

# The EU Constitutional Treaty: How to Deal with the Ratification Bottleneck

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The effects of the Constitutional Treaty, the result of a long and common effort, are bound to unfold naturally once it enters into force. Yet it will take some time before ratification is completed and there is even the risk that one or more member states could fail to ratify. In order not to waste the valuable work done, a closer look must be taken at three important matters 1) the timeframe and methods of ratification; 2) possible anticipated application of parts of the Constitutional Treaty (CT) before it enters into force; and 3) initiatives to be undertaken in case the Treaty is not ratified by all member states. Analysis of these aspects necessarily calls for both political and legal considerations.

## **Part One: The Timeframe and Methods of Ratification**

### **Legal obligations during ratification**

The first issue to be examined is whether or not there are legal obligations for member states with respect to ratification.

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### ***The principle of good faith***

Generally recognised as one of the basic principles of international law, the principle of good faith obliges signatory countries to abstain from any conduct that could compromise full application of a treaty once it has entered into force. An explicit provision of this kind is contained in Art. 18 of the 1969 Vienna Convention on the Law of Treaties. More controversial is whether the states that have signed a treaty are subject to positive obligations, for example, to activate ratification procedures in a timely fashion or to adopt direct measures to facilitate application of the future treaty. Scholars do not agree on this matter. However, the view is widely shared that the principle of good faith takes on more importance in the sphere of international organisations, given the special cooperative relations that link the member states in achieving common goals.

### ***The principle of loyal cooperation***

In the European Union, the principle of good faith is encompassed by that of loyal cooperation. The European Court of Justice has repeatedly underlined that this principle is of fundamental value in the European system, that it involves not only negative but also positive obligations, and that its scope extends beyond the wording of Art. 10 of the Treaty of the European Community (TEC). In fact, the principle affects the member states and the Union in all possible directions. Not only do the member states have to cooperate loyally with Union institutions, the obligation also works in the opposite direction; more importantly, it applies to their relations with one another. In this way, the principle of good faith combines with the principle of solidarity, and both flow into and strengthen the principle of loyal cooperation.

### ***Ensuing obligations***

What are the implications of the principles of international and European law just mentioned? There is no doubt that member states are obliged to abstain from any behaviour that could compromise the purpose and contents of the Constitutional Treaty pending ratification. It is also reasonable to assume that the obligations extend to positive behaviour, in particular with regard to the ratification procedure. In this respect, obligations of different intensity can be envisaged: from a minimum duty to activate rapidly internal ratification procedures, to a more cogent one to facilitate (or at least not hinder) them or to actively promote a positive outcome.

Foreign policy merits separate consideration. In this field, the CT calls for

the enhancement of the Union's external powers and creates new institutions to that effect (an elected, full-time President of the European Council, a Foreign Minister, an external relations service). In particular, the CT strengthens the system of common external representation by means of three main instruments: giving the Union legal personality; increasing the possibility of a single representation in international organisations; tasking the Foreign Minister with expressing common Union positions in the United Nations Security Council. It is in light of these important developments that the foreign policy conduct of the governments that signed the Constitutional Treaty must be assessed. And it is therefore questionable whether initiatives that contradict the objective of a single external representation (for example, as concerns reform of the Security Council) can be considered compatible with the obligations of loyalty and solidarity.

## **Ratification procedures in the member states**

### ***The overall picture***

As of this writing, a number of member states have decided or intend to include a referendum in their procedures for ratification of the CT. Spain is scheduled to put the question to the people on 20 February 2005. Other countries that have made the same choice are Denmark and Ireland, both of which are constitutionally obliged to do so. Referenda will also be held in the Benelux countries, the Czech Republic, France, Poland, Portugal and the United Kingdom. The other member states have either opted for parliamentary ratification or are inclined to do so.

Thus the overall picture is varied. Nevertheless, the general trend is clear: a higher percentage of member states than in the past has decided (or intends) to submit the CT to popular approval. This can be accounted for by both general and contingent reasons. In some member states, the decision to hold a referendum has undoubtedly been dictated by domestic political considerations. But there is also a widespread demand from citizens to be directly involved in this important step in European integration.

Nevertheless, the risk that frequent recourse to popular consultation at the national level could complicate – if not paralyse – the integration process should not be overlooked. An example is President Chirac's recent proposal to hold a referendum on the question of Turkey's entry into the European Union. It is clear that if national leaders choose to appeal systematically to the electorate to avoid having to manage directly the more delicate steps in European integration, it will become increasingly difficult to reach common or strategic positions on the more important problems or events.

### ***Ratification in Italy***

Italy is moving towards rapid ratification of the CT. The government has already sent the Chamber of Deputies a bill to this effect and there seems to be a broad majority in favour of ratification. By doing so, Italy would confirm its reputation for being a pro-European country and would at the same time provide stimulus and drive for other member countries.

Nevertheless, some political forces in Italy are calling for a referendum. The Italian Constitution explicitly rules out that laws ratifying international treaties can be submitted to a referendum for either authorisation (before-hand) or abrogation or confirmation (afterward). Therefore, a referendum on whether or not to ratify the Constitutional Treaty would require a special constitutional law of the kind passed for the 1989 referendum on Europe. Another matter is whether parliamentary ratification requires an ordinary law or a constitutional law, but the Italian Constitutional Court already ruled on a similar matter in 1964 (and has not changed its stance since then): an ordinary law is sufficient since the limitations on sovereignty required for the construction of Europe are "permitted" at constitutional level by Art. 11 of the Italian Constitution.

## **Part Two: Anticipated Application of Some CT Innovations**

### **Three reasons for anticipating application**

There are three reasons why it would be advisable, where legally possible (see *infra*), to introduce some of the innovations contained in the Constitutional Treaty even before it is ratified: first, the reforms contained in it are urgently needed; second, they could be facilitated by anticipated application and; third, anticipated enactment of some reforms could actually facilitate ratification of the Treaty itself.

First, the process of constitutional reform was launched in December 2000 in the conviction that the policies and institutions of the Union had to be adapted urgently to the challenges it was facing (starting with the historical enlargement to no less than ten countries). Realistically speaking, it's likely that the ratification process will take at least two years, as was the case with previous treaty modifications that were far more limited and partial. If no reform is introduced in that time, the European institutions' problems of functionality and credibility will be exacerbated. It would be damaging indeed if the member states, faced with the growing need for greater efficiency, transparency and democratisation, were to wait passively for the outcome of the ratification process. It is therefore essential that the reform process continue and that as many innovations as possible be implemented ahead of time.

Second, once the Treaty enters into force, its implementation would be facilitated if some of the innovations it provides for were already applied and tested. Some of these innovations are rather complex and call for a number of procedural steps before becoming operational. The risk, then, is that if application is only started after ratification, it will be a long time before the Treaty comes into full effect. Anticipated enactment of some key provisions could accelerate the process. This is what is being done, for example, with the European Defence Agency; a similar approach could be applied in other fields.

Third, adopting a few measures that would allow for anticipated application of some of the more significant innovations contained in the CT could facilitate the ratification process itself. In fact, some of these innovations are currently the object of intense political debate in a few countries. Those opposing the Treaty tend at times to interpret them in a distorted fashion, spreading unfounded alarm. Their anticipated application could help dissipate these fears. It would make it clear to public opinion that introduction of some of the more disputed novelties will not only leave the nature of the relationship between the Union and the member states unchanged, but could actually facilitate the implementation of policies that concretely tend to satisfy European citizens' demands.

### **Available instruments**

A number of instruments could be used to enact the CT ahead of time.

#### ***Instruments provided by EU law***

*Interpretation of the current system in light of the CT.* In addition to introducing innovations of a substantial nature, the new Treaty states general principles already recognised in institutional practice and case law, unravels scholars' interpretative doubts, and incorporates aspects of the *acquis communautaire*. Using legal material produced within the Union sphere to interpret existing treaties is not new to European law. It was recognised by European Courts, for example in relation to the Nice Charter of Fundamental Rights. The CT is not an inter-institutional declaration like the Nice Charter. Nevertheless, its contents were worked out with the contribution of representatives of national parliaments and governments, and has now been signed by the latter. Thus, the CT can, even prior to ratification, be considered an instrument for interpreting and supplementing the present system.

*Residual powers pursuant to Art. 308 TEC.* Art. 308 TEC grants the European Community an "open" legislative power by which it can adopt measures aimed at achieving a Treaty goal that cannot be carried out on the basis of

the specific powers provided for in the TEC. Initially conceived as ancillary to the construction of the single market, the provision has turned out to be both versatile and capable of responding to the Community's growing needs even after it lost its strictly economic connotation. It has been used to introduce some very innovative measures (such as the ECU) and new competencies (such as with regard to the environment) subsequently laid down in the treaties. Therefore, it could also be used now to implement selective contents of the CT before it is ratified.

*Enhanced cooperation.* This instrument, established in Amsterdam and simplified in Nice, allows for a restricted group of member states to undertake an initiative that is not of interest to all. Enhanced cooperation is subject to a number of procedural and substantial restraints. It is especially useful in fields that require unanimity, making it possible to get around vetoes, albeit at the price that dissenting countries are not bound by the measures adopted. Thus, enhanced cooperation would allow for actions to be taken before ratification in fields that currently require a unanimous vote in the Council, but for which the Constitution envisages a qualified majority. Such initiatives could have a locomotive effect, encouraging member states not participating from the outset to join later.

*Inter-institutional agreements and declarations.* Agreements between the institutions of the Union and joint declarations, although not expressly provided for in the treaties, are currently recognised as anomalous sources of European law. Their legal value derives from the fact that they commit the institutions to a certain kind of conduct in exercising their powers, a commitment deriving from the general principles of loyal cooperation (also applicable to institutions) and legitimate expectations. Throughout the history of European integration, such agreements have been used repeatedly – at times, to make up for gaps in existing treaties (think, for example, of the European Council and the budget procedure). Sometimes, as initially occurred with the Community's recognition of fundamental rights, inter-institutional declarations preceded a subsequent modification of the treaties.

### ***Instruments provided by international law***

*Provisional application of the CT.* International law allows for the provisional application of treaties (Art. 25 of the 1969 Vienna Convention). States continue to resort to it in relation to treaties subject to ratification. It is used to implement, in those states that consent to it, all or parts of a treaty before it enters into force, thereby getting around the long times required for ratification.

It is obvious that not all of the CT can be applied provisionally because this would constitute the circumvention (even if only temporarily) of domestic constitutional requirements. But the same objection cannot be raised to provisional application of parts of the Treaty. A solution of this kind, precisely because it is not definitive, would have the advantage of not compromising the course of ratification procedures. In fact, it is generally felt that a state's consent to provisional application loses effects *ipso jure* if the state fails to ratify; this could, in any case, be explicitly set out. Provisional application would lead to an agreement entered into directly by the governments (in the so-called simplified form), whose efficacy would only be consolidated if the Treaty were subsequently ratified.

*Conclusion of autonomous international agreements.* Another anticipatory instrument is offered by autonomous international agreements concluded among member states. This has been used many times in the history of European integration. Two of the better known cases are the European Monetary System (EMS), which involved an agreement between national central banks preceded by a European Council resolution, and the Schengen agreements.

Such agreements, signed by all or some member states, could assign Union institutions tasks whose objectives are compatible with those of the Union. Later, they could be integrated into the Union's legal order as occurred with Schengen. Like those on provisional application mentioned previously, these agreements would be based on international law. They differ from the former, however, in that they are not linked to the ratification of the CT and produce permanent effects. That is why, if concluded in simplified form (that is, directly by national governments), they could cause problems of constitutionality at the domestic level.

## **Innovations that could be enacted before ratification**

### ***Innovations of an institutional or procedural nature***

*Legal personality.* The treaties currently in force bestow legal personality only on the Community. In the absence of a specific provision, scholars debate whether this personality should extend to the Union and, if so, whether that of the Union is additional to or absorbs that of the Community. The CT will put an end to this debate in that the Community is incorporated into the Union and the latter is the only entity with legal personality. In keeping with a trend already under way, this novelty could be brought into force more generally with all the benefits that would derive in terms of clarity and simplification.

*Presidency of the Council.* The new Treaty reforms the Union's system of rotating Presidency of the Council. The frequent changes involved in this system of rotation and the consequent inconsistency have already been the object of reforms which culminated in the decision, taken in Seville, to strengthen the coordination of the presidencies by means of annual operational programmes and tri-annual strategic programmes.

A Declaration annexed to the new Treaty takes this reform process a step further, providing for even stronger coordination by grouping together three countries for 18 months to take over the Council Presidency (with the exception of the External Affairs Council). The presidency of each Council will rotate between the three countries, unless the group decides otherwise. At the moment, the Council is in charge of its internal organisation and the rotations, which have been scheduled up to the end of 2006. It could choose to start designating groups of three countries at a time to coordinate the Presidency for a period of 18 months as of 2007.

*Minister of Foreign Affairs.* To make up for the inconsistency and low profile of the Union's external action, the CT establishes the post of Foreign Minister of the Union, combining the present functions of the Commissioner for External Affairs and of the High Representative for Common Foreign and Security Policy. Last year, the Heads of State and Government already named Javier Solana, current High Representative, as the future Foreign Minister, even though the position will only become effective with the Treaty's entry into force. With a special agreement, however, the member states could already confer upon Solana, minister designate, some of the powers granted by the Treaty.

In particular, the Treaty establishes that the Foreign Minister should give voice to any common position the Union works out on issues being discussed in the UN Security Council. The High Representative for foreign policy could already be entrusted with this task.

In support of the new figure's functions, the Treaty also provides for a new European service for external action, made up of officials from the Council General Secretariat, the Commission and national diplomatic services. That this is an urgent requirement was emphasised by the Intergovernmental Conference (IGC) which, in a declaration annexed to the Treaty, committed the member states to work towards this goal as soon as the Treaty is signed. The Council and the Commission could reach an agreement on setting up this service and creating the functional links between the structures required to make it possible. In this context, more coordination would have to be envisaged between the delegations of the Union and of member countries in third countries.



*Eurogroup.* The new Treaty sanctions the existence and autonomy of the Eurogroup. Pursuant to the protocol annexed to the text, the Eurogroup can nominate its own president for a period of two and a half years. The ministers of finance of the Euro countries already nominated Jean-Claude Juncker to this position in September 2004. Although his tasks have not been defined, he could be entrusted with external representation powers on the basis of Art. 111 TEC. Moreover the Eurogroup could be turned into an enhanced cooperation.

*National parliaments.* The CT strengthens the role of national parliaments within the Union system. The additional protocol on the role of national parliaments states that they must be informed directly (no longer through governments) of any draft European legislative acts. Furthermore, to ensure that the Council cannot approve proposals that have not been examined by the national parliaments, the Council will have to wait at least 10 days from when an item is put on the provisional agenda before approving it. These reforms could become accepted practice in the Union while ratification is still pending by means of simple inter-institutional agreements.

The second Additional Protocol to the Treaty allows national parliaments to object to legislative proposals by the Commission considered contrary to the principle of subsidiarity; and if the objection is shared by at least one third of national assemblies, the Commission is forced to revise its proposal. There is nothing to stop the national parliaments from expressing their opinions on Commission proposals now, thereby contributing to the Union's decision-making process. This initiative should be accompanied by a political commitment on the part of the new Commission to review its proposals if reservations are raised by at least one third of national assemblies.

*Inter-institutional cooperation.* The CT establishes that the Commission's annual and multi-annual programmes have to be drafted in cooperation with the other institutions. Even in the absence of a formal decision, this inter-institutional cooperation could become a part of Commission practice now.

*Consultation during the legislative process.* During the adoption of European laws and framework laws, the CT calls for more involvement of the social partners concerned. Independently of the entry into force of the new Treaty, the new mechanisms for consultation could be adopted to improve the efficacy and democratic legitimacy of the Union's decision-making process.

***Innovations relative to specific policies***

*Defence policy.* The most significant innovations introduced by the CT in defence policy are a European defence and armaments agency and the possibility of structured and permanent cooperation, on the model of the Euro. The urgency of rapid progress in this field has already induced the member states to introduce some of the innovations envisaged in the CT. In July 2004, a common action by the Council established the European Defence Agency. Intergovernmental agreements could also be used within the Union to pursue the objectives envisaged for structured cooperation. This was what occurred to some extent last June with the decision to set up an Operation Centre for the planning and command of small-scale operations. Moreover, the Union could immediately put into practice the Treaty clauses that allow the Union to confer mission mandates on individual or groups of countries that commit themselves to carrying them out in the name of the Union. This was already the case with the Artemide mission in Congo.

*Space of freedom, security and justice.* Considering the topicality of the problem, recognition of the principle of solidarity in the management of border control, asylum and immigration policies could be the object of a political declaration by the Council. This would be analogous to the clause on solidarity in the fight against terrorism inserted into the new Treaty and adopted by the European Council in March 2004 in response to the terrorist attacks in Madrid.

The CT extends the role of the European Parliament to numerous matters included in this field, such as immigration, and judicial and police cooperation. In all these fields, the Council could commit itself now to closer cooperation with the European Parliament in line with the new provisions.

More generally, the CT underlines that with the progressive opening of borders, closer judicial and police cooperation between member states is required. Taking into consideration that this sector has long been characterised by strong intergovernmental cooperation among most member states, some proposals contained in the CT could already become the object of enhanced cooperation or, lacking that, *ad hoc* international agreements. Examples include establishing a standing committee on operational cooperation in domestic security, introducing mechanisms for assessing domestic security, and setting up a European prosecutor's office.

**Part Three: Solutions in Case of a Ratification Crisis**

Member states are obliged to activate ratification procedures quickly and to

work loyally and in good faith towards a positive outcome (see *supra*). It is clear, though, that there is no obligation to ratify and that it would therefore be possible (and not unlawful) for one or more member states to decide not to ratify the CT as a result of internal constitutional procedures. Unfortunately, given the number of current members and the general political climate, this possibility cannot be ruled out. Therefore it seems important to consider as of now how to face the scenario of deep crisis that would ensue. Two types of solutions can be foreseen: those agreed upon between ratifying and non-ratifying states and those leaving aside such agreements. Obviously the latter are less preferable in that, although legitimate in terms of international and European law, they constitute a kind of *extrema ratio*. Nevertheless, acknowledging that they exist could facilitate an agreed solution.

### **Solutions agreed upon by the member states**

The preliminary question is whether ratifying and non-ratifying countries are in some way legally obliged to try to find an agreed solution. Regardless of the answer to this question, some concrete solutions that could be worked out have to be identified and assessed as to their political feasibility.

### ***The obligation to negotiate loyally and in good faith***

*Declaration no. 30.* Declaration no. 30 annexed to the Treaty reads:

The Conference notes that if, two years after the signature of the Treaty establishing a Constitution for Europe, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council.

There can be no doubt that the phrase "referred to the European Council" means that the matter 'must be' referred. Thus, the member states are obliged to meet in the European Council and examine the situation at hand. The Presidency at that time will have to act and, given the importance of the matter, call an *ad hoc* meeting. Furthermore, it would seem that the member states cannot simply passively acknowledge the problem, but are obliged to do everything possible to reach an agreed solution.

A duty of this kind is based once again on the principles of good faith and loyal collaboration (see *supra*), which play a central role in international and EU law. They give rise to the member states' duty to negotiate a solution constructively every time a problem relating to the Union crops up.

The more serious the problem (and this one would certainly be extremely serious), the stronger the member states' commitment.

*Existence of a pactum de negotiando.* In this particular case, things could be taken one step further. One could claim that the treaties in force entail a kind of pact among the member states by virtue of which they have undertaken to enter into a stepwise process of integration. Attesting to this are the phrases in the preambles of the instituting treaties referring to an "ever closer union", as well as the need for further steps to develop the common project. The progressive integration of the member states and the European peoples therefore constitutes both an objective and an endeavour that all member states have solemnly underwritten.

It would be going too far to argue that this means that there is a *pactum de contrahendo* that obliges the member states to ratify the CT or (subordinately) to agree to negotiated solutions in line with the integration process. It does, however, confirm a precise obligation to negotiate loyally and with commitment within the frame of a *pactum de negotiando*. This pact binds all member states equally, both ratifying and non-ratifying, but in particular the latter because they are the ones that are producing the obstacle to further integration. In fact, the ratifying states cannot impose the CT or the innovative parts of it on the non-ratifying states – consensus is required. But by the same token, the non-ratifying states should not be entitled to block the others by claiming a kind of veto power. If they are not able to proceed with implementation of the common plan, good faith and loyal collaboration should make them consent to, or at least not oppose, the others going ahead.

*Obligatory withdrawal from the Union of non-ratifying states.* The idea has been put forward that member states that fail to ratify should leave the Union. The political and ethical reasoning behind the idea is clear, but can states be legally obliged to withdraw in case of non-ratification and to commit themselves to doing so in advance? It is hard to imagine that the principle of loyal collaboration could be taken that far. The non-ratifying countries are certainly free to decide to take such a step, possibly upon the urging of the other member states (see *infra*). But it is another matter to assume the existence of a legal obligation to do so – an obligation which could not be sanctioned by expulsion if it were not fulfilled. In fact, expulsion is not provided for in the treaties in force and would not be justifiable on the basis of international law. As will be seen further ahead, should it prove impossible for ratifying and non-ratifying states to co-exist, the legal solution available to the former is not to force the latter to leave the Union,

but to withdraw themselves from the current treaties to refound the Union on the basis of the new CT.

### **Possible solutions to be negotiated**

*Revision of the CT.* This is an option that could receive consensus if a number of countries were not to ratify the CT and the referendum campaigns and results revealed strong opposition to some of the Treaty's innovations. Two delicate political problems would arise: what kind of negotiating procedure should be adopted and on what kind of issues should the new negotiations be centred?

As regards the negotiating procedure, the alternative is between another Intergovernmental Conference with a simplified procedure and calendar, and a new Convention followed by an IGC. The first option would be more rapid and would ensure more effective diplomatic management of the political issues posed by non-ratification. The second would consolidate the Convention method, making it a definitive acquisition, along with the values of democracy and transparency that it embodies. Here too, a rapid Convention with simplified rules could be envisaged.

The choice of issues to be reviewed, on the other hand, would involve a difficult compromise between opposite political requirements: while the non-ratifying states would want substantial changes to be introduced into the Treaty, the ratifying states would probably be reluctant to water down a text that cost so much time and effort, especially if it were approved by a broad majority of members of parliament or voters. In practice, this would call for a (politically) delicate selection of the innovations to be kept and those to be eliminated on the basis of a joint assessment of the reasons for non-ratification. An agreement to keep everything that goes in the direction of simplification (unification of the treaties, renaming of the legislative instruments, reduction in procedures and greater transparency) would probably be relatively easy to achieve. It might be harder to confirm incorporation of the Charter of Fundamental Rights and such institutional innovations as the Minister of Foreign Affairs and an elected, full-time President of the European Council.

*Granting the non-ratifying states special status within the Union.* This option would exonerate one or more member states from some of the obligations set down in the Treaty. This was the path chosen after the Danish referendum turned down the Maastricht Treaty in June 1992. Denmark negotiated an agreement exempting the country from the obligations of the new treaty in the fields of defence, justice and home affairs, and citizenship. Obviously, this would be the preferable option if only one country were not

to ratify and the majority were not too large, as was the case with Denmark.

In order to determine the exemptions to be granted, however, a look would have to be taken at the reasons for opposition to the Treaty that emerged during the referendum campaign. Exemptions should, in fact, allow for a positive outcome in a new referendum or vote in parliament. It should be recalled, however, that opting-out formulas are easier in policy sectors and more complex and problematic in procedural and institutional matters.

*Granting the non-ratifying states special status outside of the Union.* At first glance, this option seems preferable if the Treaty is rejected in only one or a few countries but by such a broad margin as to make it unlikely that it would be approved in a second referendum or another vote in parliament, even after the adoption of opting-out clauses. The difficulty lies in reaching an agreement with the member state for withdrawal from the Union and the institution of a regime of external association. The leadership of the country in question would have to come to the conclusion, on the basis of the referendum results or the parliamentary vote, that rejection of the Treaty actually reflects a rejection of the Union as a whole, even the treaties already in force. This is unlikely, unless openly anti-European political forces were to come to power. Otherwise a 'no' to the Treaty would be taken as directed specifically at the innovations it contains. In general, voluntary withdrawal from the Union by a member state seems improbable, at least for as long as the revision of the treaties is bound by unanimity. The member state could, however, be persuaded to leave the Union if offered the prospect of a regime that goes beyond a mere association agreement or participation in the European Economic Space.

It goes without saying that the last two solutions could be adopted contemporaneously if, in the case of non-ratification by a few member states, some were to opt for the former solution (membership with opt-outs) and some for the latter (special status outside of the Union). The Treaty could, in fact, be rejected for different reasons and, above all, by different percentages of voters.

*Putting aside the Constitutional Treaty.* If efforts to come to an agreement among member states on one of the above solutions were to fail, a dramatic alternative would open up: abandonment of the CT or enactment of solutions not agreed upon by all member states. The first proposition is hard to accept for those who feel that the CT responds to a compelling requirement of the Union and that putting it aside would open the road to an inexorable decline in the integration process. The second would lead to a rift between member states, with consequent destabilising effects and unknowns for the future development of the European project. The negative

consequences of the two solutions could be partially mitigated if, in the first case, some of the CT's innovations were nevertheless adopted using the instruments available in the present system (see *supra*) or if, in the second, the countries were to opt for non-agreed solutions that are compatible with the continuing existence of the present system (see *infra*).

*Overall evaluations.* In choosing among the various options illustrated, account would have to be taken of the variables mentioned, above all of the number of member states not ratifying and the degree of opposition manifested in each. The specific reasons for rejection of the Treaty in each state would also have to be investigated. The decisive factor could be widespread and consolidated Euro-scepticism among the public, already seen on other occasions. In this case, the negotiating margins would probably be so limited as to make agreed solutions impossible. On the other hand, rejection of the Treaty could reflect a lack of confidence in the government in power or, more specifically, its European policy. In this case, the possibility of winning a second referendum would increase with a change in government.

This indispensable effort to interpret why the Treaty was rejected would have to be made by national leaders. But coming up with effective solutions would also require close interaction between the national and European levels. The leaders of the countries that ratified the Treaty and the Union's highest-ranking institutional figures, starting with the Commission president, would be called upon to play a decisive role in urging, and if necessary putting pressure on the national leaderships of the non-ratifying countries.

### **Solutions not agreed upon by the member states**

As already mentioned, these solutions are a last resort. They involve only the ratifying countries, which decide to go ahead on their own without the prior consent of the non-ratifiers. This would entail a departure from the traditional consensual method of European integration, and the effects could be more or less serious (and therefore more or less easy to remedy) depending on the solution considered. Indeed, some solutions could integrate the present system and would therefore allow for continuity, others would be totally incompatible and substitutive of it. The former evoke the scenario of an integrated Union strengthened by an *avant-garde* group, the latter a refounded Union with a new composition and a new associative structure. Both raise problems of legitimacy to be assessed in light of European and international law.

***The scenario of an 'enhanced' Europe***

A solution of this kind could take the form of sectoral agreements among all ratifying states aimed at achieving greater integration, or a kind of pact between some member states to coordinate their participation within the Union. In both cases, the resulting structures would be outside the Union but capable to coexist with the Union's system.

*Sectoral agreements.* The ratifying member states could enter into one or more sectoral agreements amongst themselves on specific policies (foreign affairs, defence, security, the fight against crime, economic development, etc.). These agreements would implement provisions of the CT or even go beyond them (since the CT's provisions suffer the effects of compromise within the Convention and the IGC). As normal agreements under international law, they would fall outside of the Union system but could be brought into it during subsequent revision of the treaties. Until this were to happen, there would be two parallel systems: the general Union system, valid for all member states, and the one deriving from the agreements binding only a few of them. This would give rise to a delicate problem of coordination between the two, the solutions for which range from substantial autonomy to strong links.

Partial agreements of this kind, modifying multilateral treaties for only some of the parties are a practice well-known to the European integration process (as exemplified by Schengen and the EMS). They are legitimate as long as certain conditions are met. For international law, the changes must not jeopardise achievement of the objective of the original treaty, nor the rights of the other parties (Art. 41, 1969 Vienna Convention). The same conditions hold for agreements that modify the Union treaties for only a few member states. Moreover, according to Union law, such initiatives can only be undertaken after attempts at enhanced cooperation within the Union have failed.

*Pact for coordinated action within the Union.* A more radical solution that could be combined with the preceding one would envisage agreements among some member states establishing an organisational structure for systematic coordination of their positions within the Union. This could also lead to a single representation in the Council, assigned in rotation to individual or groups of states. Such a solution, while it would not alter the Union's current institutional arrangement, could allow the *avant-garde* core of member states to move towards closer integration at both the institutional and the individual policies level.

This solution, like the previous one, seems compatible with the continuity of the current system. It could meet with greater opposition from



the excluded member states, however, even if it is inevitable that, in the scenario of an enhanced Europe, the states participating in the core will to some extent stand apart from the others (as is happening now – although not quite in comparable terms – with the Eurogroup).

### ***The scenario of a ‘refounded’ Europe***

The failure to ratify and the difficulties in finding agreed alternative solutions among all member states could lead the ratifying states to conclude that the current system cannot be further modified or integrated, and that it should be put aside and replaced. In this light, the CT would open a new, refounding phase in the integration process, breaking with the past. This is an extreme solution that would involve at least two steps: 1) adoption of the CT (or some other act refounding the Union) by the ratifying states; 2) termination of the current treaties for the same states through withdrawal or by some other means.

*Entry into force of the CT without ratification by all member states.* It could be argued that the requirement of ratification by all member states set down in Art. 48 of the Treaty of European Union (TEU) does not apply to the CT, in that the TEU refers to *modifications*, by amendment, of the existing treaties. Consequently, the procedure provided for applies to the *revision*, not the *replacement* of those treaties and, much less, to the *refounding* of the Union on new constitutional bases.

Nor can Art. IV-447 of the CT be invoked to support the opposite view, first, because its efficacy is dubious until the Treaty enters into force and, second, because the provision seems to assume ratification by all signatory states, but does not explicitly demand it. This could be inferred from the text of Art. IV-447, where it states that the two months preceding the entry into force of the treaty will be calculated from the time of the deposit of the instruments of ratification by “the last state to take this step”. In the absence of an obligation to ratify established elsewhere (that is, if Art. 48 TEU is not to be applied), such language could be interpreted to mean that the treaty enters into force two months after the last state intending to ratify does so. Therefore, if a signatory state decides not to ratify, this excludes it from those that have to deposit the instruments of ratification for the CT to enter into force.

In light of this interpretation, the CT would enter into force with the ratification of only the countries that intend to ratify. Pursuant to the provisions for abrogation and succession (Articles IV– 437 and 438 CT), the new Union would for those member states replace the old one and the current treaties would be considered repealed. The same should apply with

respect to the non-ratifying states. In any case, ratifying countries would do well to notify the others that they no longer consider themselves part of the old treaties or, in case of dispute, to withdraw formally from them.

*Withdrawal from the Union and adoption of a new refounding act.* Another way to achieve the same result would be to invert the two steps mentioned above: the ratifying states first withdraw from the treaties and then sign and ratify a new refounding treaty amongst themselves.

For constitutional reasons, such a solution would call for new ratification procedures – with all the relative consequences – to the extent that the previous ratification was based on the logic of all member states participating in the CT. The new procedure, however, could be simplified and more rapid. Clearly, this solution would do away with any debate over the admissibility of the CT entering into force without the ratification of all member states. Moreover, it would make it possible to adapt the CT to the new situation or even refound the Union in much more advanced terms than those set out in the current CT.

In the same spirit, adoption of a new refounding act could be envisaged outside of the classic scheme of international law and, therefore, without an IGC and without ratification. The new text could be adopted by a Constituent Convention and then approved by a European referendum. In this way, even the form and procedure for the entry into force of the act would be in harmony with its substantially constitutional nature.

As for withdrawal from the existing treaties, this should not raise questions of legitimacy. It is true that a special clause to that effect is provided for only in the CT (Art. I-60) and not in current Union law. But such a provision can be considered implicit or natural for institutions such as the Union (although not all scholars agree on this). On the other hand, international law allows for withdrawal from treaties in the absence of explicit provisions, both in the case of a fundamental change in circumstances and when that option can be assumed from the nature of the treaty (Articles 56 and 62 of the Vienna Convention). Even those authors who are in principle against recognising the right of member states to withdraw from the Union concede that withdrawal is permitted in situations of particularly serious crisis. Thus, withdrawal from the Union appears to be legitimate at least in the presence of such a serious circumstance as the failure to ratify the CT.