



Towards a New European Treaty: How to Recover the Essence of the Constitutional Treaty, Without Really Seeming To

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Theme: Germany's EU presidency ended with a precise mandate to negotiate a new treaty in line with the classical method of reforming founding treaties.¹

Summary: The European Council on 21 and 22 June, which effectively concluded Germany's busy presidency of the EU, yielded an important agreement that was eventually accepted by all heads of state and government. This ended the constitutional impasse which the EU has weathered since France and the Netherlands voted in referendums to reject the Constitutional Treaty two years ago and another seven countries froze their ratification processes. Some of these states also used the council forum to reopen discussions on a number of institutional and material issues relating to the Constitutional Treaty which they had previously accepted and signed in Rome on 29 October 2004. This agreement opens a new phase which should lead to swift negotiation of a new text reforming the treaties that make the EU what it is today. The talks will be undertaken at a classical, EU-style Intergovernmental Conference (IGC) with a very specific timetable and mandate. In fact, the IGC's mandate is so specific that it practically predetermines the entire content of the new treaty. This content recovers the essence of the Constitutional Treaty to a very significant extent, although the final agreement is subject to removing any formal or symbolic hint that it is a full-blown constitution, as well as including further exceptions favouring the UK. It nevertheless introduces new elements such as energy and climate change which did not feature in the Constitutional Treaty but which are considered necessary to keep the EU apace with the requirements of ever-changing times. In short, in view of the political climate in which the European Council began after two years of never-ending 'reflection', it is fair to say that the final outcome is reasonably positive.

Analysis:

General Aspects: The Success of the German Presidency

The European Council which ended Germany's highly active stint in the EU presidency concluded in the wee hours of Saturday 23 June, true to the style of the classical summits dominated by negotiation, with last-minute obstacles that seemed impossible to overcome and final agreements *in extremis* which are not entirely free of at least some element of theatricality. In any case, a valuable agreement was reached which establishes with Germanic precision a 'road map' to extricate the EU from the constitutional labyrinth in which it had become embroiled since France (29 May 2005) and the Netherlands (1 June 2005) voted in respective referendums against ratifying the treaty establishing a constitution for Europe. Germany's presidency has therefore notched up the huge achievement of meeting the requirement set out rather vaguely in the last paragraph of the Berlin Declaration on 25 March 2007 of 'placing the European Union on a renewed common basis

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before the European Parliament elections in 2009'. This 'renewed common basis' is now embodied in an agreement in the form of an annex to the conclusions of the European Council, which contains a specific mandate to hold a new Intergovernmental Conference (ICG) with the goal of drafting another treaty to reform the current treaties that make up the EU (TEU) and the European Community (TEC).

Of the various ideas on the table, this agreement opted for a stripped-down treaty featuring a lowest common denominator from the Constitutional Treaty that was acceptable to all and whose outlines we already commented on prior to the Brussels meeting, in this same forum (see J. Martín y Pérez de Nanclares, *Solutions to the Current Constitutional Impasse in the European Union: the 'Reduced Treaty Option'*, WP 16/2007, Elcano Royal Institute, especially section III). The core of the Constitutional Treaty therefore remains intact, and at a price that does not affect the essential elements of the Constitutional Treaty. It does involve ditching any linguistic or symbolic hint smacking of a full-blown constitution, and it means abandoning the ambitious, simplifying task of repealing the previous treaties (art. IV-437) and the re-launching of the Union (art. IV-438), returning instead to the classical method of reforming the EU treaties (art. 48 TEU). Making some concessions was therefore inevitable in order to reach a final agreement acceptable for all. Professor Araceli Mangas said the agreement is a 'selective rescue, which does not affect the substance and balances achieved in 2004' ('Reflotar Europa tras hundir la nave constitucional', *El Mundo*, 25/VI/2007). The European integration process has in any case been brought on course to create a new treaty which, as the Chairman of the European Parliament's Constitutional Affairs Committee puts it, will be 'better than the Nice Treaty, but worse than the Constitutional Treaty' and in which 'the substance of the Constitutional Treaty has been preserved' (Jo Leinen, *Bulletin Quotidien Europe*, nr 9454, 26 June 2007, p. 4). Furthermore, it has demonstrated a revitalisation of the Franco-German axis (or Merkel-Sarkozy tandem) which allows for moderate optimism in regard to the EU's future and in which Spain will have its own modest role.

Convening an Intergovernmental Conference on a Mandate that is 'Almost' the Treaty Itself

The ICG Mandate: A Precise Spelling Out of the Content of the Future Treaty

The European Council meeting in Brussels yielded above all else a clear mandate for convening an ICG which is extremely precise in content, as well as long-winded and sometimes even dense (Annex I to the Presidency Conclusions). This mandate is the 'exclusive basis and framework for the work of the ICG'. This conference will have to hammer out a new reform treaty amending the current TEU and TEC and introducing the modifications resulting from the 2004 conference in accordance with the specific guidelines set forth in the mandate itself. Thus, the TEU will retain its current name, while the TEC will be called Treaty on the Functioning of the European Union (hereinafter TFEU), although it will be stipulated that both treaties will have the same legal standing.

The mandate clearly states that the Union will be a single legal entity and that the current term 'European Community' will be replaced in all texts by that of 'Union'. The reform treaty resulting from the forthcoming ICG will also include the standard provisions concerning ratification, entry into force and transitory provisions. Furthermore, technical modifications to the EURATOM Treaty and the current protocols agreed at the 2004 ICG will be carried out through protocols accompanying the reform treaty. Put clearly, if anyone had any doubts regarding the return to the traditional method of reforming constitutional treaties, the resulting treaties 'will not have a constitutional character' (section 3 of Annex I). The mandate even stipulates the six titles of the future TEU: four of which, focusing on common provisions (I), enhanced cooperation (IV) external action (V) and final provisions (VI), will include what has so far been established, whereas two of them, those relating to democratic principles (II) and institutions (III), will include innovations agreed at the 2004 ICG and brought back now.

In fact, the mandate is extremely precise and agreed down to the last detail, and has no precedents among earlier EU treaties. More than anything this will allow the timetable to be met. Upon close

examination, it is much more than a mandate for calling an Intergovernmental Conference in the traditional sense in which pending issues were simply spelled out for intense negotiation during the months that the conference would last. The current mandate is in fact 'almost' the reform treaty itself, to be polished over the coming months with work of a more technical than legal nature.

Keeping to Schedule: Entry into Force before June 2009

In fact, the timetable which was indirectly implied in the Berlin Declaration remains in place, so that the new treaty will be in force before the next European parliamentary elections in June 2009. Actually, it may take even less time than estimated prior to the European Council.

The Presidency Conclusions include the goal of having the Intergovernmental Conference open by the end of July (section 10) and the Portuguese presidency appears to have set the date for 23 July, which will require that the European Parliament and the Commission speed up the pace for issuing their reports. In fact, the Portuguese presidency seems to want the European Council meeting on 18 and 19 October to be in a position to approve the resulting text. If this is not possible, under no circumstances should the deadline exceed the one set for the European Council meeting in December 2007, since past experience shows that it takes at least 16 to 18 months to conclude the ratification process by *all* member states.

The Likely Content of the New Treaty: on Maintaining the Essence of the Constitutional Treaty, Without Really Seeming To

The Merit of the Agreement: Maintaining the Essence of the Constitutional Treaty

There is no doubt that the main merit of the agreement is that, regardless of any possible deficiencies it might have, it maintains the essence of the Constitutional Treaty. In fact, it maintains almost all the material novelties, both those included in parts I and II, and those included in parts III and IV. It will, however, adapt them to the structure that exists in the current TEU and TEC.

As regards part I, the institutional reforms will be included in both treaties. The new title III of the future TEU will offer an overview of the institutional system and will set forth the modifications based on the new composition of the European Parliament, the elevation of the European Council to the status of an institution, creation of the office of President of the European Council, the new make-up of the Commission and strengthening of the role of its President, as well as creation of the new office of the external affairs chief, who will maintain the dual role of Vice-president of the Commission and President of the Foreign Affairs Council. It also retains the double majority voting system (55% of states and 65% of population). The future TFEU will include the development of these institutional provisions, as well as the regulation of the Court of Auditors, European Central Bank, consultative bodies and European Ombudsman in accordance with the clarifications concerning the location of these provisions in a list at the end of Annex I of the Presidency Conclusions. It also maintains the broad list of decisions which will be implemented by a qualified majority instead of unanimously.

Similarly, concerning competences, it maintains the basic novelties of the Constitutional Treaty, although with a complex system of location of the provisions. There will be basic provisions in the TEU, including the regulation of the specific competence in external affairs. These will be developed in the TFEU. A statement will be added in reference to the delimitation of competences. And the protocol on the principle of subsidiarity and early warning mechanism are also maintained, although the deadline for presenting rulings from national parliaments is extended from six to eight weeks. Lastly, it is evident that the content of the current title VI of the TEU concerning PJCCM will be inserted as another shared competence within the title on the area of freedom, security and justice set forth in the TFEU. Accordingly, the text maintains what is without doubt one of the most notable advances of the Constitutional Treaty, the full 'communitisation' of the third pillar and, in any case, the formal elimination of the current pillar structure. This circumstance obviously does not prevent foreign and common security policy from maintaining its own bodies anchored on

the cooperation model rather than on integration, and it would be fair to say that at ‘psychological’ level, the second pillar persists to an extent.

As for enhanced cooperation, the future title IV of the TEU will be amended in accordance with the provisions resulting from the 2004 ICG and the minimum number of member states required for launching enhanced cooperation shall be established as nine, as opposed to one third of states envisioned under the Constitutional Treaty. It also maintains ‘permanent structured cooperation’ in the field of defence, which provides for the creation of a European defence area with scope for future development.

Similarly, the precepts of part I of the Constitutional Treaty are maintained, concerning objectives, single legal personality, citizenship of the Union, the solidarity clause, voluntary withdrawal from the EU and revision of treaties, whose procedures (ordinary and two simplified procedures) are regrouped.

Furthermore, the Charter of Fundamental Rights remains fully binding (and ‘shall have the same legal value as the treaties’) and in what will be the future article 6 of TEU it maintains, we think even more significantly, the mandate of the Union’s adhering to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Price of the Agreement: Removal of Any Hint of Constitutionality

The first price paid by the 18 member states which had already ratified the Constitutional Treaty was the removal of any hint of constitutionality in the future reform treaty. The term ‘Constitution for Europe’ is removed; the agreement is stripped of the term External Affairs Minister, with this office to be known simply as High Representative of the Union for External Affairs and Security Policy, although it will fully maintain the prerogatives of the former; it removes the terms ‘law’ and ‘framework law’ in referring to traditional regulations and directives; it eliminates the precept relating to the symbols of the Union (flag, anthem and motto); and it also removes the article which explicitly referred to the principle of primacy, although a declaration will be adopted recalling the case law of the EU Court of Justice in this regard which (obviously) will continue to be fully in force, and annexed to the Final Minutes of the Intergovernmental Conference will be the ruling from the Council’s legal service (doc. 580/07). In the same way, future article 1 of the TEU will not include the reference to the dual legitimacy of the Union, but will be limited to establishing that ‘the Union will be based on the present Treaty and on the Treaty on the Functioning of the European Union’ which will replace and succeed the current European Community. As for the Union’s objectives, the objective that ‘competition be free and not distorted’ has been removed as a concession to France. A protocol will also be included about services of general economic interest (III, 19, i), which could reopen the interesting debate that is still pending on the European social model.

All in all, perhaps the most controversial concessions are those obtained by Poland and the UK following a negotiation which has sometimes been conducted in an utterly disloyal and unfitting manner. Accordingly, in regard to the system of voting by double majority, its entry into force is postponed via a complicated two-phased system. Between 2009 and 1 November 2014, the current mechanism under article 205.2 of the TEC will continue to apply. From that date until 31 March 2017 a transition period is opened in which any member of the Council may request that a measure be approved under this same article 205.2 of the TEC. Furthermore, a kind of ‘Ioannina Compromise’ of 1994 is rescued (section 13 of Annex I) which is not easy to interpret and which poses a potential conflict during the ICG negotiations. And, in relation to the Charter of Fundamental Rights, it is particularly surprising that it accepts as an annex to the treaties a protocol pursuant to article 2 from which a new exception for the UK emerges: ‘this shall only apply in the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of the United Kingdom’. And no less surprising is the ‘hidden’ acceptance (in a footnote) of a unilateral declaration by Poland pursuant to which ‘The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as

well as the protection of human dignity and respect for human physical and moral integrity' (note 18). Not to mention the new specificity applying to the UK with regard to foreign and security policy. Compared to this, it seems anecdotal that the legally binding nature of the Charter and its material content are maintained at the cost of using a cross-reference system which is hardly a paragon of transparency and visibility for citizens.

To a lesser extent, and partly as compensation for a red line imposed by the Netherlands, the title on democratic principles of the TEU will include a new article on the role of national parliaments, which in six very specific sections broadens the role which in the Constitutional Treaty is attributed to the protocols concerning the role of national parliaments and the principle of subsidiarity.

The Inclusion of New Elements: Climate Change and Energy

Taking advantage of the fact that an ICG has been convened, member States have raised some issues which are particularly interesting and which were not included in the Constitutional Treaty. Accordingly, the agreement reached at the European Council meeting in Brussels includes the addition of two new matters which in recent months have been forcing their way onto the agenda with unanimous support. The first is inclusion, in the environmental chapter, of the 'the particular need to combat climate change in measures at international level'; and the second refers to energy, in reference to the spirit of solidarity between member States, as well as fomenting the interconnection of energy networks.

Conclusion

On Not Counting One's Chickens

In our view, there is no doubt that the agreement at the European Council meeting deserves to be welcomed overall and signifies a major step forward. First, it is a political advance which untangles the constitutional mess the EU had been in for two years and which had unleashed a serious political crisis. Secondly, it also gives something of a psychological boost which at last injects a good dose of optimism to an integration process which for too long had been in the doldrums and with no clear political direction. And, thirdly, as Joschka Fischer pointed out starkly, it prevented the EU from becoming a 'laughing stock for the whole world' (*El País*, 28/VI/2007).

Nevertheless, there is no hiding the fact that the price paid is not limited to the aforementioned specific concessions. There has also been a notable increase in the opacity of the system with myriad protocols, declarations, annexes, notes, etc. It marks a break with the convention's attempts at transparency and simplification of a particularly complex and difficult regulatory area. As the Prime Minister of Luxemburg, Jean-Claude Juncker, said –not without irony– at the end of the summit, it will be a 'very complicated simplified treaty'. In fact, it would seem that the aim has been to make it 'look like something it is not' (External Affairs Minister, primacy, legislative acts, symbols, etc.); as though the aim was to convey to citizens the (false) idea that less progress is being made than really is the case; as though, in a way, it were an attempt to conceal what has already been achieved. It would be advisable, then, not to count one's chickens before they are hatched. There will certainly be a referendum in Ireland and probably in Denmark; in the UK, the opposition and much of the press will do all they can to pressure the new Prime Minister to seek approval from voters; and in Poland, Slovakia and the Czech Republic the question remains open.

Furthermore, regardless of the specific concessions to secure the backing of the two "no" states', other concessions have been made to other States which had readily signed the Constitutional Treaty on 29 October 2004 and which now, taking advantage of the fuss raised by the 'no' votes in France and the Netherlands, have used the situation in their own interests to withdraw from basic institutional aspects or even matters relating to fundamental rights which they had already accepted. In perspective, this is worrying, as well as disloyal, and in some cases positively outlandish. In fact, any unbiased observer of the process without an over-active imagination might ask why some insist on belonging to a club whose regulations they disagree with, whose dues they refuse to pay while others contribute religiously, and whose ideas and objectives they do not share

with the rest of members. Indeed, in a number of internal affairs they are actually more concerned about what might be in the interests of the rival club –on the other side of the Atlantic– than those of their own club. The unbiased observer might wonder why so many exceptions for the laggard (however important that country is) do not exhaust the patience of the rest and, once the storm has passed, force the question very seriously onto the agenda of a General Assembly of members any day now.

Furthermore, the conclusions do not contain, quite rightly, a plan B, so that until the very last instrument of ratification is deposited in spring of 2009, we must not count our chickens before the eggs hatch. After all, the ratification process could still fail for a second time...

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