



Policy Brief

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Debating the Constitution: between realism and revival

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Background

Almost three years have passed since the Constitutional Treaty was agreed by the EU Member States, and more than five since the Convention on the Future of Europe began work on drafting the text. The new arrangements were intended to come into force on 1 November 2006 but, as a result of the failed referenda in France and the Netherlands, the EU is still working on the basis of the institutional framework agreed in Nice in December 2000.

In line with the European Council's June 2006 declaration ending the "pause for reflection", the German Presidency is consulting national capitals to produce a roadmap for further negotiations and, possibly, a detailed agenda for the Intergovernmental Conference (IGC) which is expected to be launched during the Portuguese Presidency in the second half of this year.

The focus of these consultations is on seeing what can be 'salvaged' from the 2004 treaty text and how, avoiding the need for another round of referenda if at all possible, given

that an overwhelming majority of governments are anxious to avoid this.

At the same time, it must be acknowledged that the ambitious two-pronged exercise launched at the December 2001 Laeken European Council – aimed at reforming the Union *and* bringing it closer to citizens – has failed dramatically. Regardless of who is to blame for this, the citizens have inflicted a serious blow on the planned reforms. In order to resuscitate them (in part or in a new package), it is considered necessary to resort to a classical intergovernmental deal negotiated in (now much less) smoke-filled rooms.

The current revival, in other words, is based on realism rather than idealism. Still, it does at least provide an opportunity to address the shortcomings of the current arrangements and to equip the EU for the expected (and unexpected) challenges that lie ahead.

So what can EU governments realistically aim for in the forthcoming negotiations and

how likely is it that the issue can be settled ahead of the 2009 Euro-elections? To answer these questions, it is useful first to outline what the Constitution contains, what alternatives have been suggested and what implications these would have for the subsequent ratification process.

A robust Constitution

The EU is currently governed by a number of treaties which have been adopted and revised over the past 50 years. The 'Treaty establishing a Constitution for Europe' is a single text which was designed to replace all the current treaties (except the one for Euratom) and give the EU a single, and simpler, legal framework.

In essence, the Constitutional Treaty consists of four parts:

- Part I, which defines the objectives, powers, decision-making procedures and institutions of the Union;
- Part II, which contains the Charter of Fundamental Rights;
- Part III, which sets out the activities and policies of the Union, including the provisions

of the current Treaties;

■ Part IV, which consists of the final clauses, including the procedures for adopting and reviewing the treaty.

The Constitution merges the three-pillar structure created under the Maastricht Treaty – where policies were defined either under the Community pillar, the Common Foreign and Security Policy (CFSP) pillar, or the Justice and Home Affairs (JHA) pillar – with the aim of providing a more coherent design for – and interplay between – the different policy areas.

The institutional reforms enshrined in the new treaty can be categorised as either *procedural* or *organisational*.

The *procedural* reforms predominantly relate to the definition and scope of qualified majority voting (QMV) in the Council and the co-decision procedure under which the European Parliament and the Council act as co-equal legislators. The Constitutional Treaty expands this procedure to cover almost 95% of all legislation, up from 50%

now – a considerable increase in the Parliament's powers.

The Constitution also reforms the Council's voting rules, moving from the complex triple majority system (adopted at Nice) to a simpler double majority. The three thresholds laid down in the current rules for approving proposals are: 72% of weighted votes; a simple majority of Member States (i.e. at least 14 now); and 62% of the total EU population. Under the double majority rule, the new thresholds would be 55% of Member States and 65% of the population.

The *organisational* reforms include making the European Council a separate institution to be chaired by a President appointed for two and a half years. The Council of Ministers would retain the rotating presidency system (except in external relations).

The precise arrangements would be decided by the European Council, with a presidency *à trois* suggested for periods of 18 months, with each of the three countries assuming a 'lead role' in each term.

This was agreed to enable the new Member States to hold a shared Presidency sooner than would otherwise be the case, but with 'support' from older Member States, and to make the presidency system more effective, as the main agenda items would not change every six months.

An exception to this would be the Foreign Affairs Council, which would be permanently chaired by a new Foreign Minister. This post would merge the roles of the current High Representative for the CFSP and the External Relations Commissioner ('double-hatting') and the holder would become a Commission Vice-President.

The Constitutional Treaty also raised the ceiling on the number of seats in the European Parliament to 750 (the Nice Treaty stipulates only 732 but there are currently 786). The Commission would consist of one Commissioner per Member State until November 2014, when the size of the College would be reduced to two-thirds of the number of EU countries, with the Commissioners chosen on a rotating system.

State of play

It is now widely accepted that there is no prospect of the Constitutional Treaty being ratified as it currently stands, given the unanimity requirement. Only 18 Member States (including Romania and Bulgaria) have completed the ratification process – short even of the four-fifths threshold which would trigger an extraordinary meeting of the European Council to decide how to proceed.

France and the Netherlands have made it clear that they will not hold another referendum on the same text; and the UK, the Czech

Republic, Denmark, Poland, Portugal, Sweden and Ireland (the only EU country constitutionally bound to hold a referendum regardless of the content of a new treaty) have suspended the ratification process.

Meanwhile, Spain and Luxembourg, the two countries which held successful referenda on the Constitution in 2005, have taken the lead in forming a 'pressure' group, consisting of the 18 countries which have ratified the treaty, to defend the existing text.

The German Presidency now finds itself in the ambivalent

position of being among the staunchest advocates of the Constitution (partly because of the gains it would make under the proposed new voting rules for the Council), while bearing responsibility for forging a viable compromise on the way ahead among all the Member States at the June summit. The success of its Presidency will be primarily judged on how much progress it manages to make on this.

Its task has been made more difficult by the fact that two key political unknowns have left it with only a short window of opportunity to broker a compromise: the

elections in France (where the results of the parliamentary elections will only be known just days before the June summit), and the changing of the political guard in the UK (with Tony Blair still in office but with his power ebbing away following his announcement that he intends to step down immediately after the European Council).

The debate so far

The political debate has now resumed, slowly but surely, thus bringing an end to the 'pause' and triggering (at last) some real 'reflection'.

The opening move was made by the new French President Nicolas Sarkozy in a September 2006 speech in Brussels, in the early stages of his campaign for election, in which he explicitly argued for a "mini-treaty" (later corrected to a "simplified treaty").

The main changes from the current system would be the election of the Commission President by the European Parliament, the creation of an EU Foreign Minister, the replacement of unanimity in the Council with a "super qualified majority" rule, and a stronger emphasis on citizens' initiatives. Mr Sarkozy suggested that decisions on other sensitive issues (such as the number of Commissioners) should either be postponed or addressed in a different way – and the term 'Constitution' dropped to make it easier to ratify the treaty in national parliaments rather than through referenda.

This was the first concrete solution proposed by the main 'Nay-sayer' and offered a first answer to the basic political dilemma of how to reconcile the obligation to take into account both the ratifiers and the imperative to change at least the form of the existing text.

Partly building on this proposal, Pierre Lequiller, a former member of the Convention and current member of the French National Assembly for the UMP (Sarkozy's party), drew up a specific plan designed to preserve the substance of the Constitution by reorganising the text in a new 'institutional treaty'.

Another former *Conventionnel*, British Liberal Democrat MEP Andrew Duff, came up with a so-called "Plan B", designed not only to preserve the substance of the Constitution but also "improve" its provisions regarding the scope of QMV and other matters. Such an ambitious renegotiation would involve the European Parliament fully and be completed (and hopefully crowned) by an "EU-wide poll" to coincide with the June 2009 elections.

Belgian Prime Minister Guy Verhofstadt then published a book in early 2007 in which he expressed scepticism about the possibility of achieving consensus on far-reaching institutional and policy reforms 'at 27', and relaunched the idea of forming "vanguard" groups capable of moving European integration forward and acting as a catalyst for other Member States.

On the official front, an important turning point was the formation, in February 2007, of a new coalition government in the Netherlands – the other Nay-sayer – encompassing the Christian Democrats of Prime Minister Jan Peter Balkenende, the Labour Party and another Christian grouping.

The new coalition immediately declared that it could accept a limited revision of the Nice Treaty and ratify it through parliament if the country's State Council considered it unnecessary to call a new referendum. Later on, in a joint statement with London,

The Hague confirmed that it would subscribe to an "amending treaty" revising Nice and restricted to improving decision-making and simplifying procedures, but not to another substantial transfer of competences to Brussels.

Berlin-plus

Yet more potential stumbling blocks lie in Germany's path as it strives to revive the spirit (if not the letter) of the Constitution.

In the run-up to the extraordinary Berlin summit of 24-25 March 2007 convened to celebrate the 50th anniversary of the Rome Treaty, the Polish and the Czech governments voiced their reluctance to support any significant revision of the Nice Treaty. Their reasons were not identical, but their convergence made it particularly difficult for German Chancellor Angela Merkel to build a consensus on the 'Berlin Declaration' unveiled at the summit.

In the end, the text was accepted by all 27 governments but signed only by the heads of the three EU institutions. The line devoted to institutional reform in the Declaration was limited to a generic commitment to "placing the European Union on a renewed common basis before the European Parliament elections of June 2009".

In parallel, however, Chancellor Merkel also held bilateral talks with Warsaw and Prague. The upshot was that Poland accepted, in principle, Germany's plan to define a roadmap and an agenda for institutional reform but reiterated its rejection of the 'double majority' system enshrined in the Constitution.

The Czech government, in turn, accepted the timetable for completing the treaty revision by the end of 2008 (i.e. just before the beginning of Prague's EU Presidency) but reiterated its minimalist approach in terms of content.

Tony Blair also made it clear that London could live with a limited reform of the institutional set-up to enable the EU to function at 27-plus, provided the changes did not justify calls for a referendum – and he

suggested that such an approach would probably still find favour after he leaves Downing Street. The UK's reservations include incorporating the Charter of Fundamental Rights in the new treaty and such symbols

as the EU anthem, motto and flag; and the title "EU Foreign Minister", as it may hint at an EU 'government'. The Dutch and Czechs appear to be on the same wavelength.

Prospects

Still, all these are starting positions for the negotiations. Member States' 'red lines' are a fact of life and part of the EU game: they will influence but not pre-determine the final outcome.

Even German MEP Elmar Brok's recent soundbite – "*Verfassung oder Verhofstadt*" (either the Constitution or the 'vanguard' groups) – seemed to be aimed more at deterring the minimalists than providing a realistic alternative for the Presidency.

In April, Berlin's sherpas circulated a questionnaire among the 27 exploring what could be changed in the Constitution text – by subtraction, by simple modification or by addition.

The 'Constitution-minus' catalogue could include a broader reorganisation of the text, with sizeable sections inserted as annexes (a formal but not substantial change in legal terms); no reference to the future size of the Commission or even the Parliament, which could be addressed at a later stage (for example, when Croatia joins the EU); and, of course, dropping the name 'Constitution'.

The 'Constitution-plus' catalogue could include references to climate change, energy security and solidarity, and possibly even to illegal immigration (but apparently not to 'Christian' values); the full version of the 'Copenhagen criteria' to be met by countries

wishing to join the EU; and general or specific opt-out/opt-in clauses for common policies.

Squaring the circle

Still, the German Presidency, and the Portuguese one which will follow, are keen on preserving the substance and the overall balance of the institutional 'package' agreed 'at 25' in 2004. Presentational, terminology and other minor changes will, however, be considered.

One issue that may end up concentrating the negotiators' minds is the QMV system. Poland has abandoned its original "Nice or death" approach, but still rejects the double majority approach.

Unofficially, a compromise solution is being floated somewhere between the Nice provisions (disproportionately favourable to Poland and Spain) and the Constitution (more favourable to Germany): a 'square root' system whereby each country would get a number of votes in the Council roughly based on the square root of its population in millions. This would give Germany nine, the other big countries seven or eight, Poland and Spain six, and so on.

The superior 'fairness' of this system lies in the objective balance it strikes between size and population on the one hand, and a marginal over-representation of small countries on the other (an old principle of European integration).

Will all this guarantee respect for the timetable set in June 2006, and allow the new institutional arrangements to be ratified by all 27 Member States before the June 2009 elections? It is still too early to tell, as too many unknowns could still unravel even this 'Plan B'.

At this stage, the main challenge still lies in rapidly forging a deal that is sufficiently incisive and consistent to ensure that the enlarged EU functions efficiently and effectively, but is also capable of being accepted and ratified by all 27 Member States.

This is a huge challenge, and while Sarkozy's election may facilitate an agreement, the need for referenda in certain countries (Ireland and probably Denmark) may once again trigger demands for popular votes in others.

Therefore, no matter what solution is found in the negotiating room, EU governments must not forget the need to canvass public opinion and build support for the emerging deal during the negotiations.

Otherwise the public will conclude that EU governments have learnt nothing from the two 'No' votes in 2005 – a tragic and potentially costly mistake.

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