

THE EUROPEAN DRAFT CONSTITUTION: NO REPRESENTATION WITHOUT TAXATION?

R. Peter Harris¹

The Draft Treaty establishing a Constitution for Europe was submitted by Valéry Giscard d'Estaing to the European Council meeting in Thessalonika on 20th June 2003. A substantial number of amendments were filed on 4th July 2003². This article therefore is a summary of the draft itself, and not of the effect of any further amendments proposed.

The fiscal issues within the document are of so great a number that it would be impossible to reduce them to an article other than to give certain practical indications.

The main thrust is the definition of sovereign competences and the manner in which they are conferred, not transferred, to the Union or shared with it.

The notions of conferral are linked into the notions of proportionality and subsidiarity, and the roles of these two principles within the new Institutional structure are also defined. Note that the European Parliament will have a joint legislative role with the Council of Ministers, and that National Parliaments also have a say in whether Community laws are in accordance with these principles. There is now rather more democracy than in most Member States, with what at times is a tri-cameral system, rather than a bi-cameral system.

¹ R. P. Harris, 3, Temple Gardens Tax Chambers, Middle Temple Lane, London EC4Y 9AU; Tel 00 44 207 353 7884; Fax 00 44 207 583 2044; E-mail pharris@taxcounsel.co.uk

² The English Language Version can be found at <http://european-convention.eu.int/docs/Treaty> in pdf format.

From The Legal Position, What Are The Basic Changes?

1. The substitution of the following instruments for the present legal provisions:

Proposed	Replaces and is based on
A European Law	Extends and reinforces the notion of a Regulation European Parliament now included in the legislative process
A European framework Law	Extends and reinforces the notion of a Directive European Parliament now included in the legislative drafting process
A European Regulation	Takes over the executive part of the regulation Commission and European Central Bank
A European Decision	Equivalent to a present Decision
Recommendation and Opinions	Extends and limits the scope of Recommendation and Opinions in the sense that the European Council can only act by these.

2. The maintenance of the case-law of the European Court of Justice as a source of interpretation.
3. The reinforcement of the notions of proportionality and subsidiarity within the framework of the conferring of competences, which in itself becomes a notion of law.
4. The iteration and reiteration of the current Community legal order as the basis for the developments proposed.

Firstly, there is no new European tax instated as such. However, it is clear that the extension of certain of the Union competences will require funding, other

than by direct invoicing to Member States, an option reserved to the foreign policy and international aspects of the draft proposals.

Taking the issues of the Union's Budget as being the source of fiscal change in the proposal, the foreign policy issues appear to be dealt with by direct contributions out of Member States domestic budgets under the current principle of the proportions laid down in relation to contributions from Member States GNP³. This follows the current funding process of the amendments contained in the Maastricht and Nice Treaties, called the Three Pillars.

Aside those specific areas, it appears that the proposed European Law on the Own resources of the Union will be based on the current position⁴:

Two categories of levies collected directly for the account of the Union by the Member States, that is:

a) Common Customs Tariffs and Common Agricultural policy levies;

and two items collected indirectly by the Member States within their own budgetary procedures, namely:

b) The percentage of national VAT collected, and the percentage of GNP earned by the State in question.

Here the Union notion of taxation has to be clearly understood. EU taxation is no more than a collection of levies on the movement of goods. VAT as such is a harmonised national tax of which part is paid to the EU. What may happen under the Constitution is that VAT and Corporation Tax, whilst not becoming European taxes as such, will become subject to European Laws and Framework laws. Whilst this may appear innocuous, there will be increased harmonisation of the corporation tax base, and that may mean in turn that corporation tax may become an the third item in category b), subject to a percentage contribution from National Budgets.

However, whilst the fiscal items are supposedly subject to unanimous vote, this does not apply to certain items within the scope both of the taxes mentioned; VAT and Corporation tax, and the Union's Own Resources. Qualified majority voting in relation to administrative co-operation or combating tax fraud is available both in Corporation tax and VAT matters.

³ Council Decision 29th September 2000 OJ L 253/42, which lays down the Budgetary contributions.

⁴ See note 2.

Section 5 - Combating Fraud

Article III-317 [ex Article 280]

1. *The Union and the Member States shall counter fraud and any other illegal activities affecting the Union's financial interests through measures adopted in accordance with this Article. These measures shall act as a deterrent and be such as to afford effective protection in the Member States.*

The Union's financial interests are to be protected by the Union and by the Member States against fraud and any other illegal activities. This is an obligation, but the deterrent aspect raises questions of subsidiarity and proportionality, and whether such effective protection may be given in each Member State, particularly where there may be different attitudes and legal definitions as to what constitutes fraud an illegal activity. The issues may be resolved in the following section.

2. *Member States shall take the same steps to counter fraud affecting the Union's financial interests as they take to counter fraud affecting their own financial interests.*

It would therefore appear that there is no ground for standardisation, or even approximation, at least as yet, in such areas as sham, *abus de droit* etc. Member States shall use the same steps to counter fraud as they do for their own financial interests in other words, the fiscal and excise capability that the have under their own legislation.

3. *Without prejudice to other provisions of the Constitution, the Member States shall co-ordinate their action aimed at protecting the Union's financial interests against fraud. To this end they shall organise, together with the Commission, close and regular co-operation between the competent authorities.*
4. *European laws or framework laws shall lay down the necessary measures in the fields of the prevention of and fight against fraud affecting the Union's financial interests with a view to affording effective and equivalent protection in the Member States. They shall be adopted after consultation of the Court of Auditors.*

European laws or Framework laws shall lay down the necessary measures in the fields of prevention and fighting fraud, with a view to providing equivalent protection. It may only be possible for the Member

State concerned to achieve this by a modification of its own legislation. This could take the form of a general anti-avoidance measure in the United Kingdom. This raises questions as to any extension of the notion of own resources beyond those collected directly for the account of the EU.

5. *The Commission, in co-operation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures and provisions adopted for the implementation of this Article.*

Section 6 - Fiscal Provisions

Article III-59 requires the Council to act unanimously in relation to indirect taxation, provided that such harmonisation is necessary for the functioning of the internal market and to avoid distortion of competition (The slight difficulty is the drafting error whereby the Council acts on a proposal from itself rather than from the Commission):

Article III-59 (ex Article 93)

1. *A European law or framework law of the Council shall lay down measures for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation provided that such harmonisation is necessary for the functioning of the internal market and to avoid distortion of competition. The Council shall act unanimously after consulting the European Parliament and the Economic and Social Committee.*
2. *Where the Council, acting unanimously on a proposal from the Council, finds that the measures referred to in paragraph 1 relate to administrative co-operation or to combating tax fraud, it shall act, notwithstanding paragraph 1, by a qualified majority when adopting the European law or framework law adopting these measures.*

However, it also allows qualified majority voting in relation to administrative co-operation or combating tax fraud.

Here we may have a situation where the United Kingdom and Ireland will be unable to vote against modifications which could introduce such foreign concepts as *abus de droit*. It may even be that they would not resist these, and further resist the constitutional restraints on such doctrines in other states such as

France which in effect restrict the use of such concepts by *abus de pouvoir* and a strict definition of what constitutes *abus*. The European Court has yet to pronounce any indication of what constitutes fraud, other than to indicate that it is a generic and pragmatic concept of European law rather than a point of Constitutional principle. It is possible to restrict this definition by reference to the actual scope of EU taxation, which technically is limited to CCT duties and CAP levies. The types of fraud involved in these matters are not the same as those in the fields of VAT and Corporation and Income Tax.

Articles IV- 60 & 61 are also indicative of the future of taxation in Europe.

Article III-60 (new)

Where the Council, acting unanimously on a proposal from the Commission, finds that measures on company taxation relate to administrative co-operation or combating tax fraud, it shall adopt, by a qualified majority, a law or framework law laying down these measures, provided that they are necessary for the functioning of the internal market and to avoid distortion of competition.

The law or framework law shall be adopted after consultation of the European Parliament and the Economic and Social Committee.

Given that this falls within Section 6 Fiscal, the current assertion by the Government that all fiscal matters shall be dealt with by unanimous voting, appear a trifle partial. When one realises that this is immediately before the Approximation of Legislation section, an alert is triggered.

Certain Specific Items

Part III

Here the Cover Note specifically reminds the Convention that amendments to Part III must not be designed to modify existing provisions on policies, except those which have been discussed at Convention level (*i.e.* foreign policy, economic governance, freedom, security and justice). In other words, there is also preservation of the *acquis industrial, commercial, économique et politique* within the internal market.

To summarise, the Constitution lays down certain fundamental principles which constitute rights. There is a Charter of Rights in Part II, which will have certain tax consequences:

Article III-4 (ex article 12) provides that there shall be no discrimination on grounds of nationality as per I-4. However, the interpretative issue will be between whether the principle itself exists in Union Law as a free standing principle, or whether this can only be brought into being by a European Law or Framework Law:

The European law or framework law shall lay down rules to prohibit discrimination on grounds of nationality as referred to in Article I-4.

In the author's view, article 1-4 is an expression of a legally enforceable free standing right and principle. In other words Article III-4 can only be taken as a means of implementation of a fundamental principle, rather than as a means of defining, and limiting its scope. Otherwise, so much for the maintenance of the ECJ's jurisprudence on the tax implications of the old article 7 of the Treaty of Rome:

Article III-5 (ex Article 13) provides an interesting principle based again on certain fundamental principles embodying rights:

1. *Without prejudice to the other provisions of the Constitution and within the limits of the powers conferred by it upon the Union, a European law or framework law of the Council may establish the measures needed to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The Council shall act unanimously after consulting the European Parliament.*
2. *By way of derogation from paragraph 1, the European law or framework law shall establish the Union's incentive measures, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, excluding any harmonisation of the laws and regulations of the Member States.*

Article III-5 (ex article 12) lays down that there shall be no discrimination on grounds of sexual orientation, in other words, it may be possible to argue that under the combination of rights to non-discrimination under article I-7.1, referring to Charter Right II-9 and the rights to a family, single sex couples could be entitled to tax benefits and family allowances on the same basis as married or unmarried dual sex couples.

Article II-9

Right to marry and right to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

The right to marry is separate from the right to found a family. However, the issue may be the question of whether and to what extent the exercise of these rights is governed restrictively by national laws. The preamble does make reference to respect to *inter alia* the religious basis of its inspiration:

'Drawing inspiration from the cultural, religious and humanist inheritance of Europe, the values of which, still present in its heritage, have embedded within the life of society its perception of the central role of the human person and his or her inviolable and inalienable rights, and of respect for law'⁵

It is therefore possible that a Member State with a more entrenched orthodox or catholic approach may query the exercise of such a right as being contrary to the spirit of the Constitution. The ECJ may yet have to face the basis on which these rights are to be interpreted.

In other words, there is fiscal matter within the Charter of Fundamental Rights.

It is worth resting a little upon the final provisions of Part II

Article II-52: Scope and interpretation of rights and principles

- 1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*
- 2. Rights recognised by this Charter for which provision is made in other Parts of the Constitution shall be exercised under the conditions and within the limits defined by these relevant Parts.*

⁵ Paragraph 4 of the Preamble: <http://european-convention.eu.int./docs/Treaty/cv00820-re01.en03.pdf>

3. *Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*
4. *Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.*
5. *The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.*
6. *Full account shall be taken of national laws and practices as specified in this Charter.*

Article II-53

Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Article II-54

Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

A comment on the over-extension of the definition of this concept by Customs and Excise in the *BUPA* and *Halifax Cases*⁶ would not be superfluous. There is no similarity between what Customs are presently alleging to be an existing concept within European Law, and the far narrower pragmatic and generic concept enshrined here. If this is the limit of *abus de droit* in the new extended Constitution, it is hardly surprising that the ECJ has refused to be drawn on it by the Commission in Common Customs Tariff matters in the past. Customs and Excise should settle before they embarrass themselves and the government lawyers on whom they have been relying any further. The concept of abuse of right does not cover their present assertions. The concept is defined here and is limited to the destruction of rights or freedoms in the Charter or their limitation to a greater extent than is provided. This is a pure social contract principle of Constitutional interpretation and the mean in which rights can be used. It certainly does not extend to cover the matter in dispute in *BUPA* and *Halifax*.

Conclusion

This space should be watched, there is more than ample fiscal matter within the draft Constitution.

Whilst the present fiscal balance between the Community levies, and the indirect contribution collected by Member States from their own budgets appears to be respected, there is, in the Company taxation field, an opening for a harmonised basis of taxation, and therefore for a further budgetary extension in a similar manner to that of VAT.

The harmonisation of the Corporate tax basis will - inevitably engender questions of fiscal consolidation, or group income and group relief, and the issues of discrimination will again come to the forefront. At present the ECJ has felt unable to tackle the issues of bilateral Tax Treaties, as it does not feel able to take an indirect jurisdiction over these. The question will arise as to whether the jurisdiction of the ECJ will change as a result of the draft, and as a separate issue, whether Member States will be prepared to back provisions in a Pan-European Framework law which would alleviate distortions of competition resulting from certain bilateral Treaties.

This article does not seek to address the other extremely important issues relating to the Freedom of establishment, eroded as it has now become to a mere right for certain professions, which themselves have indirect implications.

⁶ *BUPA Purchasing Ltd and Others v. CCE* [2003] EWHC 1957 (Ch), *Halifax Plc; Country Wide Property Investments Limited; Leeds Permanent Development Services Limited v C & E Comrs* [2001] V & DR 73

The effect of the draft as an interpretative gloss over certain existing issues should not be underestimated. The definition of *abus de droit* given in the draft is not that alleged by Customs and Excise in BUPA and Halifax.