

Overcoming the Constitutional Crisis

A Treaty Amending the Treaty of Nice

The European Union is in the midst of a crisis. As a result, there is a need for alternatives in case the European Constitution cannot enter into force.

Political decision-makers and EU experts agree that the Treaty of Nice is not the suitable framework for preparing a European Union of 25 and soon more member states to meet the future challenges.

The central innovations of the European Constitution would improve both the EU's ability to take action and its democratic legitimation. In the member states the controversies were not sparked off by the institutional and procedural core of the Constitution. The considerable improvements made by the Constitution with regard to efficiency, democracy and transparency have not been called into question. These central features ought to be preserved even if the ratification should fail.

A pragmatic option would be to incorporate the core of the constitutional innovations into the existing Treaties. To do this it would be necessary to identify the central reforms of the Constitution and to bring them together in the shape of a treaty amending the Treaty of Nice. Such changes would refer to both the Treaty on the European Union (EU Treaty) and the Treaty establishing the European Community (EC Treaty). In the tradition of the Single European Act and the treaty revisions of Maastricht, Amsterdam and Nice, such a treaty would have to be adopted by an intergovernmental conference and ratified in the member states on the basis of the respective national provisions.

The reform of the current Treaties on the basis of the innovations contained in the Constitutional Treaty would affect the following core areas:

- (1) the reform of the EU's institutional system;
- (2) the development of the decision-making and voting procedures;
- (3) the reform and enhancement of the instruments of differentiated integration;
- (4) and a series of structural provisions.

(1) *Reform of the institutional system*

The central institutional reforms of the Constitution should be incorporated into the current Treaties. This applies above all to the appointment of an elected President of the European Council, the introduction of a European Foreign Minister including a new

administrative structure (European External Action Service), the establishment of a team presidency in the Council of Ministers, the appointment of a permanent president of the Euro Group, and the reduction in the size of the Commission and the strengthening of its President.

The personalization of the European leadership architecture will make it possible to assign responsibilities on the EU level more clearly and to enhance the continuity, visibility and coherence of European policymaking.

(2) Development of the decision-making and voting procedures

If the EU wishes to keep its ability to take action and to enhance its democratic legitimation, it needs to reform the decision-making and voting procedures in both the Council of Ministers and the European Parliament, and assign a prominent role to the national parliaments.

The introduction of the voting procedure of “double majority” constitutes a milestone in the development of the European Union. Applying the number of citizens and the number of states as a basis for decision-making in the Council of Ministers reflects the two strands of EU legitimation. This voting procedure will make it more difficult for member states to form blockade coalitions and will promote the ability to form constructive majorities.

The extension of majority decision-making in the Council of Ministers from 137 to 181 instances is of decisive importance for the problem-solving competence of an enlarged EU and should also be taken into account in the revision of the Treaty of Nice.

The rights of national parliaments (early warning mechanism) should be enhanced and elements of direct democracy (citizens’ initiative) should be introduced. Furthermore, the budgetary powers and the co-decision rights of the European Parliament in the legislative process should be strengthened (extension of co-decision).

(3) Reforming and enhancing the instruments of differentiated integration

In the enlarged EU the interests of the member states are becoming increasingly diverse. For this reason strategies of differentiated integration are of paramount importance. Blockades or the lack of political will in certain member states in the fields of monetary, internal and social policy were already in the past overcome with the help of differentiation, thereby promoting the process of integration.

The amendment of the current Treaties should take over the reforms of the existing flexibility instruments laid down in the Constitution (enhanced cooperation) and adopt the new instruments especially in the area of Common Security and Defence Policy (Permanent Structured Cooperation, EU Missions, cooperation within the European Defence Agency).

As in the Constitution, the Open Method of Coordination should be firmly embedded in the reformed Treaty of Nice. This Method reduces the role of the EU to setting targets for the member states and to making sure that the agreements are enforced. This is its primary advantage: The member states implement national action plans and compete with each other in a transparent manner.

(4) *Structural Provisions*

In addition to the institutional changes, the reform of the decision-making and voting procedures, and the development of the instruments of differentiated integration, certain important structural provisions of the European Constitution should form part of the amendments to the existing Treaties. These include

- the legally binding incorporation of the *Charter of Fundamental Rights* into the Treaty of Nice. A reference to the legally binding nature of the Charter – instead of the complete text – would suffice;
- the introduction of *competence categories* that describe the areas in which the Union possesses exclusive powers, the responsibilities shared by the Union and the member states, and the areas in which the Union may act only in a complementary or supportive manner;
- the incorporation of the so-called “*passerelle*” or *bridging clauses*, which will make it possible to improve the decision-making procedures in the Council of Ministers, the co-decision-making powers of the European Parliament, or certain internal policies without convening an intergovernmental conference;
- the reform of the *treaty revision procedure*, so that future changes to primary law are not decided merely by government representatives behind closed doors, but are publicly debated and concluded in the framework of a Convention including also representatives of the national parliaments, the European Parliament and the European Commission;
- the adoption of the *solidarity clause*, according to which EU members assist each other in case a member state is subject to a terrorist attack or the victim of a natural or “man-made” disaster. This clause has already proved its worth in EU practice after the terrorist attacks in Madrid;
- the introduction of the *mutual assistance clause*, with which the EU states undertake to provide support in the case of armed aggression on the territory of a member state, if need be of a military nature.

These changes to certain provisions of the Nice EU and EC Treaty could preserve the central innovations of the Constitution without embarking on a comprehensive reformulation of European primary law. The restricted revision of the current Treaties by an intergovernmental conference strengthens both the EU’s ability to act and its democratic legitimation. At the same time it deliberately eschews a strikingly symbolic emphasis on the treaty-based nature of integration.