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Global Governance, Regionalisation and Regulation:
The Role of the EU
6th EU Framework Programme

How the EU Could Overcome the Current Constitutional Crisis

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Paul Magnette

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Olivier Costa & Paul Magnette

Introduction

Since the project for a Treaty establishing a Constitution for Europe (TCE) was rejected by referendum in France and the Netherlands in spring 2005, there has been a constant proliferation of schemes designed to get the European Union out of this impasse. Without reviewing every one of these many different plans, we propose to investigate the causes of the crisis in a medium- and long-term perspective, and to explain why we consider that none of the schemes contemplated over the past two years is equal to the stakes involved. We do not mean to predict the future of the constituent process; in view of the very chaotic history of the Union since 2000, our forecast would inevitably be proven wrong. In fact, scientists and analysts are helpless, faced with a game of bluff in which some suggest options that they know to be unrealistic or do not want, while others refuse acceptable solutions in order to raise the stakes, and yet others are unexpectedly won over by solutions they had ruled out a few weeks earlier. In this highly uncertain context, it seems more constructive to carry out a global analysis of the advantages and drawbacks of the different existing options, and to try to consider the alternatives.

To this end, we shall begin by reviewing the two time frames of the current crisis. Indeed, it seems to us that the plans suggested here and there do not make an adequate distinction between two types of problems. On the one hand, we must take note of the problems linked to the Union's evolution during the integration cycle of the past twenty years, which call for structural – and necessarily long-term – amendments. On the other hand, we must identify the limits inherent to the “constitutional” process initiated by the European Council in 2001, and learn from them if we wish to revive the integration dynamic in the next few months.

In the second section of this policy brief, we will re-examine the main points of the schemes that have been publicised in the past few months, in an effort to measure their plausibility, in the light of the lessons learned from analysing the crisis. In fact, an efficient plan to end the crisis must be intellectually coherent, but it must also allow for the difficulties inherent to the logic of European integration since it began, without exaggerating their importance. Therefore, we shall advocate a revival scenario focused on a “functionalist”, objective-centred method, the only workable approach to efficiently rekindle the TCE's aspirations to institutional consolidation.

1. The underlying causes of the European crisis

What differentiates the crisis experienced by the European Union since spring 2005 from others, and justifies its being qualified the “gravest crisis” of the history of European integration, in the words of Jacques Delors, is the fact that it is both a legitimacy crisis and a motivation crisis. In the past, we have observed phases in which the motivation of European leaders has decreased, without any decline in popular support for integration, as in the period between the mid-1970s and the mid-1980s. There have also been intervals of decreased popular support for the integration project, which did not affect leaders' commitment to it; this was the case during most of the 1990s. Today, the European project is simultaneously facing both heightened mistrust in public opinion, and the massive disengagement of leaders.

The first phenomenon has been amply demonstrated by opinion polls, the increase in public demonstrations hostile to European integration, and the failure of referenda (on the Euro in Sweden in 1999, the Nice treaty in Ireland in 2001, and the TCE in France and Holland in 2005). The electoral success of parties with an openly Euro-sceptical message (from traditionally nationalist or even xenophobic parties, to left-wing parties hostile to “liberal Europe”, or conservative parties adverse to the moral liberalism or militant secularism of European policies) also testifies to this. As for the crisis in elite motivation, which at least partially reflects public concerns, it is manifested through the slight interest in the Union shown in the programs and action of main national leaders, and the deterioration of their relationships within and outside European institutions. The revival of themes such as “protecting sovereignty” or “economic patriotism” in recent political rhetoric also bears this out,

This deterioration of the Union's image, in public opinion and in the eyes of political leaders, is tied to two long-term tendencies of the European integration process, which have been heightened in the past twenty years.

As many observers have noted, since the implementation of the Single European Act in 1987, the European Community first

asserted itself as the bearer of an ambitious liberalisation policy (Scharpf, 1998). This reorientation, which reflected dominant opinion in the late 1980s and early 1990s, broke one of the foundational compromises of European integration. As a matter of fact, the treaties of Paris and Rome combined measures for negative integration (suppression of national regulations hampering the free movement of goods and services, capital and persons) and positive integration (harmonisation or convergence of social and fiscal legislation, and budgetary support to social groups and regions bearing most of the cost of economic modernisation policies). Taken together, these two courses of integration contributed to a sort of “modernisation along with progress” for European economies, and reflected “social market economy” doctrine, which the main political families (liberal, Christian-Democratic or conservative, and social-democratic) agreed upon. The political economy of integration, such as it has been asserted in the past twenty years, has been much more “liberal” on the economic level. The liberalisation of sectors that had been protected for a long time (air and rail travel, telecommunications, energy provision and postal services), and the increasingly free movement of workers and service providers, contribute to putting pressure on national arrangements, especially regarding the organisation of public services and social security benefits. The discipline that Euro zone governments have imposed upon themselves (through the Stability and Growth Pact) reduces the scope for fiscal and budgetary policy. At the same time, the near-impossibility of harmonising fiscal and social legislation – even minimally – due to the persistence of the unanimity decision-making rule in these matters, creates competition between national regimes.

Particularly in Western European countries attached to strong market regulation, these transformations have spread the feeling that national governments have lost control of monetary, economic and budgetary policy, and that State fiscal and social policies are being subjected to violent “dumping” due to the absence of common policies on the subject. Even though this analysis is a little exaggerated, it basically shapes citizens’ perception of the Union as an instance that puts national policies in competition, leaving it to governments to compensate for “social costs”. It also contributes to diffusing a feeling that the State is helpless, throughout public opinion (Bartolini, 2005): since States are prevented from freely determining policy in the name of collective discipline, and the Union has no economic policy or capacity for budgetary redistribution of its own, market forces seem to escape collective control. This is the feeling expressed by the following expression, which is now common amongst observers, “the Union makes policies, but doesn’t do politics; States do politics, but no longer make policies.” In other words, there is a growing dissociation of decision-making instances from those in charge of deliberation and responsibility, between effective and symbolic power. This evolution at least partly explains the increasing distrust of public opinion toward the Union, and the frequent temptation for member state leaders to bring decision-making instruments back to the national arena.

The rise of hostile attitudes to the Union can be explained by a second long-term tendency of the integration dynamic: the accentuation of constraints on governments regarding the choice of values, over the past ten years at least. On top of the pre-existing tension over “socio-economic models”, the extension of the fields of cooperation and integration to areas beyond their original socio-economic scope, adds further friction connected to the “values” entrenched in many national policies. The constant reinforcement of anti-discrimination policies (on the basis of nationality, gender, ethnic origin or sexual orientation) since the mid-1990s gives the Union the image of a regime engaged in spreading moral and cultural liberalism, and challenging “values” stemming from tradition, and often incorporated into a religious heritage. This feeling is particularly prevalent in the new member states, which had to carry out a rapid and massive adjustment of their legislation during the accession phase; this often provoked hostile reactions from Churches, conservative parties and reactionary movements. But similar phenomena can be observed in some older member states, where opposition to “atheistic and lax Europe” provides conservative movements with a means to revitalise themselves. Intensifying coordination of national policies in penal and police matters produces comparable effects: the minimal harmonisation of sentences and the mutual recognition of judgments compel some States to implement reform in very sensitive areas.

These two established tendencies have been all the more visible in recent years, because of a background of profound political instability. The first reason for this was that the Union’s Eastern enlargement in 2004 accentuated the heterogeneity of member states both in terms of economic development and social regulation and in terms of value systems, and increased tensions. The fears stirred by Polish plumbers in France, Latvian builders in Sweden, Romanian nurses in the Netherlands... revealed renewed mistrust between nations, which strengthens grounds for the hostility that followed from the double liberalisation trend – both economic and cultural. The second reason was that frequent reform of treaties, dramatised by the use of the adjective “constitutional” since 2001, have given the impression that the Union is an unstable regime. Along with the resumption of accession negotiations with Croatia and Turkey, the transatlantic quarrel ensuing from conflicts over the war in Iraq, and difficult budget negotiations, these continual adjustments spread the feeling that the Union was no longer capable of setting itself a goal, throughout public opinion. Governmental inactivity on sensitive issues such as energy provision and global warming have only reinforced this sentiment.

Overcoming the legitimacy and motivation crisis in which the Union has been bogged down since the failure of the constitutional

experiment, entails answering these widespread concerns. This is a difficult enterprise, especially since there is no identifiable dominant tendency in the public opinions of Europe. The constellation of feelings hostile to integration varies in time and between countries: the fear of “liberal” Europe mainly affects the centre of the continent, while in Britain and in Central and Eastern European countries, people are more adverse to European regulations. Union policies are largely perceived as secularist and intrusive in most Eastern and Southern European countries, while conversely, the most secularised countries of Western Europe fear an alteration of the course of European policies toward a more conservative direction. . . . Inasmuch as these public opinions mostly remain segmented along national borders, and heterogeneous inside each of the nations, it is extremely difficult to identify dominant tendencies.

However, beyond national particularities, some broad configurations can be observed. Comparative studies of movements hostile to integration have shown that they are starting to induce the emergence of two new attitudes that have a structural effect in national electorates. First, the appearance of a new political cleavage between the “winners” and “losers” of integration can be observed everywhere; it essentially explains the recent orientation of opinions. The first category comprises all those who apprehend European integration as an opportunity to profit from in the future, thanks to their substantial socio-cultural capital; conversely, the “losers” come from the social categories most exposed to economic liberalisation, and fear they will bear the cost of these policies (Grande and Kriesi, 2006). Secondly, integration reinforces polarisation between citizens that put forward “universalistic” attitudes (favourable to openness, expressing difference, tolerance. . .) and those who show anti-universalistic attitudes (with a preference for a “closed” national outlook, and conservatism). Education levels constitute the main underlying variable of these value and attitude systems (Grunberg, 2007): “winners” and “universalists” are mostly found among people with a high level of education, whereas there are more “losers” and “anti-universalists” among less educated persons. We do not claim that European integration is replacing traditional political references with a new polarisation between “open-winners” and “closed-losers”. However, we do consider that the main challenge for the Union consists of convincing the least educated social groups, the most exposed to economic liberalisation and the most attached to traditional value systems, that their interests and opinions are taken into account in the elaboration of Union policies.

2. Malfunctions of the constitutional process

Beyond the long-term causes outlined above, in order to understand the impasse the European Union is in today, we must examine the specific characteristics of the constitutional experiment that twice led to the rejection of the TCE, and to the stagnation that followed.

The idea of creating a “European Convention,” and of associating it to deliberation on the constitutional treaty project, was intended as a response to these increasing concerns. The heads of State and governmental leaders meeting at Laeken, in December 2001, were aware of the need to answer the criticism provoked by alternate perceptions of Europe as too liberal or too interventionist, too lax or too conservative and overall, as suffering from democratic deficit. They also knew that the big commitments of the 1990s (the creation of the euro, the initiation of new types of cooperation in the fields of foreign policy and internal security, EU enlargement to countries of Central and Eastern Europe, the liberalisation of airways, telecommunications and the energy sector. . .) had made the objectives and the scope of integration less distinct. A more intelligible foundational document was supposed to help clear up misconceptions, by clarifying the Union’s responsibilities and principles, and rationalising its institutions. This new treaty was drafted by a vast assembly, representing governments as well as national parliaments, the European Parliament and the Commission, deliberating publicly and interacting with a “forum” open to civil society representatives, and it was intended to renew Europeans’ support for the Union.

In retrospect, this ambition seems excessive. It is true that the European Convention was relatively successful; in June 2003, in spite of widespread scepticism, it managed to propose a constitutional treaty project in a consensual manner. This was adopted by the heads of State and governmental leaders, without substantial modifications, a year and a half later. However, we must admit that this success was partial at best: the constitutional treaty is not quite dead, but after the French and Dutch referenda, no one imagines that it could come into force as it is. This leads us to reflect on the question of what, in the composition process of this constitutional treaty, could have led to such an impasse.

1. First, we must consider the possibility that the very idea of drafting a constitutional treaty was uncalled for. Though this approach had broad support from European leaders and, apparently, the assent of two-thirds of the individual citizens interviewed by polling organisations between 2001 and 2004, it had two disadvantages. To begin with, it dramatised what was at stake. By calling the new treaty a “constitution”, it elicited concern from people that fear the formation of a European State, and gave the impression that the process was becoming irreversible. This gave opponents to the EU a tremendous sounding board. The process also amounted to federating the different components of Euro-scepticism, those opposed to the European integration project itself, to the Union’s institutions and the influence of “Brussels”, or to European policies.

Secondly, the constitutionalisation of treaties comprised a double procedure: it was meant to “rationalise” the *acquis* (by simplifying and clarifying the structure of previous treaties) on the one hand, and it was meant to adapt the EU to its new, enlarged dimensions, on the other hand. As a result, the ratification campaigns found themselves torn between two questions: should they confirm support for the European project such as it had been set out from the Treaty of Rome to the Maastricht Treaty? Should they accept the new elements of the constitutional treaty? This tension complicated matters considerably for TCE supporters, because they had to both praise the European Union (its institutions, its policies, the *acquis*...) and underline its weaknesses in order to call for the adoption of the Constitution. Opponents to the treaty, however, could capitalise on the rejection of both the European Union, and the Constitution.

2. The reactivation of opposition to the European project during the ratification phase also indicates that the consensus achieved by the Convention, and confirmed by governments, was more superficial than it had first seemed. The European Convention had over-represented the main centrist political families (liberals, Christian-Democrats and social democrats). It had probably underestimated the reticence of other democratic political families (the far left, ecologists, conservatives and sovereignty advocates) which together, can sometimes amount to over half the electorate. Parliamentary ratifications can conceal this discrepancy: national parliaments also over-represent centrist parties and most of them tend to systematically support the decisions of the executive branch of government. Conversely, referenda tend to amplify anti-establishment discourse.
3. Within the Convention itself, the opposition that came to light was probably not attended to sufficiently. First of all, Valéry Giscard d’Estaing, the president of the Convention, interpreted his mandate very broadly from the start. In fact, in the Laeken Declaration, member state representatives did not call for a constitution to be adopted; they simply considered the possibility. Moreover, the Convention was only in charge of preparing the next intergovernmental conference (IGC), by examining the essential issues raised by the future development of the Union, and investigating different potential responses to them. To this end, it was supposed to establish “a final document which may comprise either different options, indicating the degree of support which they received, or recommendations if consensus is achieved.” It was not supposed to elaborate a constitution. Besides, President Giscard, who wished to reach an ambitious objective, ignored the objections of some Convention members, and presented the text as the result of a consensus, whereas in fact it was a compromise, at best. Furthermore, by openly siding with the larger states, he provoked renewed mistrust of the Union in the smaller countries. In the Dutch referendum campaign, the fear of dilution in a broader Europe, and of the hegemony of the larger states, seem to have been powerful sources of opposition. Such fears were very much echoed in Central and Eastern Europe, where they overlapped with the new members’ fear of not being treated as well as the older members.
4. The problems encountered during the ratification phase can also be explained through the isolation of the Convention. Though its work was public, and though certain civil society organisations came forward and some Convention members tried to elicit debate on the subject in their countries of origin, its activities were essentially confined to a small circle of experts. The feeling of not having had a chance to influence deliberations and of being obliged to ratify or reject a text that could no longer be modified, also strengthened opposition.
5. Finally, the main shortcoming of the TCE was that the failure of the ratifications had not clearly been considered. Some convention members were aware that the text would encounter intense opposition in many member states, and had initiated a debate on the subject. But the government representatives had all maintained that this was a “red line” the Convention could not cross without being disowned afterwards by the IGC. This was the reason for the enigmatic clause according to which the European Council would meet to debate the future of the process, after twenty governments had ratified the treaty. It was also the source of the strange “reflection period” that the Union has entered into since the two rejections of the text, and from which nothing has emerged so far.

These observations define the area in which a potential resumption of the constitutional process should be planned. From the outset, we should recognise that the chances of a new ratification of the TCE in France and the Netherlands, akin to what was done in Denmark for the Maastricht treaty and in Ireland for the Treaty of Nice, are very slim indeed. One can scarcely imagine what “protocol” or “appendix declaration” could induce the citizens of these two countries to change their minds, and nothing can ensure that the treaty would then be ratified in the nine states that have not yet done so. Only a comprehensive renegotiation of the TCE, or its replacement with a less ambitious treaty, can be the way out of this impasse. These options are contingent upon designing a process to avoid reproducing the same multiple complications.

3. Three scenarios for a way out of the crisis

The multiple scenarios for a way out of the crisis that have proliferated since the double refusal of the TCE in spring 2005 can be classified in three main categories. First, there are a series of proposals based on a federalist approach: the idea that the integration crisis is primarily due to intergovernmental mechanisms has remained strong, though it ought to be forgone. The second option that is frequently mentioned is a gradualist approach, aiming to salvage the main elements of the TCE, step by step, without questioning the essentially intergovernmental character of treaty reform. There exists a third approach, which has rarely been mentioned publicly so far, which can be described as “functionalist”, geared toward reviving the logic behind the integration of the Treaty of Paris into the Maastricht Treaty. This appears to be the most realistic approach, in the light of the long-term European experience, and the most likely to lead to reviving European integration. The multiple scenarios for a way out of the crisis that have proliferated since the double refusal of the TCE in spring 2005 can be classified in three main categories. First, there are a series of proposals based on a federalist approach: the idea that the integration crisis is primarily due to intergovernmental mechanisms has remained strong, though it ought to be forgone. The second option that is frequently mentioned is a gradualist approach, aiming to salvage the main elements of the TCE, step by step, without questioning the essentially intergovernmental character of treaty reform. There exists a third approach, which has rarely been mentioned publicly so far, which can be described as “functionalist”, geared toward reviving the logic behind the integration of the Treaty of Paris into the Maastricht Treaty. This appears to be the most realistic approach, in the light of the long-term European experience, and the most likely to lead to reviving European integration.

The **federalist approach** still enjoys broad support, mainly in the founding countries of the European Union. The German philosopher Jürgen Habermas, who has been closely involved in public debate since 2001 (Habermas, 2001, 2005), has been the main advocate of this scenario. According to him, the Union cannot overcome the crisis unless it achieves a real qualitative change, breaking with classical intergovernmental mechanisms. This view is based on an old European tradition, and is very much echoed in federalist circles in France, Italy and Belgium. It consists of simultaneously intensifying integration, and breaking out of the dynamic of bargaining between governments.

The federalist option is based on three objectives. The first is to reform institutions in a truly federal direction, making the Commission a government and the Council the higher house of a bicameral parliament, and abolishing the principle of consensus decision-making. The second objective is a substantial increase of Union powers, particularly in the socio-economic field (to aim for a German-type social market economy), and that of the Common Foreign and Security Policy or CFSP (in order to constitute a civil alternative to the American superpower). The third objective is adopting a genuine constituent method: election of a constituent assembly by universal suffrage, and ratification of the constitution project by referendum on the same day in all member states. The Constitution would be enacted in the states that have ratified it, possibly on condition that a certain number of states, though not all, have done so (20 out of 27, for example) (Lequesne, 2005).

This option is certainly coherent, but it does not seem very realistic in the present situation, for at least three reasons. First, it is unlikely that the opinion leaders who stigmatised the democratic inadequacies of the conventional method would be the most willing to support the principle of the election of a trans-national constituent assembly. The critical opinions most of them offered barely concealed their visceral attachment to the national setting as the framework for the exercise of democracy. Secondly, considering the two enlargements that have taken place since the Convention’s activities, as well as the deterioration of the political climate between the 27 member states, and the decline of the federal ideal in European circles, it is doubtful that the members of a constituent assembly would be able to agree on a remotely ambitious text. On the contrary, it seems to us that there is a genuine risk that they would act as representatives of national interests. Finally, the third problem with the federalist option is convincing governments to abandon control of the treaty reform process to an elected assembly, and to entrust citizens with ratifying the constitution thus elaborated. Member state representatives have formally consented to relinquish sovereignty on many points since the early 1950s, but they have always done so either in order to protect their interests, or to formalise practices that had appeared alongside treaties, or in view of a common political objective. In the present case, it is difficult to picture why the leaders of the 27 member states would espouse such a demanding process, which impinges so much upon their powers, as the adoption of a federal constitution. For what is at stake here is not just state sovereignty, but especially the powers of historical State institutions. Though they have been more or less preserved so far by the Byzantine architecture of European institutions, their significance could be radically challenged by a truly federal architecture.

At the other end of the debate on the future of the European Union, there is a vast array of **gradualist** scenarios, which aim to retrieve the most innovative elements of the TCE without breaking with the tradition of intergovernmental negotiations and ratification based on unanimity. Some have proposed a gradual implementation of the aspects of the TCE that do not require treaty reform. Thus, one could prepare to enact the Charter of Fundamental Rights and to reinforce the powers of national parliaments, and start outlining

the right to popular initiative, reforming the Presidency of the Council... This strategy has a coherence problem – the TCE is a package that is difficult to undo without reopening comprehensive negotiations – but it is also politically hazardous. In particular, it risks spreading the feeling that governments are trying to impose what “the peoples” rejected, through other means, throughout public opinions. In the current political climate, this possibility ought to be carefully assessed.

The idea put forward by a candidate to the French presidential election, Nicolas Sarkozy, of having a reduced version of the treaty – including only “Part I” of the TCE, which essentially comprises institutional arrangements – ratified by Parliament, has the same weakness. By having part of the constitution adopted through parliamentary channels, we risk aggravating the suspicion that European leaders are trying to disregard citizens’ wishes. This proposition is all the more fragile that while Sarkozy claims that he wants to uphold the existing text, he has also called for reviewing some of its fundamental elements (the composition of the Commission, qualified majority voting, etc.). In fact, this amounts to reopening vast negotiations between the twenty-seven governments. Furthermore, advocates of this option have kept silent on the question of the status of such a treaty, if it were not to be ratified by all member states.

Bearing in mind how limited these two dominant approaches are, we may consider a third hypothesis, which is more complex, but probably also more appropriate to existing conditions in the European Union. This option, which can be described as **functionalist**, is derived from substantiated historical reasoning (Dehousse and Magette, 2006). It is also based on the observation that all attempts to give treaty reform a constitutional quality have failed (the 1948 French project, the 1953-54 European Political Community, the 1984 Spinelli project and the 1994 Herman project – which both had support from the European Parliament, and the TCE in 2004). The only “revival” attempts that reached their objective began by identifying a goal common to all the governments, and did not modify institutional arrangements further than what was required for the main objective of the new treaty (the Treaty of Paris in 1951, the Treaty of Rome in 1957, the Single European Act in 1987, and the Maastricht Treaty in 1992 all followed this logic.) This confirms that in view of differences of opinion and of interest between governments, and of their control of the treaty reform process, only a project which each government finds beneficial may prove able to revive the integration dynamic. National leaders – but also the members of Parliament or citizens called upon to ratify the treaty – must easily be able to identify the new functions that the EU could have, thanks to this new treaty. Once again, we must learn from recent mistakes, especially from the uncertainty of the TCE’s objectives: it set out far-reaching reforms without emphasising a clear goal, other than the symbolic significance of a constitution. Incidentally, we should indicate that our selection of the term “functionalist” to describe this third approach designates the openly finalised and proportional dimension of institutional changes to be implemented: we are not advocating a return to the neo-functional mode of decision-making of the early years of European integration. To implement this scenario successfully, we must bear in mind three lessons learned from the inadequacy of the recent constitutional experience.

First of all, it may be necessary to divide up the negotiations. The TCE certainly suffered from attempts to rationalise the *acquis*, accentuate integration and give the entire process a constitutional quality, all at once. Therefore, a more gradual integration mechanism should be adopted, in order to allow step-by-step verification that the new commitments do have European citizens’ support. Rather than renegotiating the entire treaty, we could consider taking action on one or two more limited “components” of the TCE, which would be likely to generate consensus between member states, both on the importance and the means of joint action. The Area of Freedom, Security and Justice and the Common Foreign and Security Policy (CFSP) could be selected; they were the subject of a broad consensus while the TCE was being drafted, and were not very much involved in campaigns against the treaty. One or two small treaties, focused on specific policies, and using the *ad hoc* material and institutional provisions of the TCE, could be put forward for ratification, in order to retrieve the most innovative and least disputed part of the treaty. This would mean losing the simplification work carried out by the Convention (which is imperfect and far from complete), but keeping the most significant developments, which accentuate European integration on a strictly political level and correspond to citizens’ priorities, as articulated in surveys and deliberative polls (Boucher, 2006).

Concentrating on issues that are not directly linked to socio-economic matters may seem paradoxical. Confrontations Europe, an association that advocates a new Single European Act based on a functionalist approach (“Un Nouvel Acte Unique au cœur de la relance de l’Europe,” <http://www.confrontations.org>) suggests centring cooperation initiatives on European powers linked to growth and socio-economic cohesion. This means areas such as energy policy, transportation, higher education, reassessment of the value of work, financial cooperation, fiscal harmonisation in specific fields, etc. This matches the objective stated in the first part of this paper. Similarly, on the fiftieth anniversary of the signature of the EEC treaty, Angela Merkel mentioned the absence of EU powers regarding energy policy, in order to call for the resumption of negotiations on treaty reform. However, the experience of the 2002-2003 European Convention and the Intergovernmental Conference (IGC) that followed in 2003-2004, shows that these matters were the most difficult for member state representatives to agree on. The energy issue, which is central to present-day concerns, will inevitably trigger a debate on nuclear energy, which is known to be a highly divisive matter. Conditioning revival of the European project upon reaching

a consensus on these policies means running the risk of delaying this revival for a long time, and it would be unrealistic to try to draft a treaty before the June 2009 European elections. Conversely, policies connected to the Area of Freedom, Security and Justice, as well as foreign and defence policies, have always been subject to broader and sounder agreement. If a new Single Act focused on these policies were to succeed, it could create favourable conditions for a later revival of negotiations on socio-economic matters. As it was done for Maastricht, two parallel IGCs could also be convened, to deal simultaneously with two different sets of issues: this would allow progress in both fields, and would prevent potential setbacks in one set of negotiations from slowing the entire process down.

The second conclusion that should be drawn from recent experience is related to the ratification procedure of the treaty. As long as the enactment of a treaty remains subject to the unanimous approval of member states, and each of them remains free to choose between parliamentary or referendum channels – within the limits set by their constitutions – there will be a very high risk of encountering setbacks. A new treaty will not be successful unless it includes provisions anticipating possible solutions in the event that it is not ratified by one or several member states, and much more specifically so than the TCE. For example, one could arrange for the new treaty to be enacted between the states that have ratified it, as soon as four-fifths of member states have done so; one could also specify the status of the states that have not ratified it by a certain deadline. Such arrangements could eventually lead to an explicit institutional distinction between a core and a periphery of the EU, accentuating and systemising the distinctions already made in terms of the euro and the Schengen Agreement, and of social policy at one point. Within the framework of the ratification campaign, each government would know that rejection might separate it from the heart of the Union, and would be induced to opt for the most efficient ratification procedure – unless it did not wish to join the core. This would be a way out of the present situation, in which there are no direct consequences of non-ratification: such a state remains part of the EU, which continues functioning on the basis of former treaties. This does not induce parties to a treaty to really commit to it nationally, and even gives them the opportunity to count on its rejection by the people.

However, incorporating arrangements to abolish the consensus requirement for enactment into a future treaty would create two main problems. First, this would lead to significant legal difficulties connected to the *de facto* modification of the foundational treaties of the European Union without the agreement of certain signatory states, or else to the coexistence of two parallel integration systems sharing the same institutions, and sometimes intervening in the same areas. Yet in the field of European integration, the law has often been adapted to political constraints. Legal experts have found ingenious ways of working out solutions to imperfect compromises, and then to promote formal simplification of fragmented competencies, institutional structures and decision-making processes. Secondly, the prospect of differentiated integration would cause institutional problems. A typical example of this is the current lack of leadership in the field of economic policy in the euro zone, because the representatives of non-member states wished to participate in the Council's activities on this matter, and because the Eurogroup (of the 13 member states using the euro) lacks actual power. Consequently, the way institutions function ought to be adapted, especially in order for the European Council, Council and Parliament to be able to deliberate in restricted formation (without convening all their members) on policies that do not concern all states. The collegiate and supranational character of the Commission apparently precludes such a restriction.

Finally, the lessons learned from recent experience also indicate that support of the revival process ought to be built up in national public space. If we mean to avoid major discrepancies between the compromises decided between governments, and public opinion in the countries involved, consultation procedures must be intensified before and during negotiations. For example, a process with four phases could be designed. First, a vast consultation of all interested parties would have to be organised prior to negotiations, through deliberative polls involving citizens (these are already in progress), and debate in national parliaments and regional instances, as well as between employers' and trade union representatives, etc. This would lead to the production of a comprehensive report on each member state. The different reports could possibly be summarised by an advisory **committee of the wise**. The second phase would involve an IGC (or several) opening negotiations based on these reports and/or the advisory group's summary, amongst other resources. When the IGC's activities are complete, the third phase would involve parallel deliberations on the draft treaty in national parliaments. The IGC would take the views of national parliaments into account in order to renegotiate certain points, before the European Council signed the treaty. Finally, the treaty would be submitted for ratification, according to the appropriate procedures in each state. This process would be facilitated by three factors: the elaboration of the treaty based on elements that emerged from public debate, its revision in view of the national parliaments' deliberations, and the dramatisation of what is at stake. This would be due to the risk of marginalisation incurred by any state rejecting it, since consensus decision-making could no longer act as a safeguard.

Conclusion

In this brief, we do not propose to anticipate the evolution of the debate on treaty reform, or to recommend a ready-made solution. In fact, there can be no miracle solution to the growth and identity crisis that the European Union is experiencing. However, it is advisable – and this was our first objective – to begin reflecting on ways out of this crisis with a thorough exploration of its causes, considering both the long-term past evolution of the Union, and more recent events. Indeed, the reasons for the TCE’s failure are to be found in this double time frame, which we ought to learn from. The long-term history of European integration impels us to find an integration dynamic apt to reduce competition internal and external to the European Union. This implies finding a new balance for the socio-economic core, and reinforcing cooperation in the judiciary and policing fields, and the CFSP. This process may well entail differentiating between a core and a periphery of the Union, if the treaty reform negotiations or the ratification process reveal clear and markedly geographical disagreements. The analysis of recent events induces us to adopt a pragmatic approach: in order to avoid the obstacles the TCE encountered, it is necessary to dissociate two sets of issues. On the one hand, we must opt for reform based on precise objectives; beyond political projects, the negotiations must be focused on actual, institutionalised European policies, which can mobilise state representatives, as well as citizens and socio-economic players. On the other hand, we ought to adopt a gradual approach and initially favour consensual issues, deferring negotiations on more problematic matters until a more propitious time. The potential success of one or several treaties related to policies for which there is a strong demand, on the part of both national political leaders and public opinion, is liable to facilitate the opening of negotiations on issues that are much less consensual at present.

Ultimately, what is most important is that the question of democratic deficit finally be seriously considered, and especially to recognise the feeling of dispossession that so many citizens are driven by, which provokes intense rejection of the European Union and the constitutional prospect. From this point of view, both the federalist and gradualist options appear inappropriate. The first has the advantage of coherence, but it most likely overestimates citizens’ European aspirations. The second, which advocates adopting part of the TCE’s provisions through parliamentary channels, would constitute a denial of democracy in the states that came down against this treaty through referenda. The functionalist option would allow us to break with the old cliché – still frequently heard in European circles – according to which the TCE’s failure and the Union’s troubles are a product of popular ignorance and rejection of the unknown. It is sociologically correct that detractors of European integration are typically less educated and less open to the world than its supporters, but this is a statistical correlation, not a cause-and-effect relationship. In other words, the question is not improving citizen information on the European Union, the issues it involves and the process of reforming it, but to acknowledge the rejection and fear generated by this system and its reform. The functionalist option meets this requirement on three counts. Firstly, it would allow gradual incorporation of public opinion in each country, as it is structured by parties, regions and employers’ and trade union representatives. Secondly, by focusing on specific political objectives that are subject to consensus, it would not demand any comprehensive transfers of sovereignty, or abstract or excessive institutional reforms. Finally, the use of a ratification procedure that allows for the treaty to be enacted on the basis of qualified majority voting would probably dissuade free-riding practices and demagogical discourse, and induce national leaders that sign the treaty to face their responsibilities.

KEYPOINTS

- The current EU crisis is distinct from preceding ones, because it combines a decline in EU support within public opinion, with a decrease in motivation on the part of European leaders.

- This crisis proceeds from changes that began in the 1980s (the growing power of the liberal paradigm, the weakening of common policies, EU intervention in the field of “values”), but also from recent failures of the “constitutional” process (excessive ambition of the Constitution, underestimation of opposition, failure to consider the eventuality of non-ratification).

- Both of the most common propositions for overcoming the crisis seem unsuitable. The federalist approach is unrealistic and disregards the attachment of national leaders to their sovereignty. The gradualist option, which proposes to retrieve some elements of the TCE step by step, or to focus on its institutional provisions, does not respect citizens’ wishes.

- A third, “functionalist” hypothesis can be considered. It is based on the observation that the only successful attempts to “revive” European integration consisted of identifying a consensual political objective, and modifying institutional structures as far as necessary. These experiences are replicable, on three conditions:

1. Dividing negotiations up by beginning with one or two limited objectives, the ends and means of which are subject to consensus (such as the Area of Freedom, Security and Justice, and the CFSP). Negotiations on more disputed matters (socio-economic issues, comprehensive institutional reform...) should be postponed to a later stage.

2. Arranging for alternatives in the event the treaty is not ratified by one or several member states (implementing the treaty among signatory states, differentiating between a core and a periphery in the Union).

3. Intensifying consultation procedures prior to, and during negotiations, including citizens, social partners, sub-state authorities and parliaments.

Bibliography

Bartolini, Stefano (2005) *Restructuring Europe*, Oxford: Oxford University Press.

Boucher, Stephen (2006) "Démocratiser la démocratie européenne. Quelles voies pour une délibération inclusive et transnationale de qualité ?" *Policy Paper* No. 17, Notre Europe.

Dehousse, Renaud and Magette, Paul (2006) "Institutional Reform in the European Union," in Peterson, John and Shackleton, Michael, *The Institutions of the European Union*, Second edition, Oxford: Oxford University Press.

Kriesi, Hanspeter et al. (2006) "Globalization and the Transformation of the National Political Space: Six European Countries Compared", *European Journal of Political Research*, 45/6: 921-56.

Grunberg, Gérard (2007) "Position sociale, identité nationale et attitudes à l'égard de l'Europe. La construction européenne souffre-t-elle d'un biais élitiste ?" in Costa, Olivier et Magette, Paul (eds.) *Une Europe des Elites?* Bruxelles: Editions de l'Université de Bruxelles.

Habermas, Jürgen, "Why Europe needs a constitution," *New Left Review* 11, September-October 2001.

Habermas, Jürgen (2005) *Pour l'Europe*, Paris: Bayard.

Lequesne, Christian, "Referenda and European Integration: A Misguided Procedure?" *Garnet Policy Brief* No. 1, December 2005.

Scharpf, Fritz (1998) *Governing Europe*, Oxford: Oxford University Press.

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