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# The Way out of Europe's Constitutional Crisis

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Despite our hopes and expectations, the process of ratifying the EU constitution will not be completed by the end of 2006. On the contrary: although 14 states have ratified it to date, the no votes in the French and Dutch referendums have brought the ratification process to a standstill; more than that, it is already now clear that these two countries at least will not have given their consent to the constitutional treaty by then. Many analysts have rightly said that the EU is undergoing one of the deepest crises in its history.

Germany will have to take the lead

Under the Luxembourg presidency, it was agreed there would be a period of reflection lasting until autumn 2006, during which ways out of this predicament would be sought. Thus far, however, there have been more signs of widespread perplexity than potential solutions.

The fact that the coalition agreement between the CDU/CSU and SPD states that Germany should give fresh momentum to the constitutional process during its presidency in the first half of 2007 indicates

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that we do not seriously expect the deadlock to be resolved before then. Furthermore, outside of Germany people frequently say they believe that only our presidency is capable of taking the initiative successfully.

This creates a two-fold dilemma: potential solutions must be discussed in advance with partners holding highly divergent views. If the proposals are revealed prematurely, however, conflicting national interests could result in failure. Moreover, when the constitutional treaty was signed by the heads of government, difficulties were expected only from countries that are less keen on integration, such as the UK. Now, however, two founding members of the EU have rejected it. Any potential solution must therefore overcome sharply differing reservations regarding the constitution.

If an agreement is to be reached between the Member States, an EU constitution or corresponding treaty must first be seen as essential to ensuring the positive further development of the EU, both in its current composition (25, or 25+2), and in the case of any future enlargement to take in other states (deepening before enlargement).

What are the options?

It is important to begin by underlining again that a majority of EU states, together comprising a majority of the EU's population, have already ratified the constitution.

So how can we move forward? Here are the options:

#### 1. Continue Ratification

Estonia will almost certainly be the next Member State to complete the ratification process. A new momentum could result, with Finland, and perhaps Portugal and others, following. Yet even if the Czech Republic, Poland and the UK (countries currently sceptical of the constitution) should follow – which is highly improbable – the constitution can only enter into force if ratified by all the Member States. As Dutch and French politicians from across the party divide assure us, asking their populations to vote again on the same text or having it ratified by the parliaments is inconceivable. The consent of these two Member States cannot be obtained in this way.

#### 2. Accept the no votes as the definitive failure at this time of the constitutional process.

The EU would continue to work on the basis of the Treaty of Nice and attempt to overcome euroscepticism by successfully pursuing policies that benefit European citizens and the Member States. Such an approach does not seem very promising to me, as the cumbersome decision-making processes are not suited to meeting the challenges facing the EU and it takes far too long to overcome blocking minorities. Thus those who want the EU to succeed must not simply resign themselves to the status quo.

#### 3. Renegotiate the Constitutional treaty ('Plan B').

This alternative, too, should be rejected. The German government had good reasons for suggesting, after the embarrassing outcome of the Nice summit, that a convention should draw up a constitution. The representatives of the national parliaments and of the EU Parliament

succeeded in overcoming national reservations and achieving a compromise that made important progress as regards the EU's democratic legitimacy, transparency and capacity for action. After an interim failure of talks, it was only with great difficulty and following tough negotiations that the Spanish and Polish reservations were overcome. A renegotiation of the treaty would re-open all of these disputes. In view of the current political balance in the Member States, it is unlikely that the aforementioned progress, including the social dimension, would be preserved. The lowest common denominator that would have to be reached would be an enormous step back compared to what has already been achieved.

#### 4. Implementation of some institutional reforms without constitutional rank ('cherry-picking').

In this scenario, a few institutional elements from the constitutional treaty would be selected and then introduced and ratified separately. This too would amount to a renegotiation of the treaty, albeit limited in scope, as agreement would have to be reached on which elements should be introduced independently of a constitutional treaty. Thus the same problems would exist as with option 3. Moreover, it must be assumed that this method would not offer any way of promoting democratisation (strengthening the European Parliament) or the social dimension, or of making the fundamental rights more binding. Further-reaching political integration would be blocked for years.

#### 5. Create opt-out options:

In the case of earlier treaties, opting out was a possibility (used by Denmark, for example). Special clauses stated that a single provision did not apply to a certain Member State. Such a solution can be considered if a Member State has a single reservation and recognising this reservation has no negative effects on the other neighbouring states. However, if we analyse the reasons for the no votes in France and the Netherlands, there was a wide range of motives which varied sharply between the two countries. It is therefore impossible to define a uniform opt-out solution. If, for example, the Netherlands

was offered the right to opt out of the introduction of more majority voting in order to allay its fears of losing its voice in the enlarged EU, the constitutional treaty would be stripped of one of its most important reforms, without this responding to the concerns of the French.

#### 6. Remove Part 3 of the treaty

During the constitutional debate in France, criticism focused on Part 3 of the treaty. For one thing, some complained – rightly – that this part contained policies which cannot be considered of constitutional rank. For another, the text includes, alongside some genuine improvements and clarifications compared to previous treaties, a number of contradictions, both internal and with Parts 1 and 2, causing critics to believe that the social dimension, for example, which is set out in an earlier part of the text, is not guaranteed. What could be more obvious, therefore, than to remove Part 3? This could be done in two ways:

- a) The French and Dutch populations vote again on Parts 1 and 2 of the constitution only; Part 3 is declared a simple treaty and ratified by the national parliaments (Giscard d'Estaing). This trick does not appear very promising to me, as opponents of the constitution will point out that in this way the entire 'constitutional treaty' would enter into force unchanged. Going behind the backs of the population in this way would be certain to lead to another no vote.
- b) Part 3 is simply abandoned, with the old Nice treaty continuing to apply as regards the EU's policies. In the following years, there would then be more time to work on reforming the constitutional foundation of the policies. Setting aside the fact that Part 3 also contains a number of positive new institutional rules, there would be adaptation difficulties: the constitutional treaty not only uses new wording, but introduces institutional change (e.g. concentration of the EU's legislative instruments), with the result that Parts 1 and 2 do not match the texts of the old treaties. For the sake of manageability, a separate 'translation' compendium would have to be created. However, the treaty system would then be very complicated; it could no longer be described as in any way transparent and attuned to public concerns.
- c) Part 3 undergoes a revision process from

the outset. This would take a great deal of time and thus delay ratification by years. Moreover, the same dilemma would arise as for renegotiation, namely the difficulty of reconciling competing interests. In any case, there is little hope – in view of the current political balance in the Member States – that a 'more social' balance can be struck, as socialist opponents of the constitution in France demanded, in particular.

#### 7. Go for a Two-speed Europe

The increasing complexity of an EU with 25 and more Member States is repeatedly leading to attempts to find a solution in the form a hard core, vanguard or pioneering group: in other words, a two-speed Europe. While the Dutch would perhaps have fewer identity problems in such a smaller 'Europe', the Member States not 'admitted' can hardly be expected to simply allow such a development to occur: '*pacta sunt servanda*'. Moreover, this too would increase complexity: the EU, the Schengen area, the eurozone and the hard core would exist alongside and interlinked with each other. As the core Europe would be an intergovernmental organisation, this would also signify a loss of democratic legitimacy.

#### The way forward: Strengthening the social dimension of Europe

In the French debate on the EU constitution, critics repeatedly claimed that the text was a neoliberal document that would increase, as they saw it, the EU's already overwhelming policy focus on market principles and make the EU a Trojan horse for negative globalisation. The disagreements on the services directive and issues relating to business relocations and tax dumping are evidence that the EU's eastern enlargement has ultimately not been accepted by large sections of the population. Fears related to enlargement were confirmed – critics argued – by the text of the constitution. The vote against the EU constitution was partly determined by the domestic-policy reasons described elsewhere, and partly expressed a euroscepticism that must not be confused with opposition to Europe. The vote

embodies a desire for a Europe in which at least a balance is struck between a focus on competition and the social dimension. This desire exists in many countries, including Germany.

How could the social dimension of the constitutional treaty be underlined?

a) The addition of a political declaration, a 'social protocol', could be considered, emphasising the elements of a European social market economy already included in the draft constitutional treaty. Such a '*protocole social*' would, however, be 'soft law' (Franz Mayer) and not legally binding. The question remains as to whether this would not be seen as a mere placebo.

b) An incentive for Member States that have rejected or not yet ratified the constitution could be the addition of binding law: one suggestion could be the addition of a fifth part of the constitutional treaty or an entirely separate part of the constitution as a charter or treaty on the social and national identity of the Member States. This could set out obligations as well as limits on European integration, e.g. protection of the '*service public*' and '*laïcité*' in France, the constitutional monarchy in the UK, etc., in other words also the protection of cultural identity. The risk would be that each Member State would add its own area to be protected (although nothing that contravened the existing treaties would be permitted). The advantage would be, however, that such a charter would respect the ratifications that have already taken place.

For the countries that would have to go through the ratification process again, it would no longer be the same text, as there would be a change (for the better) in its substance.

If this charter dealt with social issues, it would be a social treaty dealing with both the European and Member State levels. Take child labour as an example: The charter could ban in throughout the EU as a whole, or the charter could state that a ban in an individual Member State may not be annulled by regulations at European level. In other words, a charter on the protection of national and social identity could provide an incentive for very different Member States to ratify the constitutional treaty.

The solution of an addition to the constitutional treaty recognises that ultimately it was the context, not the text, which was rejected. Even a substantive expansion of the text will therefore only succeed if intensive efforts are made to change the context, too. This means that every effort must be made to ensure that the citizens of Europe experience European solidarity in practical terms: in the new Member States they must be shown the EU's assistance in fostering economic and social progress in their country and stabilising the democratic structures. And in the old Member States, people must see that this is not a zero sum game; instead, they too can benefit from the opportunities of globalisation in the enlarged EU.