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Draft Constitution :

why a "rear guard" should be established

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The creation of an advance party of Member States is presented as a panacea for breaking the current deadlock surrounding the adoption of the Constitution. This is far easier said than actually written into the text of the draft Constitution now on the table of the Inter-Governmental Conference (IGC). In fact, one is tempted to consider that the question is wrongly premised. Indeed, the idea of an avant-garde has never worked in practice, while in contrast Europe has in several instances been successful in setting up a rear guard consisting of those Member States unwilling to participate in a new policy. This approach could also be considered for those Member States that could not adopt the Constitution following a negative result in a referendum.

I. The advance party is not advancing

One first has to be clear about what precisely is meant by an advance party. There is often confusion between the two kinds of arrangement for allowing a determined group of Member States to "go it alone".

On the one hand, the advance party may be organised within the framework of the European Union and its institutions (Commission, Council, Parliament, European Court of Justice). This is the concept of "enhanced cooperation" introduced by the Amsterdam Treaty.

Alternatively, the advance party may be created outside the European Union's structures by means of an international treaty with its own institutions and legal order. This is the idea of a "pioneer group" put forward by Jacques Chirac when he spoke before the German Parliament of the creation of "a secretariat to ensure consistency between the positions and policies of the members of this group".

An advance party established outside the Union would only really make sense in the field of defence. However, even in this domain , which will determine whether or not European integration develops a truly political dimension, the most enthusiastic Member States (France, Germany, Belgium, Luxembourg) are trying a different approach at the level of the IGC to that of the "pioneer group" in order to avoid duplication of the institutions, treaties, and legal personalities. They propose a "treaty within the treaty" so that the creation of an advance party that is consistent with foreign policy, coordinated with the common policies and the European Defence Agency and that above all allows membership for those countries wishing to join in the future, is to a certain extent permitted under the Constitution.

[1] The views are expressed by the author in a personal capacity.

One of the major challenges of the IGC, will be whether or not the twenty-five Member States can agree unanimously to allow the creation of a military advance party within the Union.

On paper allowing a majority of Member States to pursue a particular Union objective is the only way to get around the unanimity hurdle. Let us not forget that 85 articles in the Nice Treaty and 60 in the draft Constitution are subject to unanimity. Unanimity is not just a question of taxation or social policies.

Let's wager, as President Prodi has warned the IGC, that compromises on the question of double-majority voting will be achieved at the expense of guarantees extracted at the last moment by certain States for maintaining the veto for even more articles than are currently proposed in the draft Constitution.

The problem with enhanced cooperation is that this option, which was created twenty years ago under the Single Act for technology programmes and seven years ago by the Amsterdam Treaty, has never been used. It wasn't until this year that for the first time a concrete and well-argued case was put forward by Commissioner Frits Bolkestein, albeit very limited in its scope, dealing with capping corporate taxes.

Why have these provisions never been used? Firstly, for political reasons; apparently there was no will out of fear of creating a competitive disadvantage for the avant-garde States who would have had to tolerate a distortion in the Internal Market. Secondly, with respect to the budget, should enhanced cooperation require money, for example in the context of an industrial programme, it would require the agreement of the non-members to provide funding for it!

The procedural requirements for launching enhanced cooperation are very strict. Such cooperation must take place within the institutional framework of the Union (Commission proposal, consultation of the Parliament, judicial control exerted by the Court of Justice). It must also respect the Community acquis, its scope must fall within the competence of the Union, demonstrate that there is no possible alternative, and involve a majority of Member States. Finally, it is necessary to ensure that decision-making in the framework of enhanced cooperation is not subject to unanimity.

However, supposing that a breakthrough in the field of corporate taxation is achieved and that in the future other forms of enhanced cooperation are agreed (e.g. harmonisation of VAT rates, coordination of social security systems, congestion or user charges for cities and motorways, judicial cooperation, etc.), these will be limited to isolated actions and involve different groups of Member States. In other words, the result will not be a stable core group of States that agree to go forward to achieve the same objectives together. This hardly amounts to the politically united advance party of States as put forward in the Schäuble-Lamers proposal.

II. The solution: establishing a rear guard

This problem should be tackled from the opposite angle by organising the "rear guard" of States unable or unwilling to fulfil the policies established in the Constitution. As Jacques

Delors has argued repeatedly, it is a matter of formalising the differentiation that has long characterised European integration.

The best example is Economic and Monetary Union (EMU), which brings together twelve of the fifteen Member States and technically cannot be considered as an "advance party" but represents rather the majority. The principle was included and accepted by all Member States in the Maastricht Treaty. But, at the same time, an opt-out or a transition period were agreed for those who were either not ready for political (United Kingdom, Denmark), or economic reasons. The Accession Treaty for the ten new Member States followed the same approach. They are all subject to the third stage of EMU, i.e. having accepted the irrevocable fixing of exchange rates, the introduction of the Euro and budgetary discipline, but will benefit from a transition period.

The participation of the rear guard States in EMU is explained by their reluctance to accept that the "Eurozone" is temporarily managed solely by those States, which have introduced the Euro – supported by ad hoc institutions – as they are also affected by any decisions taken. The question of management of the Eurozone – which is of concern to all – has been addressed in pragmatic fashion by the draft Constitution. Only those decisions affecting States with the Euro as their currency are taken in the absence of the rear guard States. Here again, concerns about duplicating legal systems and institutions prevailed.

Historically-speaking, social policy provides another example of differentiation arranged into a rear guard of States. John Major did not want the advances in social policy contained in the Maastricht Treaty, however limited, to apply to the United Kingdom. However, he accepted that these provisions would apply to the other Member States in exchange for a Protocol, which left the UK provisionally on the side-line.

Schengen is a good illustration of the theory that it is easier to organise a rear guard than an advance party. To begin with, in the 1980s, a majority of Member States established an international framework outside the European Community - without resorting to the Community method, for example by preventing Commission participation in Schengen – in order to conclude agreements among themselves enabling them to move forward in the field of judicial and police cooperation.

This kind of intergovernmental system resulted in more committees than enforceable rules. It turned out to be so inefficient in taking decisions that its supporters decided to integrate it into the Community under the umbrella of the European Union. The agreements, which had not been ratified by national parliaments, were transformed into directives or community regulations that could now finally be enforced. The price paid for the firm establishment of Schengen within the European Union was the creation of a small group of rear guard countries (UK, Ireland, Denmark).

III. The rear guard and the Constitution

The concept of a rear guard is nothing new. The Treaties of Maastricht for EMU and Amsterdam for the Schengen Agreements found a solution for those that preferred not to go ahead. Without a solution to this problem in the Constitution, a single State will be able to seek refuge behind unanimous decision-making to prevent the others from moving forward to

implement the policies. It would then be necessary to revise the Constitution requiring twenty-five national ratifications. It is therefore necessary to insert a provision enabling the Commission to propose that one or more States are not bound by a rule in the Constitution if they are unable or unwilling to implement it[2]. They remain outside the common policy and do not participate in the relevant decision-making process together with the assurance that they may join the rest of the pack when the Commission considers that they fulfil the appropriate conditions.

Should a State reject such a clause we would come back to the same old fundamental problem. How to deal with a State that rejects the Constitution or its revision and takes all the other Member States hostage? This is the skeleton that the Constitution has put in the wardrobe in the hope that in the event of a ratification problem it would always be possible to improvise a declaration with two or three opt-outs. It is the reason why the draft Constitution project "Penelope"[3] proposed an innovative solution, that can be considered more pragmatic than dogmatic taking as a starting point the "revision of the revision" in order to break the deadlock created by the unanimity requirement in article 48 of the Nice Treaty for adopting the Constitution.

Each Member State would be required to ratify an agreement in respect of the entry into force of the Constitution – a treaty in the classic international law sense, jointly signed together with the Constitution treaty – which would give the choice, through a solemn declaration, between acceding to the Constitution and therefore to the "new" Union, and non-accession if it did not adopt the Constitution. In this latter case, the State in question would preserve, through an ad hoc agreement with its former partners, all its acquired rights and would be *associated* with the Union (like Norway, Turkey or Switzerland). At the same time, through the ratification of this agreement, the State would accept that its former partners could move forward along the path mapped out by the Constitution. The latter would enter into force when at least three-quarters of Member States would have formally confirmed their participation in the "new" Union.

But this still leaves the most difficult case to solve; that of a Member State who after signing up to the constitutional treaty and to the agreement on the entry into force of the Constitution, cannot or will not go ahead with ratification, for example following a negative result in a referendum. This is not an unrealistic hypothesis if one reads the opinion polls following the announcement of referenda in several Member States, including more recently in the United Kingdom. In such a case, "Penelope" proposes a clear solution: if at a certain date at least five-sixths of Member States have declared that they can adopt the Constitution, these founding treaties would enter into force and the/those Member State(s) which have not ratified would not be considered members of the "new" Union.

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[2] The draft Constitution contains "gateway clauses" to allow the Council to decide by unanimous vote to switch to qualified majority voting in areas where unanimity is required (Art. I-24.4 (general gateway); Art. I-39.8 and III-201.3 (in the CFSP); Art. III-328 (in enhanced cooperation)). Nevertheless, even if these clauses introduce some flexibility by avoiding revisions to the Constitution for such switches to qualified majority voting, they remain hostage to the requirement for unanimity, and therefore to the intractability of those unwilling to let certain measures be decided by qualified majority.

[3] Contribution to a preliminary draft Constitution of the European Union available at : http://europa.eu.int/futurum/comm/const051202_en.htm

The case of a State that cannot adopt the Constitution ought to be addressed before the event. It is in no one's interest to be confronted with an all or nothing choice which is the trap the Constitution has blindly fallen into. It is in the interests of those States that adopt the Constitution to know how they can proceed should other States be unable or unwilling to follow suit. It is in the interests of those States that could find themselves confronted with a rejection of the Constitution to know in advance that they could negotiate the retention of its acquired rights through association outside their participation in the new Union and its institutions. No doubt Tony Blair, with the British interest at heart, might appreciate the importance of getting an advance "escape clause" in exchange for preserving the advantages of a large single European market for the United Kingdom through the mechanism of associate membership, should there be a deadlock on Article 48 of the Nice Treaty on the revision of the Constitution.

This approach consisting of negotiating in advance of the IGC the conditions for an honourable exit for those Member States who might wish to form a rear guard, is perhaps legally doubtful in international law but politically expedient. How else could the Convention be made acceptable in a referendum other than by explaining that it is better than the alternative being, for example, any progress on the implementation of social or taxation policy requiring a revision of the Constitution by unanimous vote of 25, or in the future as many as 30, Member States!

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At the very least, if the IGC cannot solve the problem of institutional deadlock (resulting from the unanimity requirement in Article 48 of the Nice Treaty), the following might be envisaged:

- either allowing Part III of the draft Constitution on the "policies" to be revised through a less cumbersome procedure than unanimity (for example three-quarters of Member States representing three-quarters of the Union's population);

- or removing Part III from the draft Constitution altogether in order to retain a minimum degree of flexibility in the development of policies, especially given that this part of the Constitution, is no more than a compilation of hundreds of articles from the existing treaties, including the most obsolete articles, without any attempt being made to bring them up to date, rationalise, reduce or simplify them, and furthermore is one of the most difficult parts of the Constitution for citizens to understand.