

# After the Constitutional Treaty: Reasoning Rather Than Rushing<sup>1</sup>



By *Dr Edward Best\**

There is no need to rush ahead with treaty reform. It does not matter sufficiently that some institutional changes should be adopted now, at best to neglect simplification and consensus-building, and at worst to risk a second failure.

On 25 March 2007, the German Presidency presented a "Declaration on the occasion of the fiftieth anniversary of the signature of the Treaties of Rome". If they looked at the end of this document, "the citizens of the European Union" – in whose name it was rather presumptuously written – could discover that they have agreed to place the EU "on a renewed common basis before the European Parliament elections in 2009." If they followed the press in the following weeks, they could learn that the Presidency, and others, were pressing to agree a basic roadmap for reaching this new deal at the European Council in June.

Assuming that there is no prospect of returning to the Constitutional Treaty as such, a historic question presents itself at this juncture. Is it better to push ahead quickly and salvage as much as possible of that treaty in another format, or to adopt a slower and more pragmatic approach aimed at strengthening effectiveness selectively while building political consensus and public consent?

There appear to be three main arguments for pushing ahead now. One stated reason is the hope to have a new treaty in place to coincide with the appointment of the next Commission and the election of the next Parliament in 2009. This would present a number of advantages, but failure to do so would not present insurmountable problems. The second reason is credibility. After all, two-thirds of the Member States have ratified the Constitutional Treaty. Commission President Barroso thus told Parliament that the failure of the ratification process "leaves a permanent shadow of doubt hanging over the European Union" which has to be removed. The sooner any solution can be found, it would seem, the better. Third, and perhaps most important, is the hope to take advantage of the political weight of Germany as Presidency, in the changed political conditions following the French Presidential elections. There is a window of opportunity in May and June 2007 which, it would seem, the EU should not neglect.

Some Member States openly wish not to go ahead with the previous package, and would like even to go into reverse gear. The UK is predictably prominent in its concerns but is not alone. The new Dutch Government came out in favour of a minimalist approach; if anything, the treaties should be reformed in the sense of more clearly limiting the powers of

the Union, while concentrating on particular areas of cooperation which could be seen as bringing practical benefits. The Polish demand to retain the Nice system of qualified majority voting has been supported by the Czech Government, which was also a leading proponent of allowing Member States not only to opt out of new policy measures but even to exercise a veto right. Public opinion is clearly very mixed across the Union.

This is hardly a promising situation in which to promote a new political settlement. One result could be to start negotiating but then fail to agree on anything. Another could be some kind of two-speed solution, which seems to be accepted as a positive option by some actors, but would not do much to deepen the solidarity of the recently enlarged Union. The worst case would be to force through a treaty which then failed to be ratified. If things were to go wrong for a second time, the consequences would obviously be very serious. Yet one does not have to contemplate such scenarios to have doubts.

Let us ask why we ever thought we wanted a new treaty of "constitutional" dimensions in the first place. Simplification was the starting point: everyone could agree that it would be a good thing to "tidy up" the institutional mess left by decades of incrementalism and compromise. The treaty involved specific problem-solving in response to deficiencies in existing arrangements. For example, a single representative and a common External Action Service would boost consistency and effectiveness in external relations; likewise, the agreement to use the same legal instruments and deepen cooperation in police and judicial cooperation in criminal matters would help respond to transnational crime. There has also been an objective of consensus-building: the very process of preparing the new treaty was hoped to strengthen political agreement and public support as to the basic rationale and rules of the Union. Above all this, however, there was a deliberate politicization of the debate with a view to fostering acceptance of a European polity on the basis of a "Constitution".

This last level has been dropped for the time being in response to negative public opinion, but seems to be taking with it the underlying simplification which had been proposed. The current structure of treaties within treaties which are changed by other treaties, and of different pillars, is both

dysfunctional and incomprehensible. The proposed suppression of the pillar system in favour of a single basic document (more or less, since the controversial treaty on atomic energy, Euratom, was not to be included) was not perfect but it would have made things significantly clearer. The statement of the basic principles which currently underlie the Union, and the different kinds of competences which are conferred upon it, would also be a move towards greater clarity. It is not clear how much of this would survive a rushed compromise process of treaty change, nor what the price of reaching a quick deal could be in terms of other elements which could be dropped.

The basic idea of the Presidency in March, supported by the Commission, the Parliament and many other actors, seemed to be that a new treaty should include at least the major institutional changes proposed in the Constitutional Treaty, as well as some innovations in areas such as climate change and energy. In April the German Chancellor circulated 12 questions (see annex). The underlying proposal seemed to be that "the institutional provisions of the Constitutional Treaty form a balanced package that should not be reopened". The "constitutional" approach could be dropped, together with all state-like symbols, but as much as possible of Part One should be retained in a slimmed-down text, making "the necessary presentational changes resulting from the return to the classical method of treaty changes". New substantive elements could be added on energy, climate change, or illegal immigration. Particular concerns from before could be addressed through some form of declaration on the social dimension, highlighting the Copenhagen criteria for membership in the article on enlargement, foreseeing new opt-in/out provisions, or dropping the explicit statement of the primacy of Union law.

If an overall "simplifying" settlement is dropped, then it becomes all the more appropriate to try to evaluate the individual elements involved in terms of their practical benefits and their political costs, not least in terms of the price paid in concessions to more skeptical Member States. On the one hand, one could classify the main institutional elements involved in terms of their need for treaty change and probable contribution to increased effectiveness of the Union in current circumstances. The following suggestion is obviously not exhaustive and may be contested, but may help raise questions.

### 1. Issues which promise to increase effectiveness and which need treaty change

- *legal personality of the Union and greater unity in external relations*  
Legal personality of the Union, the nomination of an individual as permanent chair of the Foreign Affairs Council and as Commission Vice-President (although not with the name of "Minister") and a common External Action Service would boost consistency and strengthen the Union's international presence.
- *the extension of codecision*  
This is less to do with the ability to act than the coherence of the institutional system, by giving the Parliament powers in policy areas subject to majority voting and with major budgetary and/or political importance in which it does not have colegislative rights. The main cases are agriculture and, if the shift to QMV were to happen, police and judicial cooperation in criminal matters.
- *the extension of QMV to certain key areas*  
One priority would be police and judicial cooperation in

criminal matters, but the price may be more opt-outs. Moreover the increase in effectiveness depends also on the other important changes proposed concerning common definitions, the single legal instruments and the role of the Court. This could partly be achieved by using Article 42 of the existing Treaty on European Union by which the Council could "communitize" these areas by unanimity, subject to adoption by the Member States in accordance with their respective constitutional requirements.

### 2. Issues which need treaty change but are not certain to increase effectiveness

- *the system of qualified majority voting*  
The system of QMV is less important than the scope of its application. The Nice arrangements are not optimal but have not prevented decisions from being taken. While an improvement, moreover, it is not clear exactly how much difference the proposed double majority as fixed in the Constitutional Treaty would make with regard to the ability to adopt decisions in practice.
- *the elected Presidency of the European Council*  
To have an individual chairing the summits and representing the EU for up to five years would create a(nother) face of Europe and perhaps contribute to the EU's global presence. But this would depend very much on the individual. Moreover, the internal influence of that individual would probably be weaker than that of the rotating chair now, given that he/she would not be the organic apex of the chairs of Council meetings and preparatory bodies, and have more difficulty in exercising strategic leadership and brokering deals across sectors.
- *the single system of legal instruments*  
The proposed distinction between legislative and non-legislative acts, and the reduction in the number of different instruments would increase clarity to some extent. Beyond this there would have been two main practical impacts. The new distinction between delegated regulation and implementing acts would replace the current system of comitology, but this has recently been reformed more or less in that direction (the exception being agriculture without a shift to codecision). The other would be to replace the former third-pillar instruments with more effective ones, but this also requires broader changes in the structure of the legal bases.

### 3. Issues which would increase effectiveness but do not need treaty change

- reduction in the size of the College of Commissioners  
This could – indeed, should – be done anyway under the Nice agreements.
- involvement of the national parliaments  
The Commission has already started to send its proposals directly to national parliaments. Further steps could be taken to strengthen their role without treaty change.

Looked at in this way, one may argue that there is really a rather short list of issues which would make an essential substantive difference in themselves. On the other hand, the price to be paid for going ahead now may not only be an agreement not to go ahead with some things which are substantively new, but to drop elements of the Constitutional Treaty which were not in fact new. In this respect, the very process of being seen to go back from those provisions could

have a negative impact on credibility. Most of the Constitutional Treaty – most of what was seen to be rejected and could now be seen to be undone – is what already existed. In the name of pushing forward in new areas, the result could actually be to appear to go back in some old ones. A specific case is the proposal to remove the new article stating the primacy of Union law. Neither the introduction nor the removal of this article would change anything in the legal situation, but removal now could have political consequences by creating the impression that this is the case.

Unless there were to be a two-speed solution, the probable outcome of the dominant approach which now seems to be pursued is a treaty which a) achieves few of the practical benefits which the Constitutional Treaty would have brought; b) reduces the “simplificatory” impact of the whole process; and c) would almost certainly make it seem more necessary to reopen negotiations not long afterwards while simultaneously reducing political appetites for yet another round.

Is it worth it? Despite talk of a “constitutional crisis”, there is no overwhelming need to do anything. We are not facing political unrest or popular protest. The ability to respond to economic challenges cannot be seriously related to a new treaty. And the institutions show no signs of being unable to function at 27. Although there is obviously room for improvement, busi-

ness continues to be done. The burden of proof is therefore very much on those who want to press ahead with treaty reform as quickly as possible, rather than on those who favour a more pragmatic approach.

It now seems to be recognized by almost all parties that any new treaty should not use the word “Constitution” and should avoid other terms and trappings of a state. However, the issue is not just one of imagery but of serious thinking about the nature of the exercise.

More than 50 years of the Community experience suggest that integration has depended not on public ratification of political visions but on concrete projects which commit the

Member States and key actors, and which are perceived as appropriate by citizens. Moreover, institutional questions in themselves just do not positively engage most people. The bottom line should be to achieve a basic consensus between the Member States, and a basic consent on the part of the citizens, as to the reasons and parameters of the Union. It will not help if the EU elite is seen as trying to impose a new “institutional settlement” for no clear reason, without any time for sustained public debate, and with a visible avoidance of further popular consultations by way of referendum.

The Berlin Declaration did not give clear reasons to its putative authors as to why a new common basis is necessary. It simply said that, in order to protect European unification, “we must always renew the political shape of Europe in

keeping with the times”. The follow-up speeches and debates in the Parliament were permeated by assertions that institutional reform is essential a) because of enlargement and b) to deal with globalization. It would be more effective to try to engage in a sustained debate across Europe about the costs and benefits of particular areas of cooperation. There is a demonstrable gap between the collective will to act, for example in external relations or combating crime, and the possibilities afforded under current institutional arrangements. Climate change and energy could indeed also serve as focal issues. All this could serve as a basis for public and

political debate as to the costs and benefits of common action which could in turn contribute to more fundamental discussion about the reasons for European integration.

By way of conclusion, one may return to the initial question. Does it matter sufficiently that some of the substantive institutional changes requiring treaty reform should be adopted now, at best to neglect simplification and consensus-building, and at worst to risk a second failure which would have really serious consequences for the EU’s credibility? The Union and its citizens do deserve an approach which is “in keeping with the times”. Among other things, this means taking the time to get it right.



© European Community, 2007

## NOTE

\* Professor; Head of Unit “European Decision Making”.

## ANNEX: The Twelve Questions of the German Presidency, April 2007

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 1 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 in that case the proposal made by some Member States to use 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 to drop the article that refers to the symbols of the EU?
5. How do you assess the proposal made by some Member States to drop the article which states 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 of 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?