

Mr J.G. de Hoop Scheffer
Minister of Foreign Affairs
Postbus 20061
2500 EB DEN HAAG

Date 28 August 2003

Ref. AIV/CEI-028/03

Re Result of Convention

Dear Mr De Hoop Scheffer,

The President of the Convention on the Future of Europe, Valéry Giscard d'Estaing, submitted the Draft Treaty establishing a Constitution for Europe to the President of the European Council on 18 July 2003.¹ The Advisory Council on International Affairs (AIV) has devoted attention to the Convention on numerous occasions.² The AIV wishes briefly to set out in this advisory letter its opinion on the result achieved by the Convention and to advise on the position that the Netherlands should adopt in relation to this result at the Intergovernmental Conference (IGC) that starts in October 2003.

All things considered, the AIV is positive about the results achieved by the Convention, which go further than past IGCs. In particular, the AIV believes that in the Draft Treaty, the Convention has fulfilled what we consider the most important objective, namely to increase the EU's democratic legitimacy. It will do so, in any case, if this objective, which is essentially about political reality, can be brought closer by establishing a Constitutional Treaty. This would potentially bring the European Union closer to its citizens. The Convention has also succeeded in making numerous proposals for improving the administrative effectiveness of the European Union.

What are the most important positive points, assuming that the IGC adopts this text in its entirety? Before looking at its actual content, the AIV wishes to note that it is unquestionably a positive step that the Convention has been able to put forward a single text, one without alternatives. It is an impressive result to have a single Constitutional Treaty instead of the confusing set of treaty texts on which European cooperation has been based so far. This will help meet the objective of improving and clarifying the European Union's constitutional order. The text now submitted remains difficult for citizens to grasp but is definitely more accessible and intelligible than the existing set of treaty texts. It is fundamentally important in this context to dismantle the Union's pillar structure and to widen the

jurisdiction of the European Court of Justice (ECJ). The AIV is also glad to see that the European Union will be endowed with legal personality.

Other important matters regarding accessibility and intelligibility for citizens are that the Council's legislative work must now take place in public and that legislative procedures will become more uniform and transparent.³ This has been linked to the important step of giving the European Parliament joint decision-making powers (codecision) on all subjects of legislation on which the Council decides by qualified majority: this will make the EU more democratic. Strengthening ties between the European Commission and European Parliament will further increase democratic legitimacy. Among other things, the European Parliament will be able to elect the President of the European Commission, although the European Council will still have a key role in the appointment procedure. It is also important that the Commissioners, as well as the President, will be accountable to the European Parliament, although their accountability has been formulated indirectly.⁴ The European Commission will be scaled down to fifteen members with voting rights, a step welcomed by the AIV, although the precise significance of this step will depend in large measure on the content of the roles accorded to Commissioners without voting rights. Another interesting change is that the European Parliament will be given a say on the entire European budget by abolishing the distinction between obligatory and non-obligatory expenditure. Finally, the AIV takes a positive view in principle of giving national parliaments a role in the subsidiarity procedure. This process will hopefully increase their involvement.

The most important result as regards increasing the EU's administrative effectiveness is the provision for increasing the number of policy areas in which decisions may be taken by a qualified majority of votes. Moreover, the new rules for weighting votes represent an improvement on the barely intelligible rules embodied in the Treaty of Nice. The AIV is also pleased to see that the number of Council formations is to be streamlined, and welcomes the plan to establish a Council responsible for General Affairs and Legislation and to "separate" it from the Foreign Affairs Council. The AIV also welcomes the strengthening of the European Commission's role in multilateral supervisory procedures, among other things through the right of initiative in the excessive deficit procedure and its authority to issue direct early warnings to Member States with impending excessive deficits. The AIV also notes with satisfaction that it was agreed in discussions on the policy part of the Constitutional Treaty, which the Convention continued to work on after adopting the "constitutional" Part I on 20 June 2003, that the proposed European External Action Service would be brought more under the authority of the European Commission than originally planned. Great caution will need to be exercised in implementing these provisions to assure the effectiveness and unity of external representation.

The AIV's generally positive opinion does not mean that it endorses *all* the proposals contained in the Draft Treaty. Among other things, the AIV regrets that the planned allocation of powers to the European Union will constrain flexibility because of the proposal to exclude some areas of policy from

harmonisation. The AIV further considers the inclusion of an opt-out clause to be a retrograde step: this possibility runs counter to the nature of European cooperation to date, which has called for an "ever-closer union". In addition, it is still concerned about the risks identified in its previous recommendations in the hybrid construction of having a "double hatted" Minister of Foreign Affairs who will double as the Vice-President of the European Commission. The AIV continues to take the view that combining these two responsibilities may prove problematic, possibly leading to conflicts that may weaken the European Commission's position. Besides the Minister of Foreign Affairs, the multi-year President of the European Commission will acquire a role in the EU's external representation in the area of the Common Foreign and Security Policy, which will undermine the efforts to achieve greater unity in this external representation. The AIV is reassured, however, to see that the final Convention text does not disturb the institutional balance, as originally appeared likely. The powers of the multi-year President of the European Council will leave those of the European Commission and its President intact: indeed, these will be strengthened in some important respects. Whether the doubts that exist about the introduction of a multi-year President of the European Council prove justified will depend largely on how this works out in practice and on the choice of the responsible officials. These matters will be decisive for good relations among the top three EU figures.

The AIV feels the Convention has also missed a few opportunities: one example in our view is the failure to reform "comitology". Formally speaking, the new situation is even worse than before, because allocating executive powers to the European Commission will no longer be the general rule, whilst reducing the role of comitology was not discussed. This represents a missed opportunity, for the time being, to use constitutional provisions to strengthen the European Commission's executive role. It is also a pity that a more flexible procedure was not proposed for allocating new own resources; a treaty amendment will continue to be required. Finally, the AIV regrets that the 342 policy provisions in Part III cannot be amended in a simpler manner than those of the constitutional Parts I and II of the Draft Treaty.

It is now up to the IGC to take final responsibility and to make decisions about the content of a new treaty. The AIV believes that the IGC should ensure that its decisions do not detract from what the Convention has achieved. The AIV shares the government's opinion that the entire structure could collapse if one building block is removed from the Convention's result. This would mean the IGC redoing the Convention's work and would create a risk of the IGC achieving less than the Convention has achieved. If one Member State succeeds in reversing the proposed qualified majority to unanimity on a particular point, it will not be possible to refuse to do this for other Member States on countless other points, which would unravel all the progress made in this field. Moreover, if this happened, governments would be reducing the Convention to a model of sham participation: participation that would be negated because ultimately a classical IGC would take decisions without needing to take serious account of suggestions developed by a Convention.⁵

The AIV therefore advocates that the Netherlands refrain from proposing amendments. Any demand to maintain unanimity in adopting the Financial Perspectives, for example, could elicit highly undesirable negotiating consequences in other fields (even leaving aside the counter-productive effect of other parties with opposing interests using this to their own advantage later on). Every Member State can appoint the representative of its choice to the Legislative Council. A fair rotation system for the Presidency of the European Council can be achieved using the qualified majority mechanism without the need for any formal constitutional provisions. In short, the AIV believes the Netherlands should urge other Member States to ensure continuity as regards the result of the Convention. If parties other than the Dutch government propose changes, the AIV recommends that the government do its utmost, in consultation with those Member States, to avoid the result of the Convention being put back on the table. If it is decided to appoint a preparatory group for the IGC, the AIV would repeat its earlier recommendation for the members to include representatives of the European Commission and the European Parliament.

Finally, the AIV has repeatedly drawn attention, in its earlier advisory reports, to the great importance of creating sufficient support for European cooperation among EU citizens. The new Draft Treaty has far-reaching implications for this cooperation and how it is organised. The AIV therefore recommends that both the government and the States General make a concerted effort to make clear to the nation what the new Constitutional Treaty will mean in practice.

The AIV would be happy to arrange a meeting to explain its views on the above matters in more detail.

Yours sincerely,

Frits Korthals Altes
Chairman, Advisory Council on International Affairs

¹ The Draft Treaty is contained in Convention Document CONV 850/03 dated 18 July 2003.

² See AIV advisory reports No. 24 'A convention, or conventional preparations? The European Union and the IGC 2004', November 2001, No. 27, 'Bridging the gap between citizens and Brussels: towards greater legitimacy and effectiveness for the European Union', May 2002, and No. 32 'Bridging the gap between citizens and Brussels' follow-up report, April 2003.

³ The AIV notes with satisfaction that proposals to give the *European* Council a legislative task were not adopted.

⁴ See CONV 850/03, Article I-26, paragraph 3, which stipulates that a European Commissioner or [non-voting] Commissioner must tender his resignation if asked to do so by the President.

⁵ See AIV advisory report No. 24, 'A convention, or conventional preparations? The European Union and the IGC 2004', November 2001, p. 15.