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Deadlock avoided, but sense of mission lost?

The Enlarged EU and its Uncertain Constitution

Sebastian Kurpas and Justus Schönlau*

The assertion that the enlarged EU will become dysfunctional under the current treaty provisions has been one of the strongest arguments in favour of the Constitutional Treaty. Also after the two 'no' votes to the text, political leaders continue to see the necessity of institutional reform. Jacques Chirac and Tony Blair, neither of whom is keen to resume the ratification process as such, have stressed independently that the issue needs to be addressed in the near future. The British Prime Minister argues that the EU cannot function properly with 25 member states under today's rules of governance, adding "Having spent six months as EU president, I am a good witness of that."[1] His French counterpart even predicted that the status quo would eventually "condemn the EU to inertia and paralysis."[2]

A growing number of political leaders have signalled their intention to resolve this impasse by discarding the Constitution as an integral document and 'cherry-picking' certain provisions.[3] We argue that this would be highly regrettable as leaders would then forfeit the most compelling quality of the Constitution: its powerful symbolic value as a statement in support of a re-enforced political union.

This Policy Brief investigates whether the Constitution's coming into force would make a decisive difference compared to the status quo. In the first part the authors therefore take a closer look at concrete institutional aspects to illustrate how the EU is currently performing. At the same time they ask whether the Constitutional provisions would have changed the Union's efficiency decisively for the better. In the second part the issue is put into a broader context analysing especially the Constitution's symbolic importance and its implications for the balance of power between the EU institutions. Annexes 1 and 2 offer an overview of the debate and scenarios for the future of the Constitutional process as of February 2006.

I. The impact of enlargement on the EU's institutional functioning: So far, so good

Over the past few months, the 'cost' incurred by not having a constitution has been a question posed with growing frequency, but so far no satisfactory answer has been given. This is partly due to the speculative nature of the question: How would the EU function with a Constitution that it currently does not have? While many predict a deep crisis in the basic functioning of the Union in a not too distant future, others claim that the institutions are actually coping with enlargement quite well and that this might continue to be the case. The question is thus whether there is reason for optimism or whether the current situation resembles that of a person jumping off the roof of a house calling out: "Until here, everything went well…" And if the latter were the case, would the Constitutional Treaty really provide the rescue net that could ensure a soft landing for the EU? A look at the different institutions and some of the key changes that the Constitution would have introduced helps to shed some light on these questions.

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

Innovations affecting the Council are the ones cited most frequently when arguments in favour of the Constitutional Treaty are made. One central element was supposed to be the new rules for the weighting of member states' votes under qualified majority voting (qmv), which were designed to reduce the danger of blockage in a more diverse Union. Calculations have proved that the introduction of the 'double majority system' would indeed make it much easier to avoid the formation of blocking minorities with 25 member

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* CEPS Policy Briefs present concise, policy-oriented commentaries on topical issues in European affairs. *Sebastian Kurpas* is a Research Fellow and *Justus Schönlau* is an Associate Research Fellow at CEPS. Their contribution presents the preliminary findings of an ongoing research project at CEPS aimed at assessing the functioning of the EU institutions in a post-enlargement environment, with a special focus on the Council of Ministers.

[1] Tony Blair, speech on the Future of Europe, Oxford, 2 February 2006 (http://www.pm.gov.uk/output).

[2] Jacques Chirac, New Year's address to the Diplomatic Corps, Paris, 10 January 2006 (http://www.elysee.fr).

[3] See Annexes 1 and 2 for details on the state of the debate.

Thinking ahead for Europe

states.[4] So far, however, figures on the voting reality do not confirm the widespread fear of deadlock after enlargement while the Nice system of weighting votes is still in place.[5] This can be explained by the fact that voting has not become more frequent and still represents the exception. Even when votes are taken, usually only one or two countries vote against or abstain, just as it was the case before enlargement. Interviews with Council officials indicate that the tradition of consensus-building has been maintained after enlargement, which implies that voting continues to be avoided when possible. Member states still try to accommodate each other's interests, so that the advantage of the new system would only unfold if this 'consensus culture' were to change in the future. Observers also mentioned that the larger number around the table since enlargement has indeed lead to atmospheric changes that make consensus-building more time-consuming. It is questionable, however, whether mechanical changes to the voting system would actually serve as an adequate substitute, if this culture of consensus were to dissipate over time. The main advantage of the double majority system thus lies rather in its greater transparency and the justifiability of the weighting of the votes, which would improve the overall legitimacy of majority decisions.

2. Qualified majority voting as a rule (Art. I-23.3) & the extension of its application

More important in terms of efficiency than the actual voting weights seems to be the difference between issues decided under unanimity and those decided under (whatever kind of) qmv. The mere *possibility* of proceeding to a vote is likely to change the logic of negotiations, because the technique of taking one issue 'hostage' in order to obtain concessions on another (sometimes unrelated) issue will not work anymore under qmv. While under unanimity any member state can block a decision, under qmv this would only be the case if the member state in question used its position to 'swing' the vote from adoption to rejection. In practice, however, that has never succeeded under qmv so far. The extension of qmv would thus contribute to more efficiency. There are still no reliable data to confirm that more projects are blocked under unanimity now than before enlargement, but the potential with 25 member states is certainly greater than with 15. So far member states have not shown a general change in attitude when they have a veto, and observers from within the system insist that no 'old versus new' split as such has emerged. However, the initial positions of certain old member states on the services directive or on the continuing restrictions on access to their labour markets on the one hand and the position of some new member states on the VAT exemptions on the other suggest that negotiations on important dossiers may become more difficult in the future. While the Constitutional Treaty would have introduced qmv as the regular voting procedure and altogether about 50 articles would have either moved from unanimity or would have been newly introduced under qmv, it must be stated clearly that none of the issues that have been problematic since enlargement would have actually come under qmv.

3. Permanent European Council president (Art. I-22)

An important change that would occur in the Council is the introduction of a permanent president of the European Council. The system of the rotating presidency had been criticised even before enlargement for its lack of coherence and the constant change in priorities. Although there are already mechanisms in place to coordinate the efforts of each 6-month presidency with the one preceding and following it, it is obvious that each government uses the position to promote issues that are in its own special interest. A permanent president, who would be elected for a term of two and a half years, renewable once, would be in a better position to provide continuity. After the last enlargement, member states will only hold the presidency every 12 ½ years, so that the argument of fostering a sense of 'ownership' towards the EU has become less pertinent. Also, European summits now mean that there is a considerably higher number of delegations in the room and 'running' the Union of 25 generally puts a larger burden on the presidency. The European Council, which "shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof" (Art. 4 TEU), finds itself in an increasingly difficult position to fulfil this task. However, it also has to be said that the notion of a permanent president of the European Council has been a very contentious issue in the past with mainly small member states opposing it for fear of having the Commission weakened.

There are still doubts about a potential rivalry between the Commission president and the permanent president of the European Council which could lead to 'turf wars' and less overall efficiency in the end. It also seems somewhat contradictory that such a potentially problematic structure would be created at the highest level while the Constitution actually seeks to abolish it in the field of foreign

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[4] Richard Baldwin and Mika Widgrén, "Council Voting in the Constitutional Treaty – Devil in the Details", CEPS Policy Brief No. 53, July 2004 (http://shop.ceps.be).

[5] Statistics from the Council provided to the authors actually show a disproportionately low number of negative votes or abstentions among the 10 new member states during the years 2004 and 2005.

policy through the creation of the 'double-hat' foreign minister. The Constitution would also not change much of the situation in the Council of Ministers with its different formations, as it would retain the rotating presidency (Art. I-24.7).[6] Despite these concerns, however, the current lack of political leadership in the EU reinforces the argument that a more diverse Union could potentially benefit from clearer structures for the presidency of the European Council.

4. Foreign Minister (Art. I-28)

Foreign policy is certainly one of the areas that would profit most from the Constitution's innovations. The current inefficiencies are, however, not specifically linked to enlargement as differences among member states have always existed in this policy area. Among the 'old' EU-15, there were neutral countries as well as NATO members. France in particular hoped for an independent *'Europe puissance'* while the UK remained deeply committed to its transatlantic approach and the special relationship with the United States. Even with the Constitutional Treaty, neither before nor after enlargement, could Europe have spoken 'with one voice' on all foreign affairs issues.

However, on questions where consensus can actually be achieved, the EU is likely to become more efficient. One could not claim that the EU has been 'deadlocked' in the field of foreign policy – on the contrary, as an increasing number of EU missions from Aceh to the Palestinian territories illustrate – but inefficiencies in the current institutional set-up are not even denied by the actors themselves.[7] As chair of the Foreign Affairs Council, the European foreign minister would be in a position to identify potential problems among member states at an earlier stage and develop an approach that would help to avoid open clashes, such as those that erupted during the Iraq crisis. With 25 member states, the potential for dissent (e.g. on EU-Russia relations or the Cyprus issue) has become greater, so that structures allowing for an early internal exchange and coordination would contribute to greater efficiency.

5. 'Permanent structured cooperation' on security and defence policy (Art. I-41.6)

Despite much activity in the field of foreign policy in recent years, the EU's progress on defence policy remains limited. The new defence agency aims to make military *spending* in the EU member states more efficient and to avoid duplication, but a coherent approach for a European defence *policy* is still missing. If reaching this aim proved to be impossible with 15 member states, it has certainly not become easier with 25. In this particularly sensitive policy field, the Constitutional Treaty would provide the EU with greater flexibility. While under current provisions (Art. 27 b TEU) military and defence matters remain entirely excluded from the possibilities of an 'enhanced cooperation', the Constitutional Treaty in its Art. I-41.6 would allow for a 'permanent structured cooperation' among a limited number of member states. The establishment of such cooperation could even be enacted with the consent of a qualified majority of member states. Without such a provision for flexibility, little progress on these matters can be expected in the foreseeable future. Eventually certain members might be tempted to move outside the treaty framework, as signalled by the behaviour of France, Germany, Belgium and Luxembourg when divisions between member states grew over the Iraq crisis.

6. Reduction of the number of Commissioners (Art. I-26.6)

Contrary to expectations, it seems not to be the Council that has so far encountered the biggest problems since enlargement, but rather the Commission. Clearly, factors other than enlargement have also contributed to the difficulties of the Barroso Commission. The problems that arose in the course of the approval process by the European Parliament already gave it a difficult start. The Constitutional referenda in several countries made the Commission hesitant to table controversial new initiatives and the weak economic performance of many member states fostered protectionist behaviour among national politicians who found the EU a convenient scapegoat. Most recently, the after-shocks of the French and Dutch 'no' votes left the EU with a sense of disorientation for several months. After the major achievements in the field of the common market and the single currency, the lack of a politically attractive and easily communicable mid-term 'project' also seems to be a problematic factor at the moment.

Yet, besides these external aspects, there are clearly also internal problems that have become more prominent with enlargement. The fact that Commissioners now come from 25 different national backgrounds has added to the diversity of views within the college. Coordination seems to have become more difficult – and not only between Commissioners from old and from new member states – as an increased number of public disagreements within the College (e.g. on the future of the Constitutional process, on REACH or on the services directive) have illustrated in recent months. A reduction in the number of Commissioners – as

[6] The only exception is the Foreign Affairs Council, which would be chaired by the Foreign Minister (I-28.3).

[7] See interview with Javier Solana, *E!-Sharp*, January/February 2006.

foreseen in the Constitutional Treaty – would thus hold out the potential of making the Commission more efficient and more independent from national influences. Art. I-26.6 of the Constitution states that their number should be reduced to "two thirds of the number of Member States" based on a "system of equal rotation". This step, however, would only be taken in 2014. Yet, the Protocol on Enlargement to the Treaty of Nice is already in power and foresees that when the EU includes 27 member states, the number of Commissioners will have to be reduced to "less than the number of member states". The protocol does not specify how many Commissioners there would be exactly, but the advantage over the provisions in the Constitutional Treaty is that this solution will already come into being with the accession of Bulgaria and Romania – thus, in 2008 at the latest.

7. Changing future treaties

The current debate about institutional reform shows that a Union of 25 veto players under the shadow of complex national ratification requirements is not well placed to adapt flexibly to change. The Constitutional Treaty would bring some procedural progress through the possibility of changing provisions on the EU's internal policies (Part III, Title III) such as the internal market, EMU or justice and home affairs without having to call an intergovernmental conference. However, according to Art. IV-445.2, unanimous agreement would still be needed for any change to the text, which is one of its biggest short-comings. Clearly, the Constitutional Treaty is an evolutionary step forward rather than an institutional revolution, so that further changes are likely to become necessary in a not too distant future. Especially in view of the Constitution's Part III – which deals mainly with the different policies and thus goes well beyond the traditional content of a constitution – it would have been important to introduce a 'super-qualified majority' to facilitate changes. Yet, even under the Constitution's provisions, the entire treaty *acquis* would remain hostage to national vetoes. Deadlock in this area can thus already be predicted.

II. The importance of the Constitutional Treaty beyond the institutional changes

The analysis of different institutional aspects has shown that so far the predicted blockage due to enlargement has not materialised. Does this mean that there is nothing to worry about for the foreseeable future? There are good reasons why one should be very cautious to give the EU the all-clear.

1. Long-term implications still unknown

Never before have so many new members joined the Union at once. This has changed the framework and the atmosphere for decision-making, namely in the Council. So far, the new member states have been mostly in a phase of intensive learning – a phase that most countries have undergone after joining the Union. It cannot be predicted at this stage how certain member states will behave once their administrative and political systems have developed a final routine. On the one hand, it could enhance the efficiency of the overall process as an increasing level of mutual trust develops, but on the other hand the decision-making process could also be slowed down, if and when new members should become more assertive.

2. Overall institutional balance

One cannot only look at the different institutions in isolation, but must see them in the context of the overall institutional framework of the EU. It is especially this delicate institutional balance that gives reason for concern. A weakened Commission does indeed have implications for the entire institutional set-up, since the 'supranational' institutions – the European Parliament and Commission – are *both* needed to balance the intergovernmental element represented by the Council. Moreover, the Council and the European Parliament, as the two legislative branches of the EU, are dependent on the Commission exercising its monopoly of initiative to keep the political process going.

A worrying aspect of the current situation is therefore the apparent difficulty of the present Commission to define a common internal line and to provide political leadership. One of the Commission's tasks has always been to defend the 'Community interest', which in a European Union of 25 is faced with an increasingly broad range of national preferences. Commissioners come from a greater variety of national backgrounds, and economic disparities between member states have become considerably wider. It lies beyond the scope of this paper to investigate to which extent this increased diversity means that the Commission does not dare to propose initiatives that might meet resistance from certain member states. If the Commission remains as timid as it currently appears, however, this could lead to an 'invisible' deadlock: Projects do not get stuck *during* the legislative process, because they got stuck *before*. Controversial initiatives – for example on economic issues – thus would be 'filtered out' even before a proposal is officially tabled.

Moreover, a hesitant Commission will further tempt member states to revert to intergovernmental cooperation outside the treaty framework, thus

threatening even elements of the *acquis*. The danger in this scenario is that it could set in motion its own disintegration dynamic: In such a context, it would become more difficult for the Commission to define the 'common European interest' and rally the necessary support for its policies from member states. The EU as a whole would become less efficient and effective and would thus lose legitimacy for lack of convincing 'output'. In this sense, an imbalanced institutional set-up may not immediately lead to deadlock as predicted, but rather to a slow erosion of the capacity to act.

Besides, the trend towards more 'intergovernmentalism' would also mean that the established democratic controls would be increasingly bypassed. Especially the European Parliament would risk being sidelined. By concentrating on intergovernmental agreements, the democratic deficit would be re-enforced – a trend that can currently already be observed in the area of justice and home affairs.[8]

The European Parliament itself, however, seems to have coped relatively well with enlargement so far. Its deliberative nature and its internal organisation in committtees and political groups make it well suited to deal with the increased national diversity and the higher number of MEPs.

3. The Constitution as a commitment to a political union

Finally, the question remains to what extent the commitment for a political union embodied by the Constitution would be missed if the project were to be abandoned and how this would affect the functioning of the EU. Figures from the latest Standard Eurobarometre confirm that while there is only limited popular support for the continuation of the *ratification process*, support for the *concept* of a European Constitution continues to be high in all member states.[9]

Few would contest that the Constitutional Treaty would have enhanced the democratic legitimacy of the Union. In addition to obvious features like the extension of the co-decision procedure, the election of the Commission president on the basis of EP election results or the citizens' initiative (Art I-47.4), articles providing for a more transparent division of competencies and more coherent and understandable legal bases for the Union's actions can be mentioned in this context. In fact, the abolition of the 'pillar structure' of the current treaties has been named by some observers in the institutions as one of the key innovations of the Constitution, and it is clear why: Effective democratic control of the Union's activities is only possible if it is clear who does what and to what extent. If the Constitution were not to enter into force, the 'democratic loss' would thus not only be a loss in substance, but also a loss in transparency.

Many of the decisions taken at the European level involve deep political choices, which require a democratic legitimisation that is independent (or at least distinct) from that of the individual member states. If this legitimisation cannot be provided, fading popular support and a growing resistance to EU decisions are likely to be the result, which then ultimately also affects the EU's efficiency.

III. Conclusion: Will an enlarged Union without the Constitution give rise to intergovernmentalism?

As the current debate shows, there are considerable divisions among political leaders on the EU's institutional future and it seems unlikely that the Constitutional Treaty will come into force within the next two or three years – if at all (see Annexes 1 & 2). If no agreement can be reached, the enlarged EU might even have to put up with the provisions of the Treaty of Nice for quite a while. At first sight, this might not be so dramatic, as so far the predicted deadlock cannot be detected. The Constitutional Treaty would improve the efficiency of the individual institutions to some degree, but – at least in the short run – it would not offer solutions for a considerable number of the current problems. Namely, it would not introduce majority voting to those policy areas that have turned out to be particularly contested in recent months.

These initial observations, however, should not lead to the conclusion that the loss of the Constitutional Treaty would not have serious implications. Institutions have to be regarded in relation to each other and there clearly is a problem with the balance between the EU's institutions at present. Surprisingly for many, it is not the Council that gives the weakest impression, but the Commission. While enlargement is certainly not the only reason for the relative weakening of the Commission, the conditions of the enlarged Union seem to have more of a negative impact on the Commission's supranational role than they have on the intergovernmental bargaining within the Council. Under these conditions, it has become more difficult for the Commission to define and *defend* the 'common European interest'.

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[8] Thierry Balzacq, Didier Bigo, Sergio Carrera and Elspeth Guild, *Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats*, CEPS Working Document No. 234, January 2006.

[9] Standard Eurobarometre 64, December 2005 (http://europa.eu.int/comm/public_opinion/archives/eb/eb64/eb64_en.htm).

In view of the limited prospects for restarting the Constitutional process altogether, the ultimate failure of the current text would not only mean the loss of the sum of its parts, but also the loss of a highly visible symbol of the EU's cohesion and its aim of an 'ever closer union'. Consequently, it would be the supranational dimension of the EU's institutional system that would suffer most. In the long-term, not only the text itself but also the political context in which the institutions have to operate, matter for the efficient functioning of the enlarged EU. The current effort to reform the EU's institutions would miss this important symbolic aspect if leaders concentrated only on salvaging isolated elements of the Constitutional Treaty.

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Annex 1. Overview of the debate

The immediate reaction of most political actors at both national and European levels to the 'no' votes in France and the Netherlands was speechlessness followed by a gradual process of coming to terms with the implications of the results. The European Council's announcement of a phase of reflection on 18 June 2005, was followed by a period of mainly silent brooding throughout the British Presidency. After this prolonged silence, an increasing number of national politicians as well as some European Commissioners and MEPs have recently begun to position themselves concerning the future of the Constitutional Treaty.

1. Developments against ratification

Signals from the two key countries – **France** and the **Netherlands** – have not been encouraging. In January the Dutch Foreign Minister Bernard Bot made clear that the Constitutional Treaty was dead for his government and that 'cherry-picking' of different elements was equally unacceptable.[10] Instead, the Dutch government has taken a rather defensive stand and is concentrating on a better enforcement of the subsidiarity principle.[11] The French President has not been as outspoken, but implied an ultimate failure of the current text when he proposed to take decisions for the improvement of the EU's institutional functioning already during the European Council meeting in June 2006 "on the basis of the existing treaties".[12]

Clearly, these governmental positions have to be put in context: there will be elections in May (the Netherlands) and June (France) 2007, and significant changes in the political set-up are likely in both cases. Hopes have been expressed that after these events, newly elected actors would use their fresh mandates to take action on the constitutional issue and might even put the current text to a second vote. However, so far signals point in a different direction. On the French centre-right, Nicolas Sarkozy as one of the key contenders for the presidency has positioned himself against a second referendum on the same text. Yet, unlike Chirac, he does not only want to take the existing treaties as a point of departure but also Part I of the Constitutional Treaty. According to Sarkozy, the new text would then have to be ratified by parliament only, thereby possibly avoiding a second referendum.[13] After the European elections in 2009, a new Convention should then be convened to elaborate solutions on a 'super-qualified majority' for fiscal matters, on future EU financing and on the borders of the European Union.[14] Sarkozy's main opponent on the political right, Prime Minister Dominique de Villepin, has been less clear, but he seems to be in line with Chirac's position in calling for means for a stronger European foreign policy "in the frame of the existing treaties".[15] De Villepin acknowledged the interest of German chancellor Angela Merkel not to give up on a treaty that has been approved by both German chambers of parliament, but he also pointed to the "constraints and wishes of the different states" as well as the "respect for the aspirations of our peoples".[16]

In both France and the Netherlands, political actors from the centre-left seem to be even less willing to make the unpopular decision of calling for a second referendum, as left-wing voters have disproportionately voted against the text. Especially the French PS has been deeply divided on this issue and is unlikely to risk another such rift. At a party congress in Le Mans in November 2005, a common motion was passed that accepted the outcome of the French referendum and called for the restart of the entire drafting process.[17]

[10] "The Hague says constitution is dead", 11 January 2006 (www.euobserver.com).

[11] The Dutch government organised jointly with the British EU presidency a high-profile conference on this issue under the title "Sharing Power in the Europe", 17 November 2005 in the Hague.

[12] Jacques Chirac, ibid.

[13] Nicolas Sarkozy, *Les Voeux à la Presse*, Paris, 12 January 2006 (http://www.u-m-p.org/site/GrandDiscoursAffiche.php?IdGrandDiscours=164).

[14] Nicolas Sarkozy, speech delivered at the Konrad Adenauer Foundation, Berlin, 16 February 2006 (http://www.botschaft-frankreich.de/IMG/sarkozy_europa_berlin_fr.pdf).

[15] Dominique de Villepin, speech delivered at Humboldt University, Berlin, 18 January 2006.

[16] Ibid.

[17] Parti Socialiste, 'Motion Finale du Congrès du Mans', 28 November 2005.

Besides the developments in France and the Netherlands, there is another possibility that makes the future of the Constitutional Treaty look even more difficult: namely, that of new governments coming to power which do not feel politically committed to ratification in their country anymore.

In **Poland,** this is already the case since Lech Kaczyinski of the eurosceptic Law and Justice Party (PiS) won the presidential elections in October 2005. PiS never supported the Constitutional Treaty and both PiS and the main opposition party, the liberal Civic Platform (PO),[18] believe that the EU can continue to function on the basis of the treaty of Nice. Recently Kaczynski called for a new constitution for which negotiations should start from scratch and which should better respect the views of the different nation states.[19]

A similar development can be expected in the **Czech Republic**, if the mostly eurosceptic centre-right party ODS should win the upcoming elections in June 2006. In both countries, referenda on the Constitutional Treaty were envisaged, but cancelled after the French and Dutch 'no' votes. These referenda can hardly be imagined to take place – let alone to be successful – if the respective governments campaigned against the text.

In the **UK** and **Denmark,** the governments have already signalled that they have little interest in continuing the ratification process. Both would have to hold referenda that would be very difficult to win. Tony Blair ambiguously stated: "I accept that we will need to return to the issues around the European Constitution".[20] The **Irish** government, under whose presidency the Treaty had been successfully agreed, has been even less clear about its views, but current public opinion figures suggest that a referendum on the text would also be difficult to win. In **Sweden** the government has shown no intention to submit the text to parliamentary approval unless the French and Dutch would make a fresh attempt at ratification.

In **Germany** and **Slovakia**, difficulties are of a different nature. In these countries the parliaments have approved the text with strong majorities, but the presidents of the two countries have not yet signed the ratification laws, because the Constitutional Courts were subsequently called to rule on the constitutionality of the ratification procedure. In both countries petitioners claim that ratification of the Constitutional Treaty would mean adherence to a 'European superstate' and that – if at all – a binding referendum would be required to allow such a step. The Court ruling in Slovakia is still expected for February 2006,[21] while the German Constitutional Court is unlikely to come to a conclusion before 2007.[22]

At the European level, the **Commission** has not been very visible in the debate since the ratification shock and has shown internal divisions on the issue. Last August, Commission President Manuel Barroso stated publicly during a visit to Warsaw: "In the foreseeable future we will not have a Constitution. That's obvious. I haven't come across any magic formulas that would bring it back to life."[23] Instead of "never-ending debates about institutions", he urged Europe to "work with what we've got".[24]

The first Vice-President and Commissioner for Communication Margot Wallström has been less outspoken and is concentrating on keeping the Commission's options open. Her contribution for the reflection period – 'Plan D' for democracy, dialogue and debate – was clearly placed in the constitutional context but also indicated that it was not a 'rescue plan' for the Constitution. It therefore does not contain any statements as to what should happen to the text, but rather a series of measures to improve citizens' involvement in EU politics and the responsiveness of the Union's institutions.

The first Commissioner to come forward with concrete suggestions on the Constitution was French Commissioner Jacques Barrot. However, he clearly did not speak on behalf of the whole college, when he proposed in an interview in January 2006 that single elements should be taken from the Constitutional Treaty.[25] These contradictory and ambiguous messages have added to the general impression that little leadership can be expected from the Commission on this issue.

2. Developments in favour of ratification

On the other hand, there have also been some positive indications for the ratification process lately. Governments in member states that had already ratified before the two 'no' votes have repeatedly

[18] The former centre-left government party SLD only managed to win 11.3% of the votes.

[19] "Polish president calls for brand new EU constitution", 25 January 2006 (euobserver.com).

[20] Tony Blair, speech on the Future of Europe, Oxford, 2 February 2006 (http://www.pm.gov.uk/output/Page9003.asp).

[21] "Estland behandelt Europese Grondwet in februari, Slowakije worstelt met definitieve goedkeuring", 18 January 2006 (http://www.grondweteuropa.nl).

[22] Phone interview with a spokesperson from the Bundesverfassungsgericht, 12 January 2006.

[23] "Barroso pessimistic about future of EU constitution", 1 September 2005 (www.euobserver.com).

[24] Ibid.

[25] "Paris schert bei Verfassung aus", *Kurier*, 2 January 2006 (http://www.kurier.at/oesterreich/1232173.php).

stated their interest in a continuation of the process.[26] In January political leaders from almost all upcoming EU presidencies expressed their clear commitment to this. **Austrian** and **German** Chancellors Wolfgang Schüssel and Angela Merkel, as well as **Portuguese** Prime Minister José Socrates and **Slovenian** Foreign Minister Dimitrij Rupel have unmistakably stated their will to revive the Constitutional Treaty.[27] The only upcoming presidency that takes a more nuanced stand is the **Finnish** one. Prime Minister Matti Vanhanen has called for flexibility on the side of countries that have already ratified, proposing that possible changes to the existing text might have to be made.[28] Finnish president Tarja Halonen cautioned against pre-empting the 'period of reflection'.

Another development in favour of ratification is the continuation of the process in several small countries even after the French and Dutch referenda. **Luxembourg** held a successful referendum[29] and **Latvia,**[30] **Cyprus**[31] and **Malta**[32] approved the document by parliamentary vote. After the approval of the Flemish parliament on 8 February 2006, ratification in **Belgium** is imminent and in **Estonia** parliamentary ratification is expected in the coming months.[33]

At the European level, there is a strong majority among the members of the **European Parliament** supporting the continuation of the ratification procedure. After intensive debates, the Parliament adopted its position on the period of reflection in January 2006. In the resolution based on a report by Liberal MEP Andrew Duff and Green MEP Johannes Voggenhuber, the EP calls for the extension of the period of reflection for the whole of 2006 and possibly into 2007. It demands that no decision should be taken before with regard to the fate of the text. The EP also pledges to mobilise the debate by organising joint conferences with national parliaments to discuss six questions of general importance for the future of the EU.[34] The debates in the European Parliament showed that many different views on the way forward exist, but in the end the EP reaffirmed its commitment to reach a constitutional settlement for the Union. This should be reached at the latest before the next European elections in 2009 and preferably on the basis of the Convention's draft.

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Annex 2. Scenarios for the future

Based on the analysis of the broad spectrum of opinions, essentially five scenarios for the future of the process can be identified, as sketched out below. A combination of the different scenarios in several subsequent steps has also been suggested already.[35]

1. Continuation on the basis of the Nice Treaty

In the absence of an agreement on the way forward, the enlarged EU might well have to function for quite some time under the current rules. If no political leadership is provided, only a visible institutional deadlock at the European level could force national leaders to come to a common solution.

2. Complete renegotiation

Already the fact that this scenario is proposed by political actors as diverse as the French Socialist Party on the one hand and Polish President Lech Kaczinsky on the other, illustrates how small the chances would be for a 'better agreement' finding common support. In fact, there is not even agreement on the process. In the event of a full renegotiation, certainly a new Convention would be demanded by Members of the European Parliament with calls for an elected Convention membership and a clearer mandate for the body already being voiced. Others would prefer a new treaty to be negotiated by an IGC only. In any case, decision-makers would risk getting stuck in lengthy negotiations with little prospect of reaching agreement. Currently it does not seem that there is much appetite among the heads of state and government to go down this road after the bruising experience of last year.

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[26] The following countries have ratified as of mid-February 2006: Austria, Cyprus, Greece, Hungary, Italy, Lithuania, Latvia, Luxembourg, Malta, Slovenia and Spain. Germany and Slovakia have obtained parliamentary approval, but the ratification law has not yet been signed by the countries' presidents. In Belgium the formal signing of the ratification law still needs to take place.

[27] "Slovenia joins constitution revival camp", 12 January 2006 (www.euobserver.com).

[28] "Finnish presidency to accept changes in constitution text", 29 January 2006 (www euobserver.com).

[29] 10 July 2005; final approval by Parliament on 25 October 2005.

[30] 2 June 2005.

[31] 30 June 2005.

[32] 6 July 2005.

[33] The first reading of the bill is scheduled for 8 February 2006, and its adoption has been recommended by the Constitutional Commission of the Estonian Parliament on 16 January 2006.

[34] For example, the goal of European integration, the future of the European social model, Europe's role in the world or the boundaries of the EU.

[35] For example, Nicolas Sarkozy proposes a '3-step-approach' including scenario 1 (as a first step for the immediate future), scenario 3 (as a second step until 2008/09) and possibly scenario 2 (as a potential third step after the EP elections 2009), see also page 7.

3. 'Cherry-picking' different elements

If political leaders should decide in June 2006 not to extend the time limit for ratification beyond November 2006, this approach would be a likely option for the mid-term perspective. At first sight, it seems to be a pragmatic 'quick-fix' solution to secure the most important elements of the Constitution and it enjoys increasing support not only from a number of national leaders, but also from politicians at the EU-level.[36] The problem, however, remains that there is still no agreement on what the 'most important' elements actually are. The ones mentioned by Commissioner Barrot – the permanent presidency of the European Council or the extension of qualified majority voting – were indeed among the most contested elements during the constitutional negotiations and were only agreed because of other elements that appealed to other stakeholders. The delicate balance of the constitutional package would be lost and difficult to re-establish. Moreover, concentrating on elements that do not require treaty change – as French President Chirac seems to propose – would not lead far, because most key elements would require treaty changes and thus an intergovernmental conference with subsequent ratification in the member states.[37]

4. Ratifying the present text, possibly with additional protocols, e.g. on the EU's social dimension

This solution would only be possible if leaders agree to postpone the deadline for ratification beyond November 2006.[38] A first serious attempt at reviving the Constitutional Treaty could then be made after the elections in France and the Netherlands at the European Summit in June 2007, under the presidency of Germany. As shown above, signals from French and Dutch politicians suggest that there is very little interest on their side to revive the process even then. The proponents of this approach hope to convince Dutch and especially French voters through the addition of a 'social protocol' to the current text. Whether this will be sufficient however remains doubtful. If such a protocol were to have only a declaratory character, it would probably not be very convincing. If it were to be binding, it would certainly meet the opposition of several countries and would probably necessitate additional steps of ratification in the other member states as well. If it were only to be signed by some member states and therefore establish some sort of 'enhanced cooperation', it would raise difficult questions on how meaningful it could be in practice in view of the general treaty obligations.[39]

5. Part I (& Part II) as the basis of the future Constitutional Treaty

This approach could offer a compromise solution between the proponents of 'cherry-picking' and those who insist on ratification of the current text in its entirety. However, it brings with it many complex legal questions, because the existing treaties would have to remain in force and would have to be 'adapted' to the provisions of the new treaty. Some warn against legal incoherence between the different legal sources[40], others caution against a possible 'hierarchy of norms' which would ultimately call provisions from the existing treaties into question.[41] Yet others argue that such an approach would bring in the Constitutional Treaty 'through the back-door'. Politically, referenda in France, the Netherlands and other countries could hardly be avoided. Legally, this approach would mean a difficult, but not an impossible task.

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[36] Besides Commissioner Jacques Barrot also the EU's High Representative for the CFSP, Javier Solana, has recently given indications in favour of this approach, see "Solana bids to make the EU a player on the world stage", interview with Javier Solana, *E!-Sharp*, January/February 2006 (http://www.peoplepowerprocess.com).

[37] See for more detail, Sebastian Kurpas, *What could be saved from the Constitutional Treaty if ratification failed? The Problems with a Plan B*, CEPS Policy Brief No. 70, May 2005.

[38] While it is unlikely that 4/5 of member states will have ratified by then (i.e. the share of countries mentioned in 'Declaration 30' to the Constitutional Treaty necessary for referring the matter to the European Council), the heads of state and government could still decide to extend the deadline.

[39] Member states that would sign such a protocol would still have to fulfil all their obligations under the existing treaties, e.g. the provisions for the single market.

[40] In case all treaties were to be considered as 'equal' sources of law.

[41] If the new treaty was to prevail over the other treaties in case of conflicting provisions.

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Place du Congrès 1 • B-1000 Brussels
Tel: (32.2) 229.39.11 • Fax: (32.2) 219.41.51
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