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EDITORIAL COMMENTS

From the Constitution to a new round of treaty amendments: Step-by-step

The failure of the referendums in France and in the Netherlands put a decisive brake on the process of ratification of the Constitution, the more so because a number of Member States took this as a reason to freeze their internal procedures. Some French opponents of the Constitution had declared from the start that a "plan B" existed, already lying in the drawers in Brussels, demonstrating that even a "no" to the Constitution would not interrupt the process. It is not clear whether one should be more surprised at the bad faith of these opponents of the Constitution, or at the naivety of those who believed them. Could one seriously imagine that Member States had negotiated a second treaty parallel to the Constitution and which they kept secret? Both at the political level and at the practical level, such an idea is pure mystification.

In the absence of a ready-made plan B, the reaction of the European Council was hardly surprising. Just as happened after the earlier rejections of new treaties in Denmark and Ireland, it called for a period of reflection. The results of the two referendums certainly needed to be analysed and understood in order to determine the new line to be followed. In fact, it was more "putting the debate on ice" than genuine reflection. The only action by the institutions was that the Commission, under Mrs Wallström's auspices, drew up a plan D (for democracy), aiming to inform citizens and to stimulate a debate. The results seem to have been rather modest.

In fact, the challenge facing the members of the Union was, taking into account the opposition to the Constitution, to define a strategy and then, within the framework of that strategy, find a consensus for a solution.

The search for a strategy

Basically, there were two possible courses: one that may be described as a Europe of results and one involving a search for an agreement on a rapid revision of the treaties.

Europe of results?

The first possibility was based on the idea that what citizens expected from the Union above all was answers to their immediate concerns, and they were

scarcely concerned about the institutional reforms. In this view, only after proving that the Union can provide effective answers to citizens' concerns could the debate on the Constitution resume. This was the direction the British presidency took when it organized the informal meeting of the Heads of State and Government at Hampton Court on 27 October 2005. It involved finding agreement on concrete steps forward on the topics of globalization, the knowledge economy and research, energy, and immigration. On this occasion, President Barroso stated "…I believe that the citizens do not want abstract discussions about institutions. The institutions are important, yes, but now they want us to focus on concrete results, on such matters as demography, as the fight against illegal immigration, a common approach to energy, how we can boost research and innovation so we can win the global competitiveness."[1]

However this course soon revealed its limits. It is obviously useless drawing up plans if the institutional mechanism does not make it possible to implement them. This is the case with, for instance, energy policy, which is presently subject to the rule of unanimity while the Constitution would have allowed the move to qualified majority voting. The more pressure there is to adopt concrete measures, the more obvious it becomes that, in many cases, the amendment of the treaties is an essential prerequisite.

The necessity of amending the treaties

To tell the truth, beyond the idea of a "Europe of results" as a substitute for institutional reform, political reality made any revival of the process difficult until elections had taken place in France and in the Netherlands. The arrival into power in these two countries of leaders endowed with new democratic legitimacy was needed to allow negotiation to be started on a new basis. The German presidency was entrusted with this task and was able to carry it out successfully. Many people claim credit for the success of the European Council of 21 and 22 June 2007, but, although the contribution of each was valuable, the work carried out beforehand by the German authorities in collaboration with the Secretariat-General of the Council had largely cleared the ground, so that the Heads of State and Government were only left with a few – albeit fundamental – questions to solve, while the general architecture was already established.

The essential problem was to find a compromise between the States which had ratified the Treaty establishing a Constitution and the States where a negative referendum had occurred. The situation was complicated because States

1. Press conference at the EU informal summit.

which had frozen the ratification process, like Poland and the United Kingdom, called for significant changes. The basic compromise was established on the basis of what was called a simplified treaty. This involved in fact preserving as much as possible of the content of the Constitution, but abandoning the idea of presenting it in constitutional form in a single text. The choice was made to relinquish this in favour of a traditional revision of the existing treaties, the Treaty on Union and the Treaty establishing the European Community, the latter of which would become the Treaty on the Functioning of the Union. By doing so, the readability – and thus comprehensibility – of the revision was lost, since the reform treaty would, following the practice of previous intergovernmental conferences, present an interminable list of the changes to be made to the current treaties.[2] Only with the establishment of a consolidated version thereafter would some light be shed on what was achieved. The other basic principle was that, with regard to the Treaty on the Union, the current text (i.e. the TEU as presently in force) would be retained except for amendments introduced by the mandate[3] given by the European Council to the intergovernmental conference, while for the EC Treaty, the text of the Constitution would form the basic text unless otherwise specified in the mandate. The question of form was settled – but the much more difficult question of the contents still remained.

The contents of the new treaty

While it is not possible here to carry out a detailed examination – this will no doubt be done in future articles in this Review when the IGC's work is completed – the mandate does allow us to distinguish the main points.

The basic compromise

The basic compromise was reached even before the European Council. The proponents of the Constitution agreed to give up everything that might appear to give a constitutional appearance to the treaty: that meant changing the name of the treaty, removing any reference to the symbols of statehood (flag, anthem, currency[4]), retaining the present title of "high representative" rather than creating a minister for Foreign Affairs, no longer calling the instruments

2. To judge this, it is enough to read the draft of the reform treaty prepared by the Legal Service of the Council and submitted currently to the experts' discussion, Doc. IGC 1/07 of 23 July 2007, which can be consulted on the Internet site of the Council under the "intergovernmental conference" heading.

3. The text of the mandate may also be found on the website.

4. The Euro remains, of course, but is not presented as "the currency of the Union".

"laws", removing the specific reference to primacy, etc. This step was not without problems. In many cases, the Constitution was only clarifying parts of the "acquis communautaire" which had not yet been incorporated in the treaties. For instance: primacy finds its basis in the decisions of the Court of Justice, but was included in the Constitution. Its disappearance from the text of the amended treaty could have been interpreted as a renunciation of a fundamental principle. Therefore a statement will appear in the final act, accompanied by an opinion of the Legal Service of the Council, to state that the absence of reference to primacy does not call into question the jurisprudence of the Court.

On the other hand, the fundamental features of the Constitution (merger of the Union and the Community, legal personality of the Union, disappearance of the pillar structure…) are not called into question and both treaties (Treaty on European Union and Treaty on the Functioning of the Union) have the same legal value. They will be interpreted as if there was a single text. The institutional reforms remain, except for adaptations regarding the date on which the new qualified majority enters into operation.

The specific difficulties

In order to meet specific difficulties, in particular for the Netherlands and France, a certain number of changes were made in addition to the disappearance of the constitutional apparatus. The supervisory powers of the national parliaments in relation to subsidiarity were strengthened: the Commission must give reasons for maintaining a proposal which is contested by a simple majority of the votes allocated to the national Parliaments.[5] Moreover, the examination of the proposal may not be continued if 55 percent of the members of the Council or a majority of the votes cast in the Parliament share the opinion of the national parliaments. The Copenhagen criteria relating to the accession of new Member States could not be incorporated into the treaty; agreement was reached on a protocol indicating that the eligibility criteria defined by the European Council will be taken into account. A Protocol on services of general interest was included, at the request of the Netherlands Government, in order to confirm the competence of the Member States "to provide, commission and organize" non-economic services of general interest, which should eliminate certain fears regarding any desire on the part of the Union to regulate all public services. There is no doubt that commentators will enjoy analysing and interpreting this text.

5. Each national parliament has two votes; see Protocol on the application of the principles of subsidiarity and proportionality.

The Union's competence on cross-border dimensions of family law is restricted by the possibility given to a national parliament of opposing the definition of the cross-border aspects decided unanimously by the Council.[6]

The reference to free and undistorted competition, which appeared in the article on the Union's objectives in the Constitution was removed – which caused a long debate in the European Council. The removal of this clause was in response to criticisms formulated at the time of the debates on the referendum in France. The proponents considered that this changed nothing with regard to the current situation, since the provisions on competition remained unchanged. But that ignored the fact that the Merger Regulation had been adopted at the time on the basis of Article 235 (now 308) EC. Eliminating competition from the objectives of the treaty, however, could render new recourse to this article impossible, since it requires the existence of an objective in the treaty. That was not their intention, so a new protocol is added which connects competition to the internal market and establishes the jurisdiction of the Union to take measures, if necessary on the basis of Article 308. This solution will certainly not convince a large number of legal commentators, who emphasize the implied change of philosophy making competition no longer an objective in itself, but purely a means to serve the internal market. Lastly, the competences of the Union as regards climate change and energy were underlined and, as provided for in the Constitution, a large part of energy policy comes under qualified majority voting.

The main problems

This left the British and Polish difficulties. To deal with these, the European Council called on the tried and tested techniques of opt-outs and postponements. The concern of the British Government was to arrive at a text which did not challenge essential aspects of its sovereignty, so as not to be obliged to hold a referendum. It had obtained satisfaction on certain points by the disappearance of everything that seemed to give the text a constitutional character, but there remained the question of the Charter of Fundamental Rights and that of the Area of Freedom, Security and Justice. The British hesitations with regard to the Charter are far from new, but they could have been overcome at the time of the drafting of the Constitution by a clearer distinction between rights and principles, and by means of a statement – in fact, superfluous since the text of the charter already indicated this – that the Charter did not extend the competences of the Union. Continuing in that direction, the German presidency had withdrawn the Charter from the amended treaties and had

6. This provision was requested by the Polish Government.

proposed integrating it by means of a mere reference in Article 6 TEU with an additional statement that the Charter did not extend the competences of the Union. This was not enough, though, and the British Government proposed to the European Council a carefully written Protocol on the United Kingdom, the essential object of which was to prevent the Court of Justice and the British courts from judging the conformity of "the laws, regulations or administrative provisions, practices or action of the United Kingdom" with the rights guaranteed by the Charter. It specifies in particular the application of this rule to Title IV of the Charter (Solidarity). The Protocol thus aims particularly at social rights. True, the preamble to this Protocol recalls that the Charter confirms rights already existing in the Union and does not create new rights. If this is the case, the United Kingdom is already bound by these rights as a matter of general principles of law. This seems indeed to confirm that the essential objective of the United Kingdom was to rule out the application of the social principles contained in the Charter insofar as these principles were not enshrined in British law. But even though the United Kingdom authorities may consider this Protocol to be watertight, its interpretation is likely to provide a rich ground for legal debate and case law. What appears more important at a symbolic level is that, for the first time in the Union, a State thus distances itself from the values shared by the Member States. However, at a practical level, many will consider that it is preferable to have a Charter applicable to 26 or 25[7] Member States than no Charter at all.

As for the Area of Freedom, Security and Justice, the solution adopted is again that of an opt-out for judicial cooperation in criminal matters and police cooperation. One may, nevertheless, wonder how useful this opt-out is, since the provisions relating to these chapters contain the so-called "brake-accelerator" clause of the Constitution, enabling a Member State to appeal to the European Council and block the proposal in the absence of consensus, but which then automatically allows nine Member States to progress in the form of enhanced cooperation. As far as the United Kingdom is concerned, which is already outside the Euro, these opt-outs taken together entrench a two-speed Europe.

For Poland, apart from the difficulties caused by fears concerning family law, the priority question was that of maintaining the voting system instituted by the Nice Treaty, but it was extremely isolated on this issue, since Spain – which had for a while held the same position – had switched to the other

7. The Polish Government is considering the possibility of joining the British opt-out, although this does not particularly solve its problem – which concerns private and family life, for which it is bound by the European Convention on Human Rights, and which is in any event referred to increasingly systematically by the Court of Justice using general principles of law.

camp, that of the allies of the Constitution. However, Poland was ready to accept a compromise on the basis of the so-called "square root" system, each State having a number of votes calculated on the basis of the square root of its population. This proposal was not acceptable for the other Member States. Discussions were so difficult that at one point the German presidency evoked the possibility of taking the opening decision of the Intergovernmental Conference by a simple majority, as the Treaty allows. In the end, the compromise was based, according to a traditional formula, on postponement, accompanied by the return of the Ioannina compromise.[8] The qualified majority provided for in the Constitution will be applicable as of 1 November 2014. From this date until 31 March 2017, a Member State can request that the decision be taken according to the Nice voting system. Finally, the version of the Ioannina compromise which already appeared in the Constitution will be applicable. Until 2017 this process may be started at the request of the States accounting for 3/4 of the population or at the request of 3/4 of the number of States necessary to form a blocking minority (and thereafter 55 percent of the population or of the States necessary to form a blocking minority), and it obliges the Council to achieve, within a reasonable time and in view of the limits imposed by the treaties, a satisfactory solution. These provisions are not exactly models of simplicity, but they are likely to be applied only rarely, if past experience of the compromise is anything to go on..

Conclusion

The solutions adopted constitute the best possible compromise. They have the merit of not altering the results obtained during previous negotiations too much. The substance is largely preserved; so much so, that some people accuse the European Council of mere "window dressing". That assessment is not correct. The European Council took account of the concerns of the States which had not been able to ratify the Constitution and made changes on some key points. It is true that the major part of the contents of the amended treaties is made up of provisions which already appeared in the Constitution. But these provisions, and in particular the institutional reforms, had not been the main target of dissatisfaction. The fears concerned the illusion that the Constitution would lead to a European "super-state", which is why all the constitutional aspects of the text were erased, and concerned certain eco-

8. When the enlargement to 15 Member States was imminent, and certain Member States were concerned about the increase in the number of votes needed to form a blocking minority. See Editorial comment: The Ioannina Compromise – Towards a wider and a weaker European Union?, 31 CML Rev., 453–457.

nomic and social worries, which were duly taken into account. As for how this was done, it was a case of revisiting history. This was apparent not just in the technique of amendment of the current treaties instead of substituting a new text, but also in the use of tested formulas setting transitional periods and making use of opt-outs. All conceivable diplomatic wisdom was called upon, and the Community method – i.e. revision of existing treaties – scored a victory over the constitutional method, which was suggested in the past by Spinelli: the latter was firmly rejected by certain national populations. It is also a return to the Community method in terms of the emphasis which was put on dealing with certain issues, such as energy or climate change, in order to show that the institutional reform is not an objective in itself, but a means to serve policy ends. The passage of time will no doubt enable the new Member States better to embrace the contents of the "acquis communautaire",[9] and will strengthen solidarity between all the members of the Union.

The amended treaties will be subject to legitimate criticism, whether it is their complexity, their lack of transparency or some of their provisions. These criticisms are valid. But at the same time, can one reproach the European leaders for having taken note of the situation and having tried to find remedies? Ratification of the amended treaties will constitute a new departure for the Union, which can finally tackle the problems which arise for its citizens and leave behind the institutional debates. Here is finally a chance to put the Europe of results into action; can we allow this chance to pass by?

9. One would thus avoid misunderstandings like that which is at the root of the protocol on the exercise of the shared competences requested by one of these States, and which specifies, what everyone knows, that in cases of shared competence, pre-emption only concerns the aspects covered by a Union act and not the whole of the area in which it intervenes. Did anybody ever claim that a directive on water pollution by hydrocarbons involved pre-emption for all forms of water pollution?