



## What Could be Saved from the European Constitution if Ratification Fails?

### The Problems with a 'Plan B'

Sebastian Kurpas, Research Fellow, CEPS

#### Introduction: 'Nice-Plus' as the most likely scenario if ratification fails

The pressure is on for the defenders of the European Constitution.<sup>1</sup> Although initially it seemed as if referenda would only be problematic in countries that have a reputation for a certain degree of Euroscepticism, now even France and the Netherlands look like unsafe candidates for public approval. While there is still a fair chance that a majority of the French will vote 'yes' when actually at the ballot box, there is an understandable nervousness among pro-integrationists. A French 'no' would be the most serious obstacle that any one member state among those holding a referendum could create. In the likely case that other member states besides France then reject the text – possibly for entirely different or even opposing reasons – it would become extremely difficult to 'save' the Constitution in its entirety.

During the last several weeks, there has been much talk about a 'plan B', which some governments or even EU officials are said to have already prepared in case ratification of the Constitutional Treaty fails. But while alternative scenarios are likely to be discussed behind the scenes, it surely is an exaggeration that anyone already has 'the' plan B, which only needs to be pulled out ready-made from a secret drawer.

After a possible French rejection, ratification in other countries would likely continue at the very least until the European Council meeting in June 2005. Political leaders will use this period to 'de-dramatise' the situation in the public debate and it would then depend on the summit as to which road is taken.

The position of the French government would of course be of central importance for political impetus

<sup>1</sup> The Constitution is formally called the Treaty establishing a Constitution for Europe, but for reasons of style and simplicity, the two expressions 'Constitution' and 'Constitutional Treaty' are used interchangeably in this paper.

but legally no member state could be forced to stop ratification, because unanimous agreement by the heads of state would be needed to stop the process altogether.

If leaders should, however, decide that a continuation of the process does not make sense and the Constitution as it stands has to be considered 'dead', alternative scenarios would not provide an easy way out.

A substantive renegotiation of the Constitution has to be considered as unrealistic. Anyone who has followed the complex process of consensus-building in the Convention and the two intergovernmental conferences knows that the present text constitutes a finely-balanced compromise, where one change would necessitate many subsequent others. Furthermore, a French 'no' would stem from very diverse reasons, which may not even allow a clear conclusion to be drawn in order to negotiate changes. And if the Dutch should also vote 'no', it could be motivated by yet entirely different reasons.

A second scenario, whereby a second referendum, possibly with a protocol to the present Constitution stating (for example) that the Council would take into account to a high degree the social dimension of any law that it decides upon appears to be equally unrealistic. Such a statement, tailor-made to appeal to the French public, would diminish the chances for approval in other countries. This would notably be the case in the UK, where ratification will be extremely problematic and where many already perceive the Constitution in its present form as a 'Franco-German stitch-up' that will impose red-tape on the British economy. Besides this dilemma, it is of course also highly questionable as to whether the French would actually change their minds owing to such an addendum.

The most likely scenario is thus unfortunately the one of a 'Treaty-of-Nice-Plus'. Accordingly, the existing rules established by the Treaty of Nice will of course continue to apply, and the heads of state would then try to save from the Constitution whatever they can agree among themselves in order to get these elements ratified through the respective national procedures.

The first victims of such an approach are of course the added value of the Constitution in terms of legal coherence and the strong political statement for an EU that renews its determination to be more than just an economic union. The

Constitution is more than the sum of its parts and the political and legal advantages of this ‘extra’ would be irretrievably lost if political leaders settle for this solution.

Nevertheless, even a ‘plan B’ based on such a ‘pick-and-choose’ approach would face important legal and political hurdles. This paper gives a brief overview of important elements in the Constitution and their prospects of being saved from a ‘dead’ constitutional text. These elements are ranked by their desirability for a well-functioning EU-25, while their likelihood of adoption is assessed according to the possible legal and political obstacles.

### Legal and political hurdles

Concerning the legal obstacles, three main categories can be distinguished:

1. *Elements that do not require a Treaty change.* Ratification according to the respective national procedures would not be needed for elements that fall under this category. A unanimous agreement between the heads of state and government would be sufficient combined with a legal act from the Council of Ministers. If EU institutions other than just the Council are affected by this change, this legal act would have to be followed by an interinstitutional agreement (IIA) between the EU’s three main institutions, the Council, Parliament and the Commission. An IIA cannot alter or complement the stipulations of primary law and would only be permissible if it does not change the existing power balance of the EU.<sup>2</sup> Yet the exact effects of an IIA are often unclear and thus there is a risk that jurisprudence could ultimately have the last word as to whether it is a viable way of saving certain elements of the Constitution.
2. *Elements requiring a Treaty change.* In this case ratification is always needed. The conditions for ratification depend on the respective national provisions of each member state.
3. *Elements requiring a Treaty change that shift competences or control from the national/regional level to the EU.* Again ratification is needed for elements in this category, but in many countries strict conditions must additionally be taken into account (which, for example, require laws to amend the national constitution, qualified majorities in the national parliament or a referendum, or the association of other parliamentary bodies such as second chambers). As the assessment is done by the respective national bodies, the same element can be classified differently in different member states.

Table 1 shows the legal conditions for ratification of the Constitutional Treaty in the different member states as they stand at present (the most problematic member states from a legal viewpoint are highlighted in bold).

The table serves as an indicator of the legal obstacles that

may arise in the ratification of key elements if a plan B were to include any shift of power to the EU level. The main advantage is that in a number of currently problematic countries political leaders would not necessarily have to renew their commitment to hold a referendum, including France and the UK. Whereas they would not be legally obliged, there would certainly be considerable political pressure for them to do so.

And even if this is left aside, that does not mean that ratification would become an easy task: Denmark and Ireland would still have to ask their populations for approval; in the Czech Republic and Poland, qualified majorities in parliament would be needed, which currently look unlikely to be obtained. In the latter two countries, a referendum could offer a solution for ratification, but depending on the content, a plan B may not be very appealing to the population (e.g. the double-majority voting system may be even less acceptable to the Polish if other more attractive elements of the Constitution were to be scrapped). There could also be problems in a number of other countries where a higher parliamentary majority is needed than the government actually controls. And finally there are powerful national courts (especially the German constitutional court) that would continue to be very critical of any power shift to the EU level ‘by the back door’. So contrary to what some commentators have stated lately, major innovations from the Constitutional Treaty could face serious obstacles – whether these are a part of the Constitution or an alternative plan B. A closer look at a number of important elements, their legal requirements and political obstacles therefore seems justified.

### Elements that concern the efficiency of the EU

#### 1. The double majority voting system (Art. I-25)

Regarding efficiency, the current rules of the Treaty of Nice can only be considered as an ‘emergency programme’ for the enlarged Union. While it is true that moroseness and a lack of political leadership from national representatives are the prime factors for possible political deadlock, there are also rules and structures that invite such behaviour.

Therefore, for many who are concerned with the everyday business of the EU, the new system for the weighting of Council votes under qualified majority (QMV) appears to be the most important element to keep the enlarged Union capable of acting. Although member states often do not actually vote in the Council, a *credible possibility* of being outvoted fundamentally changes the character of negotiations. The current system of the Treaty of Nice does not provide for such a credible scenario, because it is far too easy to organise a blocking minority in the enlarged Union.<sup>3</sup> The current rules will continue to apply until November 2009 in any case, and they threaten to paralyse the new EU during this important period – which in turn is likely to influence public opinion on the enlarged Union.

<sup>2</sup> See A. Maurer et al., *Interinstitutional Agreements in CFSP: Parliamentarisation through the Backdoor?*, Working Paper No. 5, EIF, Vienna, 2004.

<sup>3</sup> See R. Baldwin and M. Widgrén, *Council Voting in the Constitutional Treaty – Devil in the Details*, Policy Brief No. 53, CEPS, Brussels, July 2004.

Table 1. Legal conditions for ratifying the Constitution

AT	Simple majority in both houses of parliament sufficient for ratification (likely to be obtained, lower house approved on 11 May 2005)
BE	<ul style="list-style-type: none"> <li>• Simple majority sufficient for ratification (likely to be obtained, senate already approved on 28 April 2005)</li> <li>• Seven parliamentary bodies have to ratify it (at the federal, regional and community levels)</li> </ul>
CY	Simple majority sufficient for parliamentary ratification (likely to be obtained)
CZ	<ul style="list-style-type: none"> <li>• <b>Ratification would need a 3/5 majority in both houses (unlikely to be obtained)</b></li> <li>• <b>A (non-obligatory) binding referendum is an alternative, but would require a constitutional act, as there is not yet a general framework regulating a nationwide referendum (no obligatory referendum for a plan B)</b></li> </ul>
DE	<ul style="list-style-type: none"> <li>• Parliamentary ratification needs a 2/3 majority in both houses (likely to be obtained, lower house approved on 12 May 2005)</li> <li>• Powerful constitutional court with a tradition of critically scrutinising European integration</li> </ul>
DK	<b>In the absence of a 5/6 majority in Parliament, the Danish Constitution requires a binding referendum (27 September 2005)</b>
ES	<ul style="list-style-type: none"> <li>• Simple majority sufficient for parliamentary ratification</li> <li>• A constitutional court has ruled that all elements of the EU Constitution are in line with the Spanish Constitution (December 2004)</li> <li>• Successful consultative referendum (February 2005) &amp; ratification (May 2005) (no referendum needed for a plan B)</li> </ul>
EE	Simple majority sufficient for parliamentary ratification
EL	<ul style="list-style-type: none"> <li>• A 3/5 majority is needed because a constitutional amendment is necessary;</li> <li>• Constitutional Treaty ratified through parliament (19 April 2005)</li> </ul>
FI	Parliamentary ratification needs a 2/3 majority, because an amendment to the national Constitution is necessary (likely to be obtained)
FR	<ul style="list-style-type: none"> <li>• <i>Conseil Constitutionnel</i>: a law was needed to change the French Constitution in order to ratify the EU Constitution</li> <li>• Law approved by both chambers (convened as a <i>Congrès</i>) by a 3/5 majority (1 March 2005)</li> <li>• Referendum on 29 May (but no obligatory referendum for a plan B!)</li> </ul>
HU	<ul style="list-style-type: none"> <li>• Parliamentary ratification needed a 2/3 majority;</li> <li>• Ratification on 20 December 2004</li> </ul>
IE	<ul style="list-style-type: none"> <li>• <b>Obligatory, binding referendum for any transfer of power</b></li> <li>• <b>Government to publish a Constitutional Amendment Bill, which must be approved by parliament and then put to the people for referendum</b></li> </ul>
IT	Parliamentary ratification by both houses needed a simple majority (Congress on 25 January, Senate on 6 April 2005)
LV	Simple majority sufficient for ratification (likely to be obtained)
LT	<ul style="list-style-type: none"> <li>• Simple majority sufficient for ratification</li> <li>• Parliamentary ratification on 11 November 2004</li> </ul>
LU	<ul style="list-style-type: none"> <li>• Parliamentary ratification needs a 2/3 majority (likely to be obtained)</li> <li>• Consultative referendum on 20 July 2005 (but no obligatory referendum for a plan B!)</li> </ul>
MT	Parliamentary ratification needs a simple majority (likely to be obtained)
NL	<ul style="list-style-type: none"> <li>• Parliamentary ratification probably needs a 2/3 majority (likely to be obtained)</li> <li>• Consultative referendum on 1 June 2005 (no obligatory referendum for a plan B!)</li> </ul>
PL	<ul style="list-style-type: none"> <li>• <b>Parliamentary ratification would need a 2/3 majority in both houses (unlikely to be obtained)</b></li> <li>• <b>(Non-obligatory) referendum, but 50% turnout needed in order to be valid (but no obligatory referendum for a plan B!)</b></li> </ul>
PT	<ul style="list-style-type: none"> <li>• Parliamentary ratification would only require a simple majority (likely to be obtained)</li> <li>• Referendum foreseen for October 2005 (but no obligatory referendum for a plan B!)</li> </ul>
SK	Ratification on 11 May 2005, which needed a 3/5 majority
SL	Ratification needed a simple majority (1 February 2005)
SE	<ul style="list-style-type: none"> <li>• Parliamentary ratification will probably require a 75% majority (likely to be obtained)</li> <li>• 1/3 of parliamentarians would be needed to call a consultative referendum</li> </ul>
UK	<ul style="list-style-type: none"> <li>• Parliamentary ratification (through amendment of the European Communities Act of 1972) would require a simple majority (likely to be obtained)</li> <li>• Referendum foreseen for spring 2006 (but no obligatory referendum for a plan B!)</li> </ul>

## 4 | THE EUROPEAN PRODUCTIVITY SLOWDOWN

- *Legal requirements: High.* Ratification of this element is needed, because the text of the current treaties (Art. 205 TEC and Art. 3 of the Protocol to the TEC and TEU on the Enlargement of the European Union) would have to be changed. Since this issue also affects the relative power of each member state at the EU level, national sovereignty is concerned, which would further increase the conditions for national ratification.
- *Political obstacles: High.* The change of the voting system was one of the most contested elements during the negotiations at the Intergovernmental Conference and the main reason agreement could not be reached in December 2003. In fact, two countries – Poland and Spain – will lose significant veto power under the double-majority voting system. Agreement was only reached when the government of former Prime Minister Jose Maria Aznar lost the Spanish national elections and was replaced by the current socialist government under Jose Luis Rodriguez Zapatero, which was more inclined to reach a compromise. The Polish then found themselves isolated on this issue and agreed to the new system. In the meantime, although the Spanish public approved the Constitution on 20 February 2005, it could well be that the government is not ready to accept the unfavourable element if it is singled out of the Constitution’s ‘package deal’. This sensitive issue may also be linked to the negotiations about the EU’s budget if no agreement on the financial perspective is reached beforehand, because the Spanish will be very anxious to safeguard regional funds. The even bigger obstacle, however, is more likely to be the Polish government, which had a very difficult time in accepting the deal. By the time this issue re-emerges on the European agenda, it looks as if the Polish government might have changed (elections are to be held in October 2005), and the Civic Platform, whose parliamentary leader Jan Rokita uttered the famous words: “Nice or Death”, may be in power. Again budgetary negotiations on regional policy could open up a way forward, which would most probably entail countries such as Germany, the UK and France having to agree to an overall boost of the EU’s budget. That, however, is far from likely.

### 2. Qualified majority voting as a rule (Art. I-23.3)

The Constitution stipulates that the Council takes decisions by majority voting except when it explicitly mentions otherwise, whereas so far unanimity has been the rule. In concrete terms, this means that 24 existing policy areas have been shifted from veto to majority voting (e.g. large parts of justice and home affairs [JHA] and cultural policy). It also means that 21 newly introduced (elements of) policy areas fall directly under majority voting (e.g. the entire energy, civil protection and humanitarian aid policies, tourism and sports policies as well as the establishment of permanent, structured cooperation in the area of defence). The more significant aspect is that a *rule* has been established that changes the logic for future integration. Every policy under unanimity voting will have to be explicitly mentioned and will be classified as exceptional.

- *Legal requirements: High.* Ratification is required and as this Treaty change directly concerns national sovereignty, many member states face particularly stringent conditions for ratification. Ireland and Denmark would have to hold obligatory referenda. A possible alternative to the establishment of QMV as a rule would be to simply bring some (or all) of the 45 policy areas foreseen by the Constitution under QMV on an ad hoc basis. From a legal point of view the areas concerning JHA would be particularly attractive, because Ireland and Denmark continue to opt out of important elements of this policy under the Constitution (see protocols 18 and 19 for Ireland and protocol 20 for Denmark) and therefore these two countries would not have to hold referenda.
- *Political obstacles: High.* The fact that a general rule is being established will make it difficult for those member states with a high degree of scepticism to agree to this element in an isolated manner. Thus the approach of limiting the shift to QMV on some or all of the policy areas that would be affected under the Constitution on an ad hoc basis also seems advisable with regard to the political obstacles. The areas to which it applies would have to be those where a large degree of consensus exists. From a political perspective, some aspects of the JHA policies could be candidates for such a shift.

### 3. A permanent European Council president (Art. I-22)

The creation of such a permanent post would have two big advantages in terms of efficiency: it would provide the European Union with a ‘face’ who could give coherence to the Union representation at an external level and it would hold the potential for greater internal coherence when it comes to setting priorities.

- *Legal requirements: Intermediate.* Since the European Council is not an EU ‘institution’ in the legal sense, the current treaties only refer to the presidency of the European Council in Art. 4 TEU: “The European Council shall meet at least twice a year, under the chairmanship of the Head of State or Government of the Member State which holds the Presidency of the Council”. Nevertheless, Art. 203.2 TEC states that this Council Presidency is to “be held in turn by each Member State (...) for a term of six months” (emphasis added). A Treaty change with subsequent ratification would thus be required in order to put in place a full-time president as foreseen by Art. I-22 of the Constitutional Treaty. It is possible, however, to avoid the especially strict conditions for ratification if national sovereignty is not affected. This would require that the new post were not given any new competences and would be explicitly limited to a clear procedural role. Yet that is likely to meet strong political opposition from its advocates.
- *Political obstacles: High.* The question about a permanent president was one of the most divisive in the Convention. It was an issue that for a long time divided most of the smaller countries from the larger ones.

Those leaders from larger countries who tended to take a more intergovernmental stance pushed for a strengthened Council (especially Prime Ministers Jose Maria Aznar and Tony Blair and President Jacques Chirac, which thus led to the term 'ABC-plan'), against the opposition of smaller countries such as Austria or Finland, which had instead wanted to strengthen supranational elements like the Commission or the European Parliament. After Germany and France had tabled a proposal that combined the (French) idea of a permanent Council president with the (German) concept of an elected president of the European Commission, many smaller countries felt 'betrayed' by Germany for giving in to France, but ultimately accepted this compromise. It is therefore difficult to imagine that a permanent president would be accepted without the other part of the deal. The combination with the election of the president of the European Commission (Art. I-27.2) may, however, provoke questions about a shift of power to the EU level (and therefore face tougher conditions for ratification), because it would give more democratic legitimacy to a supranational body than is specified under the current provision (Art. 214.2 TEC only requires 'approval' by the European Parliament instead of an 'election' in Art. I-27.1 of the Constitutional Treaty). Another solution of simply changing the title from 'European Council president' to 'chairman' along with an explicit statement that only procedural powers would be given to this post would not be acceptable to the advocates of the post who were already concerned about the watering down of the current text.

#### 4. Reduction of the number of commissioners (Art. I-26.6)

Already it can be observed how difficult it is for President Jose Manuel Barroso's Commission to find a common line and then keep to it once it has been agreed. Under the current rules, there is one commissioner per member state (Art. 213.1 TEC), but an automatic change would take place with the next Commission in 2009 if the Union consists of at least 27 member states by then (Art.4 of the Protocol on the Enlargement of the Union). Rotation would be "based on the principle of equality" among member states, but the exact number of commissioners would still have to be negotiated "by the Council acting unanimously". In contrast, the provisions of the Constitutional Treaty already determine a considerable reduction in the number of commissioners to two-thirds of the number of member states. Yet as important as this reduction is for a better internal functioning of the Commission, it would only apply to the succeeding Commission (probably) starting in 2014.

- *Legal requirements: Low.* It has to be stressed that commissioners are not the representatives of their member state of origin, but for most countries 'their' commissioner is an important interlocutor and it could therefore be argued that the 'loss' of a permanent commissioner would affect national power. Yet this

question does not matter anymore, because member states have already accepted abandoning the principle of one (permanent) commissioner per member state with the ratification of the Treaty of Nice. The Constitutional Treaty would thus not mean any further shift of national power. Legally, it would be easiest to just agree to the '2/3 rule' of the Constitutional Treaty when the unanimous vote in the Council takes place.

- *Political obstacles: High.* Besides the permanent president, the number of commissioners was the most sensitive issue for many smaller countries. Again, their agreement has to be seen as part of a larger 'package deal'. Many smaller countries agreed to the considerable reduction only because they saw the supranational dimension of the EU strengthened by giving more powers to Parliament (e.g. through co-decision as the 'normal procedure') and the Commission (e.g. through abolishing the pillar structure). They hoped that this would prevent a 'directorship of the large' in the Council from dominating the enlarged EU.

#### 5. Foreign minister (Art. I-28)

The subject of a foreign minister is a hot favourite when it comes to a plan B. A 'merger' of the two current positions of the high representative of the Council and the commissioner for External Relations triggered the imagination of many who are concerned with a more visible and ultimately more powerful European Union on the international stage. A more efficient solution will, however, depend on what kind of merger will actually evolve. In practice the current dual structure has turned out to work much better than many had initially predicted, partly owing to a wise cooperation of the two personalities in charge. A merger that does not imply a Treaty change will certainly be a step towards a more coherent EU external policy (a policy domain that usually receives the highest ratings from citizens when asked in which area they would like to see a more active Union), but it would not mean any radical improvement in the EU's capacity to act.

- *Legal requirements: Low.* Ratification of this element is not necessarily needed. An IIA could be sufficient, if a Treaty change could be avoided and the existing power balance between the institutions is preserved. Current provisions state that the high representative is the secretary-general of the Council and consequently firmly assign this post to that institution (Art. 18.3 TEU and Art. 26 TEU). By itself that does not prevent the person from also becoming vice-president of the Commission, but it could create a conflict between the missions of the two posts, if distinctions were not made clear. While a commissioner is directed to "neither seek nor take instructions from any government or from any other body" (Art. 213.2 TEC), the high representative's role is to assist the EU presidency (Art. 18.3 TEU) and the Council (Art. 26 TEU), even acting on behalf of the Council "where appropriate". Art. I-28.4 of the Constitution shows awareness for potential tension and distinguishes between the EU's common foreign and

security policy (CFSP) and its external action. An IIA would have to be very clear and detailed on this point so that the different competences would not become blurred and that ultimately the current power balance between the institutions is not altered.

Further, the commissioner of the same nationality as the foreign minister would have to step down in order to be in line with the Treaty stipulation that only one commissioner per member state should be part of the college (Art. 213.1 TEC). The constitutional provision that the foreign minister “shall preside over the Foreign Affairs Council” (Art.I-28.3), however, contradicts Art. 203.2 TEC, which determines the rotating presidency of member states. Adoption of this aspect would most probably necessitate a Treaty change and therefore also ratification (just like that for the permanent president of the European Council as discussed above), but some claim that the respective country could cede this office to the foreign minister for the period of its presidency. In any case, that would mean that this arrangement would have to be negotiated with the country in question every six months anew. The title of ‘foreign minister’ may even have to be dropped to avoid a Treaty change, meaning essentially that one person would take on the two existing posts. The term could nonetheless be used in the public debate (like the ‘Treaty establishing a Constitution for Europe’ is also commonly referred to as the ‘Constitution’.)

- *Political obstacles: Intermediate.* There is wide agreement among the member states that the current dual structure should be merged into one. Nevertheless, there are still opposing ambitions that one of the concerned institutions should profit from the merger – the ‘supranational’ Commission or the ‘intergovernmental’ Council. From a legal perspective, an IIA would not allow for any power shift; from a political view, a successful solution can only be a compromise that strikes a fair balance between the more integration-minded countries on the one hand and those who would like to strengthen the intergovernmental character of the EU’s foreign policy on the other.

### 6. External Action Service (Art. III-296.3)

The External Action Service (EAS) is another element that is often mentioned when a plan B is discussed. As with the foreign minister, it concerns the form rather than a shift of powers. Deliberations within the institutions concerning the concrete establishment of the EAS have already started. As foreseen in Art. III-296.3, staff would come from the national diplomatic services, the Council and the Commission.

- *Legal requirements: Low.* Ratification of this element would probably not be needed, as an IIA is likely to be sufficient to establish the EAS. Already the existing provisions stipulate that the “diplomatic and consular missions of the Member States and Commission delegations (...) shall cooperate” (Art. 20 TEU). The EAS as outlined in Art. III-296.3 would formalise this

cooperation. Further, the fact that this service would “assist” the EU foreign minister in the fulfilment of his/her mandate is not in contradiction with the existing treaties, because this mandate would continue to be determined by the Council in all CFSP matters. The EAS would also be in the spirit of the current *acquis*, which states that “The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations” (Art. 11.2 TEU). If adoption through an IIA is chosen, a shift of power to the EU would not be possible. This means that plans for a strategic planning department within the EAS would have to be in close cooperation with the member states.

- *Political obstacles: Low.* There seems to be a consensus among the member states that an EAS should be established. The question is again about where it would be situated and what kind of tasks it would ultimately have. There are clearly countries that are more open to a more politically ‘independent’ EAS than others (e.g. Germany and many of the smaller member states). These countries see the EAS as a nucleus for more integration in the future. Others, however, regard it as a tool for better coordination of member-state policies with the actions of the EU at an international level. The legal constraints of an IIA will favour the intergovernmental view. Concerning the institutional affiliation of the EAS, a compromise between the two visions seems to be the best solution. Therefore the EAS should be located neither in the Council nor in the Commission, but become “a structure that reflects the double-hatted nature of the Foreign Minister”.<sup>4</sup> Nevertheless, such a ‘free-standing’ structure may in turn cause legal complications, because it would probably need a separate legal personality for its actions, which the current Treaty provisions could not grant.

### Elements that address democracy

The elements presented so far deliberately concern the strengthening of the EU’s efficiency. Of course there are equally important elements that would improve democracy:

- The first one to note is the enhanced role of the European Parliament through the **introduction of the co-decision procedure as the ‘normal procedure’**. The European Parliament would generally be on the same level as the member states in the Council when it comes to legislating. The legal requirements for the adoption of co-decision as the normal procedure would be *high*, because it would require a Treaty change with a power shift towards the (supranational) Parliament. Politically it would likely meet the opposition of the more sceptic member states, which reject the idea of the

<sup>4</sup> See G. Grevi and F. Cameron, *Towards an EU Foreign Service*, Issue Paper 29, EPC, Brussels, 10 April 2005.

European Parliament as a 'second chamber'. They prefer to seek a more democratic Union primarily through the better association of national parliaments to the EU's decision-making process. These member states seem to see the European Parliament as a rival to national parliaments rather than as a complementary source of democratic legitimacy and may only agree to a strengthened Parliament if in return other more intergovernmental elements were also adopted (for example, that of a permanent EU president).

- The **citizens' initiative (Art. I-47.4)** would have better chances of adoption. Legally it could even be put into practice through an IIA, because it affects the working of the Commission, but neither implies a power shift to the EU level nor does it change the power relations between the EU institutions. The scope of the initiative would only cover the framework of the Commission's powers, so that no new competences could be claimed through the back door of direct democracy. Also, the Commission would not lose its monopoly on initiatives, because citizens can only 'invite' the Commission to submit a proposal, but not force it to do so. Politically, it would be a very welcome element after a possible rejection of the Constitution, because it would demonstrate that the EU is making an effort to open up to its citizens. Strictly speaking, one has of course to admit that even today one million citizens could organise a petition to the Commission and some political reaction could be expected.
- Another likely candidate for ratification could be the limited **changes in the protocol on the role of national parliaments** and the **protocol on the principles of subsidiarity and proportionality**, in particular the '**early warning system**' (Art. 6). Both protocols were annexed to the EC and EU treaties in Amsterdam to calm fears of an uncontrolled EU integration. Politically and legally there should be no problem with the adoption of changes to these protocols, because national parliaments will probably ratify provisions that enhance their control and bring some improvements to them as regards information and transparency. Yet it has to be conceded that – as with the citizens' initiative – if a number of national parliaments really *did* voice concerns about a certain legislative initiative going against the principle of subsidiarity, the Commission would currently be well advised to take such concerns seriously.
- Finally, **public sessions when the Council acts as a legislator** (Art. I-24.6) and all other innovations in Art. I-24 concerning the **configurations of the Council** could be agreed unanimously by the heads of state and

government and would send a positive political signal in terms of transparency. Some governments, however, seemed to be less enthusiastic about the prospect of having to vote under the critical eye of the public, claiming that it would make it harder to find a consensus. They may therefore seize the opportunity to drop this 'uncomfortable' innovation.

### **Conclusion: It may require a plan B to realise that the Constitution had actually not been such a bad deal after all.**

As can be taken from this short overview, a plan B would not be an unproblematic way out, if the Constitution is not ratified in the upcoming referenda. From a strictly *legal* perspective, the most important advantage of a plan B is that in many currently problematic countries political leaders would not be obliged to renew their commitment to a referendum. Nevertheless, almost all the major elements of the Constitution would require ratification with especially strict conditions that would apply in a considerable number of member states, such as qualified majorities or even referenda (e.g. in Denmark and Ireland).

From a *political* perspective, however, political leaders may very well have to hold referenda, because they will be hard-pressed by the media, their political opponents and the general public to do so. This policy brief has intended to give an insight into the problems linked to the nature of the Constitution as a 'package deal': what may be acceptable to individual member states as an integral part of a larger compromise is often likely to be refused if isolated from the rest. As realistic survivors of a 'dead' Constitutional Treaty, it is possible that there would only be the foreign minister (a role that may have to be stripped of some of its initially foreseen competences and maybe even its title), the External Action Service, the citizen's initiative and a very limited number of further improvements, especially concerning Council reform. All in all, it would be a rather meagre result after so much political capital has been invested. It shows that the Constitutional Treaty may not be an optimal solution, but the best that can be obtained in the foreseeable future. Unfortunately, in the current national debates there is a strong tendency to ignore the fact that the Constitutional provisions are a compromise between different national preferences, where no government obtained all of its initial demands. For many who are sceptical today, it may require a plan B to realise that the Constitution had actually not been such a bad deal after all. Regrettably, it will then be too late.

## About CEPS

Founded in 1983, the Centre for European Policy Studies is an independent policy research institute dedicated to producing sound policy research leading to constructive solutions to the challenges facing Europe today. Funding is obtained from membership fees, contributions from official institutions (European Commission, other international and multilateral institutions, and national bodies), foundation grants, project research, conferences fees and publication sales.

### Goals

- To achieve high standards of academic excellence and maintain unqualified independence.
- To provide a forum for discussion among all stakeholders in the European policy process.
- To build collaborative networks of researchers, policy-makers and business across the whole of Europe.
- To disseminate our findings and views through a regular flow of publications and public events.

### Assets and Achievements

- Complete independence to set its own priorities and freedom from any outside influence.
- Authoritative research by an international staff with a demonstrated capability to analyse policy questions and anticipate trends well before they become topics of general public discussion.
- Formation of seven different research networks, comprising some 140 research institutes from throughout Europe and beyond, to complement and consolidate our research expertise and to greatly extend our reach in a wide range of areas from agricultural and security policy to climate change, JHA and economic analysis.
- An extensive network of external collaborators, including some 35 senior associates with extensive working experience in EU affairs.

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CEPS is a place where creative and authoritative specialists reflect and comment on the problems and opportunities facing Europe today. This is evidenced by the depth and originality of its publications and the talent and prescience of its expanding research staff. The CEPS research programme is organised under two major headings:

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Trade Developments & Policy  
Energy, Environment & Climate Change  
Agricultural Policy

#### Politics, Institutions and Security

The Future of Europe  
Justice and Home Affairs  
The Wider Europe  
South East Europe  
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EU-Russian/Ukraine Relations  
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