The Treaty of Nice
A failure which can only be remedied by means of an effective and properly implemented post-Nice process

By Dimitris Tsatsos *.

I. The outcome of the Nice Summit

1. The Treaty of Nice does not go far enough. It comprises a package of reforms which will not incorporate into the Union's basic political architecture either a clear system of political responsibilities or simple and readily understandable procedures and which may even give rise to new dangers. The result is disappointing. Should it therefore be rejected en bloc? A distinction must be drawn: the disappointment rightly felt at the new Treaty arrangements is a political value judgement that must be clearly expressed. The issue as to whether the Treaty as a whole should therefore be rejected relates to the political conclusions to be drawn, conclusions which do not automatically flow from that value judgement. When decisions are taken regarding the political conclusions, the value judgement must be placed in its historical context and the consequences must be painstakingly weighed up. In so doing, however, the European Parliament must take care not to forfeit political credibility. The considerations set out below are intended as a contribution to that process.

2. The European Union is a construction of a type which renders questions regarding its completion entirely spurious. Like the great cathedrals, it is not a completed building, but rather an ongoing historical process. Following the major historical achievements of the early years, the creation of a single area of Community law, the emergence of evolving institutional arrangements, and the establishment of the internal market and Economic and Monetary Union, the Union now faces its first major political challenge, namely that of shaping geopolitical relations in Europe after the fall of the Iron Curtain.

3. The Union's political response is the enlargement process. By taking its decision to offer the prospect of accession to all democratic states which are intrinsically European in political and cultural terms, the Union has placed itself in a double bind. Only if the Union retains the ability to take political action will it be attractive to potential Member States. Only if it itself complies unreservedly with democratic requirements can the Union help to stabilise the democracies in Central and Eastern Europe.

4. Moreover, in the course of the history of Europe and in the decisions leading to the establishment of the European Union (and the Communities on which it is founded) fundamental principles have come to the fore which today's political decision-makers can disregard only at the cost of destroying all that has been achieved thus far and which narrow the range of available institutional options. These fundamental principles define the European Union as a Union of peoples and states. The striking of a balance in the development of the Union of peoples and the Union of states is a prerequisite for the acceptance of any reform measures. In particular, this implies that arrangements that differentiate between states on the basis of demographic factors are entirely compatible with the fundamental principles underpinning the Union, but only as long as the basic equality of

all the states is safeguarded and no hierarchy of EU Member States emerges. This also implies that the balance between the most populous and the smaller Member States must be established anew after each reform measure. These constraints must be borne in mind when considering the political conclusions to be drawn from the disappointment at the nature of the new Treaty.

5. When assessing, in the light of its historic task, whether the Treaty of Nice can be accepted in overall terms or not, two categories of criteria musttherefore be employed, namely substantive criteria, on the one hand, and structural criteria, on the other.
(a) The substantive criteria are, firstly, an appreciable increase in the effectiveness of decision-making procedures and, secondly, an increase in the democratic legitimacy of Union decisions.
(b) The structural criterion is scrupulous compliance with the fundamental principles underpinning a Union of states and peoples.

6. Already at this point a warning must be issued against any temptation of playing off the two substantive criteria of effectiveness and legitimacy against each other. The conferral of legitimacy by means of democratic procedures is inevitably a lengthy process. The swiftest possible decision is useless if Union citizens subsequently rebel against it. The European Union must steer a course between the opposite poles of effectiveness and legitimacy, a balance which takes account of its raison d'être as a Union of peoples and states.

7. A few days after the completion of the marathon negotiations in Nice the predominant emotion felt by most of those involved, in particular those who played a key role in the preparatory work, including Parliament's two representatives, is one of painful disappointment. This disappointment is understandable. All the arguments put forward and the options considered had come together in a set of demands for institutional reform which, when taken as a yardstick, clearly reveal the outcome of the Nice Summit to be meagre and in too many respects inadequate.

8. The Treaty of Nice has brought a transition to qualified-majority voting in respect of only some 30 of the 87 provisions which, under the terms of the Treaties establishing the Union, were still subject to unanimous decisionmaking in the Council after Amsterdam. The transition will take place when the Treaty enters into force or at a later date after longer time-limits have expired (e.g. in the sphere of the Structural Funds on 1 January 2007 at the earliest), in some cases on the basis of a unanimous Council decision. What is more, the politically most sensitive areas have been excluded. The shortcomings still inherent in the Treaty of Amsterdam as regards the democratic legitimisation of the Community legislative process, i.e. the juxtaposition of majority decisions by the Council and the restriction of Parliament to the delivery of an opinion, in particular in connection with agricultural policy and competition policy, including State aid schemes, have not simply not been eliminated. The Treaty of Nice has in fact added new instances (co-operation with third countries, Financial Regulation) in which legitimisation by the national parliaments is inadequate, because the Council takes a majority decision, and the European Parliament cannot effectively make good the deficit, because it enjoys only the right to be consulted, not the right of co-decision we had called for. If one first considers the list of Treaty provisions in respect of which the Treaty of Nice specifies a transition, as part of the Community

legislative process, to qualified-majority voting in the Council in conjunction with codecision involving Parliament, the outcome is still unsatisfactory, since in overall terms the agreements reached at the Summit as far as qualified majority voting is concerned increase the democratic deficit, rather than reducing it. It is likewise unacceptable that, in connection with decision-making on enhanced co-operation arrangements, provision has been made for genuine parliamentary legitimisation at European level, in the form of the right of assent, only in those cases where Parliament is involved in the legislative process in accordance with the co-decision procedure.

9. However, in the institutional sphere some progress has been made in preparation for the enlargement:
(a) A strengthening of the role of the President of the Commission, combined with a relative reduction in the number of Commissioners as the enlargement progresses;
(b) Moves to facilitate enhanced co-operation arrangements, unfortunately - as outlined above - without any requirement that Parliament should give its assent;
(c) A revision of the provisions governing the European Court of Justice which will clear the way for the requisite adjustments parallel to the successive stages in the enlargement process; the placing of the EP on an equal footing with the Council and Commission as regards the right to bring actions before the ECJ pursuant to Article 230 of the EC Treaty is particularly welcome;
(d) The introduction of an early warning system, incorporating an appropriate role for Parliament, in connection with potential breaches of constitutional and democratic principles;
(e) Finally, the Treaty of Nice contains an innovation whose political significance goes well beyond that of the amendment or creation of a Treaty provision, given that it may lead to a substantial deepening of the democratic dimension to the European Union. This innovation is the creation of a legal basis for the adoption of framework legislation governing the European political parties (including their funding). It establishes the institutional conditions required for the framing of a European law governing political parties and does away with the legal uncertainty surrounding European political parties, particularly in terms of their funding.

10. The results of the Nice Summit are particularly questionable as regards the weighting of votes and the composition of the European Parliament, two matters that, by virtue of their political, institutional and symbolic significance, are central to the new Treaty. These issues were the focal point of the conflicts of interest played out in the course of the struggle to strike a new balance between the most populous and the smaller Member States and the painful nature of the discussions must inevitably colour any assessment of the results. The details are as follows:
(a) The new mechanism for the weighting of votes complicates the decision- making arrangements in the Council, makes them even less transparent and thus fails to comply with the criteria laid down by the EP. In addition, there is a danger that the triple threshold used to determine whether a qualified majority has been achieved will slow down the decision-making process. As a matter of principle, this solution must be challenged on the grounds that in a 'state chamber' such as the Council it overemphasises the demographic factor, since two of the thresholds relate to the proportion of the Union population supporting a given decision, but only one to the number of Member States which do the same. However, this arrangement seems unlikely to give rise to obstructionism and it can be said to maintain the

balance among the Member States of what is, as we have seen, a Union of both states and peoples. In the final analysis, it represents a compromise which takes account of both the interests of the larger Member States and the fears of their smaller counterparts. As to whether the new mechanism will lead to a loss of effectiveness, this will ultimately depend on how accurate the political theory that the mere creation of scope for a majority decision fosters a willingness to compromise proves to be in practice; if so, the counting of votes in connection with the Council's legislative work will remain the exception in future. However, it must be pointed out that in overall terms the cumulative nature of the various hurdles makes blocking minorities easier to form, clearing the way for any destructive minorities that might emerge to adopt an obstructionist approach.
(b) The arrangements governing the composition of the European Parliament take greater account than before of demographic factors, albeit not to the extent which Parliament itself had hoped. The increase in the ceiling on the number of seats to 732, a figure that may even be substantially exceeded on a transitional basis, is a particularly ill-judged move. In addition, the exact distribution of seats is by no means systematic, since it is designed to compensate for the weighting of votes in the Council – an incomprehensible arrangement which distorts the balance among the institutions. Moreover, the allocation of seats is not always consistent with the principles of equality and democracy, since the Czech Republic and Hungary have been granted fewer seats than Member States with a smaller population. Whatever substantive reservations may be voiced regarding the solutions agreed on in Nice, it must be borne in mind that those solutions were approved by all the governments and that without such unanimous agreement on these issues there would have been no Treaty and no post-Nice process.

11. In any assessment of the Treaty of Nice, the negative aspects thus clearly outweigh the positive features. Taking the enlargement-related requirements laid down thus far as a yardstick, after Nice the Union can at best be described as only partly prepared for the enlargement. It thus faces a potentially disastrous dilemma: should it go ahead with the enlargement without itself being prepared, there is a danger that it would self-destruct. Should it postpone the enlargement process, invoking the need for further institutional reforms, it would lose all credibility with the applicant countries. The only possible way out of this dilemma would seem to be the 'post-Nice process" outlined in the Treaty of Nice.

II. The post-Nice process

1. The declaration on the future of the Union after Nice amounts to official acknowledgement of the fact that the institutional reform of the Union was not completed with the adoption of the Treaty of Nice. Instead, without delaying the enlargement process and with the involvement, at the appropriate juncture, of the new Member States, the discussion on the future of the Union is to start immediately in the year 2001. The Belgian and Swedish Council Presidencies, the Commission and Parliament are to lead the way and the national parliaments, public opinion, civil society and the applicant countries are to be fully involved. One of the most positive aspects of the Treaty of Nice isthus that it itself sees further reforms as the best means of strengthening the Community method and moving beyond a purely intergovernmental approach.

2. The declaration makes clear that, against the background of the need to maintain and improve transparency and democratic legitimacy, issues concerning in particular the delimitation of powers between the Union and the Member States, the legal status of the Charter of Fundamental Rights, the simplification of the Treaties and the role of the national parliaments in the European architecture are to be dealt with and proposals for further reforms are to be drawn up as part of the so-called post-Nice process.

3. The post-Nice process is based closely on the proposals for future institutional reforms put forward by Parliament in connection with the decisionmaking process on the Treaty of Amsterdam (report by Inigo Méndez de Vigo/Dimitris Tsatsos). Given the positive reaction to the work of the Convention which drew up the Charter of Fundamental Rights, it is entirely conceivable that the first stage of the post-Nice process (Swedish and Belgian Presidencies) will culminate in a decision to convene a new constitutional Convention with the task of drawing up the next version of the Treaty. However, guarantees would be required that the Convention's proposals would indeed be put into practice.

4. Many people thus regard the post-Nice process as the only genuinely forward-looking aspect of the agreements reached in Nice. The author of this document shares that view, albeit with reservations. However, anyone toyingwith the idea of rejecting the Treaty of Nice on the basis of that assessment must bear the following points in mind.
(a) The Treaty of Nice is a prerequisite for the post-Nice process. The two form an indivisible political whole. Should the Treaty of Nice founder, there will be no post-Nice process and the Union will find itself back where it started in Amsterdam. However, at the time the Treaty of Amsterdam was accepted only as the first stage of a development which is now culminating in the post-Nice process. If they are consistent in their approach, those who endorsed the Treaty of Amsterdam in 1997 must likewise endorse the Treaty of Nice today, albeit only with the proviso that the post-Nice process is given binding, practical form so that the European Union can be properly prepared for the enlargement – setting aside any disappointment at the matters left unresolved at the Nice Summit and at the shortcomings of the Treaty of Nice.
(b) Despite and even in the throes of all its crises, the European integration process has always drawn its strength from a forward-looking dynamic. Those who wish to see that process continue successfully should acknowledge that this is still the case today. A crisis prompted by a rejection of the Treaty of Nice would generate headlines, but would set the development of the Union back to the stage it had reached in Amsterdam. The Union will move forward if the progressive features of the Treaty of Nice and the post-Nice process are taken up and used to foster the European integration process. The prerequisite, however, is that the post-Nice process should be given binding political form.

5. The post-Nice process is not a political option which offers an immediate way out of the current crisis. Political work will be needed to create the requisite practical conditions. That work must have a dual basis: a clear timetable and constructive dialogue between governments and parliaments involving the applicant countries.
(a) The timetable for the next institutional reform must lay down decisionmaking and ratification deadlines which coincide closely with the first wave of accessions. This would rule out any delays to the accession process and reduce the period of time in which a Union only partly prepared for enlargement would be forced to work with a larger number of

Member States.
(b) The EU Member States and, above all, the forthcoming Swedish and Belgian Presidencies must immediately embark on dialogue with the European Parliament and the Commission in order to exploit the full potential of the post-Nice process. The aim of that dialogue must be to remedy the illjudged and inadequate decisions taken at Nice, as outlined earlier in this document.
(c) The outcome of the Nice Summit has fully confirmed the accuracy of the criticisms made of the current Treaty reform method after Amsterdam. Since then, the only forward-looking innovation in the institutional sphere has been the Convention which drew up the Charter of Fundamental Rights. This model, which has already proved its effectiveness, its political credibility and its ability to confer legitimacy on the texts it adopts, offers the only means of enacting, albeit slightly belatedly, the reforms vital to the enlargement of the Union. A Convention would thus have to be convened by the end of 2001 at the latest, so that the results of its work could be submitted to an extraordinary intergovernmental conference for approval in late 2002. If adequate political guarantees are given that this forward-looking procedure will indeed be employed, an assessment of the positive and negative aspects of the Treaty of Nice can be drawn up which is sufficiently to justify an admittedly reluctant endorsement of the Treaty arrangements as a whole.

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