

A CRITIQUE OF PENELOPE'S PROVISIONS FOR FOREIGN POLICY AND THE RATIFICATION OF NEW TREATIES

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This is a commentary on the draft treaty known as 'Penelope'. At the behest of Commission President Romano Prodi, this document was drawn up by a group of Commission officials headed by François Lamoureux, and presented as a contribution to the Convention on the Future of Europe.

François Lamoureux and his team of Commission officials should be congratulated on their 'feasibility study' for a European constitution. The document is mercifully short, it is drafted with clarity and rigour, and it succeeds in stimulating and indeed provoking debate.

I found much that I agreed with. For example, the treaty would allow only those member-states which have sufficient military capabilities to sign up to the 'Additional Act', separate from the main constitution, which covers defence. The European Union is unlikely to achieve very much in the field of military operations or armaments co-operation unless the countries which have greater capabilities can work together as a group.

Other sections appear unwise, such as Article 99 on Public Order, which would allow the Union to take "appropriate measures" in the event of "serious internal disturbances" within a member-state. How serious do the disturbances have to be before the EU becomes involved? With what means would the EU intervene? Who would lead the intervention? The wording of this article is too vague, and will alarm those who fear some kind of 'super-state' emerging in Brussels.

However, in this short note I shall focus on only two issues raised by Penelope: the institutional arrangements for foreign policy, and the procedures for implementing and amending the constitution.

How to organise the Common Foreign and Security Policy

Penelope proposes to a large extent the 'communitisation' of EU foreign policy. The jobs of the Commissioner for external relations and the High Representative for the CFSP would merge into that of the Secretary of the Union, who would become a vice president of the Commission.

The Council of Ministers would take decisions by qualified majority vote. The various bureaucratic units that manage EU foreign policy would sit within the Commission. Penelope implies that the member-states would lose the right of initiative in foreign policy; in the long run the Commission would gain the sole right of initiative. Also in the long run, the embassies of the member-states in third countries would make way for single EU representations.

In short, Penelope would subject the CFSP to the Community method. This is very much in line with the argument often made by Commissioner Pascal Lamy, that if the Community method works well for trade policy, it should also work for the diplomatic side of foreign policy, which is not fundamentally different. But I think that foreign policy cannot be treated in the same way as trade policy. There are objections of principle: when it comes to foreign and security policy, member-states are more reluctant to cede sovereignty to supranational institutions. There are also practical difficulties: the Commission has expertise in trade and development, but lacks it in other areas of external policy.

Some of Penelope's proposed reforms are desirable. There certainly needs to be closer co-operation between the 'inter-governmental' side of foreign policy, led by the High Representative, and the 'Community' side. So the proposed merger of the jobs held by Patten and Solana makes sense. The current system of dual leadership causes confusion in other parts of the world, rivalry between competing bureaucracies and needless duplication. I also agree that in a 25-country Union, effective decision-making in foreign policy will require greater use of majority voting. For example, France and Belgium could not have blocked the renewal of a visa-ban on Zimbabwean leaders, as they did in early 2003, if QMV had applied to the decision.

However, Penelope's proposals would mark a significant shift in EU decision-making from an inter-governmental to a *communautaire* model. I do not believe that the member-states will accept the constitutional treaty which comes out of the Convention unless it maintains the current balance – and indeed tension – between those two systems of decision-making.

Ever since the negotiation of the Maastricht treaty, the Commission has made a strategic error in trying to grab control of foreign policy. The Commission's prestige and authority has declined throughout that period, for a number of reasons. These include:

- A failure to deliver or impress on some of the ‘first pillar’ areas for which it is responsible. For example, it has failed to devote sufficient resources to infringement proceedings, it has sometimes not consulted widely enough on new legislation, and some of its drafting (such as on the directive on prospectuses) has been poor;
- the Commission’s own organisation and procedures are clearly in need of an overhaul. Full marks to the Prodi Commission, and in particular to Commissioner Neil Kinnock for starting to introduce some modern management; but the rows over the dismissal of Marta Andreasen, the Commission’s former chief accountant, shows that budgeting and financial control are still a mess;
- and the Commission has sometimes appeared more interested in winning new powers than in using its existing powers to greater effect.

The Commission will not be able to restore its authority and prestige unless it applies the maxim of Jacques Santer: “Do less, but better”. That means accepting, in broad terms, the current balance between inter-governmental and *communautaire* decision-making. In particular, the Commission needs to come to terms with what is emerging as a division of labour between itself and the European Council. The regular summits of EU leaders should set the strategic direction of the Union, and take the lead in defining the CFSP. The Commission should work within that strategic framework and have responsibility for most other EU policies – the old ‘first pillar’ issues such as the single market, enlargement, farm and regional spending, the environment and trade, but also newer areas where the Community method can evidently add value, such as justice and home affairs. There is an evident parallel with the constitution of the French Fifth Republic, under which the President sets strategy and runs foreign policy, while the prime minister is responsible for internal policy.

Penelope rejects the idea of a full-time president for the European Council – presumably on the grounds that such a post would weaken the authority of the Commission and its president. But I think that so long as the EU remains a marriage of two contrasting institutional models, it makes sense for a different president to head each of them. A full-time president for the European Council – so long as he or she was a distinguished and heavyweight politician – would enhance the credibility of the CFSP. The new Secretary of the Union, like Solana today, will move at the level of foreign ministers. Neither the Secretary nor the Commission president will have sufficient credibility or authority to speak for the Union to the leaders of the US, Russia or China.

One reason why the national governments, particularly in the big member-states, are reluctant to see a bigger Commission role in CFSP is that diplomacy is much more politically sensitive than trade policy or competition policy. It is closely tied to defence policy, and thus to matters of life and death. Foreign policy is about national identity in a way that commercial policy is not. When Greece blocked the EU's recognition of the Former Yugoslav Republic of Macedonia, in the 1990s, no issue was of greater importance in Greek politics. The recent rifts over Iraq have created much more animosity than the EU's worst internal rows over trade or agriculture.

Another reason is that the Commission lacks expertise. That is not the Commission's fault: it has had little reason to recruit or train people with diplomatic expertise. But this history has left the Commission's overseas missions and Brussels offices staffed by people who often show little aptitude or skill for dealing with the complexities of foreign policy.

Perhaps the biggest barrier to the creation of a more effective EU foreign policy is the reluctance of the larger member-states to work within an EU framework. The lack of enthusiasm of Britain, France and Germany for a stronger CFSP is not based only on nationalism and the natural tendency of any bureaucracy to hang on to its powers; they are also aware that they have more diplomatic capability than the smaller member-states or the various Brussels bureaucracies. Britain, France and Germany bring disproportionate amounts of experience, expertise, and commitment to foreign policy. Large countries have real foreign policies, in the sense that they have a view on most problems in most parts of the world. To quote an adviser of Javier Solana, "Most small countries – and even one or two large EU states – have neighbourhood policies rather than true foreign policies". The imbalance between the diplomatic and military capabilities of the large states, compared to the small ones, is much greater in foreign and defence policy than in economics (the British GDP is about ten times the size of the Irish GDP; the defence budget is about 50 times greater).

Therefore the larger countries have a natural tendency to deal with international problems through small groupings, such as the 'Contact Group' which handled the Yugoslav wars. Britain and France are particularly reluctant to accept a major role for EU institutions in foreign policy. Given that reality, the Convention needs to design institutions which maximise the chances of the large countries getting involved. That

means that the Commission must not take the leading role. Any attempt to implement Penelope's proposals would ensure that the large countries boycotted the EU's institutions and acted outside them.

That said, the current institutions are clearly in need of reform. There should be a Secretary of the Union, who would be vice president of the Commission but also chairman the Council of Foreign Ministers. Neither the Commission services, nor the Council of Ministers secretariat should serve the Secretary. Instead he or she should head a new EU Diplomatic Service. This should consist of staff recruited from the Commission, the Council secretariat and the member-states. The Commission's overseas delegations would become Union delegations, reporting to the Secretary.

The Diplomatic Service should of course have close links to the Commission's directorates-general, to ensure a 'joined-up' approach to making of EU foreign policy. But it would also need to work closely with national foreign ministries. National diplomats should rotate in and out of the Diplomatic Service on a constant basis. Equally, members of the Diplomatic Service should spend periods working in the national capitals of countries other than their own. National governments need to perceive the Diplomatic Service as working with and for, rather than against them. The very fact that the Diplomatic Service was not the Commission would boost its standing in the eyes of some national governments.

Today, Solana spends more time talking to the foreign ministers of Britain, France and Germany than the others, and rightly so, because those three have much more diplomatic clout than ministers from other member-states. The new arrangements for the CFSP – *in their informal aspects* – need to provide for the fact that some countries are more equal than others. The really big problems in EU foreign policy occur when the big three cannot agree, as has been the case with Iraq. But when Britain, France and Germany are able to hammer out a common line, the others are almost always happy to follow.

Of course, many smaller countries object to *directoires*, even of an informal nature. They argue that each country, whatever its size, should have an equal say in the making of EU foreign policy. They understand, correctly, that inter-governmental arrangements make it easier for big countries to lead. They therefore tend to prefer the more *communautaire* models of decision-making, such as that of Penelope.

Such views from small countries are perfectly understandable. But they need to consider what kind of EU foreign policy, if any, they want. Do they want a system led by an EU president, a Secretary of the Union and an embryonic foreign ministry that is separate from the Commission, with the big countries contributing and engaged? Or would they prefer a *communaux* system, with the Commission in the lead, but the big countries cutting the deals outside the EU? Some member-states would probably prefer the latter, rather than cede a leading role for the larger countries. But the result would be an EU that resembled a big Switzerland: economically powerful but a diplomatic and military pigmy.

How to change the treaties

To their great credit, the authors of Penelope have tackled what is perhaps the most sensitive institutional issue of all, that of ratification. Under the current rules, no EU treaty can be amended without the agreement of every government, followed by ratification in every member-state. In an EU of ever-increasing numbers, what happens if one member-state cannot or will not ratify a change to the treaties? As the Danes showed by voting No to the Maastricht treaty in 1992, and the Irish by voting No to the Nice treaty in 2001, one country has the ability to block a treaty change that all the others desire. In both those cases, a second referendum contradicted the first and ensured the treaty's ratification. But if the Irish had voted No a second time, a nation of less than four million people would have had a major impact on the other 370 million people in the EU, and probably delayed the accession of the ten countries preparing to join.

After the 2004 enlargement, when there are 25 member-states, the risk of one country blocking the implementation of the new constitutional treaty, or subsequent revisions, will become alarmingly high. I had hoped that the Convention would grapple with this problem. But it has so far failed to do so, because the issues raised are simply too sensitive: should a country that cannot ratify a new treaty be forced to accept it, on pain of expulsion? And should the views of small member-states count for as much as those of the larger countries? Because these questions are so difficult to answer, the Convention seems likely to leave the current procedures for changing the treaties unaltered. If that is the case, the Convention will be storing up problems for the future.

Where the Convention has not dared to tread, the bold Penelope has stepped in with answers to these questions. However, Penelope has spun solutions which are complex and hard to follow. Her proposals appear to

contain some inconsistencies and to treat the larger member-states unfairly. Furthermore, many small countries, as well as large ones, are likely to oppose the Penelope model.

According to Penelope's 'Agreement on the Entry into Force of the Treaty of the Constitution of the European Union', the existing treaties are to be repealed when the new one enters into force. Before that event, "each member-state shall make a solemn declaration confirming the resolve of its people to continue to belong to the EU. A member-state which is not in a position to make that solemn declaration shall leave the EU on the date of entry into force of the treaty on the Constitution." That means that any member which does want to accept the Constitution must quit the Union. However, if more than a quarter of the member-states refuse to make the solemn declaration, the treaty becomes void.

Assuming that three quarters of the member-states make the appropriate declaration, the new treaty is then ready for ratification. So long as five-sixths of the member-states ratify the text, it enters into force. What happens if a member-state cannot ratify the treaty? It either makes the solemn declaration and remains in the Union, accepting the constitution; or "it shall be deemed to have decided to leave the Union".

Penelope proposes a slightly different procedure for subsequent revisions to the Constitution (Articles 101 – 105). A new Convention would decide on the revision. Each of its three constituent groups – MEPs, national parliamentarians and government representatives – would need to approve the revision by a two-thirds majority. Given that big countries send the same number of delegates to the Convention as small ones, this provision gives a disproportionate influence to small countries.

If the revision applies to the Principles of the Constitution – the important bits at the front – or the Fundamental Rights, the European Council has to adopt it as an Act, so long as five-sixths of its members approve. That Act then enters into force when five-sixths of the member-states have ratified it. But if the revision covers the Constitution's Policies and Additional Acts, the procedure is different. The Act must be approved by three-quarters of the members of the European Council, and also by governments representing three quarters of the population. It then needs to be ratified by three quarters of the member-states before it enters into force.

I have attempted to summarise these procedures as briefly and simply as possible. If the reader has followed the previous four paragraphs without difficulty, he or she will probably dissent from my contention that this system is unnecessarily complex. These proposals for implementing and amending the Constitution are also strangely inconsistent. For most of them, Penelope gives the same weight to the smallest and largest states. This means that the views of a citizen in a large country – expressed, for example, in a national referendum – carry much less weight than the views of a citizen in a small country.

But the procedure for revising the Policies and Additional Acts is different, requiring the backing of governments that represent three quarters of the EU population. The insertion of that criterion suggests that the drafters of Penelope were aware that the more populous member-states would object to procedures which failed to differentiate between big and small countries. But why, then, does Penelope require no population criterion for the other rules on implementing and revising the constitution? Penelope would allow the European Council to adopt a change to the Principles of the Constitution, even if the French, German and Italian governments – representing some 200 million of the EU-25's 450 million population – were opposed. Subsequently the Act would enter into force even if France, Italy and Germany failed to ratify the revision.

Therefore the larger countries are unlikely to accept the Penelope proposals. Nor are some of the smaller ones, which are firmly attached to the unanimity rule for treaty revisions. The Irish government, for example, has made it clear that it will not support any system which allows the treaties to be revised against the wishes of the Irish people.

So what system should the Union adopt for revising its treaties? That proposed by the Centre for European Reform in 2002 would allow the overwhelming majority of EU citizens to push ahead with a new treaty, if they wished to, while at the same time respecting the sovereignty of individual nations which reject change.¹

¹ See 'New Designs for Europe', CER, October 2002, pages 30 – 33. The CER's scheme considers a question not covered by Penelope: what happens if the country required to leave the EU is in the euro? The CER argues that such a country should be allowed to stay in the euro, provided that it accepted EU legislation that is relevant to the euro, such as the excessive deficit procedure and the broad economic policy guidelines; the jurisdiction of the European Court of Justice; and the loss of voting rights in the Council of Finance Ministers. However the country concerned would be allowed to retain voting rights in the European Central Bank.

The CER proposal follows the existing rules in stating that any amendment to the treaties must have the unanimous agreement of the governments. Each member-state would then have to ratify the revision within 18 months. The treaty would enter into force, unless the combined populations of the countries which failed to ratify amounted to 10 per cent or more of the EU's total population. That total is likely to be about 450 million people after the 2004 enlargement. Therefore one of the big four – Britain, France, Germany and Italy – would be able to block a treaty change on its own, as would a group of smaller countries with a combined population of at least 45 million. Then the treaty would become void.

Many politicians from small countries dislike this proposal, for it would allow a single large country to block a treaty change, but not a single small country. However, the votes of people from small countries would count for as much as those from large countries. Any group of 45 million people would be able to block a treaty change, whether they lived in one large country or several small ones.

Suppose, then, that a treaty change becomes law after ratification in most EU countries, but that one or a few small countries withhold their approval. The country (or countries) concerned would then have two years to think again. During that time the government could negotiate any number of declarations with its EU partners, to clarify certain aspects of the treaty, perhaps to reassure its population. Or it could seek to negotiate an opt out from the new treaty. Such an opt out would be viable only if it did not damage the effectiveness of the Union's common policies and institutions.

If the country concerned is then able to ratify the new treaty, with added declarations or opt outs, the problem is solved. But if it could not, it would be obliged to leave the EU altogether, or to enter the European Economic Area, alongside Iceland, Norway and Liechtenstein.

Final thoughts

In both the areas discussed in this short paper, Penelope would fail to safeguard the interests of the larger countries. The Commission's traditional role has been to act as the friend and protector of the smaller member-states, and that has been to the good of Europe. One cannot assume that the larger countries will look after either the interests of the smaller member-states, or the general European interest.

However, the existing institutional balance between large and small is dangerously skewed to the advantage of the smalls. Whether one looks at the voting procedures of the European Central Bank (where the German and Greek central bank governors each have one vote), the balance of representation of the European Parliament (where it takes more than 800,000 votes to elect a British MEP, but only 80,000 to elect one from Luxembourg), the weighting of votes in the Council of Ministers (where, with the Nice treaty, Germany with 82 million people has 29 votes, and Ireland with four million has seven votes), or the application of the unanimity rule to decisions on foreign policy and treaty change, smaller countries get a very good deal.

These existing rules, as the Economist has observed, “border on the anti-democratic”.² The enlargement of 2004 will shift this imbalance even further to the benefit of the smalls, because among the ten new members only Poland can be described as a large country. With each of the 25 members able to block decisions on foreign policy, the interests of the six larger members, which will have 74 percent of the EU’s population, risk being submerged. The same applies to changes to the treaties. The 400,000 citizens of Malta might vote No to the constitution in a referendum. The 18 million inhabitants of North-Rhine Westphalia might like the constitution, but their views would be irrelevant; the Maltese referendum would kill the treaty.

The EU will not work smoothly unless the larger countries are reassured that their interests are protected. In diplomacy, that means that they must be allowed an informal role in helping EU institutions to shape common policies, and that the Commission should not be the lead institution. And for treaty revisions, a system which takes into account the size of populations is needed. The kind of rules proposed by Penelope could lead to the enforced exit from the Union of, say, France, a prospect that would be disastrous for European integration.

² “Charlemagne: Tyranny of the tiny?” , The Economist, January 25th 2003.