

# The European President

John W. Sap\*

## Article Draco I-21<sup>1</sup>

The European Council's personal, elected and mandated presidency is without a doubt one of the major innovations in the Constitution. It is also its most fought over and precarious novelty. Until the last stages of the Convention, the great majority of small Member States' representatives maintained staunch opposition against the idea. In the end, however, they all reluctantly dropped resistance in the face of the praesidium's intransigence, supported by the major Member States. With its new chairman, the European Council can be considered the great winner among the Union institutions. Apart from becoming a full European institution (Article I-18), it is getting structured leadership. Article I-21 of the Draft European Constitution states that the European President is to be elected by the European Council, by a qualified majority for a term of two and a half years, and cannot serve more than two terms. The President may not hold a national mandate. In order to understand this new function, one needs to look into its origin, powers, strengths and weaknesses.

### ORIGIN: ABC PROPOSAL

The concept of a European President is unusual in that, unlike many other proposals, it was not raised in a separate working group of the European Convention. The idea probably originated from Convention chairman Valéry Giscard d'Estaing himself, the man who, as France's president in the '70s, put forward the idea of a European Council (first meeting in Dublin, 1975). This time, however, Giscard arranged for the concept to be put forward – not as a formal proposal but as a meeting of minds – by the heads of state/government of some major EU countries. The ABC proposal was named after José Maria Aznar of

\* Associate professor of European Union Law, Vrije Universiteit, Amsterdam and an editor of the *European Constitutional Law Review*.

<sup>1</sup> All references in the text are to the Convention's Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution's provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

Spain, Tony Blair of United Kingdom and Jacques Chirac of France. Germany came in only later. The Franco-German paper presented in January 2003 proved Germany was only then won over to the idea of a full-time President of the European Council.<sup>2</sup>

Why was the concept of a European president put forward? Formally, the proposal was introduced for pragmatic reasons. The rotating presidency had become too weak to run the European Council, whose workload during the past 10 to 15 years has increased enormously. Substantively, it also conveyed the need, perceived by its proponents, for someone to represent Europe in the eyes of the world. Mr Blair is reported as saying that a President would give the EU a sharper identity, providing much-needed leadership and accountability. According to the United Kingdom, the President of the European Council should attend G-8 meetings and work with the Commission president on issues including international financial matters, immigration and antiterrorism.<sup>3</sup> If the Union wanted to shoulder its responsibilities in the governance of globalisation and become a stabilizing factor and a model in the new, multi-polar world, to use the words of the Laeken declaration (December 2001), then there was a perceived need for a presence, at the highest level of authority, on the international scene. He or she would serve for several years, overseeing delivery of the Union's strategic agenda and communicating a sense of purpose to Europe's citizens.

Apart from those two arguments made in favour of the new office, one must consider its impact on the present 'institutional balance'. This concept covers the set of established relationships a) between the EU institutions and b) between the institutions and the Member States including their populations. Although the new presidency would fundamentally alter the institutional balance or even the constitutional structure of the Union, this was not a point in the debates, mostly because no one could tell what the change would amount to. To argue their opposition the smaller countries, which for a long time were supported or even championed by Germany, could only point at its probable affecting the Commission's position. This has worked to slim down the formal presidency's stature. While the British, French and Spanish got some of what they wanted – a president of the European Council elected by prime ministers, indirectly deriving legitimacy from the national parliaments – the Germans and the smaller countries got their way, too. They got a strong Commission president, elected by Members of the EP and answerable to them, replicating the German 'federal' model at EU level.

<sup>2</sup> CONV 489/03 of 16 January 2003.

<sup>3</sup> Peter Norman, *The accidental constitution. The story of the European Convention*. Brussels: EuroComment, 2003, p. 139.

This compromise led to anxieties about creating two parallel sets of institutions: one predominantly intergovernmental – a European Council headed by a powerful president – and the other based on the existing community institutions. It was feared that this would upset not only the equilibrium among institutions but the balance between countries as well.

#### MANDATE AND POWERS

The Benelux countries took the view that the president, if the office was to have a solid mandate, should be chosen from among the ranks of the heads of state government. A memorandum introduced by the Benelux countries stated: ‘The Benelux will in any case never accept a president elected from outside the Council’.<sup>4</sup> Later, at the insistence of Belgium, the smaller countries did accept the idea that the president should be external, as is now expressed in the proviso of Article I-21(3) that the incumbent ‘may not hold a national mandate’. Indeed, a double allegiance of the incumbent to his national political arena and to the European one would obviously have flown into the face of the intended efficacy and durability. In return, the protagonists dropped the requirement, figuring in earlier drafts, that the person should be chosen from people having sat on the European Council. This concession was merely cosmetic, as it was understood that the person chosen should have the stature derived from having been a top governing politician and (consequently) a member of the European Council. There is, of course, a risk that the office will become one of those places providing ‘jobs for the boys’, but this is inevitable.

As a result of these and similar anxieties, the office’s duties have been restricted to chairing, stimulating and promoting. There are few, if any, executive powers that allow him to take binding actions. Where there are such powers, there is a risk that differences will result in clashes between a full-time president and ‘his’ European Minister of Foreign Affairs. That is why Article I-21(2) states:

‘The President of the European Council shall at his or her level and in that capacity ensure the external representation of the Union on issues concerning its common foreign and security policy, *without prejudice to the powers of the Union Minister for Foreign Affairs*’.

To conclude, the European Council president has been granted little formal powers and will, consequently, have to carve out a real role for him or herself in practice. The office lacks the advantages and legitimacy of the current rotating presidency, yet offers countries an opportunity to familiarize themselves with

<sup>4</sup> CONV 457/02 of 11 December 2002.

the European machinery, including its administrative and political aspects. Holding the presidential reins in its hands can help a country boost its domestic support for Europe. And the present formula certainly offers opportunities, particularly to the smaller Member States (giving expression to the equality of states).

One important question raised by the new formula is: to whom should the President be accountable or justify his or her actions? An objection frequently voiced is that the office is undemocratic or has no legitimate basis. This is not certain. A European President elected by democratically based heads of state can contribute to European democracy as there is no democracy without political leadership. The divisions within Europe that were laid bare by the invasion of Iraq showed that there is a clear need for an office such as this. And in recent years, the Commission's authority has crumbled as a result of fraud and a lack of decisiveness. From a democratic point of view, a European President may be preferable to a strong Commission president. In present circumstances or, in the present political state of Europe, the new president would probably wield greater authority. It must also be recognized that, in the new Europe, population size and power will become more relevant factors. Accordingly, the larger countries rightly claim a greater say. From a democratic point of view, this is not illogical. Ultimately, the president should simply be elected by the greatest number of European citizens. In US constitutional history, direct election of the president quickly evolved out of the indirect formalities (which are still in place). In Europe, this is probably a very long shot.

#### PROMISES AND RISKS

As argued above, the first holder of the new office will have little natural, legal or traditional authority from which to work. His or her election will be a matter of agonizing compromise. He or she will have to start from scratch and earn their way into authority. This may provide, however, some better clues to the risks and the promises of the new office than a legal power count would do. Two contradictory fears have been voiced by opponents. The first is that the new president will be the mere caretaker of the major Member States. The other is that the president may be incapable of keeping abreast of divisions between the Council Members in matters which are essentially the president's business – foreign affairs and diplomacy – and may be drawn into meddling in economic government, which is not his business.

It is not known now if the office will prove a success. The risks are serious, but there is no evolution without risks. What is reassuring, to some extent, is that the risks are shared among the European Council members, i.e., the Mem-

ber States. They can hardly afford to make the office a failure; that would turn the constitutional edifice into a sham in the face of the whole world. Working on this little capital, the president will have to find agreement, first, between the major European Member States, without which no concerted EU action in foreign affairs is conceivable. Then, he or she will have to find support for this agreement from the other members. It is good to know that there is enough variety of interest, cultures and allegiances between the three major states, that once an agreement is found between them, there is bound to be something in it for most others.

At this point in time, we see only glimmers of the new office, weakly shining from the yawning risks of failure. We tend to forget that it was thus with the American presidency at the time of its creation.

#### QUESTIONS

1. Will the President of the European Council undermine the role of the President of the Commission or the EU Minister for Foreign Affairs or reinforce these?
2. What is the governmental structure of the EU in which the President of the European Council may ultimately be conceived?

