

WHAT HAPPENS IF THE CONSTITUTIONAL TREATY IS NOT RATIFIED?

by
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I. Introduction

It became a commonplace in political discourse after the successful conclusion of the Treaty establishing a Constitution for Europe in June 2004 to argue that the EU was now embarking on the third and perhaps *most important phase* of the constitution-building process – that of ratification.¹ Ratification of the Constitutional Treaty requires unanimity amongst the Member States under the clear terms of Article 48 TEU. The Constitutional Treaty will not enter into force if one or more Member States fails to ratify in accordance with their national constitutional requirements. Such flexibility as will exist for future amendments once the Constitutional Treaty has entered into force (Article IV-444 – the simplified revision procedure) cannot apply to the initial ratification. On the other hand, having agreed (June 2004) and signed (29 October 2004) the Constitutional Treaty, the Member States are under an obligation under international law to seek ratification of the Treaty at the domestic level. Their obligations to their fellow High Contracting Parties under international law – not to mention their obligations under Article 10 of the existing EC Treaty to show ‘loyalty’ to the EU as it stands – require them not to pretend simply that the Constitutional Treaty does not really exist.

It is possible – indeed many would say likely – that the ratification process for the Constitutional Treaty may be very difficult. Around ten Member States are likely to

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¹ I.e. Convention IGC Ratification. See J. Leinen, MEP, Editorial, Federal Trust EU Constitution Newsletter, October 2004, www.fedtrust.co.uk.

hold referendums – perhaps more.² Some of the national parliaments may encounter difficulties with ratification, especially in circumstances where there are weak coalition governments and ratification requires an enhanced parliamentary majority. Although the European Parliament has called for a consolidated and coordinated approach to ratification,³ in practice each of the ratification processes is likely to be a national issue, contextualised in different ways by European issues and especially the complex relationships between each Member State, its partners and the EU institutions. Beyond meetings which the European Parliament is holding with some of the national parliaments, the most that is likely to occur is that there may be a coordinated information and communication campaign, in which the European Parliament tries to play a central role. Whether this is accepted at the national level will vary from Member State to Member State. The Commission was also rather quiet on the question of ratification, especially in the first phase which comprised the final drawn out months of the Prodi Commission, and the difficult birth of the Barroso Commission, and a consequential lack of active political leadership. Ratification will be drawn out at least up to the Constitutional Treaty's own deadline of November 2006,⁴ and possibly well beyond, especially if one or more Member States hold(s) more than one referendum. In that case, the question will arise as to the timing of the next Enlargement of the EU, likely to involve Romania, Bulgaria and Croatia. Should they accede on the basis of the Nice settlement, and sign and ratify the Constitutional Treaty later? Or should accession be delayed until the Constitutional Treaty comes into force, so that the accession treaties are formulated and the national accession referendums themselves are conducted on the basis of the Constitutional Treaty?

In a number of respects, the Convention and the IGC foresaw the risk that the Constitutional Treaty may not be ratified at the national level, and responded accordingly. There are a number of high profile examples where national representatives were able to exert pressure for specific changes to the text of the Constitutional Treaty. One such is the so-called 'cultural exception', requiring unanimity in the Council of Ministers for the approval of agreements with third countries in the field of trade in cultural and audiovisual services where these risk prejudicing the Union's cultural and linguistic diversity.⁵ This was debated right at the end of the Convention's deliberations on Part III of the Constitutional Treaty, and French Government representative Pascale Andréani along with other French members of the Convention such as Hubert Haenel, Pierre Lequiller (national

2 The Commission has opened a webpage to carry information about the ratification processes: http://europa.eu.int/futurum/referendum_en.htm. For further information on referendums, albeit of a rather partisan nature, see the Campaign for a European Referendum: <http://www.european-referendum.org/basics/en/>.

3 European Parliament Resolution on Ratification procedures of the Treaty establishing a Constitution for Europe and the communication strategy, 14 October 2004, B6-0067/2004.

4 Article IV-447(2).

5 See now Article III-315(4)(a) of the Constitutional Treaty.

parliament) and William Abitbol (European Parliament) all pointed out ‘the future Constitution would stand little chance of being ratified in France if it did not contain such provisions’ (i.e. providing for unanimous voting).⁶ More generally, the announcement by British Prime Minister Tony Blair on 20 April 2004 that there would be a ratification referendum in the United Kingdom (UK)⁷ allowed the UK to argue throughout the endgame of the IGC that its so-called ‘redlines’ must be fully respected, because it would be likely to prove much more difficult for the UK to ratify the Constitution via referendum than via a vote in Parliament.⁸

The public and collective response of the Member States to the scenario of possible non-ratification is contained in Declaration No. 30 appended to the Constitutional Treaty:

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.

Since it has already become practice for the European Council to debate questions arising from ratification difficulties, it is hard to see what this adds to the existing scenario, other than to institutionalise the role of the European Council,⁹ and to signal that all have been aware, throughout the process of reform, of the possibility of non-ratification by one or more Member States. No one could claim to be surprised if this eventuality transpires.

It is worth commenting that the question of ratification could provide some clues as to the related question of whether the envisaged future arrangements for the EU based on the Constitutional Treaty represent a ‘treaty’ or ‘constitution’. It is clear that at best the current process of transformation and reform might produce a mixed arrangement for the EU, with elements of constitutionalism in the classic sense combined with a framework which continues to rely upon international law. *Pace* the Commission’s attempts to imagine some other more flexible scenario for

6 See summary at http://www.europa-web.de/europa/03euinf/08VERFAS/CONVA_EC/backgrou.htm.

7 See statement by Prime Minister Tony Blair to the House of Commons, 20 April 2004, “Let the People have the final say”, available on www.fco.gov.uk.

8 In many respects, the IGC produced a text with the appearance of a political compromise, and this is related in many respects not only to the question of agreement, but also that of ratification. However, some of the more subtle concessions to the UK, e.g. in respect of alterations to the detail of the opt out from certain policies relating to Freedom, Security and Justice, are clearly not aimed at a popular ‘referendum audience’, but rather at the political and governmental elite. For more examples, see Editorial, (2004) 41 *Common Market Law Review* 899.

9 This text is also institutionalised as part of the future amendment procedure for the Constitutional Treaty in Article IV-443(4).

ratification of the Constitutional Treaty in the Penelope contribution,¹⁰ justified by the argument that the Constitutional Treaty is effectively a refounding of the European Union, it is hard to see how the current constitutional settlement for the EU, rooted as it is in international law, could be altered otherwise than as a result of the common consent of the Member States. That is not to say that all the Member States would necessarily have to be involved in any future constitutional settlement. It is perfectly possible under both international and national law to envisage a scenario in which the Member States decide unanimously for the future to divide up into two or more groups, or for ratification of a future treaty to be associated with the voluntary withdrawal of a dissenting Member State, thus removing the impediment to ratification by the remaining Member States. All such arrangements would need to be fitted to the national constitutional settlements of the various Member States.

II. The process of ratification in brief – and specifically in the UK

In broad terms, ratification in the Member States will involve some sort of parliamentary process and may involve a binding or advisory referendum.¹¹ In some of the Member States organised as federations there is additional input from the regional or state level. In some cases a referendum is constitutionally required for ratification, but in the majority it is a matter of political choice, as in the case of the UK and France. Only in Ireland and Denmark, however, have referendums on treaties amending the EC and EU Treaties been the norm, rather than the exception. Germany contemplated a referendum for some time, but required first the adoption of the necessary constitutional arrangements to allow a nationwide referendum to take place.¹² In some Member States, the changes brought about by the Constitutional Treaty – for example in the area of defence policy and cooperation – may require prior amendments to the *national* constitutions.¹³

10 European Commission, “Feasibility Study: Contribution to a Preliminary Draft Constitution of the European Union”, December 4, 2002 (presented on December 5, 2002), Working Document (http://europa.eu.int/futurum/documents/offtext/const051202_en.pdf). See generally, F. Lamoureux, “La Constitution “Penelope”: une refondation pour en finir avec les replâtrages”, in A. Mattera (ed.), “*Penelope*”: *Projet de Constitution de l’Union européenne*, Clément Juglar, Paris, 2004, at pp.28-30.

11 See D. Keohane, *A Guide to the Referenda on the EU Constitutional Treaty*, Centre for European Reform Briefing Note, October 2004, www.cer.org.uk; N. Hussain, *Referendums on the EU Constitutional Treaty: The State of Play*, Chatham House, European Programme, EP BP 04/01, October 2004.

12 “Rot-Grün will Volksentscheid”, *Spiegel Online*, 25 October 2004, <http://www.spiegel.de/>.

13 This is the case in France, see O. Pognon, “Les Sages seront bientôt saisis de la Constitution européenne”, *Le Figaro*, October 5, 2004.

Strictly speaking in the UK, ratification of an international treaty requires merely an executive act on the part of the Foreign Secretary, acting on behalf of the Crown, in exercise of the Royal Prerogative.¹⁴ However, the so-called Ponsonby Rule since the 1920s has effectively required that a treaty subject to ratification be laid before Parliament for 21 sitting days before ratification, for information and to give Parliament the opportunity to debate such a treaty. In practice, ratification of treaties such as the Constitutional Treaty requires an Act of Parliament (an act amending the original European Communities Act 1972), because of the domestic and budgetary effects of such amending treaties. This also extends to accession treaties, which also require an Act of Parliament. The UK will hold a national referendum only after some form of parliamentary process has been undertaken. Such a referendum could be made binding in the sense that the Act of Parliament providing for its occurrence could make ratification conditional upon a yes vote. However, since parliamentary sovereignty would continue to apply, it would be conceivable that such a Constitution or Referendum Act itself could be repealed by a further Act of Parliament reverting to the conventional parliamentary system for ratifying EU treaties which the UK has used hitherto. On the other hand, in the context of the evolution of constitutional reform in the UK since the election of the government of Tony Blair in May 1997, which has involved a number of referendums on new constitutional arrangements and governance mechanisms such as devolution there may be emerging a new constitutional convention which reduces the opportunity for politicians to use referendums as political play things. In particular, it would appear that a convention is gradually emerging that a structural change to the UK constitutional settlement – e.g. devolved institutions in Scotland and Wales – agreed by referendum would not be reversed without a further referendum.

Unless the entire Constitutional Treaty project has already foundered by that time, the referendum is likely to be held in the first half of 2006 – after an anticipated General Election (probably May 2005), after the end of the UK Presidency (second half of 2005), and before the beginning of the World Cup Finals in June 2006.¹⁵ Given the passions sometimes bordering on jingoism to which such sporting events give rise, it would probably be best to avoid holding a referendum during that time. Most recently, at the time of the signing ceremony for the Constitutional Treaty in Rome on 29 October 2004, the Foreign Secretary Jack Straw intimated that March 2006 was the most likely date. The circumstances in which the holding of a referendum was announced in April 2004 by Prime Minister Tony Blair gave rise at the time to much media comment. There was no debate in Cabinet about the proposal before it was announced in Parliament. It would appear to have been a tactical and highly partisan move on the part of Blair with a view to the performance of his party in both the European Elections of 2004, and the anticipated General

14 See for more details “IGC 2004: issues surrounding UK ratification of the European Constitution”, House of Commons Standard Note SN/IA/3040, 10 May 2004.

15 For informed political comment on the UK referendum, see A. Menon, “European Puzzle”, *Prospect*, November 2004, p.27.

Election of 2005, and to remove a tactical weapon regarding the role of plebiscitary democracy from his political opponents. It undermined the immediate possibilities for a cross-party consensus of pro-EU elements which could be capable of leading a successful referendum campaign.

The referendum will be governed by the terms of the Political Parties, Referendums and Elections Act 2000, and regulated by the Electoral Commission. This will be the first occasion on which the Electoral Commission has managed the arrangements – including campaign spending limits – for a nationwide referendum. It is interesting that there is expected to be a General Election before the referendum is held. The votes received by each of the parties will be instrumental in determining what amounts they may spend on campaigning on the referendum. This is especially interesting for the United Kingdom Independence Party (UKIP), which is the only high profile explicitly anti-EU party in the UK. UKIP is very successful at raising funds for the specific objective of campaigning against the EU and now the Constitution. The ceilings on spending will be matters of acute interest to UKIP and are clearly linked to its expressed desire to maximise its vote in the General Election and ostensibly to be seen as a powerful mainstream political force, even though it stands little chance of winning many or any seats in the Westminster Parliament on the current first past the post electoral system. However, those ceilings only apply during the so-called referendum period, which is a period which will be designated for formal campaigning, during which time public funds are also available. Until that time, campaign groups with private means are free to spend as much or as little as they wish.¹⁶

III. Ratification and non-ratification: law, politics and history

Non-ratification of the Constitutional Treaty would raise questions of both law and politics. Ratification is a legal process and a legal requirement, governed by aspects of international law, EU law and national law. However, such legal questions cannot conceivably be viewed in isolation from the political conditions in which they are raised.

It is possible to respond to the challenges raised by the upcoming ratification debates in the Member States purely pragmatically. From a pro-Constitution perspective, these debates raise strategic and tactical challenges about the optimum approach to campaigning, and appropriate responses to parliamentary or referendum decisions against ratification. What should happen next if Member State A does not ratify? Should a repeat referendum/parliamentary vote be held? What response should the European Council make, in accordance with the role which has been

¹⁶ In a widely publicised move, the organisers of the Vote No campaign funded an anti-Constitution advertisement to be shown in cinemas before showings of a popular new film released on the same day as the Constitutional Treaty was signed (29 October 2004).

institutionalised for it by Declaration No. 30? These are issues which raise questions at both the national and the European levels, and especially in respect of the interaction – such as there is – between the two levels. In addition, however, there are questions of (constitutional) principle which are raised by the issue of ratification as a whole, the role of referendums, the question of popular sovereignty and the implications for constitutional politics of the types of pragmatic response hinted at above.

It is important first to examine some examples from history regarding ‘ratification troubles’.

The first instance of a ratification crisis resulting from non-approval was the case of the European Defence Community in 1954, and the refusal of the French *Assemblée nationale* to approve the Treaty. In that case, the Treaty initiative was abandoned, even though the French stood out alone against the proposal. European integration efforts were re-focussed on functional and economic questions, and the result was the Treaty of Rome in 1957 establishing the European Economic Community. Only in the 1990s did political integration really return to the forefront of debate, when Germany insisted on having an IGC on political union alongside the (Maastricht) IGC on economic and monetary union. It took even longer for the Member States to return, constructively, to the question of defence – now translated by means of word-shift from ‘defence’ into ‘security and defence’.

The more recent examples belong, precisely, to the era of intensified political union. Thus the second and third instances of ratification crises concern the cases of Denmark (Treaty of Maastricht, 1992) and Ireland (Treaty of Nice, 2002). In both cases, second referendums were held and the Treaty was finally ratified and entered into force, after a meeting of the European Council had made appropriate soothing noises and allowed the adoption of strictly non-binding declaratory measures intended to make the Treaty more palatable to the electorate.

It is worth mentioning a fourth ‘quasi-crisis’ regarding ratification. It is clear that had the UK not been permitted an ‘opt-out’ from the amended provisions on social policy which were introduced by the Treaty of Maastricht, an opt-out which took the form of the Social Policy Protocol and the Social Policy Agreement, then Prime Minister John Major would probably not have been able to secure ratification of the Treaty in the national parliament without the express support of the Labour opposition. He would have faced even more deepseated opposition to the Treaty from within his own euro-sceptic Conservative Party in Parliament than was already the case, and he would have fatally damaged his own political authority within his party. As it was, Major secured the concession in 1991, (surprisingly) won a further general election in 1992, and remained in office until 1997.

Some interesting hypotheses could be elaborated on the basis of these rather thin data:

- In view of the apparently increasingly frequency with which Treaties face ratification difficulties in the era of political integration, it can be hypothesised that *political* rather than *economic* questions appear to raise greater sensitivities in national political institutions and national electorates.

In other words, these political questions raise fundamental issues about the legitimacy of the EU as an integration project, and the extent to which it is broadly accepted within the Member States. As an aside, it should be noted that anecdotal evidence suggests that members of the European Movement who campaigned for a 'yes' vote in the 1975 UK Referendum on membership of the EEC were encouraged to stress the *economic* rather than the *political* aspects of membership. The consequences of that (slightly misleading) emphasis can definitely be felt in the UK debate at the present time.

- Second, a closely related point is that the reasons *why* ratification fails will affect the consequences of non-ratification, especially as regards the reactions of both the partner Member States and of the European Council as a collective entity. It is not easy, of course, to know why citizens vote a particular way in a referendum, but at least in the context of parliamentary ratification it is possible to discern from the parliamentary debate what issues particularly animated individual members of parliament.
- Third, the *size* of the Member State matters (France and the UK are big; Ireland and Denmark are small, or at least would be regarded as small in the context of an EU of 12 or 15, even though the question of relative scale has been altered somewhat by the 2004 Enlargement).
- Fourth, the *age* (in EU terms) of the Member State matters (France was a member of the original founding club of six Member States; the UK, Ireland and Denmark acceded in 1972).
- Fifth, absent an intervening general election and change of government, *parliamentary rejection* (or even threatened parliamentary rejection) is more final than *popular/referendum rejection*. It is worth noting that in the case of Ireland, turnout on the second referendum was much higher than for the first. The no vote remained relatively constant through the Amsterdam referendum and the two Nice referendums, but the yes vote fluctuated sharply.
- Sixth, the effects of non-ratification may differ depending upon whether or not it concerned a *new start* (the EDC and – arguably – for the future the Constitutional Treaty), or an *amendment* to an existing set of arrangements, as with the Treaties of Maastricht and Nice.
- Finally, steps taken pre-contractually – i.e. during negotiation – to avoid future ratification difficulties are clearly to be preferred to steps taken after a parliamentary or referendum defeat to placate national sensitivities. In some cases, the latter can cast much longer shadows than the former. That is certainly the case if one compares the long term effects of the Danish 'issue' with citizenship and with Schengen, which has given rise to very complex opt-out provisions which will persist even in the era of the Constitutional Treaty. In the case of the UK, ratification difficulties were anticipated pre-contractually, and what turned out to be a temporary solution to a political question was worked out. Since 1997, when the new

UK government immediately 'accepted' the Maastricht 'social chapter', a political decision which was codified by the subsequent amendments in the Treaty of Amsterdam, the UK appears to have broadly resolved itself to the current state of qualified majority voting in the social policy area while resisting any additional developments. However, this would doubtless be an issue raised by any future Conservative Government in the UK.

Two other variables which the cases as set out here do not address concern the question of *when* the rejection occurs (early or late in the increasingly drawn out process of ratification which now involves 25 Member States) and what the effects may be of *multiple rejection*. In the case of Maastricht, the French referendum was extremely close (barely 51% in favour), and the Germans experienced a number of legal difficulties with ratification associated with a certain famous Constitutional Court case.¹⁷ However, it remains the case that the Danish rejection of Maastricht and the Irish rejection of Nice were singular events. This may not of course be the situation with the Constitutional Treaty, as substantial doubts also hang over whether Denmark¹⁸ and the Czech Republic, along with the UK, might ratify, and there are some doubts about the fate of the Constitutional Treaty in France, and in a number of other states.¹⁹

IV. Options in the event of non-ratification

Working out which option(s) might be taken in the event of non-ratification by one or more Member States will be affected by these principal variables.²⁰ A number of possible scenarios will now be explored in more detail:

- A second (or even third...) attempt at ratification is made within the state(s) in question.
- The Constitutional Treaty is dropped, and the current Treaties are retained for the foreseeable future.
- Various steps are taken to introduce aspects of the Constitutional Treaty by measures short of Treaty amendment.

17 In English: *Brunner* [1994] 1 CMLR 57.

18 See however a report that a majority of the Danish population backed the Constitution autumn 2004: "Danish parties agree Constitution deal", *EUObserver*, 3 November 2004, www.euobserver.com.

19 However, there was some cause for optimism in the July 2004 Eurobarometer survey on attitudes to the Constitution, which indicated a majority against only in the United Kingdom: www.europa.eu.int/comm/public_opinion/archives/eb/eb61_en.htm. See S. Crossick, "Reconciling polls with 'legitimacy crisis'", *European Voice*, 9-15 September 2004, p7.

20 L. Rossi, "What if the Constitutional Treaty is not ratified", *European Policy Centre*, 6 July 2004, www.theepc.be; E. Philippart, "Preparing for constitutional crisis", *European Policy Centre*, 19 May 2003, www.theepc.be.

- An IGC is convened (with or without a Convention preceding it), and attempts are made to change the Constitutional Treaty to achieve a situation in which the Treaty would be more likely to be ratified at national level, or attempts to negotiate a wholly new Treaty.
- A related possibility would be the convening of a restricted IGC to introduce amendments specifically to Article 48 TEU, in order to facilitate the actual entry into force of the Constitutional Treaty.
- The non-ratifying Member State(s) voluntarily leave(s) the EU and the Constitutional Treaty enters into force as between the remaining Member States. This could be facilitated if an IGC were convened for the purposes of introducing a withdrawal clause.
- Those Member States which have ratified the Constitutional Treaty agree to enter into a new Treaty without the non-ratifying state(s).

1. Further attempts at ratification

Should non-ratification by a given Member State be regarded as a final statement, or would it be possible to try again to obtain ratification on the basis of a legally unaltered, but politically ‘improved’ or ‘sensitised’ text? Such ‘improvements’ would normally involve the adoption of political resolutions by the European Council in the context of its Conclusions, or the addition of a Declaration on the part of the Member State which specifically draws attention to particular difficulties which might have emerged during the ratification process.²¹ They can also help to focus the debate in the second referendum: many referendums do not focus on the question at issue, but represent an opportunity to deliver a message of discontent to national politicians. To that extent they could be said to be a rather perverted exercise in direct democracy. The hypotheses elaborated above may help to guide reactions, on the basis of past experience.

It is interesting to focus on the type of issues this might raise in the UK. If the rejection does indeed come from the UK – a big state – and involves a resounding no vote on the basis of a reasonably high voter turnout, this will have very significant consequences for the EU. It is hard to see what inducements or soothing noises on the part of the European Council to improve the Constitutional Treaty could feasibly be offered to the UK electorate to persuade it to change its mind. Any government might well construe putting the Constitutional Treaty to a popular vote for a second time as an act of political suicide. One possibility might be if such a government felt that the risk of putting the Treaty to referendum for a second time was outweighed by the potential political costs to the UK of being ‘left behind’, as the *only* Member State not to ratify. Here the choices might be those of withdrawal

21 In the case of Denmark, the so-called Edinburgh Declaration (http://euo.dk/fakta_en/denmark/edinburgh/) and in the case of Ireland, the so-called Seville Declaration see <http://www.ireland.com/newspaper/special/2002/seville/>.

or facing up to the reality of a so-called pioneer group of Member States going ahead without the UK. In other words, it would be necessary to premise the referendum on a stark choice between being inside or outside the European Union. Essentially the question would have to be different – i.e. ‘in’ or ‘out’ – even if it remained formally the same (Constitution – yes or no). However, that scenario would not be conceivable if the underlying question of the UK’s membership of the EU had in essence been the primary terrain of debate first time round. In other words, it could only work if the terms of the debate had been more limited in the first referendum, offering an opportunity to widen the debate in a second referendum.

It seems likely that all parties to a UK referendum debate will be quickly drawn into discussing the wider question of the UK’s membership during the campaign, despite the official positions of the three largest parties (Labour, Conservative and Liberal Democrat), which seek to separate the question of the Constitution from the question of membership. The ‘third way’ suggested by Sir Stephen Wall, former advisor UK Permanent Representative and former Head of the European Secretariat in the Cabinet Office in Downing Street, is to focus on Europe as a bridge between the superpower, the United States, and ‘a dangerous, complex world’, with ‘extreme poverty, grave threats to our global environment, conflict and terrorism’.²² However, this is unlikely to provide an attractive alternative to the simpler question of ‘EU – yes or no?’ especially in the stark terms in which this is often posed by the tabloid newspapers. All of this would rule out a second referendum, if the larger questions had already been canvassed before and ruled upon by the electorate. Furthermore, although ratification could still strictly speaking proceed just on the basis of parliamentary ratification (on the basis of a further Act of Parliament repealing an earlier Act establishing the referendum), taking that option in the event of a referendum ‘no’ would also be political suicide for any governing party.

One conceivable scenario which would demand that the UK takes a much closer look at its own position within the European Union would be where the different parts of the now devolved UK voted very divergently in the referendum. What if England votes strongly no, and Scotland, Wales and Northern Ireland vote yes, and even strongly yes? At the very least this will provoke some form of internal constitutional crisis that the existing devolution arrangements, which do not focus particularly effectively on the resolution of disputes between the component parts of the UK, would be ill-equipped to deal with. It could be interesting, for example, to see how the Conservative Party could finesse its possibly contradictory policies in this area: on the one hand, it is firmly in favour of preserving the Union (of England, Scotland, Wales and Northern Ireland), but it opposes the Constitution. If this position places additional stresses upon the UK’s internal constitutional settlement in so far as it highlights differences in views between the different component parts

22 Stephen Wall, “Editorial”, Federal Trust EU Constitution Newsletter, September 2004. www.fedtrust.co.uk.

of the UK and thus encourages the view, for example, that Scotland would better off on its own within the European Union, the predominantly English-dominated Conservative Party may find itself under pressure from Scottish elements within the party to minimise any damage that this position may do to the (domestic) Union.

However, experience from the past has indicated that there may be circumstances in which a second referendum may work positively in the sense of offering a legitimacy surplus because levels of awareness and understanding about the EU are thereby raised as a consequence of the resulting debate. In Ireland, the Government focused in a positive way upon the issues raised by the Treaty of Nice and Enlargement in the context of the second referendum campaign,²³ whereas the first referendum campaign was dominated by domestic issues²⁴ and the apparently omnipresent dissatisfaction with national governments and politicians which again played itself out in June 2004 in the European Elections. A National Forum for Europe²⁵ attempted to foster constructive conditions for informed debate.²⁶ Those who argued against the Treaty were faced with difficult questions about the implications of a 'no' vote for Enlargement and also for likely future perceptions of Ireland in the new Member States. On the other hand, the pressure of being seen to 'hold up' the ratification of a Treaty approved by every other Member State had some negative effects, with the electorate in some ways seeing itself as held to ransom.²⁷ In terms of EU law and politics, however, the Irish case on Nice has not had negative effects, unlike the Danish rejection of referendum which has cast a considerable shadow over later negotiations based on a Danish claim for exceptionalism, and excessive bilateral sensitisation with regard to certain domestic concerns.

2. Should the Constitutional Treaty be dropped?

Non-ratification by one or more Member States may result in the Constitutional Treaty as a whole being dropped, so that the current Treaties are retained in force for the foreseeable future. The abandonment of the work of the Convention and the IGC obviously has a number of costs, including reputational costs for those who have invested time and effort to turn the vague concerns of the Declaration on the Future of the Union appended to the Treaty of Nice and the questions raised by the Laeken

23 See the section on Nice in B. Laffan, *Ireland and Europe: Continuity and Change*, Notre Europe, Research and European Issues No. 30, December 2003, www.notre-europe.asso.fr.

24 B. Laffan, *The Nice Treaty: the Irish vote*, Notre Europe, July 2001, www.notre-europe.asso.fr.

25 Website: <http://www.forumoneurope.ie/>.

26 For a strongly positive evaluation see T. Brown, "Ireland's National Forum on Europe", *European Essay No. 33*, 2004, Federal Trust (www.fedtrust.co.uk).

27 This may be one reason why the Danish Government already stated in advance during 2004 that there would only one referendum on the Constitutional Treaty, and that the alternative to approval must be withdrawal.

Declaration into a concrete output which is seen – at least in elite political circles – as an acceptable compromise between the various interests concerned, and certainly a practical improvement on what exists at present. Only time will show whether the EU is truly unworkable under the Nice arrangements, especially since many of these, including the revised arrangements of qualified majority voting, have only entered into force in November 2004. Of course, the current round of enlargements is not yet complete, with Bulgaria, Romania and probably Croatia yet to be accommodated into the structures. However, these three candidate states are unlikely to be the ‘straws which break the camel’s back’ in terms of the workability of the Nice arrangements, and consequently it should already be possible by early 2005 to have some clearer sense of how enlargement under Nice is actually working and will work in the event of enlargement from 25 to 28. On the other hand, the question of Turkey, its possible accession and the impact of this upon how the EU works and what the EU should be understood as being raises huge questions which perhaps even the Constitutional Treaty does not address. Consequently, it is pointless to hold this particular eventuality up as a reason to argue why it is imperative not to abandon what might be termed the achievements of the Constitutional Treaty in favour of settling for what we know and what we have, namely the settlement based on the Treaty of Nice. Overall, politicians may conclude that it is better to continue with the existing arrangements, and perhaps to seek some incremental developments at a later stage, than to try to unravel the complex legal relationships with a single Member State which has difficulties with the Constitutional Treaty.

Politically, if just one Member State fails to ratify the Constitutional Treaty, its dropping by all the others does not seem the most likely option, although the response is bound to depend upon which Member State is saying ‘no’. It goes without saying that there is a difference between France and the UK, on the one hand, and – say – Malta or Estonia on the other.

3. Introduction of elements of the Constitutional Treaty

In conjunction with the formal abandonment of the Constitutional Treaty, it would be possible for various steps to be taken to introduce aspects of the Constitutional Treaty by measures short of Treaty amendment. In addition, of course, there may well be incremental constitutional changes to the existing Treaty structure effected by the Court of Justice in the future as there have been in the past, especially judgments which gradually chip away at the stark ‘pillar’ structure separating the arrangements for Common Foreign and Security Policy, Cooperation in Police and Judicial Cooperation in Criminal Matters on the one hand, and the rest comprising the so-called first pillar. There are numerous examples from the present and from the past of the anticipatory bringing into effect of innovations contained in new Treaties in advance of ratification. These include the Employment Policy Title of the Treaty of Amsterdam, which was implemented through various European Council ‘processes’ from the mid 1990s onwards, well in advance of the entry into force of the Treaty in 1999. More recently, in 2004, the Member States were already taking steps to put into effect the innovations of the Constitutional Treaty, in particular

through the decision to create a Defence Agency with a view to looking at common defence procurement,²⁸ even before the Constitutional Treaty was signed, never mind ratified. This type of approach is possible because not everything that is in the Constitutional Treaty requires Treaty amendment to bring into force. A whole raft of procedural possibilities are raised here.

In the first place, the possibilities offered by Article 308 EC – now popularly called the flexibility clause – could be explored as a legal base for certain institutional or policy innovations. This could be used, for example, for the energy title. Second, some innovations could be given a ‘soft’ legal base and introduced by political action alone without formal institutionalisation, or via inter-institutional agreements which have had an impact even in relation to so-called ‘big issues’ such as the budget.

Third, innovations could be introduced by means of collective action of the Member States outwith the scope of the EU Treaties, although such action, if it involved an international treaty, would also require ratification at the national level before it came into force.²⁹ It is also subject to the general provisions governing EU law, such as conformity with the Treaties. Schengen – as a laboratory for further integration in relation to the removal of frontiers and borderfree travel – is the best example of the long term pursuit of integration objectives under international law. As is well known, Schengen eventually became part of the Treaties, by virtue of the Treaty of Amsterdam, but still without the participation of the UK and Ireland, and with special arrangements for Denmark. This development occurred, not least because the evolution of Schengen, and aspects such as the Schengen Information System, raised many doubts as to its compatibility with the framework of the EU Treaties. Long term flexibility through a combination of international law, opt-outs and then eventual reintegration into the Treaties is clearly a conceivable option for the EU which mirrors the past.

Fourth, the framework for enhanced cooperation under the EU Treaties, as it applies post Amsterdam and post Nice, could be explored as a means to bring certain innovations into force for the Member States willing to make changes. This procedure has never been used, and continues to be hedged around by procedural and substantive safeguards.³⁰ Sometimes the use of enhanced cooperation has been threatened by the majority of Member States in order to obtain agreement on the part of reluctant Member States to measures which require a unanimous vote (*e.g.* in the case of Italy and the European Arrest Warrant in late 2001). It will be interesting

28 Council Joint Action 2004/551/CFSP of 12 July 2004 on the establishment of the European Defence Agency (OJ 2004 L245/17).

29 B. de Witte, “Old-fashioned Flexibility: International Agreements between Member States of the European Union”, in G. de Búrca and J. Scott (eds), *Constitutional Change in the EU – From Uniformity to Flexibility?* Oxford, Hart Publishing, 2000.

30 See J. Shaw, “Enhancing Cooperation after Nice: will the Treaty do the trick?” in M. Andenas and J. Usher (eds.), *The Treaty of Nice and the EU Constitution*, Oxford, Hart Publishing, 2003.

during the latter part of 2004 and early 2005 to see whether preliminary studies amongst a working group of Member States in favour of creating a common base for corporate taxation (a move opposed by the UK, Ireland, Slovenia, Estonia and Malta) will result in the first practical application of the enhanced cooperation provisions.³¹ From this, more evidence can be gleaned about the usability of the provisions in the event of non-ratification, for example for the title on energy if unanimity cannot be achieved under Article 308.

Finally, non-ratification may focus the minds of political actors on their own political responsibility for improving EU governance. Thus action could be taken at national level to institutionalise a stronger role for national Parliaments, in order to assuage some of the democracy and participation concerns which the Constitutional Treaty has brought to wider attention. It is not fundamentally the responsibility of the EU that within the national constitutional systems many of the European affairs committees of the national parliaments do not function as well as they should do. Many of the concerns about subsidiarity raised in the context of the Convention could be met by a combination of such national action and greater political responsibility and self-discipline on the part of the EU institutions with regard to the question of subsidiarity and the exercise of shared competences. These are the types of changes which clearly do not require treaty amendment or constitutional change to formalise.

None of these mechanisms can be used to change the existing legal bases or procedural arrangements for decision-making under the EU Treaties, such as changing from unanimity to qualified majority voting in the Council of Ministers (except by the alternative means of using enhanced cooperation), enhancing the role of the European Parliament, or changing the basis of qualified majority voting to the dual majority system. Since the Constitutional Treaty is relatively little concerned with the policy scope of European Union, but much more with institutional arrangements and what might be termed the rearrangement of the legal and institutional deckchairs with a view to achieving something which is more pleasing to the eye, flexible interpretation of existing competences or the use of enhanced cooperation will be of little or no avail. Enhanced cooperation is of little assistance, in any event, in the field of CFSP, and is explicitly ruled out under Nice in relation to matters having defence and security implications. Here, the Member States would have to look outside the confines of the EU to find collective solutions to their concerns about security and defence, and the potential role of the EU in the military arena.

4. A new or reconvened IGC?

Non-ratification may result in the convening of a new IGC, which may or may not

31 S. Castles, "Britain Objects to Harmonised Tax Rate", *The Independent*, September 13, 2004 (<http://news.independent.co.uk/europe/story.jsp?story=561014>).

be accompanied by a preceding Convention. This IGC could attempt to make changes to the Constitutional Treaty which would be more likely to be ratified at national level, or alternatively to negotiate a brand new Treaty. However, it is not apparent why such a further trip around the circuit of negotiation and amendment would be any more successful or popularly acceptable than has been the case with the current one.³² Indeed, as increasing numbers of commentators suggest, the real malaise is less about what the EU is or is doing, and much more about governments and politicians more generally. Reconvening the IGC may therefore be futile without addressing the underlying causes of discontent and distrust of politicians.

Another purpose for reconvening an IGC could be that it might help to simplify the legal situation. While the Foreign Ministers during the IGC might have vehemently rejected the idea of changing the amendments procedures within the Constitutional Treaty to facilitate future entry into force of amendments other than in relation to a very limited category of cases, it may be that the Member States could take a very different view in the context of an IGC specifically on Article 48 TEU, specifically intended to resolve a crisis. There is no reason, of course, should such an IGC be convened, an amending Treaty be agreed and signed and unanimous ratification thereof by the Member States be effected, that any reconvened IGC on the Constitutional Treaty would necessarily change the clauses of Part IV on *future* amendment procedures. In other words, the solution of a majority vote for entry into force could be taken as a one-off solution to an existing *impasse* relating to the entry into force of the Constitutional Treaty alone. The question would still arise, even if this option were taken, however, of what steps any Member State which still did not ratify the Constitutional Treaty would take. Should it stay and accept a Constitutional Treaty to which its domestic consent has not been given, perhaps in the hope that the domestic electorate may gradually come to see the desirability of the Constitutional Treaty?³³ Or would it leave?

5. Voice or exit?

The ratification of the EU treaties differs sharply in terms of *realpolitik*, if not law, from the ratification of other international treaties. While the requirement of unanimity is not unknown before a Treaty may enter into force, it is not so common. Furthermore, the systems of interdependence built up over fifty years of experimentation and experience with European integration mean that the putative

32 Compare B. de Witte, "The Process of Ratification and the Crisis Options: A Legal Perspective", Paper prepared for Asser Institute Colloquium on European Law, The Hague, 13-16 October 2004, *The EU Constitution: The Best Way Forward?*, who is more optimistic on this point.

33 In the (admittedly unlikely) event of this occurring, in a (dualist) state such as the UK, it would still be necessary to introduce domestic legislation to give domestic effect to the Constitutional Treaty, unless it could be argued that the Treaty was covered by earlier domestic legislation, such as the European Communities Act 1972 in the case of the UK.

ratification by any given Member State of an amending (or refounding) Treaty in the context of a unanimity requirement could never be seen as a 'take it or leave it' situation. The decision of one parliament or national electorate clearly affects the freedom of action of other contracting states in ways which are more intense than under what the Court of Justice characterised in *Costa v ENEL* as 'ordinary international treaties'.³⁴ The suggestion has therefore been made that this is could be a 'take it or leave' situation for Member States.

The non-ratifying Member State(s) may choose voluntarily to leave the EU. The UK Referendum of 1975 over membership was not strictly speaking a referendum over ratification, but it would be relevant to the case in point in so far as it seemed clear from the debate at the time that no serious objections could be made if the UK, as a sovereign state, had decided to withdraw from what were then the European Communities. Since that Referendum resulted in a 'yes' vote, the EU has little experience with secession or withdrawal (Greenland's withdrawal was *sui generis*, not least because it was not the withdrawal of a state, but of a sovereign territory of a Member State), and indeed it has often been argued that the decision to include a withdrawal clause (Article I-60) in the Constitutional Treaty is an important innovation which offers additional legitimation to the EU, because it makes it clear that the EU is ultimately a voluntary association between sovereign states.

As things stand, absent a reconvened IGC with the objective of introducing a withdrawal clause in the TEU in order to give a more elegant solution to problems which might arise with ratification, withdrawal would involve a combination of national law, EU law, and international law, not to mention a lengthy negotiation period, and would itself require an international treaty to give effect to any political declarations of intent. Withdrawal could not be a unilateral act, without negative legal consequences arising at all levels for the withdrawing state. In particular, individuals affected by a unilateral secession in relation to the rights which they enjoy under EU – or more precisely EC law – could presumably seek judicial protection in national courts, which could bring about a constitutional crisis involving a conflict between the courts on the one hand, and the executive and legislature on the other. The UK judges might have indicated they would always follow Parliament in the past. This may no longer be the assured result in the era of the Human Rights Act 1998. What would happen to the withdrawing state is also unclear, since it might try to enter into an arrangement akin to the European Economic Area, again requiring the intervention of international treaties. In any event, successful withdrawal certainly opens the way with relatively few formalities for the Constitutional Treaty to enter into force as between the remaining Member States. On the other hand, if it is a big state which withdraws, this will weaken the EU in many different ways, not only in relation to economic weight within the global economy, but also in relation to its bargaining power in bilateral and multilateral international fora, such as transatlantic relations and the World Trade

34 Case 6/64 [1964] ECR 585 at 593.

Organization. The withdrawal of a big state could fundamentally change the dynamic of the integration process, which has been premised ever since the first decision of the original Six to proceed towards enlargement in the early 1960s on the logic of accession processes rather than the logic of withdrawal processes.

Increasingly complex legal scenarios would arise if voluntary withdrawal did not precede steps being taken by those Member States which have ratified the Constitutional Treaty to agree to enter into a new Treaty without the non-ratifying state(s).³⁵ This may occur if the state is unwilling to withdraw and insists on standing firmly on its accrued rights and obligations based on the foundation of the existing Treaties as amended. It is conceivable that two unions could subsist in parallel, under the Vienna Convention on the Law of Treaties. Both sources of law would be binding on the participants. However, their co-existence as co-equal unions under international law, each comprising a binding legal order and adjudicatory system headed by a Court of Justice with more or less identical powers, would undoubtedly make it difficult for any Member State involved in both unions not to transgress the rule systems of the two unions at different times. Some institutional arrangements would come into obvious conflict, such as the proposal to introduce a Minister of Foreign Affairs or to introduce a long term European Council President.

It is also possible that the effective refounding of the European Union by the willing Member States and the political abandonment of the old EU would result, in effect, in *de facto* acceptance by all parties of a new state of affairs. In other words, all those who are wishing to go further could withdraw from the European Union leaving only those states which have not ratified the Constitutional Treaty. However, unless this mass withdrawal could be found compatible with both EU law and international law this would amount to an effective break with the law-bound past of the European Union, which has proceeded by always placing a premium on 'integration through law'.³⁶ Indeed many would argue that this would amount to expulsion of the non-content(s), and this would raise questions of law, especially under international law. It does not seem a desirable approach to the resolution of difficulties which would be brought about because one or more Member State had failed to give its consent to the new Constitutional Treaty coming into force, and there are formidable political and legal obstacles to be overcome before it could be put in place.

35 For more details see L. Rossi, "En Case de Non-Ratification...(Le destin périlleux du "Traité-Constitution")", (2005) *Revue Trimestrielle de Droit Européen* forthcoming.

36 See I. Pernice, "Begründung und Konsolidierung der Europäischen Gemeinschaft als Rechtsgemeinschaft", in M. Zuleeg (ed.), *Der Beitrag Walter Hallsteins zur Zukunft Europas*, Nomos, Baden-Baden, 2003 and I. Pernice, "The Draft Constitution of the European Union: A Constitutional Treaty at a Constitutional Moment?", in I. Pernice and M. Maduro (eds.), *A Constitution for the European Union: First Comments on the 2003-Draft of the European Convention*, Nomos, Baden-Baden, 2004, at p14, quoting extensively from Walter Hallstein on a 'community of law'.

V. Conclusions

Here is not the place to consider the question of how representative democracy in the form of parliamentary ratification³⁷ shapes up against an act of direct democracy in the form of a referendum approving or disapproving the Constitutional Treaty. Clearly it is wrong that supporting the use of a referendum as a means of ratifying the Constitutional Treaty is treated in some Member States as code for opposing the Constitutional Treaty. In many respects a referendum, with its associated campaigns for and against the question put to the electorate could be a highly desirable development from the legitimacy point of view for the European Union.³⁸ This would be the case especially if the debate in some way bridged the divide between the separate *demos* of the Member States, as issues 'leaked' from one national public sphere to another. In practice, this does happen in some cases, although some Member States are very resistant to the idea of outside interference in their national ratification debates. Were this to happen more frequently, it could be the beginnings of the recognition of a concept of popular sovereignty in the EU, even without the European referendum campaigned for by some members of the Convention which might operate as the trigger for an incipient common European political *demos*.³⁹

But it cannot be doubted that all of the above scenarios, which to a greater or lesser extent are conceivable or likely, and which have been treated here so far as possible in an objective way, raise interesting questions of principle for the EU. The final resolution of any ratification crisis will involve a measure of risk assessment, and it is to be hoped that political reactions will be informed by previous experience. There remains uncertainty at the present time as to what the treaty basis of European Union will be in the future (Constitution or Nice), whether it will or will not be faced with a substantial *crise existentielle* in the event of ratification difficulties, and what its membership configuration might be in five or ten years time. Some have questioned whether non-ratification of the Constitutional Treaty could be a form of negative constitutional moment for the EU, placing in question even the 'old' bits and pieces constitutional framework which operates at the present time. The question of 'treaty or constitution' was alluded to at the beginning. In truth the

37 Parliamentary ratification assumes that issues of European integration are one of the campaign issues on which national parties take a position, allowing the electorate to make choices in the context of general elections, which leave political responsibility for questions such as ratification with the legislature (as well as leaving negotiation and signature with the executive).

38 On the ways in which popular sovereignty interacts with democracy in the context of constitutional change, see S. Chambers, "Democracy, Popular Sovereignty and Constitutional Legitimacy", (2004) 11 *Constellations* 155.

39 See Conv 658/03, Referendum on the European Constitution, 31 March 2003.

answer to this question both at present and in the near future is probably both mixed and contingent, since the EU displays in some respects a multitude of faces at different times and in different fields of its activity. This would not be fundamentally changed by the Constitutional Treaty despite its formal abandonment of the Maastricht pillar system, and its creation of legal personality for the EU as a whole. In some respects in both its internal and external dealings the EU continues to be treated by others and indeed to act as an international organisation. In other respects, especially with regard to some of the implications of European integration for citizens and residents of the Member States, it has at least a quasi-constitutional force and effect. These aspects would be reinforced greatly by the formal adoption of the Charter of Fundamental Rights as a constitutive and binding element of the EU legal order, notwithstanding the restrictive effects of the so-called horizontal clauses. Ironically, the very fact that the Constitutional Treaty will be the subject of referendums in so many Member States does reinforce its constitutional character, since it is hard to imagine why something which is essentially merely an international arrangement between sovereign states ought otherwise to involve the invocation of so many acts of popular sovereignty.