

spotlight europe

2007/02 – June 2007

Withdrawal or Creation of a New Union – A Way Out of the EU's Constitutional Dilemma?

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A withdrawal of countries from the EU or the creation of a new supranational Union are neither realistic nor desirable alternatives in case the EU governments fail to solve the constitutional question. In order to retain Europe's ability to reform itself and as a trade-off for their readiness to find a compromise in the upcoming intergovernmental conference, the "Friends of the Constitution" should demand a radical revision of the current treaty amendment procedure.

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After the failure of the original Constitutional Treaty, the heads of state and government will at the EU summit on 21-22 June 2007 initiate a new attempt to reform the current EU Treaties. More than two years after the French "non" and the Dutch "nee" a new intergovernmental conference will be commissioned to negotiate and adopt a reform of the Union's primary law. The success of these negotiations, which are to begin in the second half of 2007 under the Portuguese Presidency, is by no means certain. The Polish President Lech Kaczynski has already threatened with a blockade if the decision-making procedure of "double majority", which Poland considers to be disadvantageous, is

not dropped. The Czech President Vaclav Klaus, one of the most vocal critics of the European Constitutional Treaty, has even called into question the whole timetable for a reform of the EU's primary law until 2009. And the governments of the Czech Republic, the [Netherlands](#), and the United Kingdom have already defined narrow negotiating margins for a successful conclusion of the intergovernmental conference – red lines which in parts deviate considerably from the original Constitutional Treaty. On the other hand, the "[Friends of the Constitution](#)" who, besides the 18 member states which have [ratified](#) the Constitutional Treaty, include also Denmark, Ireland and Portugal have

expressed their determination to defend most of the innovations laid down in the original text.

But even if the intergovernmental conference ends in a compromise, the new text may well suffer the same fate as the Constitutional Treaty. If the reforms fail to surmount the hurdle of ratification in a single member state, the new EU primary law cannot enter into force. The reform of the EU's politico-institutional system would have failed once again.

As in the past, when progress seemed threatened by a minority of member states, there is also at present a call for alternative options – for a “Plan B to Plan B.” Such ideas start out from the belief that the development of the EU should not be held up by forces unwilling or incapable of implementing reform. In the run-up to the adoption of the “Berlin Declaration” on the occasion of the 50th anniversary of the signing of the Treaties of Rome, leading members of the European Parliament called on the [opponents](#) of a new treaty to withdraw from the European Union if they are not prepared to place the EU on a new footing. Others, such as [Romano Prodi](#), the Italian Prime Minister and former President of the Commission, have suggested that a Europe of different speeds could show the way out of the constitutional crisis. This harks back to the old idea of a core Europe, which brings together those states, which seem to be willing to further deepen integration. Yet how realistic or illusory are these alternatives? Are they merely being used as threatening gestures in order to prepare the grounds for the forthcoming intergovernmental conference? And how desirable or risky are such alternatives with regard to the future of European integration?

OPTION I

The “obstructionists” withdraw

The withdrawal option originates from the idea that the countries, which are either not prepared or not able to support the development of the EU Treaties, should actually leave the European Union. After the “[obstructionists](#)” have left, the constitutional stalemate could be overcome, and the new primary law could enter into force as soon as the remaining EU countries have ratified the new treaty or constitution. Thereafter the EU would no longer have 27 member states, but 26, 25 or even less.

The European Treaties currently in force do not explicitly provide for a withdrawal from the Union. However, it is a distinct possibility, at least from a legal point of view. On the one hand and according to international law the EC/EU Treaties are international treaties. For this reason a withdrawal from the European Union could be administered on the basis of the general rules of international law and in particular the “[Vienna Convention on the Law of Treaties](#)” (Article 62).

On the other hand, the European Constitutional Treaty, which was negotiated and signed by all EU member states in 2004, for the first time explicitly stipulates the possibility of a voluntary withdrawal (Art. I-60 TEC). Thus every member state can withdraw from the Union “in accordance with its own constitutional requirements.” After the country in question has notified its intention to withdraw to the European Council, the two sides – the withdrawing state and the EU – will negotiate and conclude an agreement setting out the arrangements of its withdrawal. On the part of the Union the Council, acting by a qualified majority (not unanimously!), will be the institution responsible for concluding such an agreement. European primary law would cease to apply to the state

in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification to the European Council, unless the latter, in agreement with the state concerned, unanimously decides to extend the period.

As the Constitutional Treaty did not enter into force, the withdrawal clause has not attained legal validity. However, the clause is politically important as the governments of all member states had adopted and signed the Constitutional Treaty including the possibility of a voluntary withdrawal.

Beyond the question of a legal basis for a withdrawal from the EU, several facts and arguments speak against the practicability or desirability of this option:

- *EU withdrawal possible only on a voluntary basis:* No member state can be forced to give up its EU membership. No matter what the legal basis may be (Vienna Convention or withdrawal clause), a withdrawal from the EU can only be negotiated and executed on a voluntary basis. However, in the context of the current constitutional debate it is unlikely that, in view of the associated political and economic costs, one of the countries concerned would actually withdraw from the EU voluntarily. Demanding from a state to withdraw is thus pointless if the countries concerned do not themselves deem withdrawal from the EU to be a sensible thing to do.

- *Weakening the EU:* The voluntary withdrawal of certain states could ease the ratification of a new primary law, but at the same time it could also substantially weaken the European Union. For example, the withdrawal of the United Kingdom would be a severe setback for the efforts being made in the area of European Security and Defence Policy (ESDP), and thus for the future relevance of the EU in a multi-polar world setting. With regard to Economic and Monetary Union, the withdrawal of the founding states and Euro-

zone countries France and the Netherlands, who were (also) responsible for the non-ratification of the original Constitutional Treaty, would place a considerable and incalculable strain on the stability of the common European currency. The above examples show that the withdrawal of countries, who are (co-)responsible for a failure to reform the EU Treaties, would exact a high price from the European Union and the remaining member states.

- *The danger of European division:* The withdrawal of a group of states, which are either unwilling or unable to ratify the new primary law, entails the risk of creating rival camps in the heart of Europe. This would particularly be the case if former EU members decide to establish their own grouping in order to compensate the political and economic costs associated with the withdrawal from the EU within a new collective framework. This prospect could only be avoided, if the withdrawing states remain closely affiliated to the Union after their withdrawal - e.g., by entering the European Economic Area (EEA), which would enable them to benefit from a proven inter-institutional structure (EEA Council, Joint Committee, Joint Parliamentary Committee and Consultative Committee) between the EU and [EFTA](#) and from the advantages of the internal market.

“The voluntary withdrawal of certain states could substantially weaken the EU.”

Since certain “obstructionists” cannot be forced to withdraw from the EU under the provisions of the current Treaties, and since the withdrawal of certain states could weaken the Union or even divide Europe, the withdrawal option seems neither realistic nor desirable in the context of the current constitutional debate. But would the establishment of a new Union be a better alternative?

OPTION II

Creation of a new (supranational) Union

According to this option the states willing and able to deepen integration establish a new Union after a reform of the EU Treaties failed due to the opposition of a limited number of EU countries. This option preconditions that the potential members of the new Union have come to the conclusion that further integration and deepening seems impossible within the framework of the "old EU." The creation of a new Union would be the ultimate response to the fact that the diverging views about the future progress of [EU integration](#) can no longer be reconciled.

The legal basis of the new Union would have to be laid down in a separate treaty or constitution, which would be worked out, approved and ratified solely by the states participating in this new entity. Here the substance of the original Constitutional Treaty could function as a guideline and basis for the negotiations. However, since the creation of a new Union would require a massive political effort on the side of the participating states, one can expect that the legal basis of this new entity would be more ambitious than the Constitutional Treaty, which in the final analysis was a hard-fought compromise between integrationists and intergovernmentalists.

The establishment of a new supranational Union would entail the creation of an independent [institutional structure](#) outside the framework of the "old EU." The new entity would require a strong and effective executive, a parliamentary dimension securing democratic legitimacy, and a separate judiciary for settling legal disputes within the new Union. A lending of organs (Organausleihe) of the "old EU" to the new Union does not seem plausible, since EU institutions cannot operate on the basis of two separate sets of primary law.

Yet how probable and desirable is the establishment of such a new supranational Union?

- *Current crisis too insignificant:* The extent of the present crisis surrounding the ratification of the Constitutional Treaty is not big enough to generate the political energy needed for the creation of a new Union. The EU has by far not reached the point at which diverging national European perspectives can only be resolved by the establishment of a new Union. In the current situation the political, administrative and economic costs would be considerably greater than the potential benefits of a new Union.

- *Limited willingness to deepen integration:* The creation of a new Union seems politically feasible only if the participating states were prepared to transfer competences and pool sovereignty beyond the current level inside the "old EU." But even in the most integration-friendly states there is currently hardly any readiness to give up or to further pool substantial national competences. The wider public and parts of the elites even in the most integration-friendly countries are not (yet) willing to materialize the idea of a federally organized "[United States of Europe](#)" as postulated by Belgian Prime Minister Guy Verhofstadt. Moreover, in a newly established Union one would also witness a clash of diverging interests and diverging perspectives concerning the future of the integration process. This would in return again lead to decisions based on the lowest common denominator. One cannot assume that the potential members of a new Union - which would probably also include France and the Netherlands in spite their "no" to the Constitutional Treaty - would be willing or able to agree on a common grand vision of Europe.

- *Marginalization of the "old EU" and rivalry between the Unions:* It seems more than likely that the creation of a new supranational Union with an independent set of legal norms and an independent

[institutional structure](#) would lead to rivalry between the “old” and the “new” Union. The members of the new Union would concentrate their political energies on the development of their new-found entity. In return the “old EU” would gradually become marginalized. In this case the “old EU” would not be able to function as a kind of bracket between the two entities. The idea that the “old EU” could ally the more integration-friendly European states and those less willing or able to further integrate in some sort of a “stability community” would not materialize. On the contrary, the rivalry between the two Unions could lead to a division of Europe into two opposing camps – on the one hand the members of the new Union, and on the other the excluded states which seek their political fate in other (geo-)political constellations.

- *Counterproductive for further differentiation in Europe:* The idea to create a new Union in order to resolve the EU reform crisis is not only unrealistic and risky. The debate about this option is thoroughly counterproductive. Repeated demands that the constitutional project should proceed, if necessary even against the will of certain EU states, are (mis)perceived as a threat to create a closed core Europe. Especially the EU’s smaller and new countries fear that they could be left outside

“Rivalry between two Unions could lead to a division of Europe.”

such a club. But threats and misunderstandings overshadow the fact that differentiation provides a key [strategic opportunity](#) in a bigger and more heterogeneous EU. As a result, the real potentials of greater differentiation in Europe, which allow the implementation of projects without the participation of all EU countries, are not exploited. Promising projects remain tucked away in a drawer as unrealistic threats to create a core Europe generate a climate of mistrust among member

states. But in order to be able to meet future challenges, the EU needs more than ever before different speeds if it wants to remain effective. Citizens expect the EU to provide state-like services in areas as diverse as justice and home affairs, security and defence policy, taxation, environmental, or social policy. However, not all member states can or may wish to provide such services at the same time and with the same intensity. As was the case in the past with regard to the common currency, the Schengen accords, or social policy, closer cooperation among a smaller group of countries can help to overcome a situation of stalemate and improve the functioning of the EU. In the context of the EU reform debate threats calling for a European core however impede greater differentiation in Europe and in the final analysis do a disservice to the future development of integration.

Reform of the treaty amendment procedure

Since neither the option of a voluntary withdrawal nor the establishment of a new Union offer a realistic or desirable way out of the current reform crisis, the question of a feasible alternative arises. Since the original Constitutional Treaty, despite its numerous [advantages](#), has failed, and as a successful reform of European primary law presupposes the approval of and ratification by all EU member states, it is now time to be realistic. In the forthcoming intergovernmental conference the main task will be to salvage as many of the central innovations of the original Constitutional Treaty as possible within the framework of a [treaty amending the Treaty of Nice](#). In the negotiations the governments of the Czech Republic, France, the Netherlands, Poland, and the United Kingdom, for a variety of different reasons, will seek to ensure that substantial elements of the Constitutional Treaty are changed or even eliminated. In order to avoid national ref-

erenda – which could again impede the ratification of the new treaty – and in order to obtain the approval of parliaments the final result of the intergovernmental conference will have to differ substantially from the original Constitutional Treaty.

In the end, numerous and even fundamental innovations of the Constitutional Treaty will be sacrificed for the sake of a compromise between the 27 EU governments. In addition to the symbols of European statehood (the term “constitution,” the flag, the anthem) these might include the complete integration of the Charter of Fundamental Rights into the European treaty framework, the abolition of a number of veto rights in the Council, certain co-decision rights of the European Parliament (EP), the double majority procedure – at least in its original form –, or the term “Union Minister for Foreign Affairs.”

This long and impressive list illustrates the fact that the 18 states which had successfully ratified the Constitutional Treaty will have to pay a high price for their readiness to find a compromise – independent of what the new treaty will look like, and which elements of the Constitutional Treaty it will in the end (no longer) contain. As a compensation for the partial mutilation of the original treaty, the “Friends of the Constitution” including the EP and the European Commission should ask for two fundamental quid pro quos.

“Threats calling for a European core do a disservice to future integration.”

Firstly, at the end of the intergovernmental conference there should be a binding agreement that the constitutionalization of Europe will have to continue. The goal of a “[Constitution II](#)” should be conceptually thought of already in the framework of the upcoming negotiations, and the grounds for the next round of constitutionalization should be prepared at an early stage.

Secondly, the continuation of the constitutional process requires a radical revision of the treaty amendment procedure currently in force (Art. 48 TEU-N). This procedure, which found its way also into the Constitutional Treaty, stipulates that a new treaty can only enter into force when all EU member states have ratified it. A retention of this procedure means that any future substantial revision of European primary law may suffer the fate of the Constitutional Treaty: A small minority of member states or a minuscule part of the EU’s total population can delay or perhaps even prevent the Union’s political and institutional development.

In order to break the vicious circle of a permanent blockade, the intergovernmental conference should adopt a procedure, which makes one thing unmistakably clear to both states and citizens: non-ratification cannot inevitably signify the failure of a new treaty or constitution but rather calls into question a country’s (full) membership in the European Union. Henceforth, member states would be under greater pressure to ratify a new treaty – a new treaty which after all must be adopted and signed by every democratically elected EU government. Such efforts were not undertaken by the political elites in France, where the Constitutional Treaty was rejected by sections of the socialist party, nor by the governments in the Czech Republic, Poland and the United Kingdom, where the “no” votes in France and the Netherlands was taken as a welcome excuse to terminate national ratification processes.

There are two basic alternatives how the current treaty amendment procedure could be revised: (1) A new treaty or constitution enters into force if a (super-)qualified majority of EU states has ratified the new primary law, even if not all member states have successfully passed the new treaty or constitution according to their national ratification requirements. If ratification fails in a first attempt, each member state should be given the chance to repeat na-

tional ratification within a predetermined period of time. (2) The new primary law is ratified on the basis of a Europe-wide referendum. If a qualified majority of EU citizens within a qualified majority of member states is in favour of ratifying the treaty or constitution, the new primary law can enter into force.

It must be clear for both alternatives that no substantial revision of primary law can enter into force against the will of an EU state. Thus each country should be accorded the right to leave the Union on the grounds of the voluntary withdrawal clause. If the state in question does not make use of this possibility, remaining in the EU will be tantamount to accepting the new primary law.

If the “Friends of the Constitution” manage to push through a fundamental revision of the treaty amendment procedure as a quid pro quo for their readiness to compromise in the forthcoming intergovernmental negotiations, the constitutional crisis of the past two years may well have served an important purpose. The contents and structure of the new primary law may well fall qualitatively behind the original Constitutional Treaty. However, the constitutionalization of Europe, which is essential to ensure the old continent’s ability to shape developments in a [changing global environment](#), could continue without running the danger of a déjà-vu ending in yet another constitutional crisis in the course of the next decade.

Further Reading:

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ISSN 1864-9440

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