

# Documento de Trabajo

## Working Paper

**Solutions to the Current Constitutional Impasse in  
the European Union: the Reduced Treaty Option  
(WP)**

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## Summary

Almost two years after the referendums in France (29 May 2005) and the Netherlands (1 June 2005), the European Union (EU) is still in a state of confusion. We could continue to pontificate about whether or not a genuine crisis exists. Unfortunately, however, the time for reflection is over, and the moment has come for the constitutional question to be tackled head on.

## I. GENERAL ASPECTS: THE SEARCH FOR A WAY OUT OF THE CURRENT CONSTITUTIONAL LABYRINTH

Almost two years after the referendums in France (29 May 2005) and the Netherlands (1 June 2005), the European Union (EU) is still in a state of confusion. We could continue to pontificate about whether or not a genuine crisis exists. Unfortunately, however, the time for reflection is over, and the moment has come for the constitutional question to be tackled head on. Over the next few months we must try to find a definitive way out of the *constitutional labyrinth* in which we are currently lost (see Araceli Mangas, 'El rescate del Tratado Constitucional: qué y cómo se puede salvar', ARI 17/2007).

In this regard, the Berlin Declaration of 25 March 2007 to mark the 50th anniversary of the Treaties of Rome was effectively the first time we could take the *European patient's* temperature. And yet this important Declaration makes no specific reference to the Constitutional Treaty (CT). All that it contains is a statement in the final paragraph which notes that 50 years on 'we are united in our aim of placing the European Union on a renewed common basis before the European Parliament elections in 2009'. That said, although it does not expressly mention the CT, it is clear that the effort of giving the Union a 'renewed common basis' refers to the need to find a solution to the current constitutional impasse, while still leaving open the question of *how* this is to be done. In fact, the positions taken by the different Member States still differ widely, and the possibility of the negotiations on the new Treaty being based on the Treaty of Nice rather than the CT is a distinct possibility. However, the Declaration does establish *when* –the chosen solution must be ready before the European Parliament elections in June 2009–. This commitment will clearly have an impact on the calendar of events and probably also on how ambitious the content of the new Treaty will be.

## II. PROSPECTS AND OPTIONS FOR THE CONTENT OF THE NEW TREATY: ATTEMPTING TO SQUARE THE CIRCLE

### 1. Prospects for the New Treaty: Brief Intergovernmental Conference with a Clear Mandate and Ratification Before June 2009

If, as would seem more than reasonable, the objective is to resolve the issue by the time European citizens go to the polls to elect new members of the European Parliament, the calendar of events is quite clear. The next European Council of 21 and 22 June will have to produce a clear and precise mandate to make it possible to convene a new Intergovernmental Conference. This will undoubtedly mean tough negotiations in a difficult European Council under the direction of a

Presidency that, through the system of sherpa meetings (bilateral meetings between the Presidency and Member State representatives), has reserved to itself a clear leading role.

In any event, this European Council will have to reach a final decision which leaves the way clear for the Intergovernmental Conference to begin its work by the end of September or the beginning of October at the latest. By no means will this be easy to achieve, since the different positions of the Member States still range from those who want a new treaty that is as close as possible to the current CT to those who want negotiations to be based on the Treaty of Nice and whose objective is to kill off the TC. In addition, we imagine that whatever final content is chosen, the seal of approval of the European Parliament will also be desired.

Given this, there is only time for an *extraordinarily brief* Intergovernmental Conference. In fact, however difficult it may seem, the IGC must have completed its work by December 2007, so that the European Council which is closed by the Portuguese Presidency can definitively approve the resulting text. After that, six to eight weeks will be needed so that the Council's experts and linguists can do the necessary 'polishing up' and produce the final draft of the agreement. At the very latest, this means that by the end of February 2008 the new Treaty must be ready for signing to allow sufficient time for ratification by all Member States before June 2009. Past experience shows that it would be extremely difficult to complete the entire ratification process in less than 16 to 18 months, which means that if there truly exists the will to meet the deadline contained in the Berlin Declaration, this is the only possible timetable, particularly since some Member States would subject the new Treaty to a referendum.

As a result, then, the really thorny issue will be establishing the content of the IGC mandate and – equally importantly – the starting point for the negotiations within the IGC (whether based on the CT or existing Treaties).

## **2. Options for the New Treaty: Negotiations on the Basis of the Treaty of Nice or the Constitutional Treaty?**

### *(a) The option of Retaining the Constitutional Treaty in its Current Form: A (Politically) Impossible Alternative*

The first possible option would be to keep the CT in its current form and look for some mechanism which, similar to that which was devised for Denmark when it rejected the Maastricht Treaty (2 June 1992) or when Ireland voted against the Treaty of Nice (29 May 2005), made it possible for France and the Netherlands to reconsider their 'no' votes. Thereafter, the CT would be ratified in the remaining Member States who had yet to do so. This is without doubt the most desirable way out of the current constitutional impasse. But, in our opinion, it is as desirable as it is impossible to achieve.

It is not realistic to think that France and the Netherlands will repeat their referendums in the hope of obtaining a vote in favour of a treaty which has only experienced some 'cosmetic changes' (such as *ad hoc* declarations or a specific protocol). In fact, the Dutch government has already ruled out this possibility. Nor can those Member States which have yet to ratify be expected to accept the Treaty at this stage without any problems.

It is true that the position of a majority of two thirds of the Member States which have fulfilled the commitment to ratify the CT in time and form cannot be ignored when planning the future of the European Constitution. Yet however we attempt to approach the problem and regardless of the somewhat forced arguments that are put forward, it is quite plain that, as things stand, in order for the CT to enter into force –or for any amendment of the current founding treaties (Article 48 TEU) to take place– ratification is required by *all* the High Contracting Parties (Article IV-447). And France, the Netherlands, the UK, Portugal, Ireland, Denmark, Sweden, Poland and the Czech

Republic are as much High Contracting Parties as the 18 Member States who have ratified the Treaty.

The option of maintaining the CT in its current form must, therefore, be ruled out from the beginning. At the very least, some minor changes would be necessary. In fact, at present this is something that is even accepted by the 'Friends of the Constitution', which held a summit meeting in Madrid on 26 January 2007 following a joint Spanish-Luxembourg initiative. Following this meeting, the Spanish Foreign Minister declared that the 18 Member States –although in fact 22 were represented– were prepared 'to make amendments to the Constitution in order to facilitate an agreement with the two Member States which had rejected it (France and the Netherlands) and the remaining seven which had postponed their decision'. That said, he also emphasised that the Member States which had already ratified preferred 'an audacious proposal, although not a reckless one, to making a *de minimis* proposal which would inevitably lead to a *de minimis* agreement that would soon prove to be insufficient in practice'. In short, 'an ambitious proposal' was thus favoured. In fact, today only Giscard d'Estaing maintains his last ditch defence of the option of leaving the CT unchanged. There is no alternative, then, but to accept that this option has no chance of succeeding.

*(b) The Option of Negotiations on the Basis of 'Nice Plus': Unsatisfactory, But Quite Possible*

Having ruled out option (a), another possibility could be simply to forget the CT and to start negotiations again from scratch on the basis of the current primary treaty in force. In other words, to use the Treaty of Nice as the starting point. Without doubt, this option has its supporters among the ranks of the most euro-sceptic Member States. Statements such as 'I think we have to take a step back and not have a constitutional treaty' (Tony Blair, 19 April 2007) or 'Europe does not need a constitution but rather the reform of the existing texts' (Jaroslaw Kaczynski, 18 April 2007) appear on the face of it to provide backing for this possible way out of the current constitutional logjam. Nevertheless, this option, which is at one end of the spectrum of possibilities, is in our opinion wholly unsatisfactory. In the first place, it does away at a stroke with almost 10 years of work which –it should not be forgotten– was reflected in the final agreement of the last IGC signed by all the Member States in Rome, including those who, while totally overlooking the time-honoured principle of *pacta sunt servanda*, now reject the political agreement that was signed. Secondly, it does away with the work of the Convention which, despite the holes that some are now happy to pick in it, introduced an additional element of transparency, participation and legitimacy that the traditional intergovernmental conferences lacked. Thirdly, and most importantly from a political point of view, it is totally unacceptable for the two thirds of the Member States that, having fulfilled the commitments given by all in the last IGC, have already ratified the text, and in some cases (for example Spain) through a referendum.

In short, this option should not be allowed as the political compromise between not touching the CT and forgetting about it completely. If the 18 Member States which have already ratified accept that the CT is to be amended in order to be able to reach a final agreement that is acceptable to everyone, those which have yet to ratify should also accept that the negotiations in the future IGC be based on the text that all Member States accepted in Rome following the *travaux préparatoires* of the Convention. Anything else would not be about finding a compromise in the negotiations but rather caving in to the demands of the Member States that are most critical of the CT. That said, the events of recent weeks do anything but suggest that this option will be finally ruled out. Instead, we fear that it may ultimately be the option which prevails.

*(c) The Option of Negotiations Based on the Constitutional Treaty: The Most Appropriate Alternative, But Difficult to Sustain*

In the light of the above, in our opinion the most appropriate political option would be for negotiations to be based on the CT. This would involve making some slight changes to the text, namely those amendments that are needed to make the resulting treaty acceptable both to those who

have already ratified it in its original form and also to those who have encountered –or looked for– internal problems in the ratification process. Clearly, the main difficulty is to delimit the scope of these amendments. The Member States which have already ratified would presumably aim for the fewest possible amendments, while those where ratification is pending would prefer the changes to much more substantial.

In this regard, it should not be forgotten that the final text of the CT was the fruit of a difficult compromise which reflected a complicated political balancing act. Thus, there were Member States which finally –and reluctantly– accepted reforms in exchange for other new features being inserted into the Treaty as a sort of *compensation* for their sacrifice. To give one important example, Spain’s acceptance of the new dual majority system in the Council was compensated in other institutional and material parts of the Treaty which, if amended now, would seriously damage the balance achieved at that time. As a result, the temptation to engage in cherry picking runs the serious risk of reopening the debate on key institutional questions. This would lead, at the very least, to long negotiations that would make it impossible to comply with the timetable required for the resulting text to come into force before June 2009. It would effectively amount to going back to the state of negotiations left open in Nice. For this reason, one of the possible options is that of a *reduced Treaty*, one that maintained the essence of the current CT after certain parts had been ‘pruned’ from it. This would basically mean rescuing the irreducible elements of the CT.

*(d) Towards the Convergence of the Various Options: A New Reform Treaty with the Essential Elements of the Constitutional Treaty*

From the above, we can see that the final solution could well be a symbiosis of the last two options, the result of which would be a reduced Treaty that substantively contained the irreducible elements of the CT and formally only involved another reform of the current founding treaties. To some extent it would be a convergence between what we have called a ‘reduced Treaty’ and what has been dubbed an ‘improved Treaty’. Ultimately, it is an option that could satisfy even those who favour a return to Nice, since the resulting text would probably differ quite markedly from that of the CT while it would still effectively be a new treaty amending the founding treaties currently in force which would contain the essence of the CT.

In addition, from the moment that it became a new treaty, there would not be any real difference between using the Treaty of Nice as the basis for negotiation while incorporating the most important elements of the CT into the new Treaty, and using the CT as the basis for negotiation while pruning it of those elements that were not essential. At least not if we take into account the difficult situation which we are currently in. This is particularly so since, in our view, it would be hard for the new treaty to avoid the need for ratification by all Member States, including the 18 which have already ratified the CT.

### **III. THE REDUCED TREATY OPTION: IN SEARCH OF THE *LOWEST COMMON DENOMINATOR* ACCEPTABLE TO ALL**

#### **1. Maintaining the Substance of the Constitutional Treaty: The Difficult Task of Specifying the Irreducible Essence**

A reasonable approach would therefore be to look for the *lowest common denominator* acceptable to all in a reform of the current CT by removing certain very specific elements that would not affect the underlying political equilibrium referred to above. However, when trying to specify what exactly this *lowest common denominator* is, the problem is obviously defining what is meant by the irreducible essence of the CT. Once again, there is a great deal of difference between the amendments proposed by the ‘Friends of the Constitution’, who favour sticking as closely to the existing Treaty text as possible, and the most euro-sceptic Member States, who want to carry out more rigorous ‘pruning’.

Nevertheless, after an in-depth analysis of the positions taken by the different Member States in recent weeks, and in attempt to find some chink of light when really there is still just darkness, some initial points of contact can be made in an attempt to delimit this possible common area of agreement. Any consensus would basically have to be established by finding common ground between the so-called red lines that might be drawn by the Member States which have yet to ratify the CT and the maximum amount that the 18 who have already ratified would be prepared to concede.

## **2. Legal Nature of the Traditional Treaty Amending the Founding Treaties: Abandoning the (Formal) Constitutional Dimension of the New Treaty**

An issue that must be addressed prior to the question of the precise content of any new treaty is the legal nature of the resulting text. In this regard it is probable that, given the existing situation and the positions on this point, this would involve a return to the traditional (international) treaties used to amend the founding treaties. It would therefore be a treaty amending the current founding treaties that, unlike the CT (Article IV-437), would not repeal the Treaty establishing the European Community (ECT) nor the Treaty on European Union (TEU), particularly if, as seems likely, it is decided to eliminate the controversial part III.

A different question is whether, as the CT states, the Union that is established will replace the current EU and the EC (Article IV-438) or whether, by contrast, the decision is taken to keep the EU and EC in their current state and simply introduce specific amendments to the founding treaties (Article 48 TEU). A possible intermediate position cannot be excluded here: one which led to the TEU being repealed and substituted by the new Treaty and the (amended) EC Treaty being maintained subject to the institutional and substantive amendments introduced by the new treaty (amending the current founding treaties of the EC and EURATOM).

In any event, it does appear clear that the new Treaty would remove the idea, at least formally, of there being a *constitutional* dimension. In fact, there does seem to be a certain degree of consensus about the perverse effect that the Treaty's name has had. Calling the text in question 'Constitution' (Article I-1.1) or giving the founding Treaty the label 'constitutional' (Treaty establishing a Constitution for Europe) has probably been a mistake that has caused a negative reaction among quite a number of citizens. It has transmitted the false idea of having a political and legal effect on the sovereignty of Member States that is far removed from reality. There have even been critics who have seen the real purpose of the CT to be the creation of a future European super-state. It is therefore quite likely that the new treaty will return to the previous 'step-by-step' approach, and, while retaining essentially the same content, avoid using any terminology that suggests the idea of a constitution.

## **3. Minimum (and Likely) Content of the New Reduced Treaty: The Irreducible Nature of Part I of the Constitutional Treaty**

### *(a) The Red Lines of the Member States that Have Not Ratified the Constitutional Treaty*

Ultimately, what really matters is the content of the future treaty rather than its name. It is therefore very important to know the 'red lines' of those Member States which have yet to ratify; from this we may determine more precisely the scope for agreement in the IGC negotiation. In fact, it is expected that initially the two Member States where referendums have produced a negative result should state clearly the amendments that are required to make possible the ratification of the new Treaty in their respective States. In this regard, the French and Dutch proposals clearly favour the 'reduced Treaty' option.

In France's case, this is not actually its government's official position, since this cannot properly be known until Nicolas Sarkozy and the new French Government take an official position. In any case,

the next President already presented a proposal for a new Treaty in a speech before the Friends of Europe Foundation on 8 September 2006. The Sarkozy proposal advocates a mini-treaty and its basic premise is that France will not call another referendum to decide on the same text. However, Sarkozy is in favour of reaching a new agreement, since ‘the Nice Treaty is inadequate because it does not enable the Union to function with 27 Member States’. The new treaty would, according to Sarkozy, be a mini-treaty that would only cover the EU’s most pressing needs, leaving all remaining reforms for a second phase that, in any event, would be postponed until after 2009, although no date is actually specified for this, and it could well be thought that if Sarkozy’s views prevail, none ever will be. The content of the mini-Treaty will be as follows: the provisions concerning the configuration of the qualified majority in the Council through the dual majority system (Member States and population); the extension of qualified majority voting and co-decision voting; the election of the President of the Commission by the European Parliament; the stable presidency of the Council; the creation of the position of EU Foreign Minister; citizens’ legislative initiative mechanisms (based on a petition presented by at least one million citizens) and enhanced cooperation; and the express attribution of legal personality to the EU. In addition, to avoid lengthening the debates in an IGC that would have to be short, Sarkozy proposes not to tackle the thorny issue of the reform of the Commission, but instead to postpone the discussion until 2014 and set up a new Commission in 2009 in accordance with the current rules in force. The Sarkozy proposal also includes other important aspects. Of note are the delicate issue of Europe’s geographical limits (differentiation between Member States and states with a preferential partnership), the financing of the Union and the need to modernise the EU’s policies on immigration, environment, energy, defence and monetary policy. However, what particularly stands out is his advocacy of variable geographic groups in certain areas, which he argues can be useful, ‘depending on the subject’. There would be no need for a referendum.

As for the Dutch government, in a letter sent to its national parliament dated 19 March 2007 it set out its position in some detail, making it quite clear what was needed for this country to be able to ratify a new Treaty (*Letter from the Minister of Foreign Affairs and the Minister of European Affairs to the House of Representatives on the status of discussion on a new European treaty*), apparently without the need for a referendum. From the outset, the proposal takes a constructive approach, accepting the need for a debate about a new treaty on the (substantive) basis of the current CT (‘it is almost self-evident that certain elements of the Constitutional Treaty will be drawn on’). This is basically for two reasons. First, because ‘many Member States have already ratified the text’. And, secondly, because ‘parts of the Constitutional Treaty will be useful in fulfilling the Netherlands’ desire to strengthen democracy and the EU’s capacity for decisive action’. It then goes on to establish the Netherlands’ red lines. The main one is to remove from the CT its constitutional nature (*a treaty without the characteristics of a constitution*). Thus, the proposal starts by demanding that the political primacy of the Member States should be made clear and that the EU will not become an autonomous organisation. Little detail is given as to how this requirement would be put into practice, but some argue that this would involve, for example, removing the provision concerning the Union’s symbols (Article I-8), the express reference to the legal supremacy of Community law (Article I-6) –although maintaining the meaning given to this by the case law of the Court of Justice– and, of course, erasing any references which suggest a constitutional nature. Obviously, this requires giving up any option of re-founding the Union (Article I-438) or repealing the previous treaties (Article I-437). What is clearly required is a treaty that simply amends the existing treaties. By contrast, the letter is clear that the new treaty should not include the full text of the Charter of Fundamental Rights (part II of the CT), although it does accept the latter’s legal nature. To combine both positions, it proposes including in the new treaty an *ad hoc* legal basis which would allow the EU to accede to the European Convention on Human Rights, which is a similar provision to that contained in part I of the CT (Article I-9.2). The Dutch government is also in favour of retaining the provisions of the CT that regulate the participation of the national parliaments in the control of the subsidiarity principle, and proposes reinforcing such participation in an attempt to increase democracy in the EU. It also advocates the express inclusion

in the new treaty of the criteria for future enlargements of the EU, which we take to mean the Copenhagen criteria. Finally, the Dutch government identifies policy areas where it is in favour of greater European cooperation, namely energy, cross-border environmental problems (including climate change), asylum and immigration, terrorism, international crime, European economic competitiveness and foreign affairs.

Lastly, we cannot overlook the positions of Poland and the Czech Republic. Poland has consistently demanded the inclusion of a reference to Christian roots and, much more worryingly, a renegotiation of the dual majority mechanism in the Council contained in the CT. Further, Poland's general anti-European tone in delivering its proposals causes concern. The Czech Republic is also critical and is clearly opposed to the CT, and at the very least demands that the new Treaty be shorn of all constitutional elements, including the title of *Minister* of Foreign Affairs for the High Representative for CFSP.

*(b) The Irreducible Requirements of the Member States that have Already Ratified the Constitutional Treaty*

However important the above 'red lines' may be with a view to attaining a new consensus in the Intergovernmental Conference, they are not the only ones on the table. It is natural that the 18 Member States which have already ratified should also limit the concessions that they are prepared to make, although it is still expected that these concessions will be significant ones. Thus, the agreement reached at the summit meeting held in Madrid by the 'Friends of the Constitution', as well as showing their willingness to renegotiate certain contents of the current CT, included certain elements which were probably there in an attempt to meet the particular sensitivities of those Member States most reticent about ratification. Thus, it was proposed to include 'the accession criteria for new Member States' (the Copenhagen criteria) which was perhaps an attempt to meet some of the internal criticisms that had arisen in France and the Netherlands. The same could be said of 'strengthening European immigration policy'. And the proposal regarding 'perfecting the control mechanisms of subsidiarity' might be aimed at British worries about a loss of sovereignty and the Dutch requirement of greater participation of the national parliaments. Equally, reference is made to the 'development of an energy policy' which, in addition to addressing a general and growing concern of the Union and its citizens, was one of Poland's particular concerns, while a 'greater coordination of national economic policies' and the development of a 'European social area' might be aimed at assuaging some of the heavier criticisms made of the CT in France.

That said, the agreement reached in Madrid was too vague and general. Its most important contribution was, without doubt, that it showed the readiness of the Member States which had already ratified in question to make changes to the text of the CT. In any event, these countries cannot be expected to show all of their cards before the start of the negotiations, which are bound to be complex.

*(c) The Probable Content of the New Treaty: A 'de minimis' Solution*

In our view, Sarkozy's proposed mini-Treaty can be criticised for a number of reasons. First, it retains none of the CT's essence. Rather than pruning the Treaty, Sarkozy proposes mutilating it beyond all recognition and reducing it to an absolutely insufficient bare minimum. Secondly, it only covers the institutional dimension and overlooks important substantive matters, such as everything relating to new competences in the defence area, or as regards Freedom, Security and Justice which, according to the proposal, would be initiated by the European Parliament. Thirdly, the proposed solution regarding reform of the Commission clearly infringes current law, which requires a new regulation for the Commission to be established in November 2009. The Dutch proposal is also clearly *de minimis* and raises very similar doubts to the Sarkozy proposal. However, being realistic, it does at least offer a starting point for negotiations.



In our opinion, therefore, the irreducible elements must be clarified if there is a genuine will to retain the essence of the CT. The four parts of the CT include elements which should be maintained, although part I is obviously the one with the most important new features. In **part I**, then, the non-negotiable elements would be as follows:

- The classification and definition of competences, as well as control of subsidiarity contained in an annexed protocol (early warning mechanism) and the widening of competences to cover areas like energy, tourism and administrative cooperation. It should also include freedom, security and justice as an area of shared competence of the Union (Article I-14.3).
- Institutional reforms, in particular the stable presidency of the Council (Article I-22), the position of the Minister for Foreign Affairs (Article I-28), the strengthening of the position of the European Parliament (including its position in the flexibility clause contained in Article I-18 or the budget) and the increased number of situations where qualified majority voting instead of unanimity will be used in the Council (more than 40). In our view, the new voting system in the Council based on the dual majority of Member States (55%) and population (65%) (Article I-25) should also be retained.
- The solidarity clause (Article I-43).
- The popular initiative of one million citizens (Article I-47).

This does not mean that we are not in favour of including the rest of part I. Matters such as the legal personality of the Union (Article I-7), new legislative acts (Articles I-33-39), the regulation of the Union's values (Article I-2) and objectives (Article I-3), primacy (Article I-6), citizenship (Article I-10), enhanced cooperation (Article I-44), structured cooperation in the area of defence (Article I-41.6) and the Union's policy vis-à-vis its neighbours (Article I-57) are also very important. However, they can all be deduced from the law already in force or the case law of the Court of Justice. More complicated is the position of issues like the voluntary withdrawal of a Member State from the Union (Article I-60) –its being based on the Vienna Convention on the Law of Treaties causes some controversy– or the status of churches (Article I-52), whose omission could give rise to serious opposition in different Member States. On the other hand, removing the provision related to symbols (Article I-8) or references to certain elements that some Member States consider to be constitutional in nature seems to be the price to be paid to obtain a consensus. This price should not, however, include the dual legitimacy of the Union (Article I-1).

As regards the Charter of Fundamental Rights contained in **part II**, both its contents and its legally binding nature must be left unaltered. How this is achieved could be subject to negotiation. Thus, including a single provision in the new treaty that refers to the Charter as a whole, at the same time as giving the Union the competence to accede to the European Convention on Human Rights (Article I-9.2), must be non-negotiable. Otherwise, an essential substantive aspect of the CT would be mutilated.

**Part III** obviously creates some serious difficulties. It cannot be simply removed, since some of the new features in part I are necessarily developed in it. Take, for example, questions as important as the legal standing of the Committee of the Regions before the Court of Justice (Article III-365.5), the powers of the European Parliament with respect to budgetary matters (Article III-310), or the increased number of situations to be decided in the Council by qualified majority voting. Equally, the new competences related to the area of Freedom, Security and Justice should be retained (Articles III-257-277) as a result of being considered as a shared competence in part I (Article I-14.2j), and it will probably be necessary to extend further competences in the areas of energy or the environment, with respect to climate change. That said, many other provisions in part III can clearly be removed because they already form part of the *acquis*.

Finally, from **part IV** we should retain the ordinary revision procedures (Article IV-443), the simplified revision procedure (Article IV-444) and the simplified revision procedure concerning internal Union policies and action (Article IV-445). As regards the remaining provisions, they will obviously have to be adapted to fit the nature of the new treaty, although they will probably not include the repeal of earlier treaties (Article IV-437) or the constitution of a new Union which is the legal successor to the current EU (Article IV-438).

In our opinion, the above would be the absolute ‘bottom line’. Anything which went beyond this would mean that the essence of the Treaty had not been retained.

#### **4. The Need for Fresh Ratification by *all* Member States: The Impossibility of Retaining Alternative Mechanisms to New Ratification**

In the light of the likely terms of the negotiations, it seems clear that whichever path is taken, the text resulting from the IGC will have to be ratified afresh by all Member States. It is true that there are some interesting ‘legal engineering’ proposals being mooted whose aim is to avoid the need for the 18 Member States who have already ratified the CT to go through the ratification process again, on the grounds that –simplifying to some extent– ‘whoever has ratified the most has also ratified the least’. But in our view, as soon as the final solution goes beyond the inclusion of simple protocols or declarations as was done to resolve the ratification crises involving Denmark (the Maastricht Treaty) and Ireland (Treaty of Nice), the new treaty will involve reforms of such magnitude that it will be practically impossible to avoid a fresh ratification process for all. It is a new negotiating process that will lead to a new treaty and, as such, it will have to be ratified afresh. Whether it is called a framework treaty, a founding treaty, a simple reform treaty or whatever, under no circumstances will it include the word ‘constitutional’.

A very different issue is whether those Member States like Spain who held an internal referendum prior to depositing the instrument of ratification would have to go through the same process again or whether they could make use of alternative mechanisms. In the case of Spain, this would mean authorisation through passing an organic law (*ley orgánica*) in accordance with article 93 of the Spanish Constitution.

#### **IV. FINAL CONSIDERATIONS: TOWARDS THE INEVITABILITY OF FUTURE MECHANISMS OF CONSTITUTIONAL FLEXIBILITY**

As things stand, ‘reach an agreement by whatever means possible’ on the grounds that ‘anything is better than a second failure’ seems to be the attitude of many. And in practice this will probably mean that a genuinely lowest common denominator agreement will prevail. A new treaty which would amend the current founding treaties and include the most significant institutional reforms of the CT, certain new competences with regard to immigration, energy and climate change and otherwise maintaining the status quo. Perhaps it is true that the needs of *realpolitik* leave no room for anything else at present. But at least the failure of the CT should make it necessary for everyone to engage in some fundamental reflection about the shape of the EU for the next decade.

First, under no circumstances should we accept as a starting point for this debate the false and counterproductive contrast that some try to make between the ‘Europe of results’ –supposedly pragmatic, realistic and ‘step-by-step’– and the ‘Europe of the Constitution’, where the CT is unfairly and deliberately distorted as being a utopian dream for a politically impossible Europe. The so-called Europe of results effectively continues to function with or without the CT. That being so, for the EU it would be advisable to have a ‘Europe of the CT’, which introduces the amendments needed to carry out a general redesign of the building –or the minibus, in the words of Iñigo Méndez de Vigo– meant for six Member States at the time of the Cold War and European division so as to be able to meet the needs of its current 27 tenants at a stage in the globalisation process which is far removed from that of 50 years ago.

Secondly, if we really want the successes of the last 50 years of European integration to continue into the future, certain things will have to be explained better, such as the achievements and benefits that EU membership provides in our daily lives. Otherwise, it will be difficult to reawaken the European dream and transmit to future generations any enthusiasm for the European project.

Thirdly, one clear lesson that can be extracted from the current situation is the pressing need to do something about the heavy burden of a system for revising the treaties which requires ratification by all Member States. If we want the Union of 27 to advance and to have genuine mechanisms to enable future *deepening* of the Union, alternative revision mechanisms will have to be examined. Here, the so-called small reform of the ECSC (former Article 95 of the ECSC Treaty) could be a starting point for this difficult debate. Obviously, we are fully aware of the problems created by the fact that any amendment of the need for ratification by all Member States will itself have to be approved on the basis of unanimity, and that some will resist this possibility.

Finally, in the light of the last point we believe that sooner or later the EU will have to consider very seriously the need to use mechanisms of *constitutional flexibility* or *constitutional enhanced cooperation*, or whatever we want to call them. In other words, mechanisms which, while retaining what has been achieved until now for all 27 Member States, allows those who want to go further to do so. Whether we like it or not, the fact is that (almost) irreconcilable positions as regards the future model of integration currently co-exist within the current Europe of 27.

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