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**Briefing Paper for the European Parliament**  
**“Issues and context of the period of reflection on the European constitution”**

**1. Should the European Constitutional Treaty be salvaged?**

The text that 28 governments (including Bulgaria, Romania and Turkey) signed in October 2004 would certainly be worth salvaging, but the possibilities to do so look increasingly faint. Ratification by every member state is needed for the Constitutional Treaty to come into force, as even the treaty itself stipulates in art. IV-447. However, after the two ‘no’ votes in France and the Netherlands, the commitment to continue with ratification has dissipated in many European capitals. Especially from the British and the new Polish governments, there are signs of indifference, if not clear opposition to the continuation of the ratification process. The same would be true for a possible new ODS-led government in the Czech Republic after the elections in 2006. In the other referenda countries (Denmark, Portugal, Ireland) it seems that no action will be taken as long as the French and Dutch governments do not clearly state that (and how) they intend to get beyond their national no-votes.

A call for a re-vote would therefore be unavoidable, but it would be politically suicidal for the current government in both countries. It therefore would depend on a new political leadership to announce such a step, but this would imply ‘freezing’ the process until 2007. Latest signals coming from potential future leaders do not suggest that they are willing to take this risk even then. Certainly a second referendum in France and the Netherlands would face the accusation of “ignoring the voters’ choice”. And without a change of the current economic conditions, a second failure would also not be unlikely. Particularly in France the ‘no’ was strongly motivated by citizens’ dissatisfaction with high unemployment and a sluggish economy.<sup>1</sup>

If one has to concede that the current Constitutional Treaty is unlikely to be salvaged in its current form, it seems ironic that the text actually addresses some of the key concerns about the current institutional set-up of the EU. Few would argue that the status quo is more transparent, democratic or efficient. As a compromise between many national and political preferences, the text would have improved the EU while remaining sensitive to national identities and interests. It is not as clear and short as many had hoped for, but

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<sup>1</sup> See Flash Eurobarometer 171, “La Constitution européenne: Post-Référendum France”, June 2005

given the developments in the last few months, it is highly questionable whether leaders will be able to agree on a new one, not to speak of a better one. Consequently, the present Constitutional Treaty would certainly deserve to enter into force, but as this looks very unlikely to happen, an alternative way to salvage its 'essence' should be explored.

## **2. What could be the main features of an alternative to the current text?**

In the current situation one has to acknowledge that there is no 'silver bullet' solution. Every scenario that can be envisaged will meet serious objections and reservations.<sup>2</sup> With the challenges for an enlarged EU remaining unsolved, simply hanging on to the current treaties is not a viable solution. Integration without treaty change (e.g. through inter-institutional agreements) cannot solve most of the challenges for an enlarged EU and will add to the lack of accountability and transparency. Amending the existing treaties with single elements will unravel the complicated 'package deal' of the current text and it is very questionable whether a new compromise can be reached. I therefore propose to look closely at a possible solution that has already been brought forward in the Convention. It should be reconsidered in view of the fact that conditions for the ratification of the current text have changed so dramatically.

As a first step, (most of) **Part III should be dropped from the Constitution**. A Constitution should define the values and objectives of the political entity to which it applies, determine the legal instruments and the allocation of institutional powers as well as name the basic rights and duties of the citizens in relation to the authorities. With its focus on policy, Part III clearly goes beyond the realm of a Constitution and the referenda have shown that it attracted most of the criticism. Many citizens (but also an increasing number of political leaders) criticise the length and complexity that Part III adds to the text. It often creates the wrong impression of introducing innovations, while in most cases it just reflects the 'acquis communautaire'.

As a second step, the 'package deal' of **Part I should be kept as much intact as possible**. This is especially important concerning the particularly sensitive Titles III, IV, V and VII, which were extremely controversial among the negotiating parties. A new effort should firmly build on the basis of the present text in order to avoid the pitfalls of full re-negotiations. Anyone who followed the difficult constitutional process knows that any new text would have to be a compromise not so different from the current one, if it is to be acceptable to all national and political preferences involved. Most elements of the new institutional arrangement are part of a larger compromise and renegotiations would see the same trade-offs all over again.<sup>3</sup> In a political environment that certainly has not become more favourable for bold moves on European integration, it is even less likely now that a new 'deal' can actually be reached than it was a year ago. Some governments seem to have understood the no-votes as a mandate to defend even more vigorously what

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<sup>2</sup> See for some of the scenarios: Sebastian Kurpas, *Should ratification proceed? – An Assessment of Different Options after the Failed Referenda*, CEPS Policy Brief No. 75, June 2005.

<sup>3</sup> See for greater detail: Sebastian Kurpas, *What could be Saved from the European Constitution if Ratification Fails? – The Problems with a 'Plan B'*, CEPS Policy Brief No. 70, May 2005.

they define as their ‘national interest’ and rallying cries like Jan Rokita’s “Nice or death” could be heard more often this time round.

For the negotiations there should be **two guiding principles** against which any change of the current text needs to be measured and justified:

- The delicate overall balance that has been established by the current text between the supranational aspects (standing for a Union of Citizens) and the intergovernmental aspects (standing for a Union of Member States) should not be altered.
- The coherence and simplification that Part I brings to the Union’s institutional framework must be respected (e.g. the abolition of the pillar structure, the clearer division of competences and the reduction of legal instruments).

A Constitution without Part III implies of course that the old treaties remain in force and cannot be repealed as foreseen by art. IV-437. The old treaties would certainly have to be adapted so that they are not in open contradiction with the innovations of Part I.<sup>4</sup> The only articles from Part III that should be maintained as part of the Constitution are those to which there is a direct reference in Part I. These articles could either become integrated in Part I or – preferably, in order to keep the main text short – feature in a separate legal text annexed to the Constitution. Existing references to Part III in its entirety would have to be replaced by references to the then consolidated versions of the existing treaties.

The exclusion of Part III will probably give rise to three objections:

Firstly, it is likely to be said that the insistence on Part I (and possibly the Charter of Fundamental Rights) means the introduction of the Constitution ‘through the back-door’. However, this argument can be adduced against *any* attempt to introduce an element of the current constitutional text. Despite strong reservations from this author, a compromise could be that only the titles on competences and institutions (essentially articles I-11 to I-44) would be part of a new treaty. This text would then certainly no longer merit the title of a “Constitution” and would be more of a “Basic Treaty”<sup>5</sup> establishing a simpler, more coherent and efficient institutional framework for the EU. However, this clearly runs the risk of breaking up the package deal and forfeiting the coherence of Part I. The strong political signal of the word “Constitution” for a more integrated Union would also be lost, although this might actually make subsequent ratification in a number of member states easier.

Secondly, there are concerns that the old treaties would become ‘second-class’ law that eventually might become subject to lighter revision procedures (e.g. by a super-qualified majority). To accommodate these concerns, it could be envisaged to introduce an article to the Constitution that explicitly rules out such a development. (Looking towards future treaty revisions in the enlarged EU, it would of course be highly desirable to move to a

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<sup>4</sup> Example: Obviously, if the Constitution defines qualified majority voting and co-decision as the rule, the old treaties cannot continue to make it the exception.

<sup>5</sup> Corresponding to the German word “Grundlagenvertrag”

revision procedure that does *not* demand unanimity – at least for parts of the existing treaties. Unfortunately, this is something that the present text also does not provide.)

Thirdly, there are objections that the legal coherence of the present text would be lost. This concern has to be acknowledged since the existing treaties (in a consolidated form) would continue to apply next to the new Constitutional /Basic Treaty. However, given the difficult circumstances for the ratification of the current text, it should not become an unsurmountable obstacle.

c) There are certainly also items for a ‘wish-list’ to **improve the current draft**. Better provisions for flexible integration within the treaty framework and a lighter procedure for treaty revisions than foreseen in Part IV (possibly with a super-qualified majority for certain parts of the treaties) would feature among these. However, – as already mentioned above – this seems to be an unrealistic aim at present and one should be extremely careful with such demands, because they are certain to trigger calls for amendments to other parts of the package deal.

### **3. Which other reforms should be prioritised?**

a) Concerning other **institutional reforms**, the European Parliament should pursue the idea of introducing at least a limited number of seats to be won by direct mandates. This would make MEPs more independent from national party control and strengthen democracy at the European level.

Concerning the European Commission, it will be important that the size of the college of Commissioner will be reduced *considerably* after the next enlargement. Art. 4 of the ‘Protocol on Enlargement of the Union’ foresees a reduction, but does not specify a number. If the Constitutional Treaty (according to which a reduction would only happen in 2014) should not come into force before the next enlargement, the solution that the Constitution proposes should be introduced (2/3 of the number of member states, art. I-26.6).

b) Concerning **policy reform**, the guiding principle in all activities that the EU takes on must be the principle of subsidiarity and the question of ‘European added-value’. Research and development as well as the vast field of JHA-related issues (counter-terrorism, border control, immigration and asylum) are two sets of policies that clearly qualify. However, the current crisis should not lead to unconsidered activism and announcements that create unrealistic expectations among citizens. The EU cannot do the member states’ job in such areas as social and labour market reforms or the consolidation of their budgets. Therefore it should also avoid creating such an impression.

Despite the progress already made on the Common Agricultural Policy, further steps must be taken and the overall spending at the EU level should indeed shift more courageously towards other sectors. However, it is important to ensure that a reduction in spending on the highly-integrated CAP does *not* mean a reduction in the overall EU budget, as some critics of the CAP might envisage. In contrast to agriculture, spending on R&D is still mostly national and a joint European effort would represent a real ‘added-

value', as it would help foster cross-border exchange and avoid duplication of national efforts.

Foreign and defence policy are also among those areas where – according to numerous polls – many Europeans would like to see a stronger European engagement. However, more visibility for the EU in this sensitive field is unlikely without clear support from the member states. For the time being, the EU should therefore concentrate on its successful approach of delivering on concrete projects instead of focusing on high-level politics and diplomacy. The EU military mission 'Althea' in Bosnia-Herzegovina, its first peacekeeping mission outside of Europe 'Arthemis' (in Congo) or the establishment of the European Defence Agency provide good examples of Europe's added-value and the success of this approach.

#### **4. What should the EU do to reconnect with its citizens?**

It is essential that the 'period of reflection' does not become a period of inaction, because the current crisis is only a symptom of a bigger problem between the EU and its citizens. With or without the European Constitutional Treaty, Europe's politicians must engage their citizens in European policy initiatives at an earlier stage of the decision-making process. It is not sustainable that European policy only 'hits home' when it is already too late and people perceive it as a bureaucratic act that is being imposed on them. Instead of just 'selling' the Constitution, the period of reflection must therefore directly address the larger malaise that characterises the attitude of a growing part of the population towards the EU.

As a clear signal of their determination to reach out to the citizens, European politicians need to subscribe to a hard compact that addresses the democratic and communication deficits of the EU with concrete measures. The main aim of such a '**Citizens Compact**'<sup>6</sup> would be to establish an effective 'European Democratic and Civic Space', which would serve as a follow-up to the relevant discussions in the European Convention.

The Citizens Compact would aim to establish better conditions for debate on the future direction of the EU. It would foster a European dimension in the national debates by improving the 'vertical' links between the national (regional, local) level and the European level as well as the 'horizontal' links among the different national forums. This would help to counter the 'nationalisation' of the EU debate, as occurred in France and in the Netherlands.

The initiative for the Compact must represent a concerted effort on the part of all European institutions and should go beyond a mere declaratory text. Through the adoption of the Compact, binding commitments on its basic content must be obtained from all political actors involved. It would be **appropriate for the initiative to be launched by the European Parliament**, as it is the elected representative of the EU citizens and is the EU institution that is best placed to coordinate such a process with the necessary legitimacy. Political parties at the national and the European level should be

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<sup>6</sup> See for more detail: Sebastian Kurpas et al, *A Citizens Compact – Reaching out to the Citizens of Europe*, EPIN Working Paper No. 14, September 2005

closely associated with the process. National governments and parliaments as well as regional and local actors will have an important role in presenting the Compact to the citizens. In cooperation with actors from the European level, they should use their high profile within their respective constituencies to raise awareness for this initiative.

Concerning its content, the Citizens Compact must include commitments for better communication from European and national actors, short-term structural changes and the development of a long-term strategy to tackle the EU's democratic shortcomings. It must deliver practical and visible measures such as the following:

- National parliaments should participate more strongly in the controversies on core European issues through earlier and intensive debates about EU initiatives.
- Every six months governments should explain their positions on the priorities of the EU presidency in their national parliaments.
- EU actors (MEPs, Commissioners and top officials) should participate more intensively in national debates about European issues and contribute to a better understanding of the European political processes among citizens.
- National governments should regularly publish information bulletins about the latest EU initiatives and decisions.
- Public fora about European issues should be established in every member state with speakers coming from national politics, from the EU level and other member states as well as representatives from civil society.
- Uncontroversial elements of the Constitutional Treaty that strengthen EU democracy could already be adopted through inter-institutional agreements.
- A White Paper on the establishment of a 'European Democratic and Civic Space' in the EU should be elaborated.
- In the future important legislative acts should contain an impact assessment of the consequences on citizens' lives.

This list is by no means exhaustive, but it shows what could be possible, if resources are made available and political determination prevails over the current feelings of crisis and perplexity. In this sense, it could be a successful initiative in creating a crucial sense of ownership on the part of citizens towards the European Union.