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## EDITORIAL COMMENTS

### What should replace the Constitutional Treaty?

This should have been a year of celebration for the European Union – the fiftieth anniversary of the signing of the Treaties of Rome. The way that has been found by Europeans, as the moving language of the ECSC Treaty puts it, "to substitute for age-old rivalries the merging of their essential interests" and "to create, by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts" is testimony that humankind may, after all, be capable of collective self-improvement. We should be loudly proclaiming the political and economic successes of the European Union, in gratitude to those whose intelligence and imagination made the miracle possible, and as a sign of hope that, if the continent that was once a cockpit could become a haven of peace and prosperity, it may be possible to work a similar trick in other troubled parts of the world.

The modified rapture with which the anniversary has in fact been greeted must be at least partly due to the unfinished business of the Treaty establishing a Constitution for Europe. The failure to complete the ratification of the Treaty is a low-level crisis sapping confidence in the ability of the Union to provide solutions to problems the Member States are certainly incapable of resolving on their own – the challenge of a globalized economy, the need to cope with climate change, the threat from Islamist terrorism, massive migration flows, to mention only the most intractable. The German Chancellor, Mrs Angela Merkel, is therefore to be commended for the quietly persistent work she has been doing in order to break the deadlock. It has become the received wisdom that any institutional changes must be in place by 2009, in time for the next elections to the European Parliament and the changeover of the Commission; this means that the main lines of a settlement need to be agreed at the European Council in June, so that an intergovernmental conference can be convened with a decent prospect of completing its deliberations by the end of 2007, leaving enough time – though only just – for the ratification of a new instrument.

The Governments of the 18 Member States that have ratified the Constitutional Treaty are insisting, perfectly reasonably, that the text eventually agreed must correspond closely to the one that was signed in Rome on 29 October 2004 – reasonably but unrealistically. The victory of Mr Sarkozy in the French Presidential election confirms, what was already virtually certain,

that an ordinary amending Treaty, effecting minimal changes, will prove to be the best available option. Mr Sarkozy has expressed support for such a solution, which would avoid the necessity of holding a referendum, and this preference appears to be shared by the Prime Ministers of The Netherlands and of the United Kingdom.[1] Even though Mr Blair will no longer be in office when any fresh Treaty is signed, it is inconceivable that his heir-presumptive, Mr Brown, would be willing, in the political climate that was created by the French and Dutch rejections of the Constitutional Treaty, to agree a text sufficiently far-reaching to justify calls for the revival of the British Government's earlier promise of a referendum. A short Treaty also seems most likely to be found acceptable by the Euro-sceptic Governments of the Czech Republic and of Poland.

Does this mean abandoning the great objective, identified in the Laeken Declaration, of simplifying the structure of the foundational Treaties, and hence of the Union itself, so as to render it more comprehensible to those other than Brussels professionals? Not necessarily, or not altogether. Given sufficient political will, it should be possible to achieve an appreciable measure of simplification, without causing alarm and despondency in the Member States where ratification is liable to be problematic.

The Convention compounded the error of describing its draft as a "constitution", by the risky strategy of entirely replacing the EC Treaty and the TEU, together with all amending and accession Treaties; this meant that there were large swathes of text that had to be incorporated into the Constitutional Treaty without any substantive amendment, but needing to be re-ratified, alongside provisions that were truly novel. It seems that one of the reasons for the loss of the referendum in France was voters' becoming aware of provisions on the internal market, which they found scary, although these had been part of the EC Treaty at least since the Single European Act.

An alternative strategy for an amending Treaty would be to convert the TEU into a basic Treaty, perhaps renaming it the "Treaty establishing the European Union". As much of Part I of the Constitutional Treaty as can (and should) be salvaged could be inserted into the TEU, in substitution for the present Title I. Shorn of its institutional provisions, and with any further amendments that might be considered appropriate, the EC Treaty could be connected to the TEU by language indicating the unity of the constitutional order of the Union. For symmetry, the present Titles V and VI TEU (unless the latter Title is assimilated into the EC Treaty)[2] could be taken out of the

1. See *Financial Times,* 20 April 2007, pp. 1 and 3.
2. As to this possibility, see below.

main body of the Treaty and given the status of free-standing instruments, linked to the TEU in the same way as the EC Treaty.[3] The provisions of the amending Treaty effecting this re-organization of existing instruments would, of course, have to be ratified; but not the substantive provisions of those instruments, except in so far as it was intended to change their content. A re-structuring of the primary positive law of the Union along these lines would leave the Pillars in place but the constitutional architecture would be much more clearly visible.

An amending Treaty would provide an opportunity for improving some unsatisfactory features of Part I of the Constitutional Treaty. For instance, it is uncertain whether the principle of primacy, as stated in Article I-6, is intended to apply in the areas of EU law presently covered by the Second and Third Pillars. The Declaration noting that the Article "reflects existing case law" provides no assistance, because under the present Treaties the issue simply does not arise.[4] If the Member States wished to exclude at least the Common Foreign and Security Policy from the scope of the principle, this could be made clear in a new version of Article I-6 or through a Declaration. Or the provision could simply be omitted, leaving the principle to be developed, as it has been hitherto, through jurisprudence. This would remove one of the grounds on which the Constitutional Treaty has been persistently, if wrongly, attacked for subordinating Member States' constitutions.

Another provision that would benefit from pruning is Article I-13 on the areas in which the Union enjoys exclusive competence. The areas of *a priori* Union exclusivity are listed in paragraph (1) of the Article, which reassuringly demonstrates how few these are. Paragraph (2) is a different matter. It represents an attempt to formulate principles identifying the circumstances that render exclusive the competence of the Union to enter into international agreements. The principles have been developed, with respect to the Community's external relations competence, in a subtle and complex case law, based on the duty of loyal cooperation under Article 10 EC. Not only are the implications of the case law ineptly expressed in Article 13(2) but, just as in Article I-6, it is left unclear whether they are intended to apply to the CFSP. The best solution would to delete the paragraph.

3. These suggestions recall some of the options discussed in the period following the Laeken declaration; see the overview in de Witte, "Simplification and reorganization of the European treaties", 39 CML Rev. 1255–1287, and the proposals already in Dashwood, Dougan, Hillion, Johnston and Spaventa, "Draft Constitutional Treaty of the European Union and related documents", 28 EL Rev., 3.

4. Though, as the Court of Justice held in *Pupino*, Member State courts must do their best to interpret national rules in conformity with Third Pillar framework decisions: Case C-105/03 [2005] ECR I-5285.

An attempt will doubtless be made to reduce institutional reforms to a minimum. The following, it is submitted, are indispensable to a well-functioning Union of 27 Member States:

– *A full-time President of the European Council*. To function effectively as the agenda-setting organ of the Union, the European Council needs a full-time President, as provided for by Article I-22 of the Constitutional Treaty. This will help ensure that meetings are better prepared and that decisions are followed through. In the enlarged Union the job of chairing the European Council has become too onerous for a person acting at the same time as a Head of Government to be able to give it the attention it requires. Moreover, a President appointed for a fixed-term, who is out of national politics, will be better placed than is possible under the rotating Presidency to contribute to the development of coherent Union policies.

– *The creation of a post similar to that of the envisaged Union Minister for Foreign Affairs* (UMFA) – though with a less provocative, indeed misleading, title – and the establishment of an external action service. If the Union is to fulfil the destiny that is set for it by the TEU, of asserting its identity on the international scene,[5] machinery has to be created to allow for much closer coordination of activity across the whole range of external relations, and to avoid the debilitating turf wars that have regularly broken out in this area between the Council and the Commission. The role of the UMFA, as defined by Article I-28 of the Constitutional Treaty, calls for a (perhaps impossibly) fine sense of balance on the part of an individual, who would be, at the same time, the President of the Foreign Affairs Council and a Vice-President of the Commission. Second thoughts might point to a less radical solution, in the form of a High Representative for Foreign Affairs retaining the status of a senior officer of the Council, but enjoying a right to attend Commission meetings where external relations are being discussed, as an observer with a right to speak but not to vote. At all events, the holder of the post will need to be assisted by an external action service, which it must be hoped will develop, over time, the professionalism of an EU diplomatic corps.

– *The size of the Commission.* The issue of the Commission's size is unavoidable, in view of the amendment to Article 213 EC, which requires the number of Commissioners to be smaller than the number of Member States, "as from the date on which the first Commission following the accession of the twenty-seventh Member State of the Union takes up its duties" (i.e. 2009).[6] So, even if there were second thoughts about the arrangements envis-

5. See the tenth recital of the preamble to the TEU and Art. 2, second indent TEU.
6. See Art. 4 (2) of the Nice Protocol on the Enlargement of the European Union.

aged by the Constitutional Treaty (as from 2014, a reduction of the Commissioners to two thirds of the number of Member States, with a strict system of rotation),[7] a Treaty amendment would be needed to preserve the *status quo.*

– *Qualified majority voting (QMV) in the Council.* It is incontestable that effective decision-making in a Union of 27 Member States means it is essential to keep to a minimum the cases in which the Council acts by unanimity. The quite modest extension of QMV by the Constitutional Treaty[8] should be preserved, if at all possible. It goes nowhere near as far as that prescribed by the Single European Act or the Maastricht Treaty, and would not, therefore, justify calls for referenda in Member States where this is not a constitutional requirement. As for the envisaged change to the rules on the QMV threshold, this modest correction of the imbalance that disfavours the larger Member States, especially Germany, is a necessary and just reflection of demographic, and hence democratic, reality. Replacing the rebarbative arithmetic of the Treaty of Nice with a simpler rule based on the proportion of Council members voting for a measure, and the proportion of the Union's population they represent, would also bring a gain in transparency. However, the Polish Government has signalled its intention to re-open this issue, which is likely to prove one of the harder nuts for the new IGC to crack.

– *Addressing the democratic deficit.* A supreme effort must be made to preserve the various ways in which the Constitutional Treaty would have addressed the perceived democratic deficit in the constitutional order of the Union. First and foremost, the amending Treaty should acknowledge the co-decision procedure as "the ordinary legislative procedure" of the Union; and it should introduce the procedure into as many as possible of the legal bases where this is envisaged by the Constitutional Treaty, including the current Third Pillar. Secondly, the procedure for the election of the Commission President by the European Parliament should be maintained, even though it is largely a presentational amendment.[9] Thirdly, Protocol No.1 on the role of National Parliaments and Protocol No. 2 on the principles of subsidiarity and proportionality must be taken over in their entirety. Fourth and finally, the opening up of the Council's process when legislation is being discussed, on which a good beginning has been made, must be completed.[10]

7. Art. I-26.
8. Art. I-25.
9. Art. I-27.
10. Arts. I-24 (6) and I-50 (2). See also "Editorial comments: **In the meantime …: Further progress in transparency and democracy while the Constitution is dormant" 43 CML Rev., 1243–1250.

What of the Charter of Fundamental Rights, which figures as Part II of the Constitutional Treaty? If only because its inclusion was justified by the constitutional character of that text, the Charter seems very unlikely to feature *in extenso* in any replacement. The most that could be hoped for would be a provision of the amending Treaty that confers binding force upon the Charter, but even that may be seen as too controversial by some Member States. Whether this really matters is questionable. The Charter is bound, in time, to be recognized as an authoritative re-statement of fundamental rights that derive their character as general principles of law from the constitutional traditions of the Member States or from international agreements to which the Member States are parties.

A substantive amendment that might be thought highly desirable, and perhaps not excessively controversial, would be the absorption into the EC Treaty of the provisions of the Constitutional Treaty relating to judicial cooperation in criminal matters and police cooperation.[11] These are areas in which the need for more effective action at the level of the Union is generally acknowledged, and where legislation is liable to have a direct impact on the rights of individuals, making it important that the full scope of judicial protection under the First Pillar should be available. Such an amendment would be no more far-reaching than the incorporation, under the Treaty of Amsterdam, of the bulk of the original Third Pillar into Title IV of Part Three of the EC Treaty. It would also simplify the Union's structure by reducing the Pillars from three to two.

An amending Treaty that included all or most of the elements discussed here would represent a real advance on the present constitutional settlement, equipping the Union better to respond to the challenges it faces. Such a text should also be achievable within the tight timetable imposed by the 2009 deadline. After that, let there be a moratorium on constitution-making for a generation!

11. See Arts. III-270–277.