THE FUTURE OF THE CONSTITUTIONAL TREATY

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THE FUTURE OF THE CONVENTIONAL TREATY

Positions and proposals of the Greens and other European political actors

A study by Michaele Schreyer

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WAYS OUT OF THE DEAD END

How to get the European Constitutional Treaty back on track

The European Union urgently needs new impetus. The European Constitutional Treaty – which carried so many hopes, maybe too many hopes – is at a standstill after its rejection in France and the Netherlands. At the same time "enlargement-fatigue," which has been spreading through the Member States since the major round of accessions in 2004, is spilling over into the parliaments and governments. Accession negotiations with Turkey have ground to a halt. In this critical phase it is clear that no sustainable consensus exists between the States and peoples of Europe as to where the EU journey should lead: What form should the future division of power between the European institutions and the Member States take? Where should the external borders of the European Union be situated in the future? How can the political, social, and cultural diversity of Europe be harmonized with the common capacity to act? And how can we prevent the transfer of further competences to "Brussels" from also reducing the democratic influence of the citizens?

Key questions on the future of the European Union converge in the debate surrounding the Constitutional Treaty. This is due to the fact that this document portrays itself as no less than the first comprehensive description of the fundamental values, objectives, functionality, and policies of the Union. Previous Treaty law is summarized and developed in the direction of stronger integration, that is, the strengthening of the political union. This direction does not suit all governments and is not undisputed among the populations. Reform of the decision-making procedure is necessary to ensure the capacity for action of an alliance of 27 and more States. Consolidation of the European Parliament is, in turn, necessary to maintain the separation of powers at the European level. But these measures alone are not enough to generate a new enthusiasm for Europe and give fresh impetus to the European ideal. There is a lack of European projects and initiatives with which the general public can identify.

If it is the case that the Constitutional Treaty cannot enter into force in its original form, new directions must be taken. But "Return to Go" would not be advisable here. The starting point for revitalization of the constitutional process must be the current document, which, after all, has already been ratified by 18 States. How can the European advancement formulated in the Constitutional Treaty be maintained while engendering a new political legitimation? This is the question at the core of this study, written by the former EU Commissioner Michaele Schreyer on behalf of the Heinrich Böll Foundation.

After a short review of the genesis of the Constitutional Treaty and its key elements, the study sets out a diversity of political proposals for further dealings concerning the document and discusses their pros and cons. At the end the author makes three recommendations for action: Firstly, a division of the current body of work into a Constitutional Treaty, in the stricter sense of the term, and an "Implementation Treaty" containing the provisions for the concrete policy areas in which the EU is active. Secondly, a proposal that the constitutional document be supplemented with two voluntary agreements on key political challenges which are the focus of European public attention: establishing cross-border social minimum standards, and a European pact for a sustainable energy policy based on a European internal market for renewable energy. Thirdly, a "confirming

referendum," which would add democratic legitimation to the new Treaty, is given a positive assessment.

The history of the European Union – starting from the European Community for Coal and Steel through to the European Economic Community, the introduction of the internal market, the Maastricht Treaty establishing the political union, and up to the recent major enlargement – has passed through many phases of crisis and stagnation. Most recently it was the growth crisis, from which the European project emerged in a stronger position. We are counting on the same happening this time. Europe must have the capacity for both external and internal action to cope with the challenges of a rapidly changing world. But to turn the present crisis into an opportunity, we need thinkers and actors with strategic vision and European interests at heart. A major responsibility falls to the German federal government, which holds the current EU Presidency. With this study we hope to present possible courses of action as to how the European project can be brought back on track and how the Constitutional Treaty can be brought to its destination. Our thanks go to Michaele Schreyer, who with her talent for lucid analysis and her practical political experience seems predestined to present this debate.

Berlin, 1 February 2007
Ralf Fücks
Member of the Board of the Heinrich Böll Foundation

I INTRODUCTION

The "Treaty establishing a Constitution for Europe" (TCE) was signed in Rome by the heads of state and government of the 25 Member States of the European Union on 29 October 2004. It is based on the draft published by the European Convention on the Future of Europe in June/July 2003.

Just as the parliamentary and open methods of the Convention represented a democratic advancement in drafting new Treaty provisions for the European Union, entry into force of the Constitutional Treaty would have heralded a new era of democracy, transparency, and efficiency for political action at the European level.

However, expectations that the Treaty would enter into force within two years of its ceremonial signing on 1 November 2006 were quashed by the "no" vote on the TCE by the French and Dutch populations. Following the period of reflection – decided by the European Council – the number of proposals on how to deal with the Constitutional Treaty in the future is on the increase. The German EU Council Presidency has the task of pointing an acceptable way forward.

This study analyzes and evaluates existing proposals and supplements them with additional propositions. The study does not claim to be exhaustive – neither with regard to the proposals under consideration nor in terms of applied evaluation criteria. The two core questions under examination are: How can the concerns and worries of the citizens be addressed? And how, in the face of impending referenda, can chances be improved of winning the approval of the population for the reforms contained in the TCE?

The study also focuses on the positions and proposals of the Greens. The Greens have been actively involved at various levels in the constitutional process and remain committed to the realization of a constitution for Europe. This study also draws conclusions on how Green objectives for reform of the Treaties on which the EU is founded can be introduced and realized.

A review of some of the legal foundations and principles of the EU may prove expedient for understanding, classifying, and assessing the different proposals for re-launching the constitutional process. The first part of the study, therefore, examines the position of the TCE within the history of EU Treaty revisions, the most important changes resulting from the TCE, and the requirement for ratification of the TCE by all Member States. This is followed by an overview of the involvement of the Greens in the constitutional process. The subsequent presentation, analysis, and evaluation of the options for the future of the TCE focus on those proposals which have deepening European integration as their goal.

The study is based on text analyses as well as numerous discussions with European political actors. I would like to thank all my dialogue partners for their willingness to talk openly on the subject.

II THE CONSTITUTION FOR EUROPE AS THE NEW TREATY ON WHICH THE EUROPEAN UNION IS FOUNDED

European integration is based on Treaties agreed by the Member States. The Constitutional Treaty will replace two existing Treaties: the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC). One other founding Treaty of the EU remains in effect: the "Treaty establishing the European Atomic Energy Community" (EURATOM).

The Treaties, which were concluded to amend and supplement the founding Treaties during the now fifty years since the signing of the Treaties in Rome, reflect the history of European integration. These new or amending Treaties differ in the scope of the amendments and the range of steps they brought to European integration.

Following the rather technical Merger Treaty of 1965, the Single European Act brought substantial changes in 1986, including provisions for political cooperation on foreign policy. European integration was taken to a new level with the founding of the European Union through the Treaty of Maastricht (TEU), which introduced the three pillar structure of the EU – European Community; Common Foreign and Security Policy; Justice and Home Affairs – and created the basis for Monetary Union. The Treaty of Amsterdam of 1997 included new provisions for a common social policy, which had previously been regulated in a protocol, without the participation of the United Kingdom. The Treaty of Nice of 2000, which was expected to bring about the necessary institutional reforms with a view to the impending enlargement of the EU, brought only very limited institutional amendments, which were judged by the European Parliament, the general public, and even by the governments of most Member States to be totally insufficient. However, as long as no revision is agreed, the TEC and the TEU remain in force in the version of the Treaty of Nice.

It was the disappointing results of Nice that led to the appointment of the Convention on the Future of Europe. This marked a new, parliamentary approach to drafting a new Treaty. It set a new standard both for parliamentary participation and for openness and pluralism in the revision of EU Treaties.

The Convention was surprisingly successful, not only in agreeing on a complete, comprehensive concept for far-reaching reforms of institutions and decision-making procedures, but also in reaching a consensus on the use of the term "constitution." Moreover, it reached agreement on an issue that could not be resolved between the heads of states and government in Nice, that is, the legal status of the Charter of Fundamental Rights.

As is generally known, the Charter of Fundamental Rights forms Part II of the TCE.

Part I of the TCE states the objectives and values of the Union, lists the competences of the Union on the basis of the principle of subsidiarity, creates the posts of President of the Council and Union Minister for Foreign Affairs, and introduces election of the Commission President by the EP. With the principle of double majority voting in the Council, the size of the population will be the direct point of reference for majority decisions for the first time. The co-decision procedure by EP will become the ordinary legislative procedure. The acts of law are rearranged and the term "European law" is introduced for the first time. The provisions for enhanced cooperation are simplified. Under the principle of participative democracy, the instrument of the citizens' initiative is introduced. Further important amendments are the new provisions on budgetary issues and the significant innovation of the right of voluntary withdrawal from the Union.

Thus, Part I and Part II contain those core components that are generally understood under the term "constitution."

The extensive Part III (Articles 115–436) of the TCE contains the detailed provisions for the policies of the Union. Since many proposals about re-launching the TCE refer to Part III, it is worth remembering the fundamental principle of the EU, namely, the principle of conferral. Unlike the nation-state – with its comprehensive jurisdiction for public affairs – which may be allocated to various political levels according to its constitutionality – the EU can only act in those areas with the objectives and instruments which have been conferred upon it by the Member States. It is not at the European level where the division of competences between the EU and the Member States is determined, but it is the members of the EU who decide which sovereign rights and which duties are transferred to the European institutions. This fundamental principle has not been changed by the TCE. The regulations which now make up Part III of the TCE thus constitute the concrete, primary legal basis for the actions of the European institutions in accordance with the structure of the EU.

Part III assimilates the 'acquis communautaire' of competences from the Treaty establishing the European Community. Moreover, it contains the two policy areas – Common Foreign and Security Policy and Justice and Home Affairs – which, according to the present Treaty structure, are covered in the Treaty on European Union. Besides these two policy areas and the adaptations to the new institutional and procedural provisions of Part I, Part III also contains some new provisions for other policies of the EU.

In Part III a competence to act in the energy sector is conferred on the EU for the first time. The objectives of common actions in energy policy include promoting energy efficiency, energy savings, and the development of renewable energy. Also new is the authorization to coordinate disaster control operations and the legal basis to establish a European public prosecutor to combat fraud related to the EU budget. For many policy areas, a new obligation is introduced to meet the requirements for the well-being of animals as feeling creatures. Part III also provides for significant changes to the budgetary procedure: in the future the EP, as part of the budget legislature, will also decide on agricultural expenditure – which makes up about 45 percent of the EU budget.

Part IV of the TCE contains the final provisions including those for future revision of the TCE. Here too the EP receives a new role as an actor in future revisions of EU Treaties. The appointment of a Convention is introduced as the ordinary revision procedure, which can only be deviated from with the consent of the EP.

The protocols and annexes to the TCE are also integral parts of the Treaty. Some new protocols are annexed to the TCE, such as the Protocol on the role of national Parliaments in the EU. Unlike the Treaty of Nice, where only the four newly adopted protocols were annexed to the document (including the protocol on the enlargement of the EU), the TCE contains all the protocols currently in force, in a form adapted to the TCE, because the TCE is meant to replace the two existing Treaties – the TEC and the TEU – with all their related protocols.

Should the TCE – despite all the fundamental reforms it contains – be simply categorized in the series of Treaties that have marked the way to European integration? Or is the use of the term "constitution" justified to describe this Treaty, in that it not only constitutes the Union as a legal entity, but reconstitutes the Union politically?

The supporters of an emphatic constitutional concept will place a different emphasis and draw different conclusions about further dealings concerning the Constitutional Treaty than the proponents of a pragmatic constitutional concept. Those who see the

decision for the name "Constitution for Europe" as a chance to reach a new stage of post-nationality – in the sense of overriding the nation-states – will support the proposal for an EU-wide referendum on the TCE, which would document that the previous Treaties between Member States are being replaced by a social contract of the "European People."

Those who prefer a pragmatic constitutional concept may refer to the fact that the Treaties establishing the Community can already be understood as a type of constitution, in a formal sense. Accordingly, the TCE is classified in the series of Treaty revisions whereby this time, due to the quantity and quality of the amendments and for reasons of transparency, the new Treaty not only contains the amendments to current law – as was the case with the Treaty of Nice – but is presented in a consolidated version.

Dependent on perspective, the 'integrationists' will call for more common policies to give new impetus to the ratification process of the TCE, whereas the 'intergovernmentalists' will lobby for amendments to the EU Treaties being limited to institutional reform.

This is not the place for deepening the discussion on the TCE from a treaty law and constitutional law viewpoint. However, two points should be noted. On the one hand, the TCE gives a new order to the founding Treaties of the EU, which equates to one's perception of a constitution, particularly with the inclusion of the Charter of Fundamental Rights in an EU Treaty for the first time. On the other hand, even with the Constitutional Treaty, the fundamental principle of the division of sovereign rights between the national and European levels remains intact, whereby the nation-states decide on this division, voluntarily and with equal rights. Even if Giscard d'Estaing spoke at the Convention of laying a new spiritual foundation stone for the future of the EU, the European house – the EU – retains the basic structure that gives this political community its unique character.

This principle is also apparent in the provisions for the decision on and entry into force of amendments to the founding Treaties. This is currently governed by Article 48 TEU, which stipulates that a conference of representatives of the governments of Member States (Intergovernmental Conference) shall be convened to agree on the amendments to the Treaties. The agreement of the Intergovernmental Conference on the TCE was reached in June 2004.

Another consequence for proceeding with the TCE resulting from Article 48 TEU is that every solution to the current situation that requires an amendment to the TCE has to be agreed by an Intergovernmental Conference – irrespective of whether a Convention will be convened or not.

For entry into force of Treaty amendments, Article 48 TEU stipulates: "The amendments shall enter into force after being ratified by all the Member States in accordance with their constitutional requirements." Whether a referendum is necessary or possible for ratification – instead of or in addition to parliamentary ratification – depends solely on the national provisions of each Member State. The EU has no authority to regulate the national constitutional requirements for ratification of European primary law.

This requirement for ratification by all Member States presents a very high barrier to new Treaties. The EU has experienced this not only with the referenda on the TCE in France and the Netherlands, but on numerous occasions in its history. With the increasing number of Member States, the statistical probability that one or several Member States cannot ratify new Treaties also increases. Nevertheless, the TCE repeats the requirement for ratification by all Member States, not only for its own entry into force (Art. IV–447), but for all future Treaty revisions (Art. IV–443).

If, after expiry of an agreed time limit, one or more Member States experience difficulties with the ratification, while four-fifths of the members have already ratified, the

TCE merely states that in the future the European Council will then convene. This accords with the declaration of the Member States that was agreed for dealing with issues concerning the TCE in June 2004.

How should this requirement for ratification by all Member States be assessed? The principle of voluntary integration into the EU and the voluntariness of the transfer of national sovereignty to common supranational institutions is evident within this requirement. Since the Member States enter into obligations with their agreement to the Treaties – including the obligation to accept majority decisions made at the EU level in the designated areas – the agreements to amend primary law that are reached at an Intergovernmental Conference are subject to the right to reserve agreement by the national parliament or by the national population.

Renunciation of the requirement for unanimous agreement in the case of primary law would have to be approved by all national parliaments or in national referenda. It is doubtful whether all national parliaments would agree to such a change, especially as in some Member States this would also require changes to their Constitution. Majority decision for amendments to the founding Treaties of the EU in place of unanimous agreement would radically change the relationship between the Member States and the EU. Since the current legal situation in the EU neither provides for the expulsion nor the withdrawal of a Member State, renunciation of the requirement for unanimous agreement would mean that a new European primary law could be forced on a Member State. The national institutions – either the parliament or, in the countries where a referendum on amendments to the EU Treaties is mandatory, the national population – would be massively devalued if an essential component of national sovereignty, namely that of deciding for itself on the transfer of sovereign rights to the supranational level, would be restricted. A constituent element of the EU would be changed.

The voluntariness of integration into a Europe-wide political community is an achievement of civilization in the history of Europe. "The core of the concept of Europe," according to Joschka Fischer, "was, and still is, a rejection … of the principle of hegemonic ambitions of individual states." It is the voluntariness of the common approach and of the integration that makes for the attractiveness of the Union as a new type of political community (Pernice). According to Walter Hallstein, "Only a voluntary union has the prospect of survival."

The requirement of unanimity for the ratification of new Treaties and the question of the acceptance of this principle are key to the proposals on the future of the Constitutional Treaty.

III THE GREENS AS ACTORS IN THE CONSTITUTIONAL PROCESS

With the plea for the "realization of the project of a European Constitution" in his speech at the Humboldt University in Berlin on 12 May 2000, Joschka Fischer gave impetus to the European constitutional debate right across Europe. According to Fischer, the core of a constitution should be "centred around basic, human and civil rights, an equal division of powers between the European institutions and a precise delineation between European and nation-state level."

Daniel Cohn-Bendit has also been calling for a "constitution for a united Europe" for a long time. In his opinion the constitution should not just be "a plan on how a united Europe should function," but rather "an agreement among Europeans on the values for their common way of integration." In a passionate speech in November 2000 in Groningen, he confessed to a "constitutional patriotism for Europe."

The call for a constitution for the EU was not an exclusive project of the political elite at that time, but had widespread approval among the population. According to a Eurobarometer survey in July 2000, 70 percent of people questioned were in favour of a European constitution. Only 6 percent were against it.

The idea of a European constitution was not new in 2000. It already existed before the start of the common European project. It failed in 1954, just as the initiative of the European Parliament failed in the 1980s. But like that initiative, the call for a European constitution kept coming back, both from the organized European civil society, such as the European Movement, and from political parties (Wolfgang Schäuble and Karl Lamers in 1999 in Germany, for example).

The current constitutional process started with the work of the "Convention to draw up a Charter of Fundamental Rights of the EU." The mandate for this first Convention was formulated at the Cologne Summit of the European Council in June 1999, chaired by the Red-Green federal government. However, a Constitutional Treaty could not be agreed upon at the following Intergovernmental Conference in Nice. Even agreement on the status of the Charter of Fundamental Rights could not be reached. This was only achieved with the appointment of a second Convention, the "European Convention on the Future of Europe," which completed its work in July 2003.

Never before were the Greens so directly involved in a process of amending the EU Treaties as with the drafting of the TCE. This was possible because of the Green's membership during the time of the constitutional process in all three European institutions – the European Parliament, Council, and Commission. But the main difference was the historical act of appointing a Convention for drawing up a new Treaty which allowed the active participation of members from the Greens, because the Convention was composed of representatives from the governments, the Commission, and members of the EP and the national parliaments of all Member States and enlargement states.

Besides Joschka Fischer (government representative DE) and Johannes Voggenhuber (MEP, AT) as full members, also involved in the Convention as alternate members on behalf of a Green Party were Neil MacCormick (UK) for the EP and Marie Nagy (BE), John Gormley (IE), Renée Wagener (LU) and Eva Lichtenberger (AT) for national parliaments.

Moreover, the composition of the Convention – with a strong representation of members of parliament, as well as its discursive form with diverse forums – enabled the organized civil society, in particular, to put forward their proposals and demands much more

directly than would be conceivable in the traditional form of an Intergovernmental Conference to amend the Treaties on which the EU is founded.

The Intergovernmental Conference, however, was unable to agree upon a new Treaty on the basis of the Convention draft at the first attempt. The breakthrough was achieved with the Irish Council Presidency in June 2004, and the TCE was signed in Rome in October 2004.

The TCE was welcomed by the majority of the Green Parties, Green parliamentary factions, and the majority of the members of the Greens/Free European Alliance group in the EP. On the EP ballot on the motion for a resolution on the TCE, only seven members of the group voted against (including three members of the Green Party), one member abstained, while 32 members of the Green EP group voted for the motion.

In the Member States in which the TCE had been ratified by the end of 2006 and in which members of a Green Party are represented in parliament, the large majority of Green members or groups have voted in favour of the TCE, for the most part unanimously.

In the campaigns for the referenda on the TCE in France and the Netherlands, the position of the Green Party in France was not unequivocal, while the Dutch Greens lobbied intensively for a "yes" vote to the TCE. According to a survey in the aftermath of the referendum in the Netherlands, 54 percent of those questioned with political party preference for the Green Party voted for the TCE. That was the highest approval rate of any group of a particular political persuasion. Conversely, according to surveys in France, the rejection quota among Green sympathizers and the ecologically oriented was 64 percent. Thus, the outcome of the TCE referenda also points to dissent between Green voters and Green politicians.

In this situation and after the great commitment of the Greens to the current constitutional process, it is not surprising that the Greens are also actively engaged in the discussion on how to rescue the TCE. The aims of the reform of the founding Treaties– more democracy, more transparency, and enhanced capacity to act for a Europe that is fit for the future – have not yet been achieved.

IV THE WAY FORWARD FOR THE CONSTITUTIONAL TREATY

Presentation, analysis, and evaluation of options

With the accession of Bulgaria and Rumania, the status of ratification of the TCE at the beginning of 2007 is as follows:

18 of 27 Member States – that is, two-thirds of Member States, representing approximately 55 percent of the population of the EU – have ratified the Treaty. In Germany, however, the ratification is not yet legally binding.

One-third of these 18 Member States ratified the TCE after the "no" votes in France and the Netherlands.

France and the Netherlands have not carried out parliamentary ratification due to the results of the referenda.

Of the seven other Member States, four are seen as "Friends of the TCE" by the German Council Presidency, due to statements made by their respective governments: Denmark, Ireland, Portugal, and Sweden.

In five of the seven States, a referendum has been announced or is required under domestic constitutional regulations.

As is generally known, after the rejection of the TCE in France and the Netherlands, the European Council decided on a period of reflection. This, however, was not meant to, and did not lead to, an interruption of the ratification process. The phase of reflection was extended by one year at the June Summit of 2006.

With the maxim, "Constitutional Treaty: continuing the reform" it was agreed at the same time that the Council Presidency in first half of 2007, that is, the German Council Presidency, should prepare a report based on extensive consultation with the Member States, presenting "an evaluation of the status of the consultations on the Constitutional Treaty" and "possible future developments."

Mainly because of the presidential and parliamentary elections in France, but also because of the unclear political situation in other Member States, the German Council Presidency will not present the report until shortly before the Summit in June 2007. Public debates are not planned, but rather consultations with the Member States, understood as a "listening phase" among the governments. There is a risk with this approach that attention will be focused entirely on reaching agreement at an Intergovernmental Conference. On the one hand, this approach risks loosing sight of the fact that the TCE was a well-balanced compromise between the European institutions. On the other hand, there is the risk that once again too little account will be taken of the autonomy of referenda in the ratification process. The dissent which became apparent in the referenda in France and the Netherlands did not come from the governments of the two countries but from the populations.

However, various European political actors have in the meantime made proposals on the future of the TCE. The period of reflection is turning into a period of proposals. One thing all the proposals have in common is that they neither see "keep things the same" nor "Return to Go" as the solution. Otherwise they vary considerably in scope and direction. Various studies provide a good overview of the diverse proposals and options, following different systemizations (cf. appendix).

In this study the proposals on the future of the TCE are categorized into those that

- Abandon the constitutional project and just propose reforms on the basis of the Treaty of Nice – "Nice Plus,"
- adhere to the constitutional project. The second category is divided into those that
  - are confined to amendments to the form of the TCE,
  - want to supplement the TCE with additional content – "TCE Plus." The "TCE Plus" category, to which most of the proposals from the Green spectrum belong, is further subdivided according to whether this "Plus" relates to an
    - increase in input-legitimation of European politics – keyword referendum,
    - increase in output-legitimation through additional agreements for common policies.

1. Abandoning the constitutional project – Nice Plus constitutionalization

Immediately after the "no" in France and the Netherlands, the death of the TCE was loudly proclaimed in some quarters. But surveys subsequent to the referenda show that no firm criticism of the institutional and procedural reforms contained in the TCE can be deduced from its rejection. Therefore, some proposals call for the implementation of as many of the consensual points of reform as possible in ways that do not involve the TCE, namely by way of "soft constitutionalization" or through a "mini treaty."

The most prominent proposal for a mini treaty came from Nicolas Sarkozy, French Interior Minister and candidate for the French presidential elections. The statements of Dutch Foreign Minister Bot and French President Chirac, as well as the detailed proposal from April 2006 of the French Minister for Foreign and European Affairs, are examples of the way to soft constitutionalization.

1.1 The way to soft constitutionalization

This way aims to use the leeway of current Treaty law and the instruments at the disposal of the institutions based on other provisions for the realization of as many institutional reforms as possible, for stronger parliamentarization of European decisions, for more transparency, and for the introduction of elements of participative democracy. These instruments include:

- The *pass*erelle clauses in the TEU and TEC for transferring policies from the intergovernmental cooperation to Community policy and for the transition to a co-decision procedure in the Parliament in the designated areas.
- The right to self-organization of the institutions, for example, for more transparency in the decision- making of the Council.
- The organs' right of decision, which was applied in the case of the European Defence Agency.
- Inter-institutional agreements between the EP, Council, and Commission, for example, for intensified cooperation on foreign policy or for the involvement of national parliaments in terms of the subsidiarity monitoring procedure.

In political reality, Nice Plus already exists to a certain extent. The European Defence Agency was founded in 2004; the "tripartite presidency" has been introduced; the Commission sends all documents directly to all national parliaments; an inter-institutional agreement gives the European Parliament more influence on decisions in budgetary matters. It is therefore understandable that a network of NGOs is demanding the introduction of the instrument of the citizens' initiative that can call for policy initiatives by the Commission without waiting for the TCE to enter into force.

All the proposed steps leading to soft constitutionalization represent positive changes to the status quo, but they are limited in their range. Without amendment to the Treaties, there will be no EU Foreign Minister and the double majority principle for decisions in the Council of Ministers will not be introduced. Thus, a reform of EU primary law would only be postponed. The incentive to agree to a new Treaty could even be diminished by this course of action for some European political actors because they could realize their main aims in advance, in the sense of cherry picking.

It goes without saying that making full use of the available leeway is not viewed negatively from the Greens' point of view. However, the course of soft constitutionalization as an alternative to the TCE is rejected by the EP and by the Greens. This course also disregards the fact that 18 Member States have already ratified the new Treaty. Moreover, soft constitutionalization does not address the concerns and fears of the population as expressed in the "no" votes on the referenda.

1.2 A mini treaty for Europe

French Interior Minister Sarkozy brought the concept of a "mini treaty," concentrating on the implementation of institutional and procedural reforms, into the debate in 2006. This mini treaty would essentially contain provisions for the following: the new post of the Union Minister for Foreign Affairs, the post of the permanent Council President, the election of the Commission President by the EP, expansion of the co-decision procedure by the EP, qualified majority voting in the Council of Ministers, simplification for enhanced cooperation, and the subsidiarity monitoring procedure.

A mini treaty concentrating on these areas would leave the other areas, which would have been reformed by the TCE, at their current legal status of the Treaty of Nice. Therefore, Sarkozy additionally proposes the appointment of a new Convention that would deal with all other issues after the EP elections in 2009.

If Sarkozy were to win the presidential elections, he would not put the mini treaty to a new referendum, but rather bring it to parliamentary ratification. Precisely for this reason, some political actors see his proposal as "bridge-building" because then the other Member States could decide against their announced referenda using the same argumentation as France.

However, the proposed mini treaty has many disadvantages:

- It does not respond to the reasons for rejection of the TCE in France and the Netherlands.
- It hardly acknowledges that 18 States have already ratified the TCE.
- The mini treaty does not answer three of the four questions asked in Declaration No. 23 to the Treaty of Nice, which partly substantiated the mandate for the Convention. These are the questions on delimitation of powers between the European Union and Member States, simplification of the Treaties, and the status of the Charter of Fundamental Rights.

- The undoing of the TCE, which is bound up with the mini treaty, could bring about a further 26 requests to undo the TCE, and the equilibrium of compromise between the institutions will be lost.

- A new, major Convention in 2009 means the EU would be preoccupied with its constitutionality for years to come – with all the attendant consequences for its capacity to act.

- After a constitutional process lasting 10 years, only an intermediate stage would have been reached by 2009.

A mini treaty is rejected by the Greens, as it is by the EP and several Member States that have already ratified the TCE. But the proposal has met with partial approval in the United Kingdom. The German Council Presidency has taken a negative view of a mini treaty.

2. Ways for realization of the Constitutional Treaty

Even though a further six States have ratified the TCE since its rejection in France and the Netherlands, it is virtually impossible that the TCE will enter into force without changes.

The Eurobarometer surveys of December 2006 show a change in public opinion which is in favour of the TCE in France and the Netherlands. The fundamental changes to the Services Directive by the EP and the granting of a substantial rebate to the Netherlands on its contribution to the EC budget have addressed important points of criticism that contributed to the "no" votes in France and the Netherlands. Nevertheless, it can be assumed that a completely unchanged text would not win a majority in a second referendum. It is also a political impossibility that the parliaments of these two countries would ratify an unchanged text.

The Greens in France and the Netherlands also reject a second ratification attempt without changes to the TCE.

In the cases of France and the Netherlands, could a similar route to ratification of the TCE be taken as that taken after the "no" votes in Denmark on the Maastricht Treaty and in Ireland on the Treaty of Nice?

After the "no" votes of Denmark and Ireland, protocols were added to the respective Treaty, which were custom-made for the country and the specific reasons for rejection. These protocols provided a ruling on the opting-out of new policies planned in the Maastricht Treaty and clarified the relationship of the Treaty of Nice to the Irish Constitution. These protocols are still valid and are included in the TCE.

In the case of the current "no" to the TCE in France and the Netherlands, there is no specific new provision in the TCE that can be identified as the main reason for its rejection, which could then be tailored specifically for France or the Netherlands. A ruling on the opting-out of a Member State as a solution to a ratification problem with a new Treaty such as the TCE that contains tepid institutional and procedural reforms is much less practicable than would be the case if amendments to the Treaty established new competences for the EU and these were rejected by one or just a few Member States. For example, it is not possible to resolve the ratification problems of the TCE by applying the principle of the double majority to Council decisions for 26 Member States only while one country remained subject to the voting rules of the Treaty of Nice.

At the moment there are no apparent solutions to the ratification problem of the TCE in France and the Netherlands such as those applied in the cases of Denmark and Ireland.

All proposals where the objective is the realization of the TCE therefore contain amendments to the current TCE text. But they differ considerably in the scope and content of the proposed changes.

It should be noted that, in accordance with Article 48 TEU, every amendment to the current TCE text must be agreed by an Intergovernmental Conference, irrespective of whether a Convention is convened or not. Moreover, with every amendment to the TCE, another ratification process becomes necessary, which would include the 18 Member States that have already ratified the TCE. However, the less the political content is affected by the amendments, the more the new ratification process will be seen as a formal rather than a political act.

2.1 Re-structuring and shortening the Constitutional Treaty

2.1.1 Renaming the Constitutional Treaty

The minimalist amendment proposal limits itself to renaming the TCE. In its study on the reorganization of the Treaties, undertaken in 2000, the European University Institute Florence gave the name "Basic Treaty" to the part containing the fundamental provisions of the Treaty. "Framework Treaty" is another example of a new name.

Proponents of renaming want to clear up misunderstandings about the relationship between the EU Treaties and the constitutions of the Member States and also take the wind out of sails of those critics who see the Constitutional Treaty as heralding a European superstate on the basis of the name alone.

The spectrum of those who reject a renaming of the TCE ranges from those who value the name "Constitutional Treaty" because of its conciseness and clarity, since EU Treaties were always a form of constitutional texts, to those who hope that constitutional patriotism will form the basis of a new identification of the citizens with the European project. The retention of the term "constitution" is therefore essential for all proposals that envisage an EU-wide referendum. There are two reasons for this: On the one hand, the name "constitution" promises a much greater mobilization in a referendum than terms like "Framework Treaty" or "Basic Treaty"; on the other hand the name "Constitution" is essential if the referendum is intended to give post-national constitutionalization to the EU.

Others involved in the name debate pragmatically insist that rescuing the contents of the TCE should have priority over preserving the name.

The Greens are standing by the name "Constitution for Europe," which the Convention gave to its draft. Thus, according to Johannes Voggenhuber, it will be "acknowledged that the European Union does not constitute an international organization but a political community."

In any event, all actors are aware that a mere change of name will not suffice for the realization of the TCE. Neither is there agreement whether renaming the Treaty would win more new supporters than it would lose. To clarify the relationship of the TCE to the Irish national Constitution, the protocol to the Treaty of Nice has been carried over to the TCE. In the broadest sense, comparable protocols are conceivable for other States whose population reject the TCE on the basis of its name because of concerns about their own constitutional identity.

2.1.2 Dividing the Constitutional Treaty into two Treaties

The components of the TCE to which the protocols and annexes belong (Art. IV–442) comprise several hundred pages. The protocols amount to approximately 200 pages in the corpus of the TCE. The declarations on the TCE and the declarations on the protocols, some from individual States, some from several or all Member States, make up another 100 pages. The total volume of the document is some 500 pages. The Articles of the TCE make up less than half of this and Parts I and II together even less than one-tenth. Even the supporters of the referenda commented that a document of the size of 500 pages is not suitable for a referendum.

All the new provisions of the TCE together with all the amended or still valid provisions of the current TEU and TEC and their protocols have been merged into a single document for reasons of legal certainty and in the hope that this will increase the transparency and legibility of the TCE.

In the course of the French referendum and its aftermath, criticism of the size of the Treaty was generally and specifically aimed at Part III: It was considered that the individual policy provisions of Part III and the protocols did not deserve "constitutional status."

Many members of the Convention whose work was primarily concerned with Parts I and II see themselves confirmed by this criticism.

Support is growing for partitioning Part III off into a separate Treaty.

The following points should be noted in the case of a division of the TCE text:

- Part III must also exist as primary law. It provides the concrete legal basis for the European institutions to act.
- If Part III is partitioned off, the reforms of current law it contains should still apply.
- The TCE text cannot simply be torn apart. It must be decided how the cross-references between the two Treaties are formulated and whether the articles of the current Part III are presented as a new consolidated separate Treaty or whether only the amendments and adaptations of the TEC to the – abridged – Constitutional Treaty are formulated and put forward for ratification.

The first detailed proposal for the division of the TCE text into a "Constitution" and a "Treaty" was presented in November 2006 by a member of the French Greens, Gérard Onesta, MEP and vice-president of the EP: "Le Plan A +." This proposal establishes a hierarchic order by different ratification procedures, according to which the "Constitution" should be decided by an EU-wide referendum while parliamentary ratification is envisaged for the "Treaty" on the policies of the Union (cf. 2.2 of this study).

The European University Institute of Florence in cooperation with the Amato Group is also working out a proposal for the division of the TCE into a framework Treaty and a second Treaty for adjusting the TEC to the new provisions of the framework Treaty.

The Greens have proposed a division of the TCE text into a "Constitution" and a "European Treaty" in the EP, in some national parliaments, and in the declaration of the Federal Council of the European Green Party (EGP). The German alliance Bündnis 90/Die Grünen speak of a "Constitutional Treaty" and an "Implementation Treaty." Other names being bandied about for Part III of the TCE are "Working Treaty" or "Policy Treaty."

A division of the TCE text would have the advantage for the continuation of the ratification process that, in the countries in which a referendum has been announced but is not obligatory, the referendum could be limited to the "abridged" Constitutional Treaty and the amendments to the TEC. This would be in line with the plea by the Luxemburg Prime Minister Jean-Claude Juncker for an "intelligent shortening." The decision would then have to be made in France and the Netherlands whether only the Constitutional Treaty, shortened to Parts I and II, would be put to the vote in a new referendum, while parliamentary ratification alone would be envisaged for the Union's policies.

Division of the TCE into two Treaties, whereby the second Treaty would only contain amendments and adjustments to current law, would also require new ratification processes in the 18 States that have already ratified the TCE. Nevertheless, the fact that they have already given their approval to the TCE would be respected in terms of content.

2.1.3 The status of the Charter of Fundamentals Rights in the Constitutional Treaty

Proposals for shortening the text are partly related to changing the position of the Charter of Fundamental Rights in the Treaty. This act should not call the legally binding status of the Charter into question. But this should be declared in a single article in the Treaty, while the text of the Charter itself would be appended as a protocol or an annex to the Treaty. Since the protocols and annexes form an integral part of the Treaty (Art. IV 442), this would not change the legal force, but it would definitely change the visibility of the Charter.

This debate started at the Convention. All Green members and alternate members of the Convention jointly initiated or signed a motion to the Convention that the complete text of the Charter of Fundamental Rights should be included in a prominent position within the Constitutional Treaty itself. This was justified with the words: "Whoever opens the European Constitution expects to find his basic rights and freedoms right at the beginning. To hide the Charter of Fundamental Rights in a protocol would contradict its dignity and significance."

For the proponents of an EU-wide referendum, and especially for supporters of an EU constitutional patriotism, the fundamental rights belong to the nucleus of the TCE. The term "constitution" in itself implies that the fundamental rights represent a prominent part of the text, and a referendum on only the section containing the aims, values, competences, institutions, and procedural rules would be far less attractive.

2.1.4. Amending detailed provisions–Constitutional Treaty Minus

It is very probable that requests for amendments to individual provisions of the TCE will be made in the consultations of the Council Presidency with the governments of the Member States. Best known is Poland's wish for retention of the Treaty of Nice voting rule in the Council instead of voting based on the principle of the double majority. It should not be speculated here whether other Member States, especially those where ratification is still pending, express equally significant or less serious amendment wishes and whether all the Member States, including those that have already ratified the TCE, would be prepared to accept such individual amendments.

It should be pointed out, however, that the inherent risk of such a course of action is the breaking down of the well-balanced compromise that the TCE represents, with the consequence of new uncertainties for the future of the TCE.

To find compromises with those States who, in the meantime, have developed particular misgivings about individual provisions, the proven strategy of gradual entry into force of reforms could be used. Andrew Duff, for example, refers to "piecemeal implementation" and Eckart Stratenschulte, Director of the European Academy Berlin, to "entry into force in instalments." In the TCE, this strategy has already been used with regard to the downsizing of the Commission. In theory it would be possible to apply the same strategy to other changes such as, for example, the switch to the principle of the double majority.

2.2 Constitutional Treaty Plus

Would re-structuring of the TCE be sufficient to successfully conclude the ratification in all Member States? Will the Commission's "Plan D – Democracy, Dialogue, and Debate" – or the upcoming Berlin Declaration be convincing enough to persuade the citizens to vote "yes" in new referenda in France and the Netherlands or in the outstanding referenda in other Member States? Or should another element be added to the constitutional text itself?

Many proposals on the future of the TCE answer this question in the affirmative in order to meet "the concerns and fears of the people," as formulated by the European Council after the "no" votes in France and the Netherlands. Various political actors therefore propose a "TCE Plus."

2.2.1 Enhancing the input-legitimation with an EU-wide referendum

The TCE significantly increases the parliamentarization of political decisions at the European level and thereby the democratic legitimation of European action: the co-decision procedure in the EP will become the ordinary legislative procedure, the EP will become an actor in Treaty revisions, and the national parliaments will gain more influence in European legislation through the subsidiarity monitoring procedure. The citizens' initiative introduces an instrument of direct participative democracy – the dynamic and effect of which cannot yet be estimated – in view of the requirement for one million signatures, which represents a low threshold of the EU population numbering 500 million.

In addition to the democratic reforms contained in the TCE, some proposals for relaunching the ratification process of the TCE argue that its entry into force should be subject to a procedure of direct democracy – not at the national level but at EU level with an EU-wide referendum on the TCE.

The pros and cons of parliamentary ratification of EU Treaties versus national referenda on ratification will not be discussed here, neither the reasons why the constitutions of some Member States do not provide for referenda. Discussion will be limited to proposals that call for a EU-wide referendum, which would replace national parliamentary ratification or national referenda.

There are a variety of intentions behind the proposal for a EU-wide referendum on the TCE. For some proponents of this idea it is principally a matter of using direct democratic mechanisms for important political decisions. For others, however, the objectives of the proposal go beyond that: With an EU-wide referendum, a step would be taken toward overriding the nation-states. Furthermore, this would establish the status of the Constitution for Europe as a social contact for a European nation rather than a Treaty between European Member States.

A further consideration behind these proposals is that an EU-wide referendum increases the chances that European issues – instead of national issues – would determine voting behaviour. Thus the most common proposal is to hold the referendum in all Member States at (almost) the same time, namely, alongside the next elections for the EP.

Finally, for the proponents of an EU-wide referendum, this is the answer to the question of how to ensure that one or a few members of the Union, now comprising 27 States, cannot block the coming into force of the TCE by non-ratification.

It is crucial to the legal and political implications whether an EU-wide referendum is proposed as

- an EU-wide referendum which should replace individual ratification by all the Member States,
- a confirming or rejecting ballot in addition to individual State ratifications,
- a consultative referendum, held in advance of individual State ratifications.

The political implications of the different proposals become clear on the question as to what should happen to the Member States whose citizens cast a majority "no" vote in a EU-wide referendum.

The proposal that goes furthest regarding the legal and political implications is the proposal to have one EU-wide referendum on the TCE, which should replace national ratifications. The TCE would then – according to most formulations – enter into force when it is adopted with (qualified) double majority, that is, the (qualified) majority of the EU population and the (qualified) majority of the Member States.

This proposal constitutes a breach of current law. Article 48 TEU gives every Member State the legal certainty that there can be no amendment of the primary law of the Community without its agreement. Furthermore, Article 48 TEU ensures that ratification of a new EU Treaty is aligned to the constitutional requirements of the respective State.

Conversely, the proposal of an EU-wide referendum in place of individual State ratifications implies firstly that the agreement of all States is no longer necessary for entry into force of new EU primary law, and secondly that an EU-wide referendum replaces national constitutional provisions for the ratification of an EU Treaty. The proposal thus entails a deep intervention into the constitutional structures of the Member States and would require changes to the constitutions of several Member States.

Politically, the proposal implies that Members States whose populations reject the TCE by majority decision in an EU-wide referendum must accept the Treaty anyway. In the future the only resort for these countries would be "voluntary" withdrawal from the EU, which under these circumstances would be more like expulsion. Thus if in France or the Netherlands the majority of their populations again reject the (amended) TCE, according to this proposal they must either accept the Treaty anyway or the two countries would no longer be able to continue as members of the EU. A ruling – given the event of a "no" by the population, whereby the countries in question remain in the same position as before the new EU Treaty – would not be possible given the institutional and procedural reforms contained in the TCE.

This makes clear the polarizing effect inherent in the proposal of an EU-wide referendum on a new EU Treaty which does not require the individual majority vote of the populations of all Member States, but rather an EU-wide qualified double majority. The price to pay for a departure from the requirement that all States must agree to amendments to the EU Treaties – be it by referendum or by act of parliament – is enormous: either the principle of voluntariness on the common road to European integration is surrendered or the break-up of the EU is accepted. This is why Andrew Duff calls the proposal to replace Article 48 TEU with a majority decision "the nuclear option."

It cannot be assumed that such an amendment to current Treaty law – required in advance for the realization of an EU-wide referendum – would obtain the consent of all national parliaments or, where necessary, the consent of the population in a national referendum. In terms of content, this amendment would mean that the national parliament agrees that future Treaty amendments could be made without its consent or against its will, and that it gives up the right to voluntarily decide on the transfer of sovereign rights to the supranational level. Accordingly, in countries in which a referendum on

this amendment would be necessary, the population must give its consent to a ruling whereby the results of future national ballots will no longer count. It is hard to imagine that the populations of France or the Netherlands would appreciate such a proposal as a consequence of their "no" votes.

It is doubtful whether the people would perceive it as a democratic gain if the questions concerning which sovereign rights remain at the national level and which are transferred to the EU were, in the future, no longer decided by national majority vote, as expressed in a referendum or in parliament, but determined by a majority of the 500 million people that comprise the EU.

The proponents of an EU-wide referendum counter with the argument that the current legal situation means that even the smallest Member State – an extremely small minority in terms of the whole EU – can block the demand of all other Member States for a new EU Treaty. This argument again shows the constant difficulty of achieving a balance between the equality of the States and the equality of the citizens in a unique political structure such as the EU.

Every new provision in EU law which affects the basic principle of equality of Member States is an extremely difficult political process, as shown by the debate on the principle of the double majority as a voting rule in the Council for secondary law. A departure from the basic principle of equality of Member States requires mutual trust, and not just the trust of governments among themselves but also among the people. One should remember the importance of the argument in the new Member States during the referenda on accession to the EU – that there is no hegemony in the EU and that every new member of the EU has equal rights with the other Member States to decide on the future course of the EU and on fundamental questions, such as the division of sovereignty between national and European level or the number of members each country has in the EP and the Commission.

In the current situation of the EU – in which it has to redefine itself and build up mutual trust following enlargement – an agreement of all Member States to replace Article 48 with an EU-wide majority decision is virtually inconceivable. Rather, it can be assumed – at least for the moment – that the situation remains whereby the Member States who want to take integration a stage further have to find a way to that end without excluding those who do not want it, and these States for their part should not block the way, but without their having to leave the EU for it.

Can the proposal for an EU-wide referendum on the TCE be developed in such a way that the sovereign rights of Member States are not restricted and without intervention into national constitutional structures? The proposal for a confirming EU-wide referendum (MacCormick; Pernice) is oriented toward these criteria. This referendum would not replace the requirement for individual national ratification, but would be an additional democratic legitimation of the TCE. Accordingly, in the first stage the TCE must be ratified by all Member States in accordance with current law. An additional provision in the TCE would then stipulate that the TCE only enters into force if it is subsequently adopted by majority vote in an EU-wide referendum. The people would have the final say.

This proposal has the advantage that it does not represent a different but an additional legitimation for the TCE. It would link the principles of the equality of the Member States and the equality of the citizens in a new way.

This proposal also raises the question of the consequences if the TCE were confirmed by an EU-wide majority, but in one or more individual Member States the majority of the population voted "no." Since this would not prevent entry into force because the prior ratification had also included this Member State – be it on the basis of parliamentary decision or a national referendum – there is no direct conflict at the European level, but at the national level. In certain circumstances this could lead to a Member State having to decide on the question of voluntary withdrawal. It should also be considered that if the TCE were ratified in all Member States but subsequently rejected by majority vote in an EU-wide referendum, the EU would probably be plunged into a deep crisis.

The possibility of holding an EU-wide confirming referendum specifically on the Charter of Fundamental Rights could also be considered. The Charter of Fundamental Rights is a new constitutive element in the EU Treaties, which may be more significant in terms of the citizens' identification with the EU Constitution than the institutional and procedural regulations. Moreover, fundamental rights should be understood as rights taken by the people for themselves rather than rights granted to the people by the sovereign powers. Accordingly, a provision could be added to the TCE that the Charter of Fundamental Rights only becomes legally binding when it has been adopted by majority vote in an EU-wide referendum following individual State ratification of the TCE. For Member States where the majority of the population rejects the Charter of Fundamental Rights because of their constitutional tradition or for other reasons, this would be recorded in a protocol of the TCE. The citizens of these States would then not be able to invoke the Fundamental Rights in legal actions. For their part, however, the European institutions would be bound to these Fundamental Rights in respect of all citizens of the EU.

Some proposals for re-launching the TCE include an EU-wide consultative referendum, whereby the population would be asked whether it is for or against the Constitution for Europe during the EP elections. In the States in which a referendum is constitutionally required, the individual State result would be binding; in the other States, ratification would take place only after the EP elections (according to Voggenhuber). Whether the individual national parliament would then be bound to the individual State's result in the referendum or accept the Europe-wide result – for example, in the case of a "no" vote by a narrow majority in an individual State, but a large Europe-wide majority in favour of the TCE – would remain a decision for the national parliament.

This proposal also respects the necessity of individual state ratification in accordance with the respective constitutional requirements, and the EU-wide referendum is introduced as an instrument of participative democracy as additional legitimation for the TCE.

With all of these proposals for an EU-wide referendum, the question must also be considered as to whether the EU would even have the right to enact a ruling for a referendum of this type. According to current law the EU has no authority to enact legal rulings for an EU-wide referendum. As set out above, for an EU-wide referendum in which the ruling of Article 48 would be replaced, not only would this Article have to be changed, but also the constitutions of some Member States. Even for a confirming or a consultative referendum, the EU would first have to be conferred a competency. Article 308 TEC, which confers wide-ranging competence to act on the Community, pertains to the common market and can thus hardly serve as a legal basis for a ruling on a referendum on the TCE. Linkage to the legal provisions for the EP elections would also require acceptance by all Member States in accordance with the constitutional provisions. In the proposal by MacCormick, the question is solved in that the competence for an EU-wide referendum is anchored in the TCE and would be conferred with ratification of the TCE, thus providing the EU with the competence to enact a ruling for a confirming referendum.

Some members and alternate members of the Convention, including the four Greens – Voggenhuber, Gormley, Lichtenberger, and Nagy – brought the proposal to the Convention suggesting that the Constitutional Treaty not only be voted on by the national parliaments, but also in referenda in all Member States. The motion was not very detailed in terms of its relationship to Article 48 TEU and other issues, because its main purpose was to initiate the discussion. However, the proposal was not accepted by the Convention. Due to time constraints, discussions at the Convention on the entry into force of the Constitutional Treaty were limited.

In the declaration of the Federal Council of the European Green Party (EGP), which also proposes a division of the TCE into two Treaties, ratification of the constitutional section by a voting procedure in a Europe-wide referendum is demanded. The principle of double majority should be applied for its adoption. The proposal does not comment on the question of the consequences for Member States where the majority of the population votes "no."

In "Le Plan A+" presented by Gèrard Onesta, the present formulation of Article IV–447 TCE, which requires ratification by all Member States for entry into force, is replaced by the requirement for a majority vote in an EU-wide ballot. This regulation would apply to the constitutional section. Conversely, for entry into force of the Treaty, which contains the provisions for the policies of the EU, the previous ruling on unanimity is retained. However, for future revisions of this Treaty it would be sufficient if parliamentary ratification is effected in 80 percent of Member States.

Some proposals aim at a consultative EU-wide referendum on the constitutional section of a newly subdivided TCE. Here, the individual parliaments should be bound in advance to the result of the national vote. A double majority should be sufficient for the entry into force of the Constitutional Treaty. Member States that do not ratify the Constitutional Treaty because of a "no" vote by the population would be faced with the choice of accepting the Treaty anyway, or ratifying it in a second attempt, or accepting that they can no longer belong to the EU.

The party resolution of Bündnis 90/Die Grünen in Germany of December 2006 also speaks of an EU-wide citizens' vote, whereby a majority decision by the citizens plus two-thirds of Member States is proposed as the required proportional level of consent. No comment is made about the consequences for Member States where the majority of the population vote against the TCE. There is no demand for an EU-wide referendum in the motions of the Bundestag faction of Bündnis 90/Die Grünen.

In Germany, an EU-wide referendum on the TCE has also been demanded by the Left Party and from the ranks of the FDP. And here, too, there is no mention of the consequences for Member States where the majority of the population votes "no."

However, there are no party resolutions calling for a parliamentary vote on the annulment of the requirement for individual state ratification for EU Treaties and for the amendment to the Constitution that this would entail.

2.2.2 Enhancing the output-legitimation by means of additional agreements for common policies

On the one hand, surveys document over and again widespread Europe-scepticism among the population and little trust in European institutions. On the other hand, the expectations placed on the EU are very high. This applies to foreign policy, in which more joint action is demanded for internal and external security, to climate protection, to securing

energy supply, and to the social area in which the people expect the EU to ensure, even in the globalized economy, a high level of social security in the EU.

It therefore seems obvious to give a positive impetus to the continuation of the ratification process via additional agreements to the TCE which accommodate these expectations.

It is hoped that the Berlin Declaration, on the occasion of the 50th anniversary of the founding of the EEC, will also add a positive impetus. With the "refounding" of the European project, the conviction should grow that the EU needs the institutional reforms of the TCE to be able to meet the expectations.

However, many European political actors are sceptical as to whether ceremonial declarations are sufficient to motivate or mobilize the people to bring the constitutional project to a positive conclusion.

The "Plus" to the TCE therefore needs to be concrete and, above all, mandatory.

Additional formulations in the list of EU objectives and values in the first part of the TCE or in the preamble only partially fulfil this need.

Therefore, proposals for the renegotiation of the TCE (Duff) or for a "first amendment to the Constitution" (Voggenhuber) have been brought into the debate. According to the proposal by Voggenhuber, a "first amendment" to the TCE should further strengthen the democratization of European action, for example, by restricting or excluding exceptions to the rule of co-decision by the Parliament. Duff proposes renegotiations in the five policy areas of Economic Governance, Climate Protection (with integration of the Euratom Treaty in the TCE), Financing the EU, Enlargement Policy (inclusion of the Copenhagen Criteria in the TCE), and Social Policy (protocol on the Social Union).

Protocols in which common action can be agreed are part of the Treaty and are binding agreements on the part of the signatory States. Named examples include: the protocol on convergence criteria; the protocol on the procedure in the event of an excessive deficit; the former protocol on social policy that was annexed to the Maastricht Treaty. This contained the agreement between the eleven Member States of that time, with the exception of the United Kingdom, which enabled the EU to enact rulings for minimum standards in agreed areas for the social protection of employees.

A social protocol was also mentioned by the German Chancellor after the "no" votes as a possible solution to the anxieties expressed by the population, particularly in France, but it was never clearly defined. This idea played an important role in the French discussion on further dealings concerning the TCE. From comments made by the Prime Minister of Luxembourg, who time and again called for a set of minimum standards for the social protection of employees, it can be concluded that Luxembourg is in favour of a social protocol.

In a social protocol to be added to the TCE, the signatory States could commit themselves to enhanced cooperation in this area to achieve agreed goals. This enhanced cooperation would be open to all Member States, so that those States that do not want to commit themselves during the course of TCE ratification would have the possibility of opting-in at a later date.

Considerations on giving new impetus to the ratification process through additional agreements annexed to the TCE were also brought up in discussions concerning other policy areas, such as defence policy. Since, however, the TCE, already includes various amendments in the area of common security and defence policies, it should not be assumed that a large number of Member States would agree to further steps in this area at this point in time. Also, additional agreements in this area are more likely to reinforce

than diminish the rejection of the TCE among some of its critics in France, both on the left and the right of the party spectrum – although for different reasons.

Climate protection and secure energy supply are very high on the population's list of expectations of the EU. It is therefore astounding that there are no concrete proposals for an additional agreement on the TCE concerning the areas of climate protection and renewable energies. The Green group in the EP has tabled a motion for a stability pact for climate protection, but without linking it to the constitutional process.

However, the link between the challenges facing the EU in the areas of energy and climate protection policy and the constitutional process seems self-evident:

- The population's consciousness of the urgency of climate protection has never been as great as it is now and in Member States, such as the United Kingdom, expectations for common European action in this area are high.

- Political developments have placed the issue of secure energy supply very high on the political agenda and it is now on the list of concerns of the population.

- The TCE, with the new competences in the energy sector and innovative regulations for enhanced cooperation between Member States , offers a new legal basis for common action for a sustainable energy policy.

As with the social sector, an agreement could be added to the TCE as a protocol for the energy sector. This could be an agreement for a common sustainable energy policy that all interested Member States could join. It would require ratification, as do all components of the TCE, and would enter into force with the TCE. In the countries in which a referendum is still outstanding, it would form part of the referendum and would thus become an important component of a campaign for the TCE.

However, an agreement of this type should not just contain common aims for national action but agreements for actions by the Community for a sustainable energy policy. Renewable energy plays a key role here – both with regard to climate protection and secure energy supply. Seeing, developing, and utilizing the potential of renewable energy not only in the national sphere but in a common strategy of a sustainable European energy policy could establish a new major project for the Community: a "European Community of Renewable Energy" which meets its energy supply requirement increasingly from its own renewable energy sources.

The EP has stipulated that the proportion of renewable energy to total energy consumption in the EU should increase to 25 percent by 2020. A study by the Institute for Applied Ecology, "The Vision Scenario for the European Union" dated November 2006, shows the role that the Union's own renewable energy sources – with common endeavours for renewable energy development, energy conservation, and energy efficiency – could play in Europe's energy supply.

A sustainable supply of renewable energy from its own resources requires:

- the creation of a common energy market for renewable energy,

- that every country brings its potential renewable energy – be it wind, water, wave and tidal energy, solar energy, geothermal heat, biomass – to the market; here too the strength of the EU lies in its diversity,

- that the required infrastructure for energy supply from renewable energies is developed within and between the Member States with common and collective efforts,

- a solidarity pact with a mutual undertaking for the use of reserves, so that in the case of temporary supply shortages of energy imported from third countries, every Member State is assured of a sufficient supply from Europe's own energy sources.

Such an agreement for establishing a "European Community for Renewable Energy" would have to be entered into by a sufficient number of Member States from the beginning. It would be of particular interest, both for States with an above-average or one-sided dependency on third countries for energy supply, as well as for States with a particularly high potential in renewable energies, or with special technological and economic competitiveness in this area. States that are currently not prepared to enter such an agreement would have the possibility of opting-in any time at a later date – in accordance with the provisions of the TCE – to the enhanced cooperation for a sustainable energy policy.

It is often bemoaned that the EU – after the 'grand projects' of the internal market, monetary union, and enlargement – currently lacks a new 'grand project' to generate enthusiasm for the European idea. Jacques Delors makes constant reference to this. Is it possible that a "European Community for Renewable Energy" could be that 'grand project'?

In this context it seems reasonable to consider a complete overhaul of the current Euratom Treaty. However, this task might require more time than is available in the course of the constitutional process.

A new agreement on a "European Community for Renewable Energy" could be developed from the action plan for energy policy, which is already on the agenda for the March Summit of the European Council. It could be a new European 'grand project' that makes the value of common action obvious to everyone and instigates a mobilization that leads to the realization of the Constitutional Treaty.

3. A new Convention or just an Intergovernmental Conference?

The "European Convention on the Future of Europe," which laid the groundwork for the TCE, set new standards of parliamentary participation, transparency, and openness in the drafting of a new Treaty on which the EU is founded. In contrast, an Intergovernmental Conference expressly excludes parliamentary participation, which even with the admittance of some EP representatives as observers does not change. An Intergovernmental Conference also takes place behind closed doors.

According to current law, amendments to the Treaties must be agreed upon by an Intergovernmental Conference. This also applies to amendments to the present TCE. Hence, the question is not whether amendments to the TCE, designed to give new impetus to the ratification process, should be agreed upon by an Intergovernmental Conference – this is needed for amendments in any case – the question is whether a Convention should be convened before this Intergovernmental Conference takes place in order to discuss possible amendments and to pass on recommendations to the Intergovernmental Conference.

Following the success of the Convention, it seemed necessary to assure the same degree of parliamentary participation, transparency and openness in the future. For that reason the final provisions of the TCE state that for future amendments to the Treaty, a Convention composed of representatives of the national Parliaments, the governments, the EP, and the Commission will be convened. The European Council can only deviate from this line with the approval of the EP, and only if minor Treaty amendments are planned.

To date, no government of a Member State has commented on whether a Convention should be scheduled in the roadmap to be presented by the German Presidency. The general preference seems to tend toward not convening a new Convention.

No motion has been tabled in the EP thus far for convening a Convention. The Greens, however, have demanded a new Convention whereby the European Council give a clear and focused mandate for its work. Since the Greens would probably not be represented at the next Intergovernmental Conference, the preference for a Convention, which would ensure Green participation via parliamentary representation, is self-evident from a party point of view.

But the question as to whether or not a Convention will be convened should not be regarded as an issue for the political elite alone. It is rather a matter of the openness of the debate and the proposals put forward. It is precisely because the ratification process of the TCE has ground to a halt because of dissent between the people and the political elite that the population should not be excluded from the debate on the future of the Constitutional Treaty.

In any case, the decision not to convene a Convention should only be taken with the consent of the EP. Such a course of action – which according to current Treaty law is not yet mandatory but also not excluded – could be agreed in an inter-institutional agreement between the EP, the Council, and the Commission.

V CONCLUSIONS AND POLITICAL RECOMMENDATIONS

The rejection of the Constitutional Treaty in France and the Netherlands did not stop the ratification process continuing in other Member States of the EU. By the beginning of 2007, 18 of the 27 Member States had ratified the TCE. Under current law, the TCE can only enter into force when it has been ratified by all Member States in accordance with their constitutional requirements. However, ratification of the TCE cannot be successfully concluded without further amendments. This is because the results of the referenda in France and the Netherlands have to be respected. At the same time, consideration must be given to the fact that the TCE has been adopted in two-thirds of Member States and that ratification is still pending in seven other Member States, with referenda envisaged to take place in five of those States.

For any proposal to have a chance of taking the Constitutional Treaty forward, it has to build a bridge between these different groups of Member States. The proposal must allow for compromise, and is more likely to succeed if it not only contains a single point for negotiation but several building blocks to construct the bridge.

And with each proposal, the gain in acceptability for outstanding ratifications must be weighed against the price to be paid by the European project.

Giving up the constitutional project, or attempting to implement as many reforms as possible by way of "soft constitutionalization," or restricting amendments of the current Treaties to a mini treaty would be very high prices to pay. Only limited reforms could be implemented; a more extensive reform of the Treaties on which the EU is founded would just be postponed. After a constitutional process lasting eight years, only interim objectives would have been achieved, with negative consequences for the Union's capacity to act and without fully addressing the concerns, anxieties, and expectations of the population of the EU.

It should be clearly stated, however, that the adoption of every substantial institutional and procedural reform contained in the TCE would represent an advancement of current Treaty law.

No apparent disadvantages for the European project can be discerned in dealing with the criticism that the Treaty text is too long for a constitution and that not all the provisions it contains warrant constitutional status, in the traditional sense. The new provisions, plus the '*acquis communautaire*' from the two existing Treaties it is due to replace (TEU and TEC) and all the annexed protocols have made the TCE extremely voluminous. A division of the content of the TCE into two Treaties is a practical concession that may be acceptable to those States where ratification has already taken place and where a new ratification process would be required in the case of amendments to the TCE, including its division. However, the precondition should be that no important amendments to current Treaty law contained in the TCE shall be lost – be it amendments to objectives, institutions, procedures, or policies.

Neither should the binding legal force nor the visibility of the Charter of Fundamental Rights be lost. The Charter represents a new achievement for the political European Union, as does the name "constitution" for the text of an EU Treaty. The reservations of Member States about the Charter of Fundamental Rights or naming the Treaty a "Constitution" could be accommodated in protocols, as the constitutional reservations of Ireland were stated in a protocol to the Treaty of Nice.

However, these amendments are unlikely to fully address the concerns and expectations of the population and give a sufficiently positive impetus to the ratification process. The TCE needs something extra, a "Plus," on the way to further ratification.

This "Plus" must consist of more than just ceremonial declarations or supplements to the preamble. It should be concrete and binding and citizen-friendly.

Direct participation of the citizens in the decision-making process on the TCE would be citizen-friendly. It could revive interest in the European project, in the sense of new "ownership" of a project that brings people, not only markets, together. Should then the rule that the TCE must be ratified by every individual Member State be replaced by a ballot of the European people that decides on the TCE by double majority or qualified double majority vote? Would that be perceived by the people as a gain in democracy? Or would they perceive it as a loss of their own national sovereignty if decisions about the division of competences between the national and the EU level were no longer decided by the national parliament or a national referendum?

And what would happen if the majority of French and Dutch people again vote "no" in the EU-wide ballot? Would they have to accept the TCE anyway, or would they have to leave the EU? This is the crucial political question concerning the proposal for an EU-wide referendum. A new Article in the TCE – stating that its adoption would no longer be decided by individual State agreement but by majority decision in an EU-wide referendum – could well mark the end of the TCE, and not only in the United Kingdom or Poland or the Czech Republic. It is also probable that large proportions of the population in the Netherlands and France would not appreciate such an amendment in response to "no" votes.

The price to be paid for the "Plus" in participative democracy through an EU-wide referendum on the TCE would be very high. It would be a breach of current EU law and an intrusion into national constitutional structures; but it goes much further than that: either the principle of voluntariness on the common road to European integration is surrendered or the break-up of the EU is accepted. This is the "nuclear option" (Duff) and should not be chosen. "For it would be historically absurd and utterly stupid if Europe, at the very time when it is at long last reunited, were to be divided once again," (Joschka Fischer, speech at Humboldt University).

Conversely, a confirming EU-wide referendum on the TCE, held after ratification by all Member States, would offer additional legitimation. The principles of equality of the Member States and equality of the citizens would be interlinked in a new way. The people would have the final say.

The people would have the first say in a consultative referendum. Had! Because ratification has already been carried out in 18 countries. Proposals for an EU-wide consultative referendum on the TCE – which could also count as a referendum in Member States where this is obligatory – assume that the whole ratification process would start all over again in all the Member States, and national parliaments would then ratify on the basis of the national or EU-wide result. Since this proposal does not build a bridge between the different groups of Member States – in respect of ratification status – it is very doubtful whether the Member States would unanimously agree to confer competence to the EU for implementing a referendum of this type.

Bridges could be built between Member States with offers of opting-out and opting-in. However, this would be impracticable in the case of the reforms of European institutions and procedures such as those contained in the TCE. But these options could be considered for additional Community policies, that is, for additional policy agreements on the "Plus" to the TCE.

The European population has high expectations for EU polices. It thus seems an obvious course of action to accommodate these expectations in a "Plus" to the TCE, a voluntary "Plus" of Community policy, to give new impetus to the ratification process.

Many citizens expect common action in the social sector to ensure a high level of social security in the EU, particularly in a globalized economy. An agreement for enhanced cooperation at the EU level to establish common social minimum standards for the protection of employees could make an important contribution to safeguarding the European social model. This agreement could be added to the TCE in the same way the social protocol was appended to the Maastricht Treaty.

Climate protection and secure energy supply are very high on the population's list of expectations of the EU. As with the social sector, an agreement for the energy sector could be added as a protocol to the TCE. This could be an agreement for a common sustainable energy policy open to all Member States who wish to participate. It would require ratification, as do all components of the TCE, and would enter into force with the TCE.

Renewable energy plays a key role in climate protection and safeguarding future energy supplies. Viewing the potential of renewable energy beyond the national sphere, and developing and utilizing this potential in a common strategy for a sustainable European energy policy could form the basis of a new Community 'grand project': a "European Community for Renewable Energy" which increasingly meets its energy supply requirement from its own renewable energy sources. Here, too, the strength of the EU lies in its diversity.

A new agreement on the "European Community for Renewable Energy" could emerge from the energy policy action plan, which is on the agenda for the March Summit of the European Council. The core elements for an agreement of this type should be the establishment of a common internal market for renewable energy and the development of a trans-European distribution network. The "European Community for Renewable Energy" could be the new European 'grand project' that makes the value of common action clear to everyone and provides the motivation for realization of the Constitutional Treaty.

A package that

- preserves the results of the Convention on reform of the EU for greater democracy, transparency, and improves capacity to act,
- divides the TCE into a Constitutional Treaty and a Policy Treaty,
- initiates agreements for social minimum standards and sets a new 'grand project' in motion – the "European Community for Renewable Energy" – for progressive realization of a sustainable energy supply for a united Europe from it own sources, could form a basis for building an ecological bridge for implementation of the TCE and for its confirmation by the population of the EU.

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