



## Should ratification proceed? An Assessment of Different Options after the Failed Referenda

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### From deep coma to death?

After the resounding Dutch no-vote of 62%, ratification of the Constitutional Treaty has become even less likely than it already was after the political earthquake caused by the French referendum three days before. While the German Chancellor and the French President encourage other countries to continue with the ratification process, the British message is clear: Any attempt to proceed at this point would be pointless. British Foreign Minister Jack Straw found rather subtle words in the House of Commons to describe the situation, but other sources suggest that instead of wasting their time on a lengthy and useless exercise that would cost the EU even more support, European leaders should bury the Constitution at the upcoming European Summit on 16-17 June (or soon afterwards) and then settle for something 'more modest'.

The motivation for sending such a message is not altruistic of course. The new situation opens a unique opportunity for Blair and the British EU Presidency. A whole list of reasons can thus be given for the British position:

- Blair would not have to hold a referendum that he is set to lose. (If the Dutch reject the treaty with 62%, one does not even want to imagine the British scenario – latest polls suggest a no-vote of 72%.)
- The European project could now be given a long-term direction that is much more reconcilable with British public opinion.
- The UK can play an active and constructive role in European politics as a 'crisis manager' (with the French weakened and a lame-duck government in Germany until early elections in September).
- If ratification will be stopped already now, the French position in the EU will be weakened for a long period of time. If the French should ever reproach the British for obstructing European

integration in the future, they will receive resounding laughter followed by the question: "Who was it again that killed the Constitution?"

It would thus be understandable if the British pushed for an official 'death declaration' in the near future. They could then propose a 'tidying-up' of the current treaties and suggest that the EU should concentrate on its economic 'core competences' (internal market, competition policy, external trade) and continue to play a coordinating role (but no more!) where it strengthens the member states' political interests (e.g. foreign and security policy and certain aspects of justice and home affairs).

Accordingly, it should not aspire to become a polity in its own right, let alone attempt to inspire some kind of 'European identity'. Efforts to strengthen the Commission (and possibly the European Parliament) are unlikely to be encouraged. At the same time, the British will continue to push for enlargement – including Turkey – to ensure an even larger economic community and a potential dynamic for growth, but which would also make it harder to strengthen the 'supranational' dimension of the EU.

The British – once at the fringes of European integration – can present this approach as sensible and realistic in view of the abyss of disintegration and chaos. The upcoming EU presidency will be a possibility to present the British government as a pragmatic manager of a crisis caused (mainly) by the French.

The British view has largely met a positive reception in the media and among other opinion-makers. Before such a consequential decision is taken, however, those who are responsible must have a clear idea of the alternative scenarios and the probability of finding a common agreement on them. This Policy Brief looks a little closer at the different options available and assesses their respective advantages and disadvantages.

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### 1. Continuing ratification (possibly after a ‘period of reflection’)

The only possibility to ‘save’ the text in its entirety would be to continue with ratification. Plebiscites could either continue as foreseen or after ‘freezing’ the process of ratification for some time before continuing with the referenda. At the end of this exercise, the ‘wounded’ would have to be counted while hoping for more favourable conditions for a second vote in the countries that rejected the Constitution. If such a second vote is to be successful, however, it will have to happen in a completely changed political context. Particularly the French vote was to a considerable extent motivated by a ‘vote sanction’ on the current executive and the only way that there might be a better chance for public approval would be with a new ‘strong personality’ like e.g. Nicolas Sarkozy as French President. Such a change, however, will probably not happen before 2007 (unless President Chirac would resign earlier), so that the process of ratification would indeed have to be ‘frozen’ for some time. In the meantime the other governments would have to be reassured that this second referendum will eventually be held, because otherwise, Blair (and perhaps others) will have an excellent argument for not holding their referendum at all.

Linked to the continuation of the ratification process is also the idea of amending the current text with a ‘protocol’ that would address certain fears that particularly seemed to motivate the no-voters in certain member states. This could indeed be envisaged for certain ‘opt-out’ scenarios (where voters demand ‘less Europe’), although most innovations of the Constitutional Treaty do not allow for it (e.g. the double majority system or the abolition of the ‘pillar structure’). In the particular French case where apparently many voters rejected the Constitutional Treaty for the lack of a social dimension, an ‘opt-out’ would not work either. Instead, for example, the Council would have to commit itself in a special protocol to especially take into account the social dimension when it legislates. However, it is unlikely that such a protocol would be accepted by a large number of other member states and it is also doubtful that the French would actually change their minds because of such a rather ‘declaratory’ addendum.

Arguments in favour of continuation:

- Continuation would ensure that every country gets a say on the Constitutional Treaty. This also complies with the procedure foreseen in ‘Declaration No. 30’ annexed to the text of the Constitutional Treaty.
- It would be the only way to keep the option of adopting the Constitutional Treaty in its entirety. If leaders proclaim the current text ‘dead’, the need for a more efficient, democratic and transparent Union will of course persist.

Arguments against include:

- Continuing ratification would leave the EU in a state of uncertainty and bears the considerable risk that the

process develops an even more negative dynamic: The referenda could become a vote on the legitimacy of the EU itself and with a growing number of no’s, the yes-campaigns would have a difficult time making their case.

- It is still doubtful that any (new) political leadership in the member states that rejected the treaty would actually want to take the (high) risk of calling a second vote on the same text, because such a strategy could easily be interpreted as ‘arrogance of power’ vis-à-vis the citizens. A possible second no-vote could thus seriously harm a national leader’s political career without bringing about a solution.

### 2. Full renegotiation

In the French debate, the no-side often claimed that a French rejection would send a clear signal for a renegotiation on French terms. It was, however, never specified how this should come about and that was for a very good reason: because full renegotiation is simply ‘not an option’. Anyone who has followed the complex process of consensus-building in the Convention and the subsequent two intergovernmental conferences knows very well that there is no room for any substantial change of the current text. For example, the demands of the French left for more ‘social Europe’ are diametrically opposed to the demands of many British and Dutch (and even French ‘*souverainistes*’) for less European interference. And even if a new agreement were to be negotiated, it would be far from clear whether this would be acceptable to the population. Currently there is absolutely no political will to take up the lengthy and controversial process of negotiating anew.

### 3. ‘Nice-plus’

Such a ‘cherry-picking’ approach would envisage that on the one hand certain elements are taken from the Constitutional Treaty which might not even need ratification and are politically undisputed. Examples include:

- the Foreign Minister (in a probably somewhat watered-down version, meaning essentially the fusion of the two existing posts of High Representative and Commissioner for External Relations through an Inter-Institutional Agreement that has to make very clear when the FM acts in which function),
- the External Action Service,
- the Citizens Initiative,
- the early warning mechanism for national parliaments and
- measures concerning the functioning and the configurations of the Council of Ministers.

On the other hand (and maybe only at a later stage), other more ambitious, but much-needed elements could be introduced to make the EU more efficient (e.g. the double majority system or extending qualified majority voting) and more democratic (e.g. strengthening the European Parliament through more co-decision).

Arguments in favour:

- In the current political situation, this seems to be the most feasible solution.
- It would ensure a limited, but certain quick ‘return’ by avoiding the aforementioned risks of continuation.

Arguments against:

- The big weakness of this approach is that the much-disputed institutional ‘package deal’ would most certainly have to be unravelled again. De facto (limited) new negotiations would have to take place eventually, because very often one group of member states only accepted a certain element in exchange for assurances that their favoured arrangements would also be accepted. There is a considerable risk that negotiations would ultimately only lead to very meagre results.<sup>1</sup>
- The second weakness is of course the loss of coherence (e.g. perpetuation of the complicated ‘pillar structure’) that would have been achieved through the Constitutional Treaty. This shows the ‘added value’ of this text which is more than just the sum of its parts.

#### 4. A ‘Constitutional Treaty Light’

This approach has lately been put forward again by members of the cabinet of the Polish President Kwasniewski. It would basically mean that instead of ‘cherry-picking’, a core part would be cut out of the current constitutional text. This core part would essentially consist of Part I (Arts I-1 to I-60) of the current Constitutional Treaty (or at least considerable parts of it). The preamble and the Charter of Fundamental Rights (Part II) would be dropped without substitution. Part III would also be dropped, but its substitution would – of course – be the existing treaties (Treaty establishing the European Community and Treaty establishing the European Union with their respective protocols). Part IV could only be preserved partly (essentially Arts IV-440 to IV-448). In the existing parts any reference to the word ‘Constitution’ would probably be eliminated and replaced by ‘Treaty’. Certain controversial articles that are not essential for a more democratic or efficient Union but that create the impression of a European ‘super-state’ could be scrapped, e.g. Art. I-8 (“Symbols of the Union”).

Finally, the provisions in Part I that refer to the then scrapped Parts II and III would of course either have to be (partly) omitted (e.g. Art. I-9.1) or some of the provisions in Part III would have to be included in the text of the new treaty or in a protocol (see e.g. provisions mentioned in Arts I-40 to I-44 and in Arts I-53, I-55 and I-60).

Arguments in favour:

- This approach would save the most substantial part of the Constitutional Treaty. The first part is clearly the heart of the text and includes almost all of the controversial institutional innovations.
- By keeping the first part, the unravelling of the complicated ‘package deal’ (and thus controversial negotiations) on the institutions could be avoided.

Arguments against:

- The problem with this approach is that Art. IV-437 (“repeal of treaties”) would have to be scrapped. The new text would thus not repeal the old treaties and replace them, but rather co-exist alongside them. The existing treaties would have to be ‘adapted’ in order not to be in contradiction with the new one, which would essentially mean that the old treaties would become a kind of ‘Part III’. While, for example the old treaties are based on the concept of the pillar structure introduced by the Maastricht Treaty, the new treaty would repeal that. Probably adaptations to the existing treaties would have to be so extensive that many would (rightly) view this approach as introducing the existing Constitutional Treaty ‘by the backdoor’.
- With the old treaties continuing to exist, there would be several equal sources of law instead of just one coherent one. The provisions of the new treaty would – even with the old treaties adapted – run the risk of being interpreted differently than the Court has so far interpreted the old ones. A potential source for legal inconsistency and therefore uncertainty would thus remain.

#### Conclusion

As this brief overview shows, there is no scenario that comes without considerable disadvantages. Under the current circumstances, the most likely one seems to be (unfortunately) some kind of ‘Nice-plus’. But whatever option is taken, ratification should only be stopped for good, if there is an alternative on the table that is on the one hand potentially acceptable to all member states and on the other hand ambitious enough to provide for a more efficient and democratic functioning of the enlarged EU-25. Simply burying the Constitutional Treaty and continuing on the basis of the Nice Treaty with some cosmetic changes is not an option, if politicians intend to take the massive criticism on the current state of the Union into account. Among the strongest sentiments behind the recent no votes is the widespread public perception that the EU is an undemocratic and inefficient bureaucracy that is lacking in transparency and largely detached from the citizens. It is ironic that the Constitutional Treaty – although certainly not perfect – actually addresses this criticism to some extent and would have clearly improved the status quo. If political leaders decide to scrap the Constitutional Treaty, they must have a very clear idea of how they want to tackle the substantial problems of the current institutional set-up.

<sup>1</sup> See Sebastian Kurpas, *What could be saved from the European Constitution if ratification fails? The Problems with a ‘Plan B’*, CEPS Policy Brief No. 70, May 2005.

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