Formation(s) for the Exercise of Legislative Power*

What has provoked more discussion is the nature of the Council formation that is to exercise its legislative power. The solution in the Draft Constitution was to have a Legislative and General Affairs Council (LGAC). When the LGAC acted in its legislative capacity each Member State's representation was to be composed of one or two representatives at ministerial level with relevant expertise, which would reflect the business on the Council's agenda.<sup>17</sup> The rationale for this structure was that the Council would have a specific legislative formation, and that one of the two Member State representatives might become a quasi-permanent fixture who would develop more general expertise in European matters. It would then enable this Council formation to develop a broader view of EU legislation taken as a whole.

The solution embodied in the Draft Constitution has not however proven acceptable to the IGC. The Italian Presidency of the IGC distributed a questionnaire to the Member States, asking, *inter alia*, whether the Council's legislative function should be exercised by a single Council formation, or whether a legislative function should be exercised by each of the Council formations.<sup>18</sup> The majority of the Member States favoured according legislative power to each of the Council formations, rather than having one dedicated Legislative Council. This view has been incorporated in a revised version of Article I-23 placed before the IGC by the Italian Presidency.<sup>19</sup>

There is much to be said for the IGC view that the General Affairs and Legislative functions should be separated. The two are distinct. It would almost certainly create an excessive burden on one body for it to have responsibility for both issues. This is especially so given that the General Affairs Council will have its hands full with ensuring the overall co-ordination of the Council's work.<sup>20</sup>

There is more room for debate about whether it would be desirable for there to be a dedicated Legislative Council. The main arguments in favour are that it would engender greater legislative coherence,<sup>21</sup> and emphasize the two-chamber character of the EU legislative process. The arguments against are that it might lead to some loss of expertise by way of comparison with exercise of legislative power by the sectoral Council formations. It might also lead to somewhat odd results, given the system for the hierarchy of norms embodied in the Draft Constitution. If there were a dedicated Legislative Council, it would only deal with laws and framework laws. This would mean that delegated regulations would continue to fall within the remit of the sectoral Councils, since such norms would not be regarded as legislation for these purposes.<sup>22</sup> Coherence within a particular area might well suffer if primary laws were the responsibility of a Legislative Council, while closely related delegated regulations were to fall within the remit of sectoral Councils.

*(b) Voting within the Council*

The other issue that has been contentious concerns voting within the Council, more particularly the areas that should remain subject to unanimity, and the calculation of the qualified majority.

There was, not surprisingly, continued discussion and disagreement within the Convention on the Future of Europe as to the areas that should remain subject to unanimity. The general strategy within the Draft Constitution has been to move to qualified majority voting where agreement on this move could be achieved. This was combined with the insertion of a general ‘passerelle’ clause enabling the European Council to decide on its own initiative and by unanimity, that there should be a shift to qualified majority voting in that area.<sup>23</sup> The Commission continues however to press for further reduction in the areas subject to unanimity, believing from past experience under the Maastricht and Amsterdam Treaties that the ‘passerelle’ clause will not be used.<sup>24</sup> The Commission’s strategy for the IGC of removing the unanimity requirement in particular areas, is complemented by proposals to replace unanimity with either reinforced qualified majority voting, or to have a new definition of unanimity, whereby after a certain period of deliberation by the Council and discussion within the European Council, opposition from one or two Member States could no longer prevent the measure from being adopted, even where the Constitution specifies unanimity.<sup>25</sup>

The calculation of the qualified majority for voting within the Council has also been contentious. This was not surprising given the prior experience in the negotiations leading to the Nice Treaty, where the options as to weighting of votes approached the Byzantine in terms of complexity. The calculation of the qualified majority in the Nice IGC cast into sharp relief the relative power of large, medium and small states in the Council. The compromise solution in the Nice Treaty, embodied in the Protocol on Enlargement of the Union, coupled with Declaration 20 on Enlargement, reflected the complexity of the discussions that had led to it.

The Draft Constitution has modified the Nice Treaty solution to some degree. The default position is that a qualified majority is to consist of the majority of the Member States, representing at least three-fifths of the population of the Union. Where however an act is not based on a proposal from the Commission or on the initiative of the Union Minister for Foreign Affairs then there must be two-thirds of the Member States, representing at least three-fifths of the population of the Union. These provisions are to take effect on November 1 2009.<sup>26</sup> We shall however see that it was disagreement as to the votes wielded by particular Member States within the Council that was the principal reason for the failure to agree on the Draft Constitution in the December 2003 Summit of the European Council.

### **Part 3: Executive Power**

There have, as indicated above, been major debates within and outside the Convention concerning the location of executive power in the Union. It has been disagreement about these issues, rather than those concerning legislative power, that has occupied the attention of the key players, both within and outside the Convention.

It is however important to note at the outset that there is no ready or precise definition of executive power in the EU. We know, in formal terms at least, that legislative power under the Draft Constitution captures the making of EU laws and EU framework laws, including the relevant voting rules.<sup>27</sup> There is no ready-made analogous formal definition of executive power to be found within the Draft Constitution. The scope and nature of executive power is moreover more difficult to define in substantive terms, in the sense that it varies as between different nation states. We can nonetheless identify a core set of tasks that are commonly undertaken by the executive branch of government. The executive will usually plan the overall priorities and agenda for legislation. It will normally have principal responsibility for

foreign affairs and defence. The executive will have an important say in the structure and allocation of the budget. It will also have responsibility for the effective implementation of agreed policy initiatives and legislation that has been enacted.

Having said this, it is important to understand that there are a number of different dimensions to the debate about executive power in the EU that must be disaggregated, even though some are linked. There is the issue of the election of the Commission President; the internal organisation of the Commission; the internal operation of the Council; the Presidency or Presidencies of the Union; and the creation of an EU foreign minister. These issues will be considered in turn. This will be followed by discussion of shared executive power from the perspective of principle and pragmatism. This section will conclude with some thoughts as to how the disposition of shared executive power might operate in practice in diverse areas.

## **1. The Election of the Commission President**

Let us turn first to the election of the Commission President. The Commission has in the past generally been opposed to the idea that its President should be elected. It feared the politicisation that might result. It has more recently changed its view, and come to accept that some form of elected President would enhance its legitimacy within the Union institutions, and that it would thereby strengthen the claims of the Commission President to be the President of the Union as a whole. The argument for electing the Commission President has also been supported on democratic grounds, since the voters would then be able, directly or indirectly, to 'throw out' the incumbents of political office that they disliked. The voters' inability to do this at present is one aspect of the critique concerning the EU's democratic deficit.

The debate then shifted as to who should elect the Commission President. Such an election could be direct, taking place at the same time as elections to the EP, with voters choosing the President by direct vote. The election could be indirect, the decision being taken by the EP.

There were also considerable differences of view about the consequences of any such change. There are some who feel that direct or indirect election would not markedly affect the *modus operandi* of the Commission. It would be very much business as usual, except the Commission would have the added legitimacy that comes from the election of its President. There are others who accept that election would significantly alter the character of the

Commission. They acknowledge that election would lead to politicisation, since a directly or indirectly elected President would necessarily have a political platform or agenda. They regard such a development with equanimity in the following sense. They argue that the legislative and executive powers of the Commission inevitably entail political choices and that these powers are not and cannot be politically neutral, any more than are the analogous powers within domestic polities. Better then for this to be out in the open so that voters can make their considered choices. The election of the Commission President might however have further ramifications. Consider the following two issues.

It is questionable, in the medium term, whether the EP or the voters would be content simply with an indirectly elected Commission President. The assumption underlying the debate has been that it would be the Commission President that would be indirectly elected, and that the other Commissioners would not. This is certainly possible. There are of course examples of elected executives who appoint other members of their team, who have not been elected. The point is not whether this is possible in principle or by way of comparative political analogy. The point is rather the possible repercussions of an indirectly elected Commission President within the EU. The EP already exerts power, *de jure and de facto*, over the Commission team. If the Commission President were to be indirectly elected by the EP, then it might sooner or later press that other Commissioners should be subject to the same regime.

It is also questionable whether the Commission would continue to retain its 'gold standard', the near monopoly of legislative initiative, if the President were elected. It could of course be argued that the retention of this monopoly would be strengthened if the President of the Commission were to be elected, since the incumbent of the office would, by definition, be representing those within the EP that had voted in his or her favour. The fact that a member of the executive is elected, directly or indirectly, by the legislature, does not however mean that the latter will accept with equanimity that the executive thus chosen has a legal monopoly over the introduction of legislation. The EP might equally feel that given that its democratic credentials are more direct than those of an indirectly elected Commission President, that it should also have the right to initiate legislation, rather than merely exerting pressure on its 'leader' to do so. The nature of such a right would then be a matter for further debate. It might exist in parallel to that exercised by the Commission President, such that the EP could literally draft its own legislation, which would become law subject to approval from the Council. The EP might alternatively press for a right to initiate legislation that would then

be drafted in detail by the Commission. We should not forget in this respect that the EP has pressed for a right of legislative initiative on a number of occasions in the past. The fact that it has not done so on other occasions is explicable on the ground that it wished to prioritise other issues, rather than any change of heart about the substance of the issue itself.

The EP has not surprisingly been in favour of an indirectly elected Commission President. It was however always doubtful whether the Member States would be willing to accept a regime in which they surrendered total control over the Presidency of the Commission to the EP. The solution in the Draft Constitution has brought a sharp dose of political reality to the debate.

The Member States have, unsurprisingly, not been willing to surrender this power. The articles on the institutions make interesting reading in this respect. Article I-19(1) states that the EP shall elect the President of the Commission. The retention of state power is however immediately apparent in Article I-26(1). The European Council, after appropriate consultation, and taking account of the elections to the EP, puts forward to the EP the European Council's candidate for Presidency of the Commission. This candidate shall then be elected by the EP by a majority of its members. If the candidate does not get the requisite majority support, then the European Council puts forward a new candidate within one month, following the same procedure.

The result, at least for the present, is that the Commission President is indirectly-indirectly elected. It is difficult to believe that this will do much to enhance the legitimacy of the Commission, insofar as this is felt to be a desired or necessary objective. Nor will it enhance the democratic credentials of the Union, in the sense of allowing the voters to throw out those whom they dislike, and install another person with a different policy agenda.

## **2. The Internal Organisation of the Commission**

There has been considerable debate, going back at least to the Nice Treaty 2000, concerning the overall size of the Commission. This issue came to the fore because of the prospects of enlargement. In the IGC leading to the Nice Treaty opinion was divided as to whether there should continue to be one Commissioner from each state, or whether there should be an upper limit combined with a system of rotation.<sup>28</sup> The argument for the latter view was that Commissioners do not represent their state, and that the operation of a Commission with 25 or 27 Commissioners could cross the line between a collegiate body and a deliberative

assembly. The Nice Treaty embodied a compromise. The Protocol on Enlargement provided that from January 1 2005 Article 213(1) EC should be amended to provide that the Commission should consist of one national from each state. The Council, acting unanimously, could alter the number of members of the Commission. When the Union had 27 Member States Article 213(1) would be further modified such that the number of Commissioners would be less than the number of Member States. The Council, acting on the principle of equality, would adopt a rotation system, and the Council would decide on the number of Commissioners.

The Draft Constitution embodies a compromise of a rather different kind. It provides that the Commission shall consist of a College comprising the President, the Union Minister for Foreign Affairs, and thirteen Commissioners selected on the basis of a system of equal rotation between the Member States.<sup>29</sup> The system of rotation is to be established by a European decision made by the European Council, on the basis of the following two principles. There is a state equality principle,<sup>30</sup> which mandates that Member States shall be treated on a strictly equal footing as regards determination of the sequence of, and time spent by, their national as Members of the College. The consequence is that the difference between the total number of terms of office held by nationals of any given pair of Member States may never be more than one. There is also a demographic and geographic equality principle, which mandates that subject to the first principle, each successive College of Commissioners shall be so composed as to reflect satisfactorily the demographic and geographical range of all Member States.<sup>31</sup>

The provisions of the Draft Constitution elaborated above clearly reflect the view that there should be a small and coherent Commission, with a fixed number of Commissioners that is less than that of the Member States of the Union as a whole. This conclusion is however undermined by the penultimate paragraph of Article I-25(3), which stipulates that the Commission President shall appoint non-voting Commissioners, chosen according to the same criteria as Commissioners who are members of the College, from all the other Member States. The entirety of this regime is said to take effect from November 1 2009.

It is to be sincerely hoped that this does not happen. If the IGC is to make changes in the Draft Constitution then this should be at the top of the list. A moment's reflection will reveal why this solution is unworkable. It will lead to a two-tier Commission, with voting and non-voting Commissioners. This is the worst of all possible worlds.

It will not serve the aim of producing a coherent, smaller Commission, since the views of the non-voting Commissioners will inevitably have a major impact on agenda setting and decision-making even if they do not have the vote in the College.

It will moreover necessarily produce tensions between the two groups. It is important to realise that non-voting Commissioners will still head a particular DG within the Commission.<sup>32</sup> It will therefore commonly be the case that a non-voting Commissioner will have developed a legislative initiative, but have no formal vote within the College. The tensions that this could produce, more especially if the non-voting Commissioner were from a larger Member State, would be considerable. They would be exacerbated if the College were to reject the proposal or suggest modifications when the Commissioner primarily responsible for it was not present to comment.

It is therefore not surprising that the Commission has expressed opposition to this part of the Draft Constitution in the strongest possible terms. The Commission described the relevant provisions of the Draft Constitution as 'complicated, muddled and inoperable'.<sup>33</sup> It argued that 'if the members without voting rights manage a portfolio, one cannot see how they could effectively exercise their responsibilities without being able to participate in the collective decision'.<sup>34</sup> If they 'don't have a portfolio, one wonders what their role within the College would be'.<sup>35</sup>

The Commission also pointed to significant points of detail that were unclear as to the status of non-voting Commissioners, but which were essential for the day to day running of the organisation. The general approach in Part III of the Draft Constitution is that European Commissioners, who have the vote, and other Commissioners who do not, are otherwise subject to the same responsibilities.<sup>36</sup> This still leaves open, as the Commission rightly noted, a plethora of issues on which the Draft Constitution is unclear.<sup>37</sup> Thus it is not apparent whether non-voting Commissioners can attend meetings of the College and take part in its discussions. Nor is it clear whether they can take decisions on behalf of the Commission. This latter issue is of particular importance, given that only about 3% of approximately 10,000 Commission decisions per annum are made by the College of Commissioners through the 'oral procedure' at its weekly meetings. The great majority of such decisions, approximately 60%, are made either by 'empowerment', whereby a Member of the Commission is empowered to take management decisions on its behalf; or 'delegation', whereby decisions are taken by a Director General to whom power has been delegated by the Commission.<sup>38</sup>

The Commission's proposed solution was shaped by the politics of the Convention on the Future of Europe. The provisions of the Draft Constitution reflected opposition within the Convention to the idea of a small, slimmed-down Commission. This was recognised by the Commission, which was nonetheless strongly opposed to the solution based on the divide between voting and non-voting Commissioners.

The Commission's alternative solution is premised on each Member State having a Commissioner. It is central to the Commission's proposal that each Commissioner will have the same rights and obligations.<sup>39</sup> The Commission recognizes however that some measure of structuring of the College will be necessary within an enlarged EU. The way forward is to build on foundations that currently exist. There are already informal groups of Commissioners that deal with related subject matter. The Commission proposes that this *modus operandi* of decentralised decision-making should be generalised and formalised, by structuring the College into a number of groups of Commissioners. The College of Commissioners, which would contain all members of the Commission, would consider only the most important issues.<sup>40</sup> The details of this system would be laid down in provisions made by the College. The Commission has drafted detailed amendments to Article I-25 and 26, which encapsulate its preferred solution.<sup>41</sup> It has also provided more specific guidance on the nature and size of each of the groups of Commissioners, and on the type of issues that would be decided by the College as a whole.<sup>42</sup>

There is much to be said for the Commission's proposal. A slimmed-down Commission of 15 Commissioners might still be the optimal way forward. It seems clear however that there is strong opposition to this in some quarters. Given that this is so, the Commission's schema makes sense and is infinitely preferable to the existing provisions of the Draft Constitution. The proposal is premised on the equality of all Commissioners, and on the need to find a way for the Commission to operate with 25 Commissioners in an enlarged EU. The formalisation and extension of the regime of groups of Commissioners offers a sensible and workable solution.

The Italian Presidency of the IGC has addressed a questionnaire to the Member States on the internal organization of the Commission, asking in particular whether the two-tier regime of Commissioners should be retained.<sup>43</sup> This is certainly one issue on which the IGC should depart from the provisions in the Draft Constitution. The impression conveyed at the time of writing by the most recent communiqué is however that the IGC will persist with the

divide between voting and non-voting Commissioners, while attempting to clarify the roles responsibilities of the latter group.<sup>44</sup>

### **3. The Internal Organization of the Council**

We considered above the changes proposed by the IGC in relation to the locus of legislative power within the Council. We must now consider the more general revisions to Article I-23 that are likely to be adopted that affect the Council's general internal organization and the way in which it exercises executive power.

The strategy in Article I-23 of the Draft Constitution for the Council was for there to be a Legislative and General Affairs Council, LGAC. When it operated in its General Affairs function it would ensure the consistency in the overall work of the Council. There was also to be a Foreign Affairs Council, chaired by the Union Minister for Foreign Affairs. The European Council was to adopt a decision establishing the further formations in which the Council could meet. The Presidencies of these Council formations, other than Foreign Affairs, were to be held by representatives of Member State within the Council on the basis of equal rotation for periods of at least one year. It was to be for the European Council to adopt a European decision establishing the rules of such rotation, taking into account geographical balance and the diversity of Member States.

The IGC looks set to revise Article I-23.<sup>45</sup> The LGAC has been discarded. There is to be General Affairs Council, GAC, which has the task of ensuring consistency in the work of the different Council formations. The GAC will, as in the Draft Constitution, prepare and ensure the follow-up to meetings of the European Council. This is now to be done in liaison with both the President of the European Council as well as the Commission.<sup>46</sup> The provisions concerning the Foreign Affairs Council, FAC, remain the same.<sup>47</sup> The European Council will still make the decision concerning the list of other Council formations, although the revised text makes clear that this is to be by qualified majority.<sup>48</sup> A necessary consequence of discarding the LGAC is that, as we saw earlier, each of the Council formations will deliberate and vote on legislation within their respective areas. Meetings of Council formations will therefore be divided into two parts dealing with legislative and non-legislative functions.<sup>49</sup> The method of choosing the Presidency of the Council formations has also altered.<sup>50</sup> They are to be held by Member State representatives in the Council on the basis of equal rotation, in accord with a Protocol devised by the IGC. The Protocol embodies in essence a 'team

system' for the Presidency of Council formations, other than the GAC and FAC. This means that the Presidency of those other Council formations will be held collectively by pre-established groups of three or four states, for a period that is still being negotiated, but which will be somewhere between one and two years. The Member States belonging to such a group then share the Presidency of the Council formations equally throughout the period. The Presidency of the GAC and the chair of COREPER are to be held by each of the members of the group for six months.

#### **4. The President(s) of the Union: Hats and Labels**

Perhaps the most significant debate about executive power has been concerned with the Presidency of the Union as a whole. This has at times bordered on the arcane, and much of the discussion smacks of a 'milliner's' tale: the talk was of one hat, two hats, shared hats and the like. This should not mask the issues of real power that were at stake. Two main positions can be identified.

A prominent version of the 'single hat' view was that there should be one President for the Union as a whole; the office of President should be connected formally and substantively with the locus of executive power within the Union; and that the President of the Commission should hold this office and exercise this power. The Presidency of the European Council should continue to rotate much as it has done in the past, on a six-monthly basis. The real 'head' of the Union would on this view be the President of the Commission, whose legitimacy, so it was hoped would be increased by the very fact that he or she had been elected.

A prominent version of the 'separate hats' view was that there should be a President of the Commission and a President of the European Council, and that executive power would be exercised by both. It is central to this view that the Presidency of the European Council would be strengthened. It would no longer rotate between states on a six-monthly basis. It was felt that this would not work within an enlarged Union, and that greater continuity of policy would be required. This view was advocated by a number of the larger states, but was opposed by some of the smaller states, which felt that the Presidency of the European Council would be dominated by the larger Member States.

The Convention proceedings on this issue were dramatic to say the least. It will be recalled that the membership of the Convention altered in the late autumn of 2002. The most

significant change in this respect was what Norman has termed the invasion of the foreign ministers:<sup>51</sup> Joschka Fischer and Dominique de Villepin both joined the Convention. Change inside the Convention was matched by political developments outside its portals. The larger Member States, in the form of Spain, the UK and France, had already made it clear that they subscribed to the ‘separate hats’ view. The idea of a longer-term, strengthened Presidency of the European Council, was central to what became known as the ‘ABC’ view, expressed by Aznar, Blair and Chirac. In January of 2003 Germany was brought on board. This was made clear in the Franco-German paper, in which Germany accepted the idea of a long-term Presidency of the European Council, with the *quid pro quo* being that France accepted that the Commission President should be elected.

The Franco-German paper, set against the background of the ‘ABC’ view, shaped developments inside the Convention. It set the tone of subsequent debate about the Presidency of the Union. It had a marked impact on Giscard d’Estaing’s thinking. He may well have inclined to this view in any event. The Franco-German paper, when combined with the opinions of the UK and Spain, nonetheless had a marked impact on his thinking. He was not about to produce a Draft Constitution for the IGC that contained key provisions about the institutional disposition of power that were opposed by the larger Member States. The manner of announcement of the constitutional provisions on the Presidency was nonetheless dramatic. The proposals were leaked to the press on April 22 2003, just as he was unveiling them to the Praesidium. The proposals ‘provoked shock and awe in about equal measure, particularly among the integrationist Convention members from the European Parliament and some of the smaller Member States’.<sup>52</sup> It is safe to say that they were not welcomed by the Commission either.

The ‘shock and awe’ provoked by the Giscard proposals was explicable because they not only provided for an extended Presidency of the European Council, which was to be the highest authority of the Union, but also for a ‘board’ of seven including a Vice-President, the EU Foreign Minister, two other members of the European Council, plus the Presidents of Ecofin and the Justice and Home Affairs Council. This reconfigured European Council was also to have its own bureaucratic support mechanism. It is true that the ‘most developed’ form of these proposals did not survive long within the Convention. Substantial parts hit the ‘cutting room floor’ and those opposed to the ‘separate hats’ view congratulated themselves on curbing or even emasculating the Giscardian vision.

The result as expressed in the Draft Constitution nonetheless embodies the central feature of the ‘separate hats’ view. Article I-21 stipulates that the European Council shall elect a President, by qualified majority, for two and half years, renewable once.

## **5. The President(s) of the Union: Power and Authority**

The victory, albeit qualified, for the ‘separate hats’ view is however only part of the story about the locus of executive power within the EU. Article I-21(1) tells us that there is going to be a long term President of the European Council, and an end to the existing six-month rotating system. It tells us nothing about the division of power between the President of the Commission and the President of the European Council. It is the nature of their respective powers, both *de jure* and *de facto*, that will shape the way in which the totality of executive power operates within the EU.

The importance of this point can be demonstrated from three related perspectives. We can consider proposals for the division of power that emerged in the background to the Convention; we can analyse the articles of the Draft Constitution; and we can focus on the political manoeuvring in the IGC on this issue. These will be considered in turn.

### *(a) Power and Authority: The UK Proposals in January 2003*

A vision of the powers of the President of the European Council emerged from what Grevi has termed a non-paper leaked by the UK government in January 2003.<sup>53</sup> This paper envisioned the President of the European Council preparing and controlling its agenda; developing jointly with the Commission President the multi-annual strategic agenda; being head of the Council Secretariat that would become ‘his administration’; chairing the General Affairs and External Relations Council; chairing teams of chairs of sectoral Council formations; approving agendas for sectoral Councils; chairing triologue meetings with the Commission and the EP; and attendance at Commission meetings as an observer when the President of the European Council so decides; ‘ownership’ of major summits with great powers; co-ordination and supervision on aspects of crisis management and defence.

It should be stressed that this was simply a ‘non-paper’ leaked by one of the large Member States. It does not represent the position in the Draft Constitution. It nonetheless

reflected a vision from one of the 'ABC' group as to what the powers of the long-term President of the European Council might have been.

There is little doubt that if this range of powers had been accorded to the President of the European Council the effect on the operation of the EU as a whole would have been profound. It would have had far-reaching consequences for the inter-institutional balance that has characterised the EU thus far.

*(b) Power and Authority: The Provisions of the Draft Constitution and the IGC*

The provisions of the Draft Constitution concerning the executive powers of the President of the European Council, and hence the distribution of power as between this President and the President of the Commission, are clearly of primary significance. They represent the considered view of the Convention, and it will be for those opposed to this outcome to make the case for change in the IGC. The powers of the President of the European Council are not however simple to divine.<sup>54</sup> We have to piece together the answer from the articles relating to the European Council, and the Council. These will be considered in turn.

The *provisions concerning the European Council* begin with a subtle modification of established orthodoxy. Article 4 of the TEU had stated that the European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof. Article I-20(1) of the Draft Constitution states that the European Council shall provide the Union with the necessary impetus for its development, and shall define its general political directions and priorities. It is the addition of the reference to priorities that is the formal novelty in Article I-20(1). This is subject to the caveat that the European Council does not exercise legislative functions. Article I-21(2) then specifies the powers of the President of the European Council. It states that the President shall chair it and drive forward its work; shall ensure its proper preparation and continuity with the President of the Commission, and on the basis of the work of the General Affairs Council; shall endeavour to facilitate cohesion and consensus within the European Council; and shall present a report to the European Parliament after each of its meetings; and the President shall ensure the external representation of the EU on issues concerning its CFSP, without prejudice to the responsibilities of the Union Minister for Foreign Affairs.

The *provisions concerning the Council, and its relationship with the European Council, are also vital for a proper understanding of the President's powers.* It will be

recalled that the original Giscardian proposals for the European Council provided for a crucial overlap with the work of the Council itself: the Presidents of Ecofin and the Justice and Home Affairs Council were to be members of the European Council. This would have enabled the European Council and its President to exert a direct influence on the workings of important Council formations. The UK proposals from January 2003 went even further in according the European Council power over the running of the Council.

The result embodied in Article I-23 does not encapsulate the degree of power for the European Council envisaged either by the Giscardian or UK proposals. It is clear from Article I-23(4) that the Presidency of the Council formations, other than Foreign Affairs, is to be held by Member States within the Council of Ministers on the basis of equal rotation for a period of at least a year. This was designed to meet the fears of the smaller states that a long-term Presidency of the European Council would lead to domination by the larger states.

The influence of the European Council, and hence its President, is nonetheless still apparent within the Council. It is the European Council that is to adopt a decision establishing further formations in which the Council may meet.<sup>55</sup> The European Council's strategic guidelines on foreign policy are to be fleshed out by the Foreign Affairs Council.<sup>56</sup>

The relationship between the European Council and the Legislative and General Affairs Council (LGAC) is especially significant. Article I-23(1) provides that when this Council formation acts in its General Affairs function it *shall*, in liaison with the Commission, prepare and ensure follow-up to meetings of the European Council. This is of significance because of the very centrality of the LGAC to the functioning of the Council.<sup>57</sup> The obligation cast upon the LGAC to prepare and ensure follow-up to meetings of the European Council provides the latter, and hence the President, with an important degree of power. It was of course the case that even prior to the Draft Constitution the 'conclusions' reached by the European Council would often frame the more detailed deliberations in the Council and in the Commission. This was especially so in relation to matters where the European Council expressed policy objectives in relatively specific terms, a feature that has become common in its more recent meetings. The existence and content of Article I-23(1) is significant nonetheless. It creates a cognisable legal obligation on the LGAC, when it meets in its General Affairs function, to ensure that the conclusions reached by the European Council are followed up. It creates a more formal mechanism than hitherto for the European Council to influence the priorities of the EU. It may enable the European Council to influence the detail of executive matters. It may also operate as a vehicle through which the European

Council is able to press for legislation on specific issues. It is true that the formal right of legislative initiative would remain with the Commission. The obligation cast on the LGAC, in liaison with the Commission, to ensure that the meetings of the European Council are followed up may however require the drafting of legislation on specific issues deliberated on by the European Council.

The strategy embodied in Article I-23(1) of the Draft Constitution has been preserved and indeed strengthened in the revised version of Article I-23(2) that has emerged from the IGC. The combined Legislative and General Affairs Council has been discarded. The IGC revised version establishes a separate General Affairs Council, which continues to have the obligations that it did under the Draft Constitution. It must ensure consistency in the work of Council formations. It must also prepare and ensure the follow-up to meetings of the European Council. This latter function is to be done in liaison with the Commission *and* the President of the European Council.

We shall consider in more detail below how the sharing of power between the European Council and the Commission might operate in relation to certain key aspects of executive power.<sup>58</sup>

*(c) Power and Authority: The Deliberations in the IGC*

It is too early, at the time of writing, to determine whether the IGC will make any changes to the Presidency of the European Council. It is nonetheless interesting to see how some of the players are positioning themselves in these deliberations. The Commission's strategy is interesting. It is not minded directly to challenge the issue of 'hats and labels', but is seeking rather to focus on 'power and authority'.

There is little doubt that the Commission would support any move to undo the extended Presidency of the European Council, should this move be spear-headed by the smaller states. This is not however the principal focus of its efforts. It contents itself with saying that despite the reservations that it has on the Presidency of the European Council 'the Commission does not propose to bring into question the compromise which the Convention reached after prolonged debate'.<sup>59</sup>

The Commission rather concentrates its attention on seeking to constrain the power and authority of the President of the European Council. It states that it is vital to maintain the balance of the President of the European Council's role defined by the Convention.<sup>60</sup> It argues

that any extension of the President's duties over an above the task of chairing meetings of the European Council and representing the Union in relation to the CFSP 'would inevitably change the institutional architecture agreed in the Convention and create confusion as to how responsibility was shared'.<sup>61</sup> The President of the European Council should not perform the task of organising the work of the Council, since a person 'who is not accountable for his/her action to any parliamentary assembly cannot exert influence over the *modus operandi* of the Council, which is supposed to be transparent and democratic'.<sup>62</sup> The extension of judicial review to acts of the European Council is a further element in the Commission's strategy for limiting its power.<sup>63</sup>

## **6. The Disposition of Executive Power in the EU: Principle and Pragmatism**

It is readily apparent from the preceding analysis that the deliberations concerning executive power in the EU have been contentious and complex. It is important to stand back from the detail and to consider more generally the emerging picture of executive power in the EU. We can assess this disposition of executive power from the perspective of principle and pragmatism. Two major views can be identified.

The *argument against divided executive power is as follows*. Two Presidents of the Union is one President too many. There should as a matter of principle be one locus of executive power within the Union, by parity of reasoning with domestic politics, and this should be the President of the Commission, who is responsible to the EP. The divide in executive power is also deprecated on pragmatic grounds because it will lead to confusion of responsibility as between the President of the Commission and the President of the European Council. The practical problem will be exacerbated because the nature of their respective executive responsibilities is not clearly defined.

The *argument for divided or shared executive power may be put in the following way*. The assumption that executive power in nation states is 'unitary', residing with the government *stricto sensu*, is an assumption that is often belied, both *de jure* and *de facto*, by legal and political reality. A more realistic picture of executive power within nation states would recognise that such power is exercised not only by a discrete set of ministers that form the 'government', but also by a plethora of other bodies, agencies, and firms to which power has been contracted-out, over which the government has varying degrees of control. There is on this second view therefore nothing wrong, in terms of principle, in the EU with executive

power being shared by a body representing state interests, and a body representing the Community interest. It can moreover be argued that tensions could arise if there were only one President of the Union, who was the Commission President, who would chair the European Council. The Commission President might then be weakened and subject to conflicts of interest, resulting from the desire to press the Commission view, combined with the need to retain the confidence of the Member States within the European Council and articulate their views.

The argument for shared executive power also rests on pragmatic grounds. The argument that such a sharing of executive power will lead to confusion is based in part on the assumption that this would be a novel development, a break from the past. This does not accord with reality. Executive power in the EU has not hitherto resided in a single institution. It has been shaped by inter-institutional balance. It is exercised in part by the Commission, which exercises a plethora of executive-type functions, including the administration of legislative programmes, the planning of the legislative agenda, the negotiation of Treaties with third parties, and the framing of the budget. The Commission has not however been the sole repository of executive power within the existing constitutional order. The Council and the European Council also wield executive power. The European Council is important in this respect. The Treaties may say relatively little about the powers of the European Council. The reality is that nothing of major importance happens within the EU without its approval. It has a say in setting the legislative agenda, in setting the Union's priorities, in deciding on the pace and direction of change within the Union, whether this be in relation to the timing of monetary union, or enlargement. Executive power within the Union has been divided *de facto* between the Commission and the European Council for some considerable time. This may not be neat, but it is how the Union has worked, more especially since the SEA. It is moreover clear that for the last decade at least the Commission and the European Council have worked symbiotically in developing the Union's agenda.

The pragmatic argument for shared executive power also rests on the 'lessons of history'. A constant theme in the history of the EU is that institutions have developed, often outside the strict letter of the Treaties, as a response to concerns relating to institutional balance of power. The European Council began life in this way, and COREPER and the Comitology committees are further examples of the same phenomenon. If therefore executive power were to be concentrated within a single Presidency of the Commission, and this did not prove to be to the liking of some Member States, then it could lead to further institutional

developments outside the strict letter of the Constitution. Better therefore to recognise shared executive power within the body of the Constitution, and attempt to structure and control it, than have it develop in unpredictable ways outside the constitutional remit.

## **7. The Disposition of Shared Executive Power in the EU Constitutional Order: The Reality of Power Sharing**

It seems highly likely that some form of shared executive power will be retained by the IGC in the final Constitution. We have seen that arguments of principle and pragmatism can be made for some form of shared executive power in the EU. This does not however tell us who will and should do what, nor does it tell us how the component parts of the executive will inter-relate in practice. The ‘answers’ to these issues will of course not be fully known until we see the final text of the Constitution, and until we have some experience as to how the system will operate. We can nonetheless make some headway on the information that is presently available. The discussion is best conducted by distinguishing different aspects of executive power identified above, since the disposition of power sharing might well vary in these different areas.

### *(a) The Setting of Priorities and the Planning of the Legislative Agenda*

The legal and political divide between the European Council and the Commission will be especially important in relation to the planning of the EU’s work programme and its legislative agenda.

*We can begin by looking more closely at the relevant legal provisions of the Draft Constitution.* In relation to the European Council, the changes in Article I-20 from Article 4 TEU were noted earlier. The Draft Constitution provides that the European Council shall define the EU’s priorities, as well as defining its general political directions. It should be recognised that this language is mandatory, and that the additional task of defining the EU’s priorities is not expressly qualified by the adjective ‘general’.<sup>64</sup> It might be open to the ECJ to read the word ‘general’ onto priorities, but there nothing requires this conclusion. The existing formulation makes sense as it stands, and it can be argued that if the framers of the Draft Constitution had wished to limit the European Council in this respect they could simply have said ‘and shall define ... its general priorities’. The connection between the extended

tasks of the European Council and the role of its President is obvious, but worth stating nonetheless. The President must, *inter alia*, chair the European Council and drive forward its work.<sup>65</sup> The work of the European Council now expressly embraces setting priorities for the EU, and hence the President will have the obligation to drive this forward and will have the power that comes with it. The legal provisions which relate to the powers of the European Council concerning the overall priorities for the EU are in one sense a classic example of law playing catch up with political reality, given that the European Council has been playing a role in relation to priorities for some considerable time.

In relation to the Commission, the main legal provision that is of relevance is Article I-25(1), which provides, *inter alia*, that the Commission shall initiate the EU's annual and multi-annual programming with a view to achieving inter-institutional agreements. Thus while the Commission is accorded a general right to initiate particular pieces of Union legislation,<sup>66</sup> it also has the right and duty to initiate the Union's more general programming strategy. The very language of Article I-25(1) serves however to reinforce the sense of shared executive power: the Commission initiates the Union's annual and multi-annual programming with a view to achieving inter-institutional agreement with the other players. It remains to be seen how far the language of Article I-25(1) signals a shift from the status quo ante. The strategy for the development of the multi-annual programme was hitherto embodied in the Council's Rules of Procedure. These rules provided that the GAC would recommend to the European Council a multi-annual programme for the next three years, which was to be based on a joint proposal drawn up by the Presidencies concerned in consultation with the Commission.<sup>67</sup> In the light of this multi-annual programme, it would be for the two Presidencies due to hold office in the following year to submit jointly a draft annual programme for activities during that year.<sup>68</sup> The language of the Council's Rules of Procedure thus placed the Council in the driving seat in relation to the development of the multi-annual programme: it was to be based on a joint proposal drawn up by the Presidencies concerned in consultation with the Commission. The language of Article I-25(1) frames matters the other way round, such that the Commission shall initiate the multi-annual programme with a view to securing inter-institutional agreement. It is nonetheless doubtful whether this signifies a change of substance, given that the Commission has always had a major say in shaping the multi-annual programme.

It is clear that legal provisions affirm and reinforce the regime of shared executive power that has been decided on by the framers of the Draft Constitution. The very fact that

the European Council's tasks are defined so as to include setting the priorities for the Union necessarily empowers the President of the European Council in this regard. It makes it impossible to argue in legal terms that this should be the exclusive preserve of the Commission, as does the fact that the Commission's power to initiate multi-annual programming is with a view to securing inter-institutional agreement, not the imposition of a *fait accompli*. It should also be recognised that the relevant legal provisions are 'delicately balanced' and give comfort to the Commission as well as to the European Council. Thus while the priority-setting task of the European Council is not limited by the adjective 'general', it can equally be argued that the European Council cannot go so far as to initiate its own formal multi-annual programme, since this would then trespass on the Commission's power of initiation over such matters. In that sense, it is for the Commission to 'factor in' the European Council's decisions about priorities into the annual and multi-annual programming the initiation of which remains its preserve.

*We can turn now to consider how the European Council and the Commission will inter-relate in practice* when setting the policy priorities and agenda under the Constitution. It is likely that the President of the European Council will exert greater influence over the general setting of priorities and the overall legislative agenda than was the case previously. This is because the President will be in office for five years. The President will therefore have time to develop a vision for the EU's development in a way that was simply not possible with the six-monthly rotation system.<sup>69</sup> It is also predictable that successive Presidents will wish to leave a 'mark' on the EU, in the form of an agenda that they will press to see effectuated during their term of office. Institutional support will be of importance in this respect. The European Council has not hitherto had an established institutional support mechanism to rival that of the Commission, but this has not prevented it from exercising real input into the pace and nature of the Union's development. The position under the Draft Constitution is that the European Council is to be 'assisted' by the General Secretariat of the Council of Ministers.<sup>70</sup> The nature of this assistance will develop over time. It would be surprising if it did not blossom into a species of institutional support suited to the specific needs of the 'new' European Council.

Having said this, it is clear that the Commission, and its President, will nonetheless continue to be of great importance in setting the overall agenda for the EU. It is the Commission that is to initiate the annual and multi-annual programming with the aim of securing inter-institutional agreement.<sup>71</sup> The Commission President co-operates with the

President of the European Council in ensuring the proper preparation and continuity of the work of the European Council.<sup>72</sup> The Commission President can moreover rely on the considerable force of the Commission bureaucracy.

*We may be able to press further in assessing shared executive power against the criteria of conflict-co-operation and coherence.* The relationship between the Presidency of the European Council and the Commission will evolve over time. It is interesting to reflect on the nature of this relationship through the lens of conflict-co-operation, in order to see which of these is likely to predominate, and to reflect also on the implications of shared executive power for the coherence of the EU's agenda.

The worst case scenario is that there will be conflict between the European Council and the Commission, and that this will lead to inter-institutional tensions and fights redolent of those that beset Council/Commission relations in the late 1960s and through the 1970s. The result on this worst case scenario would be that the coherence of the EU executive agenda would necessarily suffer, such that any agreed initiatives would be partial and fragmentary.

It should however be recognised that there are numerous incentives for the two players to co-operate and to develop a coherent agenda. There are a number of differing reasons why this is so.

The most obvious is that inter-institutional tension leading to failure to develop a coherent agenda would be detrimental to the EU, a consequence that would be in the interest of neither of the main players. They would both be held responsible and this would be so no matter whether the 'objective reality' was that one side was more to blame than the other.

There is a further reason which is closely related to the first, but distinct nonetheless. If shared executive power fails the consequences for the respective powers of the President of the Commission and the President of the European Council will be uncertain. Neither will be able to predict with certainty the consequences for the future disposition of executive power. They might respectively hope that any future allocation of executive power would be more unequivocally in their favour, but they could not be certain about this. The only certainty would be that the future disposition of executive power would be uncertain. It might incline towards a single locus of executive responsibility, but the beneficiary would not be readily predictable. It might be the President of the Commission, but it might equally incline towards the President of the European Council, along the lines of the Giscardian vision originally presented to the Convention on the Future of Europe, or even more radically in accord with

the UK proposals outlined in January 2003. This uncertainty, with the correlative risk of what might transpire if shared executive power fails, will be a factor in inclining the relevant players to co-operation rather than conflict and intransigence.

The respective ‘constituencies’ of the President of the European Council and the President of the Commission might be a further factor engendering co-operation between the parties in developing priorities for the EU and setting the agenda. The fear of conflict between the President of the European Council and the President of the Commission is based in part on the assumption that they will each lead a united team, which will have strongly opposed views. The reality is more interesting and complex.

The President of the European Council will undoubtedly occupy a powerful position. It should nonetheless be recognised that the interests of the President’s immediate constituency, viz the Member States, will not be homogenous. We already know that the smaller states fear domination by their larger neighbours. Many feel that they might be better ‘protected’ by the Commission. Nor should it be pre-supposed that the larger Member States necessarily have an identity of interest on the substantive direction of EU policy. The priorities that emerge from the European Council are likely therefore to be the result of compromise between the Member States. The European Council may be intergovernmental in institutional terms. It would however be mistaken to think that this will necessarily translate into intergovernmentalism and states’ rights in relation to the substantive direction of EU policy.

The President of the Commission’s ‘constituency’ under the new constitutional order is equally interesting in this respect. The incumbent will of course have considerable power. The President may however also face contending pressures from within his or her constituency. The indirectly elected President will have to take account of the interests of the majority within the EP that voted him into office on the promise or expectation of certain policy initiatives. The Commission President will, at the same time, be wary of alienating those in the EP of a different political persuasion, and wary of offending state interests if the President hopes for a second term in office. There may also be constraining influences from the other Commissioners. It is true that the President of the Commission has a degree of choice as to the Commissioners listed as candidates by the Member States.<sup>73</sup> It would nonetheless be surprising if the body of Commissioners did not reflect some real diversity of opinion on the political, economic and social priorities of the EU. This diversity is likely to play out in the setting of the multi-annual agenda. It will be for the Commission President to

balance the legitimating force that this can bring to the content of the EU's agenda, with the need to fulfil the expectations of the party within the EP that put him into power.

The *modus operandi* of the European Council and Commission in the past provides some further indication of likely co-operation in the future. It should be recalled that the European Council and the Commission have worked symbiotically and to good effect on many issues, especially since the passage of the SEA. The Commission has frequently fed policy initiatives that it wishes to advance to the European Council, and gained its imprimatur. The Commission's shift in thinking about the strategy for the single market in the 1990s is but one example of this.<sup>74</sup> Winning the approval of the European Council for the general direction of policy in a particular area facilitates the task of the Commission when fashioning more specific legislation to put that policy into effect. It is to be hoped that this pattern of co-operation will not be reversed under the new constitutional order, notwithstanding the increased power of the President of the European Council. The inter-relationship between Commission and European Council in setting priorities and the multi-annual agenda may indeed lead to more overall coherence than we have had until now. The European Council's contribution to the overall policy agenda has been real, but somewhat fragmentary and unpredictable, because of the six-month limit on the Presidency. The five-year Presidency of the European Council is intended to allow greater planning and coherence than prevailed hitherto.

The final factor in engendering a climate of co-operation rather than conflict is law. This brings us back to the discussion at the beginning of this section. The legal provisions of the Constitution embody shared executive power. This is not just in the very instantiation of the extended Presidency of the European Council alongside the President of the Commission, but also in their respective powers concerning the setting of priorities and the multi-annual agenda. These powers are delicately balanced in the manner adumbrated above. The European Council has express power to define priorities, while the Commission retains the right to initiate the multi-annual agenda with a view to securing inter-institutional agreement. Neither side can therefore use the law to argue that it should have exclusive executive power, but both can resort to legal argumentation to delimit the sphere of executive power possessed by the other.

*(b) Development of Policy Choices through the Council*

The discussion thus far has focused on the way in which shared executive power might operate in relation to the setting of the EU's priorities and the planning of the annual and multi-annual agenda. It is equally important to consider how this shared power will play out in relation to the implementation of European Council initiatives.

The role of the President of the European Council within the Council is especially important in this respect.<sup>75</sup> We have already seen that the Giscardian plan, and the proposals from the UK in January 2003, accorded the President very considerable control over the Council and its formations. These proposals were not incorporated within Article I-23. The role of the President of the European Council within the Council nonetheless continued to be a cause of concern for the Commission, which feared that the President of the European Council, who will normally be in office for five years, would exert greater influence in this respect than hitherto. This was apparent from its comments on the Draft Constitution, where it sought to confine the President's duties to chairing the European Council, and representing the Union in relation to the CFSP,<sup>76</sup> while excluding the President of the European Council from the task of organising the work of the Council.<sup>77</sup> The EP expressed similar concerns.<sup>78</sup>

While the more far-reaching Giscardian plan was not incorporated in the Draft Constitution, the President of the European Council may nonetheless be able to exert greater influence over the detailed implementation of European Council policy because of his role within the General Affairs Council (GAC). This Council formation is of central importance. It is charged with ensuring consistency in the work of the other Council formations. It is charged also with preparing and ensuring the follow up to meetings of the European Council. The centrality of the GAC explains much of the manoeuvring by key players. Some Member States sought to have the President of the European Council be the President of the GAC.<sup>79</sup> The Commission for its part sought to modify the relevant provision so as to provide that the consistency task of the GAC should be performed in conjunction with the Commission.<sup>80</sup> Neither side won out. The Presidency of the GAC is, according to the revised IGC form of Article I-23, to be held for six months by each of the members of the team Presidency. The Commission has not thus far managed to secure a formal role when the GAC performs its task of ensuring the consistency of the work of the different Council formations.

The President of the European Council has nonetheless a key role in the work of the GAC, which has been strengthened by the IGC revised version of Article I-23. Prior to the

Draft Constitution the GAERC, when meeting in its GAC formation, had the obligation to prepare the European Council meetings and to ensure that they were followed-up. This obligation was embodied in the Council's Rules of Procedure.<sup>81</sup> The Draft Constitution placed this obligation in Article I-23(1) and hence constitutionalised it, while stating that this function was to be done in liaison with the Commission. The obligation cast on the GAC to ensure follow-up to the work of the European Council would, even in this version, have enhanced the power of the President of the European Council, since he would be able to point to a constitutional obligation on the GAC to carry forward European Council policy. The position of the President of the European Council has been further strengthened by the revised IGC version of Article I-23, which in Article I-23(2), provides that preparation and follow-up to meetings of the European Council is to be done in liaison with the President of the European Council as well as the Commission. This places the President of the European Council in an important position in relation to the work of the Council. The influence of the President may be felt both directly and indirectly.

The direct impact is self-evident. The follow-up to meetings of the European Council may often require work by the other sectoral Councils. The President of the European Council, when liaising with the GAC, will therefore be able to exert influence over the more detailed initiatives that are required to carry European Council policy into action. It should be remembered in this respect that a significant number of legislative initiatives have their origin in suggestions from the Council, which are then routed to the Commission via Article 208 EC.<sup>82</sup> This power is retained in the Draft Constitution in Article III-248. The President of the European Council, reinforced by the obligation on the GAC to ensure follow up to meetings of the European Council, will therefore be in a strong position to press other Council formations to take the necessary steps, through use of Article III-248 if necessary, to carry through the detail of European Council policy.

The indirect impact of the President of the European Council within the GAC is more speculative. It concerns the GAC's role in relation to ensuring consistency in the work of the other Council formations. It is clear, in formal terms, that the President of the European Council does not have a role in relation to this aspect of the GAC's work. The formal disaggregation of the GAC's consistency task from its obligation to ensure follow-up to meetings of the European Council was evident in the Draft Constitution's version of Article I-23, and is apparent in the IGC version of the same article. The President of the European Council does not have a formal role in relation to the GAC's consistency task, whereas the

GAC's follow-on task is to be done in liaison with the President of the European Council and the Commission. It remains to be seen whether this divide is sustainable in reality. It is foreseeable that there will be overlap between the two, such that consistency of work by Council formations may be necessary for the efficacious follow-up to European Council meetings, or that the follow-up to those meetings may have implications for all major Council formations. The indirect influence of the President of the European Council, and indeed the President of the European Commission, over both aspects of the GAC's work may be further enhanced by institutional factors relating to the GAC itself. Concerns have been voiced that the GAC has not in the past performed the consistency task adequately. This was in large part due to the fact that its members were commonly national foreign ministers, who were too busy with other matters to give proper attention to ensuring consistency in the work of Council formations. If this tendency persists in the new constitutional order it will increase the likelihood that the President of the European Council and the President of the Commission will exercise greater influence to fill this 'relative vacuum'.

*(c) Delegated Rule-making*

The discussion until now has been concerned with the way in which shared executive power might operate in relation to the setting of the overall agenda, and follow-up to that agenda within the Council. It is also important to touch on the new regime for the making of delegated regulations.

The Draft Constitution provides for what are termed non-legislative acts.<sup>83</sup> A European regulation is a non-legislative act of general application for the implementation of legislative acts and certain specific provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding as regards the result to be achieved, on all the Member States to which it is addressed, but leaving the national authorities entirely free to choose the form and means of achieving that result. The Commission is empowered to enact delegated regulations to 'supplement or amend certain non-essential elements of the European law or framework law'.<sup>84</sup> The objectives, content, scope and duration of the delegation must be defined in the laws and framework laws, and the delegation may not cover the essential elements in the area, which shall be reserved for the law or framework law. The European Parliament or the Council may decide to revoke the delegation; or the delegated regulation may enter into force only if no objection has been

expressed by the European Parliament or the Council within a period set by the law or framework law.<sup>85</sup>

Space precludes a detailed analysis of these provisions, and their implications for the inter-institutional balance of power within the EU. This can be found elsewhere.<sup>86</sup> The relevance of this topic for the present analysis of executive power can nonetheless be highlighted as follows.

The constitutional strategy has been to regard delegated regulations as a species of executive power which should be exercised by the Commission, subject to the constraints identified above. This constitutional strategy, strongly supported by the Commission, was also been premised on the hope that the new category of delegated regulations will lead to the dismantling of Comitology, or at least the removal of the management and regulatory committees. The idea is therefore for the Commission in its executive capacity to be able to enact the relevant regulations, subject to the possibility of call back by the Council or EP.

It should however be noted that delegated regulations are only non-legislative in the formal sense that they are not primary laws. This does not mean that they are not legislative in nature. They clearly are, and this conclusion is reinforced by the fact that they are said to be of general application, that they can supplement or amend certain elements of primary law. The reality is therefore that a European regulation will often be what would be regarded in domestic legal systems as secondary or delegated legislation. The Commission will therefore have significant power over what may be complex regulatory choices, with relatively little input from the Council and the EP.

The methods of control will be difficult to monitor and enforce. In essence the pre-existing regime was based on generalized *ex ante* input into the making and content of the delegated norms, with the possibility of formal recourse to the Council in accord with the Comitology procedures. It allowed for regularised, general and detailed input into the content of such norms by Member State representatives, with some control exercised by the EP. We are switching to a system based on *ex ante* specification of standards in the primary law, combined with the possibility of some control *ex post* should the measure not be to the liking of the EP or Council, but this latter control will only operate where it is written into the primary law.

The efficacy of these controls is however questionable. It will often be difficult for the Council and the EP to specify with any exactitude the criteria that should guide the exercise of delegated power by the Commission, more especially if primary laws become more

abstract and less detailed. Moreover, if Comitology is dismantled then it may not be easy for the Council or the EP to decide whether to exercise their powers relating to revocation of the delegation, and/or entry into force, where such powers exist, since they might not have the requisite information on which to make this decision.

*(d) The EU Foreign Minister and the CFSP*

It is clearly necessary to consider separately how the regime of shared executive power will operate in relation to the CFSP.

The principal institutional innovation in the Draft Constitution is the creation of the post of EU Minister for Foreign Affairs, who is to 'conduct' the Union's common foreign and security policy.<sup>87</sup> The idea that executive power within the Union is divided between the European Council and the Commission is personified in this post. The Minister for Foreign Affairs is to be appointed by the European Council by qualified majority, with the agreement of the Commission President.<sup>88</sup> The EU foreign minister then operates as one of the Vice Presidents of the Commission, and is responsible for handling external relations and for coordinating other aspects of the Union's external action.<sup>89</sup> The EU Foreign Minister therefore wears a 'shared hat'. The holder of the office takes part in the work of the European Council,<sup>90</sup> chairs the Foreign Affairs Council<sup>91</sup> and is also a Vice-President of the Commission.

In order to understand the disposition of executive power in this area it is important to view the creation of the Minister for Foreign Affairs within the more detailed framework of the CFSP. It is clear that executive authority within this area continues to reside with the European Council and the Council. It is the European Council that identifies the strategic interests and determines the objectives of the CFSP through strategic guidelines.<sup>92</sup> It is primarily the Council that adopts the decisions required to implement the strategic guidelines laid down by the European Council.<sup>93</sup> It is the Council once again that adopts decisions that define the EU's approach to a particular matter of a geographical or thematic nature.<sup>94</sup> The primacy of place accorded to the European Council is even more marked in relation to defence.<sup>95</sup> It would seem therefore that executive authority within the EU in relation to CFSP matters continues to rest primarily with institutions of an intergovernmental nature, the European Council and the Council, and that this is so notwithstanding the creation of the Minister for Foreign Affairs who operates within the European Council, the Council and the

Commission. There is undoubtedly force in this conclusion: CFSP matters do remain pretty firmly in the grip of the European Council and the Council, which make the operative decisions.

While this conclusion as to the disposition of executive power in relation to CFSP is correct in its essentials, it may however need to be qualified for the following legal and political reasons.

In legal terms, it should be noted that while the ECJ is, generally excluded from the CFSP,<sup>96</sup> it does have jurisdiction to adjudicate to ensure that the exercise of power pursuant to CFSP does not trespass on other heads of competence, and vice versa. To this extent, decisions made by the European Council and the Council will be subject to legal scrutiny.<sup>97</sup> The ECJ also has jurisdiction in relation to review the legality of restrictive measures against natural or legal persons adopted by the Council on the basis of Article III-224.<sup>98</sup>

In political terms, there are reasons to believe that the creation of the Minister for Foreign Affairs will enhance de facto the power of the Commission. The pre-existing regime for CFSP concentrated executive power in the European Council and the Council. Viewed from that perspective there has been little formal change in the institutional balance of power under the new constitutional order. It was however becoming clear that even under the pre-existing regime the Commission exercised rather greater influence over CFSP matters than might have been apparent from the bare face of the provisions in the TEU.<sup>99</sup> The interesting issue is how the creation of the Minister for Foreign Affairs will change matters for the future. This remains to be seen. It is however difficult to imagine that it will weaken the impact of the Commission on the development of foreign policy as compared with the status quo ante. The Minister is to be a Vice-President within the Commission, and will perform many of the important functions currently undertaken by the Commissioner for External Relations, which include, but are not limited to, foreign policies. The lessons and ideas generated by this 'front-line' work will inevitably have an impact on the proposals contributed by the Minister to the more strategic development of common foreign policy, as decided on by the European Council, and fleshed out by the Foreign Affairs Council. It must of course be recognised that this is a 'two-way street', and that the influence will operate the other way too, such that the overall strategic focus of the European Council will have an impact on the way in which the Minister discharges more front-line responsibilities in external relations from within the Commission. This can be readily accepted. It does not however remove the force of the point being made here. The EU's foreign policy work, as

currently undertaken by the Commissioner for External Relations, covers a very wide range of important initiatives, as a bare glance at the web-site will confirm. The fact that the Minister for Foreign Affairs will be responsible for these matters,<sup>100</sup> and that he will have a central place within the Council and the European Council is likely to increase and not decrease the Commission's overall influence in this area. This is so notwithstanding the fact that formal decision-making powers remain with the European Council and the Council.

*(e) Financial Resources and the Budget*

The direction of EU policy is by no means wholly dependent on money. The EU is rightly regarded as a regulatory state, such that many of its initiatives are not conditioned on expenditure from EU funds. This can be readily accepted, while at the same time acknowledging that control over the EU's resources and its budget are also matters of importance. The disposition of power in relation to these matters in the Draft Constitution is interesting.

In relation to resources, the Draft Constitution largely preserves the *status quo ante*. It is the Council of Ministers that establishes the limits of the Union's resources, deciding on new categories of resources and abolishing existing categories. The European law through which this is done is not directly applicable: it enters into force only after it is approved by the Member States in accord with their constitutional requirements. The Council of Ministers acts unanimously in this regard after consulting the EP.<sup>101</sup> This replicates the pre-existing position.<sup>102</sup>

In relation to the budget, it is necessary to distinguish between the multi-annual financial framework and the annual budget. The multi-annual financial framework, which is to be established for a period of at least five years, is designed to ensure that EU expenditure develops in an orderly manner and within the limits of its resources.<sup>103</sup> It determines the amounts of the annual ceilings for commitment and payment appropriations. This framework is laid down in a European law made by the Council after obtaining the consent of the EP, and the first such framework made after the Constitution enters into force is to be made unanimously.<sup>104</sup> The annual budget must comply with the multi-annual financial framework.<sup>105</sup> Executive power in relation to setting of the financial framework is therefore shared principally between the Commission and the Council, since the European law made by the Council will be based on a proposal from the Commission.<sup>106</sup> The annual budget is, by

way of contrast, made through a European law jointly by the EP and the Council on a proposal from the Commission.<sup>107</sup> Space precludes a detailed analysis of the provisions relating to the passage of the annual budget.<sup>108</sup> Suffice it to say for the present that the procedure is a modification of the ordinary legislative procedure, with special emphasis being given to the Conciliation Committee. The EP's powers have been increased because the distinction between 'compulsory' and 'non-compulsory' expenditure has been abolished, thereby making the EP a more equal branch of the budgetary procedure alongside the Council.

#### **Part 4: Accountability in the Emerging EU Order**

It is important to stand back from the detailed analysis of how shared executive power might operate and consider the emerging regime in terms of accountability. This inquiry could well occupy a paper or book<sup>109</sup> in itself. What follows does not therefore purport to be an exhaustive analysis. The object is rather to identify and distinguish some of the central issues that fall within the overall heading of accountability. There are three dimensions to this inquiry that should be distinguished.

##### **1. Citizens' Understanding of the New Constitutional Order**

The first line of inquiry concerns the extent to which the new regime will be understood by citizens of the EU. It is clear that one of the aims of the Laeken Declaration was to render the process of EU decision-making clearer and simpler for the EU citizenry. It is however doubtful whether this has been achieved in relation to the inter-institutional disposition of executive power. An informed citizen, reading the text of the Draft Constitution assiduously, would still find it difficult to understand the locus and distribution of executive power within the EU. It may well be that it was always going to be difficult to deliver on this aspiration from the Laeken Declaration in relation to the executive dimension of the EU. This was more especially so once it was decided within the Convention on the Future of Europe that there would be two Presidents for the EU, and that executive power would be divided between the European Council and the Commission.

## **2. Legal Accountability**

A second dimension of accountability is legal in nature. The Draft Constitution left the general structure of the ECJ's jurisdiction unchanged. The European Council was not however subject to judicial review under what will now be Article III-270. This was anomalous given the nature of its powers under the Draft Constitution. This matter looks set to be addressed by the IGC. It has proposed a modification to Article III-270(1), so as to render the European Council subject to review in relation to acts that are intended to produce legal effects vis-à-vis third parties.<sup>110</sup> A similar amendment will bring the European Council within the ECJ's jurisdiction in relation to failure to act. These changes are to be welcomed. It is clear as a matter of principle that binding acts of the European Council could also be challenged indirectly through national courts via the preliminary ruling procedure. The ECJ has jurisdiction to give preliminary rulings on, *inter alia*, the validity and interpretation of acts of the institutions of the Union,<sup>111</sup> and the European Council is clearly an institution of the Union.<sup>112</sup>

It should also be recognised that inter-institutional disputes concerning the disposition of executive power could end up before the ECJ. There has in the past been a steady stream of such actions, many of which were brought by the EP seeking to defend its prerogatives within the legislative process. Such actions will be less likely in the future because of the extension of the ordinary legislative procedure, the successor of co-decision, to new areas. It is however possible that disputes about the division of executive power under the new constitutional order could come before the ECJ. It has been argued earlier that there are in fact cogent reasons to expect the European Council and the Commission to co-operate rather than conflict. If however co-operation breaks down in a particular area then recourse to the ECJ will always be a possibility. The ECJ would have jurisdiction to hear such actions under Article III-270 on the ground that the European Council or the Commission had infringed the Constitution in relation to the exercise of executive power.

## **3. Political Accountability**

It can be accepted at the outset that political accountability within a regime of shared executive power will be more complex than in those regimes where such power is concentrated more specifically within a particular part of the body politic called the

executive. This is of course a trite proposition, but it is worth stating nonetheless, if only to clear the ground. Indeed it could be said to follow logically from a regime of shared executive power that there is not going to be a single line of executive accountability.

There is another proposition which is somewhat less obvious, but which should also be borne in mind at the outset. Parliamentary political systems in which executive power is located within a 'single' executive may well foster electoral accountability, in the important sense that the electorate can then throw out the party whose policies they dislike. It should however also be recognised that systems with a strong relatively unitary executive power can often generate serious problems of political accountability between elections. It is for this reason that some commentators in the UK have referred to the system as one of 'elective autocracy', to capture the idea that once a government is elected with a reasonable majority it has very considerable power and it becomes all the more difficult for the legislature to exert real control over agenda setting, policy choices and the like. Indeed, much of the discourse in the UK has been about the ways in which legislative control over the executive can be enhanced through the creation of legislative select committees, as well as other institutional reforms.

Bearing these points in mind we can now turn to political accountability within the emerging constitutional order. This is best examined by considering in turn accountability in relation to the setting of the overall political agenda, and in relation to the implementation of policy choices.

*In relation to accountability for the overall political agenda*, in the form of the multi-annual programme, combined with the multi-annual financial framework, it will not be possible for the voters simply to express their dislike of the status quo and put another party into office with a different agenda. The very fact that executive power over agenda setting is shared between the Commission and the European Council prevents any such direct transmission of voter preferences. It would nonetheless be mistaken to believe that such preferences will have no effect under the disposition of power in the Draft Constitution. It should be remembered that the President of the Commission is elected by the EP and that the European Council must take account of the results of the European elections in deciding which person to put forward to the EP for election as Commission President. Thus, if the electorate dislike the direction of substantive European policy they can express this through a change in the composition of the EP, which will then have some force in the European

Council's decision as to the candidate that should be put forward to the EP for election as Commission President.

It is moreover important to be realistic about the extent to which voter preferences could be translated through a change of government even if the Draft Constitution had opted for a single President of the EU, with this power being vested in the President of the Commission, indirectly elected by the EP. This would, to be sure, have accorded the voters greater electoral influence over the major aspects of the policy agenda. There would however still have been constraints flowing from the continued existence and influence of the European Council. The President of the Commission, acting as the sole President of the EU, would still have had to take account of the strong preferences of the heads of state operating from within the European Council, as well as voter preferences expressed by MEPs. It could of course be argued that the 'solution' should then have been to do away with the European Council completely. There is, however, no possibility that this will occur judged in terms of the reality of practical politics. Nor is it self-evidently desirable in normative terms: legitimisation within the EU has always been conceived in terms of representation of both state and voter interests, through the European Council/Council and EP respectively.

The reality under the Draft Constitution is that the multi-annual agenda will be the result of a discourse between the major institutional players. This discourse will incorporate voter preferences partly through the persona of the Commission President, and partly through consultation with the EP on the framework multi-annual agenda itself. The discourse will also clearly include state interests as mediated through the European Council and the Council. This process may be 'messier' than that existing in nation states where there is a single unitary executive power. It does however avoid the kind of executive dominance over the political agenda adverted to above that can often attend executive-legislature relationships within such polities. The dialogue fostered by the system of shared executive power can be healthy in making actors re-think their own pre-conceived positions concerning the direction and pace of EU development. We have moreover already seen that the dangers of this leading to conflict between for example Commission and European Council over the direction of EU policy, leading to an incoherent agenda, are more likely to be outweighed by various factors that will engender co-operation between them.

Let us now turn *to consider political accountability in relation to the implementation and execution of policy choices*. There are of course different aspects of this process that must be disaggregated. The annual and multi-annual agenda will be developed in part through

European laws and framework laws, which are legitimated through the ordinary legislative procedure initiated by the Commission. New-style delegated regulations will also be used. There are, as we have seen, problems in this respect, which are reflective of the difficulty, more generally, of rendering the exercise of secondary rule-making power both workable and legitimate. We must also consider separately the issue of accountability as it relates to the implementation/execution of agreed policy choices, whether those choices are incorporated in European laws/framework laws or in delegated regulations. The Commission is clearly in the front line here, having the primary responsibility for policy implementation, as recognised in the Draft Constitution.<sup>113</sup> It is subject to a plethora of differing constraints, which relate in different ways to the issue of accountability. The EP can exercise control, through a Committee of Inquiry, through scrutiny by its regular committees, with the long stop of forcing the entire Commission out. The Ombudsman can investigate cases of maladministration. The Commission is moreover subject to the enormously important rules contained in the new Financial Regulation. It covers financial aspects of implementation, and also establishes detailed norms concerning the way in which policy is implemented in so far as this relates to matters such as fiscal and policy responsibility, audit, delegation, contracting out and the like.

The discussion of accountability could well occupy a paper or book in itself. The analysis within this section was, as stated above, not meant to be exhaustive. The object was to focus on some central aspects of accountability as they relate to the emerging institutional order under the Draft Constitution. The discourse on this central issue will undoubtedly continue to run irrespective of the fate of the Draft Constitution.

### **Part 5: Postscript**

This paper was written prior to the Brussels European Council in December 2004, at which the Member States failed to agree on the Draft Constitution. The future remains unclear in the immediate aftermath of that meeting. The principal reason for failure to agree on the Draft Constitution at the European Council was however clear. It was a 'classic' IGC-type disagreement over the number of votes in the Council, with France and Germany ranged against Poland and Spain. The respective votes held by particular Member States in the Council, and the calculation of the qualified majority, had been the most contentious issue in the discussions leading to the Nice Treaty. The issue was less prominent in the Convention on

the Future of Europe, but it returned to haunt the EU almost four years after the ‘Nice solution’. We shall have to wait and see whether traditional diplomacy under the aegis of the Irish Presidency can secure agreement between the contending parties.

## Notes

\* Professor of English Law, St. John's College, Oxford. I am grateful for valuable comments received on an earlier draft of this paper given at the EUI.

<sup>1</sup> C. Ladenburger, 'Introductory Comments on the Convention Method, and on Some Features of an Improved Constitutional Charter' (2003) ? *ERPL* ?

<sup>2</sup> P. Norman, 'From the Convention to the IGC (Institutions)' (Federal Trust, September 2003), p. 2.

<sup>3</sup> G. Grevi, 'The Europe We Need: An Integrated Presidency for a United Europe' (European Policy Centre, December 2002), p. 5.

<sup>4</sup> CONV 770/03, Brussels 2 June 2003, p. 2.

<sup>5</sup> Art. I-25(2).

<sup>6</sup> Arts. I-19(1) and I-22(1).

<sup>7</sup> Arts. I-33(1) and III-302.

<sup>8</sup> Art. III-127(2).

<sup>9</sup> Art. III-167(2).

<sup>10</sup> Art. III-119.

<sup>11</sup> Art. I-32(1).

<sup>12</sup> Art. I-35.

<sup>13</sup> Art. I-35(2).

<sup>14</sup> The EP shall act by a majority of its members, and the Council by qualified majority, Art. I-35(2).

<sup>15</sup> P. Craig, 'The Hierarchy of Norms', forthcoming.

<sup>16</sup> Art. I-22(1).

<sup>17</sup> Art. I-23(1).

<sup>18</sup> Conference of the Representatives of the Governments of the Member States, *Questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers* CIG 9/03, PRESID 1, Brussels 15 October 2003.

<sup>19</sup> Conference of the Representatives of the Governments of the Member States, *Council Presidency and Council Formations* CIG 39/03, PRESID 5, Brussels 24 October 2003.

<sup>20</sup> Conference of the Representatives of the Governments of the Member States, *Reply from the Commission to the Questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers* CIG 35/03, DELEG 26, Brussels 15 October 2003, p. 2.

<sup>21</sup> *Ibid.* p. 2.

<sup>22</sup> Arts. I-32, 34-35.

<sup>23</sup> Art. I-24(4). National Parliaments must be consulted not less than four months before any such decision is taken.

<sup>24</sup> Communication from the Commission, *A Constitution for the Union, Opinion of the Commission, pursuant to Article 48 of the Treaty on European Union, on the Conference of representatives of the Member States' governments convened to revise the Treaties* COM(2003) 548 final, para. 6.

<sup>25</sup> *Ibid.* paras. 6-9.

<sup>26</sup> The Italian Presidency of the IGC did not wish to change these rules on voting, Conference of the Representatives of the Governments of the Member States, *IGC 2003-Naples Ministerial Conclave: Presidency Proposal* CIG 52/1/03, PRESID 10, Brussels 25 November 2003, p. 4. However the political reality meant that the debate over the respective votes wielded by Member States within the Council came to the fore in the period leading to the December Summit in 2003.

<sup>27</sup> Art. I-33.

<sup>28</sup> Presidency Note, CONFER 4813/00, 1 December 2000.

<sup>29</sup> Art. I-25(3).

<sup>30</sup> Art. 25(3)(a).

<sup>31</sup> Art. I-25(3)(b).

<sup>32</sup> Art. III-254.

<sup>33</sup> Communication from the Commission, *A Constitution for the Union*, n. 24, para. 2.

<sup>34</sup> *Ibid.* p. 2.

<sup>35</sup> *Ibid.* p. 2.

<sup>36</sup> Arts. III-250-257.

<sup>37</sup> Communication from the Commission, *A Constitution for the Union*, n. 24, para. 3, n.3.

<sup>38</sup> *Ibid.* Annex 1.

<sup>39</sup> *Ibid.* para. 3.

<sup>40</sup> *Ibid.* para. 4.

<sup>41</sup> *Ibid.* Annex. 2.

<sup>42</sup> *Ibid.* Annex 3.

<sup>43</sup> Conference of the Representatives of the Governments of the Member States, *Preparation of the IGC Ministerial Meeting on 14 October 2003: Questionnaires* CIG 6/03, Brussels 7 October 2003.

<sup>44</sup> *IGC 2003-Naples Ministerial Conclave: Presidency Proposal* CIG 52/1/03, PRESID 10, n. 26, pp. 4-5.

<sup>45</sup> *Council Presidency and Council Formations* CIG 39/03, PRESID 5, n. 19.

<sup>46</sup> IGC revised Art. I-23(2).

<sup>47</sup> IGC revised Art. I-23(3).

<sup>48</sup> IGC revised Art. I-23(4).

<sup>49</sup> IGC revised Art. I-23(5).

<sup>50</sup> IGC revised Art. I-23(6).

<sup>51</sup> Norman, above n. 2, p. 2.

<sup>52</sup> *Ibid.* p. 3.

<sup>53</sup> G. Grevi, 'Options for Government of the Union' (Federal Trust, March 2003), p. 6.

<sup>54</sup> A point noted also by House of Lords, Select Committee on the European Union, *The Future of Europe – The Convention's Draft Constitutional Treaty* (HL 169; 2003), para. 153.

<sup>55</sup> Art. I-23(3).

<sup>56</sup> Art. I-23(2).

<sup>57</sup> Prior to the Draft Constitution the General Affairs and External Relations Council (GAERC) was viewed as the senior Council formation, which would act so as to co-ordinate the work of the Council as a whole, F. Hayes-Renshaw and H. Wallace, *The Council of Ministers* (Macmillan, 1997), pp. 29-30. Examples of its work can be found in reports of its meetings, see, e.g., 2532<sup>nd</sup> Council Meeting, General Affairs (Luxembourg, 13098/03 (Presse 291), 13 October 2003); 2526<sup>th</sup> Council Meeting, General Affairs (Brussels, 12293/1/03 REV 1, (Presse 251), 29 September 2003).

<sup>58</sup> See below, pp.

<sup>59</sup> Communication from the Commission, *A Constitution for the Union*, above n. 24, para. 14.

<sup>60</sup> *Ibid.* para. 14.

<sup>61</sup> *Ibid.* para. 14.

<sup>62</sup> *Ibid.* para. 14.

<sup>63</sup> *Ibid.* para. 14, fn 6.

<sup>64</sup> Art. I-20(1): the operative phrase is 'shall define its general political directions and priorities'.

<sup>65</sup> Art. I-25(2).

<sup>66</sup> Art. I-25(2).

<sup>67</sup> Council Decision of 22 July 2002 adopting the Council's Rules of Procedure [2002] OJ L230/7, Art. 2(4).

<sup>68</sup> *Ibid.* Art. 2(5).

<sup>69</sup> N. Nugent, *The European Commission* (MacMillan, 2001), pp. 186-187.

<sup>70</sup> Art. III-244(3).

<sup>71</sup> Art. I-25(1).

<sup>72</sup> Art. I-21(2).

<sup>73</sup> Art. I-26(2).

<sup>74</sup> P. Craig, 'The Evolution of the Single Market', in Catherine Barnard and Joanne Scott (eds.), *The Law of the Single European Market, Unpacking the Premises* (Hart, 2002), Chap. 1.

<sup>75</sup> For a general overview of the relationship between the European Council and the Council, see, F. Hayes-Renshaw and H. Wallace, *The Council of Ministers* (MacMillan, 1997), Chap. 6.

<sup>76</sup> Communication from the Commission, *A Constitution for the Union*, above n. 24, para. 14.

<sup>77</sup> *Ibid.* para. 14.

<sup>78</sup> European Parliament, *Report on the Draft Treaty establishing a Constitution for Europe and the European Parliament's Opinion on the Convening of the Intergovernmental Conference* A5-0299/2003/Final, para. 20.

<sup>79</sup> Conference of the Representatives of the Governments of the Member States, *Reply from the UK to the Questionnaire on the Legislative Function, the Formations of the Council and the Presidency of the Council of Ministers* CIG 34/03, DELEG 25, Brussels 15 October 2003.

<sup>80</sup> Communication from the Commission, *A Constitution for the Union*, above n. 24, para. 17. The wording used by the Commission gives the impression that this is the position in the Draft Constitution. This is not so. The Commission has to *liaise with* the General Affairs Council for the purposes of ensuring follow up to European Council meetings. It is the General Affairs Council itself that has the task of ensuring consistency of the Council's work under Art. I-23(1).

<sup>81</sup> Council Decision of 22 July 2002 adopting the Council's Rules of Procedure [2002] OJ L230/7, Art. 2(2)(a).

<sup>82</sup> Ex Art. 152.

<sup>83</sup> Art. I-32(1).

<sup>84</sup> Art. I-35.

<sup>85</sup> Art. I-35(2).

<sup>86</sup> P. Craig, 'The Hierarchy of Norms', forthcoming.

<sup>87</sup> Art. I-27(1).

<sup>88</sup> Art. I-27(1).

<sup>89</sup> Art. I-27(3).

<sup>90</sup> Art. I-20(2).

<sup>91</sup> Art. I-23(2). In the revised version this is Art. I-23(3).

<sup>92</sup> Art. I-39(2) and Art. III-196.

<sup>93</sup> Art. I-39(3) and Art. III-196(2).

<sup>94</sup> Art. III-199.

<sup>95</sup> Art. I-40(2).

<sup>96</sup> Art. III-282.

<sup>97</sup> Art. III-209.

<sup>98</sup> Art. III-282.

<sup>99</sup> See, eg, the Commission initiatives in relation to defence-related matters.

<sup>100</sup> Art. I-27(3).

<sup>101</sup> Art. I-53(3).

<sup>102</sup> Art. 269 EC.

<sup>103</sup> Art. I-54(1) and Art. III-308(1).

<sup>104</sup> Art. I-54(2) and (4).

<sup>105</sup> Art. I-54(3).

<sup>106</sup> Art. I-25(2).

<sup>107</sup> Art. I-55.

<sup>108</sup> Art. III-310.

<sup>109</sup> See, e.g., C. Harlow, *Accountability in the European Union* (Oxford University Press, 2002).

<sup>110</sup> *IGC 2003-Naples Ministerial Conclave: Presidency Proposal CIG 52/1/03, PRESID 10, n. 26, Annex 7.*

<sup>111</sup> Art. III-274.

<sup>112</sup> Art. I-18.

<sup>113</sup> Art. I-25(1).