

## Will the European Council end the institutional deadlock in the EU?

### The Narrow Trail to an Agreement

Sebastian Kurpas and Stefano Micossi

#### Introduction: Meaningful agreement on institutions in sight

The election of a new French president could bring an end to the institutional deadlock in the EU – provided that the German EU presidency is able to strike a deal that can embrace the divergent demands of the member states. While the prevailing mood in Brussels policy circles is one of scepticism, finding a meaningful agreement should not prove impossible if negotiators can concentrate on substance and aim for a true middle ground. In the end, all must feel that their ‘red lines’ have not been trespassed, and yet there has to be real improvement in the functioning of the EU institutions and their democratic accountability.

It should be possible to obtain an agreement if two sets of conditions are satisfied:

- a) A select number of key member states – especially France, the Netherlands and the UK – have demanded some important changes that they have identified as major obstacles to ratification. In response to these demands, all symbols of a constitution would have to be dropped and – speaking in legal terms – whatever changes are agreed to will have to amend existing treaties. Moreover, the text of the Charter of Fundamental Rights cannot be incorporated into the treaties, as this would be unacceptable in the UK. The essence can be saved, however, with an appropriate reference in the revised treaties that makes the Charter binding upon the European institutions.
- b) On the other hand, the demands of the 20 countries that support the current Treaty establishing a Constitution for Europe (CT) also have to be satisfied. The main provisions of the CT’s Part I will have to be

retained as part of the Treaty on European Union (TEU). Moreover, the changes in common policies that were agreed at the last intergovernmental conference (IGC) and included in Part III of the CT can be retained as a protocol amending the Treaty establishing the European Community (TEC).

The result would be an important reinforcement of the existing ‘two-treaty-structure’. The revised TEU would contain all the main provisions on the EU institutions, while the revised TEC would contain the common policies and details on the functioning of the institutions in specific cases. The CT already contains provisions making it easier to change policies, i.e. essentially the Part III of the CT mentioned above, notably by not requiring an IGC and giving the Council the power to modify them by unanimity. If maintained in the TEU, this would over time consolidate the status of the TEU as the ‘fundamental law’ of the Union setting the common institutional framework and the rules of the game, whereas the TEC would determine specific common policies, e.g. how much market, how much solidarity, how much environmental protection, etc.

We believe that the present conditions are auspicious for devising a possible solution to the current deadlock on the Constitutional Treaty. This Policy Brief provides an outline of such a solution. The paper is organised as follows: Section 1 presents the pre-conditions and the negotiating framework for the European Council in June and an ensuing IGC. Section 2 discusses the main substantive questions to be resolved and Section 3 casts a glance beyond the CT to other issues that sooner or later will have to be addressed. (A basic overview of the treaties involved is given in the box below.)

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### *How many treaties does it take to make a Union?*

The **Treaty on European Union (TEU)** referred to in this paper is essentially the Treaty of Maastricht in its consolidated form, including the amendments made by the Treaties of Amsterdam and Nice. It was signed on 7 February 1992 and entered into force on 1 November 1993. The treaty created the 'European Union' and established the current 'three-pillar structure' of the EU. In addition to the more integrated first pillar of the TEC (see below), it introduced two new 'pillars' of EU policy: the Common Foreign and Security Policy (the 'second pillar' in Title V) and Justice and Home Affairs (the 'third pillar' in Title VI). Both new pillars are primarily governed in an intergovernmental way with a reduced role in decision-making by the European Commission, European Parliament and Court of Justice. In 1999 the Treaty of Amsterdam brought several policy areas (visas, asylum and immigration) from the third to the 'communitarised' first pillar (i.e. from Title VI TEU to Title IV TEC), thus strengthening the role of the European institutional framework. In its Title I the TEU also includes general provisions on institutional matters (Arts 3-5) and articles on the aims (Art. 2) and values (Art. 6) of the EU and as well as a sanction mechanism for member states that do not observe these basic values (Art. 7). In Title VII there are provisions for enhanced cooperation (Arts 43-45). The 'Final Provisions' (Title VIII) contain important rules for future treaty revisions (Art. 48) and enlargements (Art. 49).

The **Treaty establishing the European Community (TEC)** goes back to one of the Treaties of Rome, the Treaty establishing a European Economic Community (TEEC), signed on 25 March 1957. The text referred to in the following is the consolidated version of this text after numerous treaty revisions, namely the substantial amendments (and name change to TEC) at Maastricht (see Title II, Art. 8 TEU). Since Maastricht the TEC represents the so-called 'first pillar' of the European treaty architecture: Procedures vary from one policy area to another (and often even within them), but essentially the TEC governs those policy areas that are 'communitarised' and where the different European institutions have been assigned an important role. It contains detailed provisions on the Community institutions, decision-making procedures and financial provisions (Arts 189-280 TEC) for the European Community. Since Maastricht the treaty also includes a part on Union citizenship (Arts 17-22) and European Monetary Union (Arts 98-124). In contrast to the European Union, the European Community has an explicit legal personality (Art. 281).

The **Treaty establishing a Constitution for Europe (CT)** would repeal and replace the existing treaties (Art. I-437 CT) which would greatly simplify the current copping of treaties and amendments. The CT is largely based on a draft presented by the Convention on the Future of Europe, chaired by Valéry Giscard d'Estaing. In a subsequent IGC, member states made only minor revisions to the Convention's text before signing it in Rome on 29 October 2004. The text has so far been ratified by 18 member states, but was rejected by popular referendum in France (29 May 2005) and the Netherlands (1 June 2005). The CT's Part I mostly regroups provisions on the EU's objectives, values, competences, finances and general institutional matters. Part II is an exact reproduction of the Charter of Fundamental Rights thereby formalising its legal force (already recognised by the Court of Justice in various decisions). Part III contains the provisions on specific policies and detailed institutional matters. Part IV provides – among others – provisions for future treaty revisions.

## 1. Setting the stage for serious negotiations

The time frame and the action plan for the new round of negotiations are de facto already decided, since it is agreed that treaty amendments should have legal force by spring 2009, in good time for the next European elections. Accordingly, the European Council will meet in Brussels on June 21 and 22 to find a compromise on the 'key elements' of a revised treaty. On this basis, it should then convene an IGC with a 'clear mandate', which should complete its proceedings by the end of this year; and the ensuing year-and-a-half should allow sufficient time for the member states to complete ratification.<sup>1</sup>

While waiting for the results of the French presidential election, the German presidency of the Council

circulated a questionnaire that provided a basis for bilateral consultations between the presidency and each of the member states.<sup>2</sup> The questionnaire has been accused of pre-empting the debate, but it does offer a comprehensive list of the questions that must be sorted out by the Council. The bilateral meetings, which took place between the end of April and the beginning of May, have provided the presidency with a clear picture of the 'red lines' beyond which each member state is not prepared to cross in search of a compromise.

The member states have been asked in the first instance to indicate whether they are ready to retain the 'balance' of the provisions in Part I of the CT, or whether they would rather discuss piecemeal amendments to existing treaties; and whether other policies should be brought into the discussion to facilitate agreement, e.g. energy, the environment, economic and social policies. Obviously, re-proposing the entire text of the CT has already been ruled out.

<sup>1</sup> See the Draft Report "on the roadmap for the Union's Constitutional Process" by the Constitutional Affairs Committee of the European Parliament (2007/0000(IN) provisional, April 2007, Rapporteurs E. Barón Crespo and E. Brok, paragraph 10.

<sup>2</sup> The questionnaire was published by Agence Europe on 28 April 2007. See the annex for an English version.

The hard nut to crack will be how much to retain of Part I and related provisions in Parts III and IV.

Other questions refer more or less explicitly to the legal nature of the new treaty: should ‘names and symbols’ typical of a constitution be dropped? More fundamentally, are certain provisions, such as those on the single legal personality of the Union or the primacy of Community law, of a constitutional nature and therefore also to be dropped? And, finally, what will be the fate of the Charter on Fundamental Rights? Is it conceivable to offer opt-out clauses to member states that are not ready to adhere to new policies introduced by the CT? Should the new treaty include the Copenhagen criteria for admission of new members<sup>3</sup> – clearly a provision designed to assuage fears of further enlargement of the Union?

While the individual answers from countries are not known, it has become clear that any solution will have to respect a fundamental constraint: whatever new treaty emerges from the negotiations, the French, Dutch and British governments demand it to be of such nature that it will not require them to hold a new referendum. They openly advocate dropping the name Constitutional Treaty and all references to a constitution, thus making the new treaty look as ‘technical’ as possible.

In France, this condition also entails leaving unchanged the status of the TEC, thus eliminating the possibility that the market economy principles would assume an enhanced force of fundamental law. Sarkozy’s public stance on the admission of Turkey should suffice to reassure his constituency on the risks of further enlargement without further ado. The situation is even trickier in the United Kingdom, since the government insists that provisions suggesting the transfer of sovereign powers to the Union would not be acceptable. The problem is compounded by the imminent change in the premiership: what was not seen as a threat to sovereign powers under Blair, when the CT was signed, might now be viewed differently under Gordon Brown.

In its opposition to meaningful institutional change, the United Kingdom will be able to enlist the support of Poland and the Czech Republic, certainly as regards opposition to constitutional symbols in the new treaty. However, Poland’s main interest is to prevent the double majority voting system in the Council as it is

outlined in the CT, to preserve at least some of the disproportionate weight relative to its population that it currently enjoys under the rules agreed during the Nice IGC. Neither the Czech Republic nor the United Kingdom is likely to go to the mat on this issue, since on balance the new system does not damage them. And Spain, once a stubborn opponent of the double majority system provided for by the CT, has now joined the camp of countries resolutely in favour of approving the CT as it is. In the end, the issue might boil down to finding adequate compensation for Poland in other domains.

The Charter of Fundamental Rights is not likely to represent a stumbling block. Its inclusion in the new treaty is not on the cards, given determined opposition by the UK, the Netherlands, the Czech Republic and Poland, and a fairly reticent attitude among the Nordic members of the Union. However, other alternatives have been envisaged: it could either be incorporated through an annex or, more likely, be recalled through a reference within the new treaty clearly stating its legal value, e.g. as done in the present Article 6 of the TEU for the European Convention for the protection of human rights. Since the European Court of Justice already refers to the Charter in its judgements as a source of individual rights, a case can be made that no new rights would be created in this manner.

Of course, stripping the treaty of all of its constitutional symbolism might come at a price, to the extent that it will weaken the legitimacy of the Union in the minds of its citizens. If political leaders think that a constitution is not the appropriate means to foster a common sense of solidarity among European citizens, they will have to propose other alternatives: past experience seems to show that a ‘Europe of results’ alone is not sufficient to endow the Union with greater legitimacy. Perhaps for this reason, Sarkozy has suggested that further reform might have to be considered after 2009, following broad public consultations and, possibly, even a new Convention.

On the other hand, any deal must pay due recognition to the fact that 18 member states have ratified the CT, in a number of cases with referenda showing strong popular support, and two other countries – Portugal and Ireland – have declared themselves “friends of the Constitution”.<sup>4</sup> These 20 governments insist that the ‘essence’ of the current text must be preserved and that, accordingly, any renegotiation should take the current CT as a point of departure and preserve as

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<sup>3</sup> The June 1993 European Council in Copenhagen established three main criteria that a country must meet to join the European Union: political (stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities); economic (existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union); and acceptance of the Community *acquis* (ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union).

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<sup>4</sup> The countries that have ratified are: Austria, Belgium, Bulgaria, Cyprus, Estonia, Finland, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Romania, Slovakia, Slovenia and Spain. Strictly legally speaking, Germany has not ratified the Constitutional Treaty despite high majorities in favour in both the Bundestag and the Bundesrat. Federal president Horst Köhler has not signed the ratification act yet, after the Federal Constitutional Court accepted to rule on a complaint by a member of parliament. The ruling has still not taken place.

much as possible the existing ‘balance’. The European Parliament – which this time is demanding full participation in the IGC – is likely to take a similar stand.<sup>5</sup>

The assignment for the negotiations is thus clear: the bulk of provisions in Part I must be saved, as any other solution would inevitably unravel the delicate balancing of the interests of the member states – big and small, federalists and intergovernmental, advocates of free markets and of the social market economy – that made agreement possible in the last IGC. For example, most of the smaller member states only accepted a permanent Council president because the position of the Commission president was strengthened as well.

Therefore, the ‘Treaty of Nice-plus’ option – cherry-picking selective provisions from Part I on the functioning of the EU institutions – does not offer a viable basis for compromise. It simply departs too much from the expectations of the member states ready to implement the CT. The alternative to retaining the balance and main institutional reforms of Part I (with minor additions and subtractions to be negotiated) would likely be deadlock and crisis – a scenario that neither the German nor the French leadership, to start with, is ready to consider.

In this crisis scenario, the Council would have to devote its efforts to the minimal task of reducing the number of Commissioners and deciding on equal rotation criteria, since under the Nice Treaty their number will have to be lower than the number of member states after 2009.<sup>6</sup> However, without a balanced package of measures, the bitter divisions that plagued the last phase of the Nice negotiations are bound to reappear. Eventually, the majority of members that want a stronger Union may well decide to proceed without the permission of those that do not want to proceed. The new prime minister in the United Kingdom will no doubt carefully consider and weigh all the implications of this scenario.

A last question on the structure of the negotiations that needs to be addressed concerns the possible role of the common policies – in such fields as energy, the environment, or economic and social policies. Those favouring their inclusion into the negotiations argue that many of those who voted ‘no’ in the French and Dutch referenda were really asking for ‘more Europe, not less’, and accordingly argue that strengthened common policies should be part of the deal.<sup>7</sup> Eurobarometer surveys show strong demand amongst the public for more effective action by the Union in

these domains. The difficulty with this proposition is that there is no agreement on what precisely the new common action should be. The Council has been unable to agree on a common policy to deal with Russia with one voice on energy supply: would it be any easier to write new legal bases for common action in these domains in the treaty? Or, to make another example: is the European Council more likely to agree on common economic and fiscal policies to be written in the treaties at their meeting in June than it has been during the past decade, and on what basis? In sum, is it realistic to think that very difficult negotiations can be made easier by introducing other controversial issues to the agenda? We believe not: the European Council ought to stick to its core business of finding a good agreement on institutional issues.

## 2. Elements of a feasible deal on institutions

If it can agree to circumscribe its negotiations as has been suggested, the European Council would confront a number of difficult, but manageable issues. Reaching an agreement would not be inconceivable.

First of all, the Council will have to decide how to proceed in amending the treaties. One possibility would be to amend the TEU in such a way that it would de facto be replaced with the revised Part I of the CT. However, the German presidency seems inclined to revert to the traditional method of treaty amendments decided one by one, so as to stress continuity between the old and the new. In both cases, the TEC would retain its present status and continue to stand as a separate treaty. The difference would lie in the degree of complexity of the future treaty structure. If the TEU becomes a slightly revised Part I of the current CT,<sup>8</sup> there would be a clear division in function:

- the TEU would then regroup all general institutional provisions and ‘fundamental’ norms, whereas
- the TEC would contain specific policies and more detailed provisions on the institutions (broadly corresponding to Part III of the CT).

If however the new treaty was to simply amend the existing TEU and TEC article by article (like the Treaty of Amsterdam or the Treaty of Nice), the two dimensions of institutions and policies would remain blurred while the amending treaty itself would only be comprehensible to experts.

It is therefore also necessary to decide what to do with the many amendments to the TEC that have been agreed and signed up to by all the member states, and that would not be retained as strict complements of provisions from Part I. Were the TEU to be substituted

<sup>5</sup> See the EP Constitutional Affairs Committee draft report quoted in footnote 1.

<sup>6</sup> Under Article 4 of the Protocol “On the enlargement of the European Union”. On this, see Section 4 below.

<sup>7</sup> See, for instance A. Duff, “Plan B: Comment Sauver la Constitution Européenne”, *Notre Europe, Etudes et Recherches* n. 52, November 2006.

<sup>8</sup> Including a very limited number of provisions from Part III and IV of the CT that deal with general institutional matters.

in full by the revised Part I, then – as has been suggested by jurists of the European University Institute in Florence – all amendments to the TEC could be included in a separate Protocol and be ratified together with the new TEU. Otherwise, the amendments to the TEC can be listed in the amending treaty one by one. What is no longer on the cards is the complete repeal of existing treaties and their substitution with an entirely new treaty.<sup>9</sup>

Turning to the substance of Part I, the first step of the European Council will in all likelihood be the removal of all provisions smacking of a constitution, as has been explained. The identification of such provisions is likely to prove controversial and a fine line will have to be drawn through the text. The easy part is ‘symbols and names’: accordingly, the Preamble and Articles I-1, I-2 and I-8 in Title I are likely to go and the word ‘constitution’ will then be surgically removed from all remaining provisions.

A specific issue arising in this context concerns the title of ‘Minister for Foreign Affairs’ attributed to the figure responsible at the same time for implementing the CFSP (Common Foreign and Security Policy) and coordinating the Commission’s external activities. As a number of leaders are clearly opposed to using state-like symbolism, they are likely to look for another name. The post should of course continue to reflect the fact that this figure will be accountable both to the Council and, as a member of the Commission, to its president and the European Parliament.

The CT also envisaged new titles and, more importantly, a well-defined hierarchy of norms for legislative and regulatory acts of the Union. While some argue that these provisions are of a constitutional nature, the main goal of the provisions is to remove the inconsistencies in the legal instruments in the treaties that have been a major source of confusion in Union legislation. Indeed, these provisions were drafted in response to the Laeken questions about simplification, democratisation and transparency,<sup>10</sup> and they are thus not a direct consequence of the constitutional project.

It may be recalled, in this regard, that at present the Union has 15 different legal instruments; some of them, while carrying different names, have similar effects.<sup>11</sup> Furthermore, some Council decisions on

individual cases have contradicted the principles established by directives, which is quite possible in a system where individual decisions are not bound by general legislation. Thus, these changes are essential to bring some order, consistency and clarity to EU legislative and administrative acts, including the delegation of powers to the Commission. Furthermore, the change in names – in particular the new distinction between framework laws (now directives, requiring transposition by the member states) and laws (now regulations, directly applicable in the member states) – was explicitly intended to improve the understanding of Union legal acts by citizens.

The European Council should also confirm the single legal personality of the Union and the elimination of the pillar structure of the TEU.<sup>12</sup> These changes would strengthen the capacity of the Union to act and make its structure more understandable both to its citizens and its international partners. If the CT’s restricting provisions in Part I for foreign policy (Article I-40 CT), defence policy (Article I-41 CT) and justice and home affairs (Article I-42 CT) are also introduced to the TEU, the effects on national sovereignty will be rather limited and of a formal nature while providing gains in transparency and efficiency.

The fate of the provision confirming the primacy of Union law is uncertain. On the one hand, the European Court of Justice’s jurisprudence on this question is well established and has not been challenged by national constitutional courts; on the other hand, signing up to this principle in the amended treaty is likely to raise strong objections among those heads of state more sensitive on national sovereignty.

Once all these questions are sorted out, the shape of a revised Part I of the CT will be settled. All other provisions should be retained – including the two Protocols on the role of national parliaments in the European Union and on the application of the principles of subsidiarity and proportionality. Also, a number of provisions in Part I of the CT would not stand by themselves, requiring the addition of complementary provisions that were placed in Part III; the straightforward solution to this problem is to insert them right away into the relevant articles of Part I. They notably concern the functioning of institutions, the flexibility clause formerly included in Article 308

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<sup>9</sup> Some Council members are likely to try to go back on certain ‘innovations’ contained in Part III, notably regarding extensions of qualified majority voting as well as changes in legal bases in Judicial and Police Cooperation. On this, the Council might want to consider granting e.g. the United Kingdom, an opt-out in these domains, as national vetoes are removed by the new treaty.

<sup>10</sup> See the Laeken Declaration on the Future of the European Union, annexed to the Presidency Conclusions of the Laeken European Council, 14 and 15 December 2001.

<sup>11</sup> On the problems arising from this duplicity of instruments, see the Final Report of Working Group IX on Simplification of the Convention (CONV 424/02 of 29 November 2002).

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<sup>12</sup> With a single legal personality, the subject of international law would be the Union, with strong benefits of clarification and simplification in its external relations. Suppression of the pillar structure would require the insertion of a clause in the TEC stating the difference between the European Community and the Union.

of the TEC and the budgetary procedure.<sup>13</sup> Agreement on these provisions should not prove too difficult.<sup>14</sup>

Some provisions to be retained are also contained in Part IV of the CT. They notably concern the general ‘passerelle’ for moving to qualified majority decisions and adopting the ordinary legislative procedure, instead of special procedures, in the Council; and the simplified revision procedure in Article IV-445. The latter is especially significant since it would eliminate the requirement of an IGC for amending Union policies currently contained in Title III of Part III of the CT (Internal Policies and Action).

### 3. Taking the longer view

With a slimmed-down treaty as outlined above, the EU would become somewhat more efficient and democratic, but it is questionable whether it would really prepare the Union for the future. In this section, we take a critical look at some other institutional aspects that could build on the solution outlined above.

#### 3.1 Super-qualified-majority for future treaty revisions

The most important institutional improvement would be an easier revision procedure for those parts of the treaties that do not pertain to ‘fundamental law’.<sup>15</sup> The current need for unanimity should be replaced by a ‘super-qualified majority’ to avoid complete deadlock on treaty reform in the future. Concretely, a revision mechanism as proposed by MEP Andrew Duff could be envisaged: 4/5 of member states representing 2/3 of the Union’s population.<sup>16</sup> The non-ratifying states would be bound by all decisions concerning policy areas of the current first pillar. They would however not be bound by decisions concerning pre-defined issues outside the first pillar that impinge on national sovereignty (e.g. on the current ‘third pillar’). In the latter case, they could then negotiate opt-outs.

The potential implications of such a change for the future development of the Union are enormous. To mention the main one: once the distinction between ‘fundamental law’ of the Union and the provisions relating to the policies has been established, this would

<sup>13</sup> For a full description of these provisions, see G.L. Tosato and G. Bonvicini, “Una strategia italiana per il rilancio del Trattato Costituzionale Europeo”, IAI, Rome, April 2007, Annex 1 (prepared by N. Pirozzi).

<sup>14</sup> A complete analysis of these issues can be found in the “Feasibility Study for a New Treaty and Supplementary Protocols to Take Over the Substance of the Constitutional Treaty”, prepared by Jacques Ziller and his colleagues at the Robert Schuman Centre for Advanced Studies of the European Institute in Florence, 23 April 2007.

<sup>15</sup> That is, the provisions that do not deal with fundamental institutional questions, division of competences, values or objectives of the EU.

<sup>16</sup> See Andrew Duff, “Constitution Plus – Renegotiating the Treaty”, TEPSA, Brussels, February 2007.

open the way to the possibility of partisan divisions in decisions over policies, which however would not call into question the institutional framework, but would develop *within* the institutional framework.<sup>17</sup> Thus, political parties across Europe could take different stances on specific Union policies, along the traditional left-right divisions typical of national politics, without calling into question the allegiance to common institutions. The possibility of European-wide debates on Union policies could revitalise the legitimacy of the Union and foster the creation of a European *demos*.

#### 3.2 Size of the Commission

The solution presented in Part I of the CT for the size of the Commission is one of the points that the heads of state should reconsider in due time. It proposes that the college should consist of a number that corresponds to 2/3 of the number of member states and that all nationalities should rotate on an equal basis (Article I-26). An interesting alternative that would overcome the drawbacks of a mechanical rotational system was put forth by the new French president – at that time only presidential candidate – in an address to the Friends of Europe in September 2006. He proposed that the choice of commissioners should be left entirely to the discretion of the president of the Commission; in forming his Commission, the latter would no doubt take into account personalities as well as the need to achieve an appropriate geographical and political balance. Under the Sarkozy proposal, the president of the Commission would be elected by the European Parliament, as is also envisaged in the CT; the Parliament’s vote of confidence would of course also depend on the quality of the college proposed for approval.

#### 3.3 A constructive use of flexibility mechanisms

As outlined in an earlier paper,<sup>18</sup> the enlarged European Union will increasingly depend on mechanisms for flexible integration. This holds true regardless of whether or not an agreement is reached in June. Flexible integration should therefore be seen as a complement and not as an alternative to finding agreement on institutional advances. It is important not to ‘abuse’ these mechanisms as threat scenarios for integration laggards, but to use them as a constructive tool to overcome tensions between countries that want to go ahead faster and those that prefer not to participate. The provisions in the current treaties have never been used, while preference was given to

<sup>17</sup> On this, see Tosato and Bonvicini cited in footnote 12.

<sup>18</sup> Sebastian Kurpas, Julia De Clerck-Sachsse, José I. Torreblanca and Gaëtane Ricard-Nihoul, *From Threat to Opportunity – Making Flexible Integration Work*, EPIN Working Paper No. 15, September 2006 (downloadable at <http://shop.ceps.eu>).

initiatives outside the treaties that were later integrated. The simplification of conditions as proposed in the CT could make this option more attractive. However, initiatives taken outside the treaties are also acceptable as long as their integration into the treaties is foreseen for a later stage and the door remains open for any EU member state wanting to join. In this regard, the Treaty of Schengen has set a useful precedent that can hopefully be imitated.

### 3.4 National parliaments: More than 'subsidiarity watchdogs'

The protocol to the CT on the application of the principles of subsidiarity and proportionality would establish a so-called 'yellow card' procedure (Article 7 Paragraph 3 and 4 of the protocol). If at least one-third of national parliaments view a legislative initiative as infringing the principle of subsidiarity, this initiative would have to be reviewed, but it could still pass if a reasoned opinion is given. Currently there are some governments (especially the Dutch) that would even like to introduce a 'red card' procedure, which would give one-third of national parliaments the right to effectively stop a legislative initiative on grounds that subsidiarity had not been respected. While the yellow card system should be adopted – possibly as a protocol to the revised TEU (see above) – the red card procedure should not be considered, even in the longer term. We do not question the wisdom of scrutinising a legislative initiative to ascertain that it really makes sense at the European level and brings value added over national regulations. However, the attendant increase in veto players should be seen in the institutional context and should therefore be balanced by measures aimed at creating a more efficient EU. The red card procedure would effectively create a 'third chamber' in European decision-making and would risk politicising the question of subsidiarity.

National parliaments viewing their primary role as 'subsidiarity watchdogs' would also limit their own potential as *pro-active* attendants of the EU policy process. They have a role to play in shaping the mandate for the negotiations in the Council of Ministers and there is a need to foster public debates on Commission initiatives at the time they are presented. At present, citizens often only become aware of an issue when EU legislation is finally implemented – sometimes years after it has been adopted. It is then easy for national politicians to blame 'Brussels', although they actually agreed to the measure in the Council of Ministers. This is clearly a problem of national constitutional arrangements, however, as some countries (e.g. Denmark) are far more advanced than others (e.g. Germany) and a one-size-fits-all approach is likely to fail. At the European level, one could envisage best-practice mechanisms that put pressure on national governments to become more active.

### 3.5 Foreign Minister and Foreign Service?

One of the main institutional changes in the CT Part I is the 'double-hatting' of the Council's High Representative and the Commissioner for External Relations as 'Foreign Minister' (or whatever else he/she might be called). This figure would be further enhanced if he/she were also to chair the Foreign Affairs Council. The holder of this office, if also a sufficiently talented individual, would be well placed to become a prominent personality on the world stage. The case can certainly be made that this would make the EU's external policy more coherent and more efficient.

Nevertheless, various problems involved with implementation of this reform seem not to have been seriously addressed, and they may turn out to be important enough to undermine its rationale. In particular, it is not clear how the relationship between the Foreign Minister, who would also be a vice-president of the Commission, and other actors would develop concretely. In a worst-case scenario, his role might weaken the position of the Commission president and fuel turf-fights between its Directorate-General for External Relations and other Directorates-General with significant external policy functions (trade, development, energy, etc.). The Foreign Minister's relationship with the rest of the college could also prove problematic. In case of conflict between the Council and his colleague-commissioners, whose line would he follow?

Clarification would also be needed about the allocation of resources between the Council and the Commission, and whether the resources that currently reside mostly with the Commission (staff and budget) would remain there. If not, it would lead to a significant weakening of the Commission at the expense of the Council. In particular the institutional location of the proposed 'Foreign Service' (or whatever this might be called) is not evident, as it could be in the Council, or in the Commission, or in neither entirely, but positioned somewhere special in between these two institutions.

The Foreign Service's operations abroad hardly need new constitutional foundations. The Commission's delegations are already global in reach and only need strengthening on the political side, which could easily be achieved by the Council Secretariat deploying people into these missions. The choice of Heads of Delegation would be a management issue between the institutions, not a constitutional one.

The demands on the time of the Foreign Minister is certainly going to be so high that he/she would need high-level political deputies equivalent to the 'state secretaries' found in most foreign ministries. Who would they be, and in which institution?

With the solutions to these important institutional details not altogether evident or easy to design, it could be that the institutions will look back to the Solana-

Patten duo as having been a rather sound model: i.e. with two able individuals, sharing both the burden of external representation and a division of labour over types of competence. It has been observed that cooperation between senior officials of the Council and the Commission has progressed significantly in the CFSP/ESDP area since the demise of the Constitution. It appears that the referendum shock has pushed them into working together pragmatically.

Among all the major functions of public policy, the conduct of foreign policy relies the least on legislation and the most on repeated games of interaction with third parties. The EU has already crafted its instruments of trade, aid and crisis management policy, all of which can be combined in agreements having the highest treaty standing. The EU is feeling its way gradually in increasing the diplomatic space entrusted to the EU institutions, alongside the decline of increasingly obsolete national diplomacy on most matters of importance. This gradual transfer of effective competences is a matter of the continuing

learning experience of how to manage world affairs best, and the build-up of trust between the EU institutions and the member states. The development of the European political demos is of the essence at this point, rather than constitutional change.

## Conclusion

This paper has provided an overview of the status of the debate over institutional reform. If the German presidency shows sufficient determination and dexterity, it can lay the foundations for a compromise that goes far beyond a lowest common denominator at the June Summit. Even if it does succeed, however, important issues will remain on the table: particularly the conditions for future treaty reforms, which are of central importance in order to avoid institutional inflexibility, and the lack of transparency in a Union of 27 member states. Moreover, the more general question of how the Union can regain popular support will of course not have been convincingly answered.

## Annex. Questionnaire in View of the Bilateral Meetings with Focal Points to be held between 23 April and 4 May

The bilateral consultations to be held between 23 April and 4 May represent an important stage in preparing the report the Presidency is mandated to submit to the June European Council. The Presidency wants to explore all avenues that would allow placing the EU on a renewed common basis before the European Parliament elections in 2009. To this end, an IGC with a very precise and limited mandate would have to be opened as soon as possible after the June summit, its starting point being the substance of modifications to the Treaty of Nice as agreed upon in the Constitutional Treaty. In order to succeed, every effort will have to be made to restrict changes to what is absolutely necessary to reach an overall agreement and to ensure ratification by all member states. Bearing this in mind as well as the questions raised by partners in the consultations in the first half of the Presidency, the Presidency invites delegations to reflect on the following questions:

1. How do you assess the proposal made by some Member States not to repeal the existing treaties but to return to the classical method of treaty changes while preserving the single legal personality and overcoming the pillar structure of the EU?
2. How do you assess in that case the proposal made by some Member States that the consolidated approach of part I of the Constitutional Treaty is preserved, with the necessary presentational changes resulting from the return to the classical method of treaty changes?
3. How do you assess the proposal made by some Member States using a different terminology without changing the legal substance, for example with regard to the title of the treaty, the denomination of EU legal acts and the Union's Minister for Foreign Affairs?
4. How do you assess the proposal made by some Member States not to include an article relating to the symbols of the EU?
5. How do you assess the proposal made by some Member States not to include an article that explicitly restates the primacy of EU law?
6. How do you assess the proposal made by some Member States that Member States will replace the full text of the Charter on Fundamental Rights by a short cross reference having the same legal value?
7. Do you agree that the institutional provisions of the Constitutional Treaty form a balanced package that should not be reopened?
8. Are there other elements which in your view constitute indispensable parts of the overall compromise reached at the time?
9. How do you assess the proposal made by some Member States concerning possible improvements/clarifications on issues related to new challenges facing the EU, for instance in the fields of energy/climate change or illegal immigration?
10. How do you assess the proposal made by some Member States to highlight the Copenhagen criteria in the article on enlargement?
11. How do you assess the proposal made by some Member States to address the social dimension of the EU in some way or the other?
12. How do you assess the proposal made by some Member States applying opt-in/out provisions to some of the new policy provisions set out in the Constitutional Treaty?