



Trail to Failure:

History of the Constitutional Treaty's Rejection and Implications for the Future

Richard E. Baldwin*

1. Introduction

The French and Dutch no-votes were a huge blow to the Constitutional Treaty. The deadline for ratification is suspended and as of early 2006, neither the French nor the Dutch government had a plan for reversing the fatal votes. In short, there is no plan for putting the Constitution into force.

What is the EU's next step?

The full answer to this question is unknowable at this point, but any answer must surely take into account the 'trail to failure' – the sequence of events that led up to the Constitution. The goal of this policy brief is to identify the political economy logic behind the chain of events that produced the Constitution. This is a critical task as far as the future is concerned. The French and Dutch votes mean that the political economy forces that produced the Constitution are still in operation and likely to produce a future event. To understand the nature and timing of this future event – the EU's next step – we must thoroughly investigate past events. We must dissect the problems that the Constitution was intended to redress, carefully distinguishing between urgent and obvious problems on the one hand, and less urgent and less obvious problems on the other. The urgent and obvious problems are things the EU must address and thus probably will address in the coming years.

It is impossible to allocate problems to the two categories with certainty, but the past behaviour of EU leaders provides important clues. 'Revealed preference reasoning' is the jargon that economists use for this type of analysis. The idea is that one learns about people's beliefs only when hard choices are made; talk is cheap. This is especially important

* Richard E. Baldwin is Professor of International Economics at the Graduate Institute of International Studies in Geneva.

when it comes to the Constitution since the argumentation has been extremely woolly and has been intentionally distorted by many participants in the debate.

The rest of the paper is organised around two questions: "How did the EU end up needing a Constitutional Treaty?" and "What are the likely implications for the future?"

2. How did the EU end up needing the Constitutional Treaty?

The Constitutional Treaty is a bit of a puzzle. EU leaders never explicitly asked for a constitution – a fact that is certainly strange for a major step in European integration. When EU leaders wanted to complete the Internal Market, they asked the Commission to draw up a plan and then unanimously and explicitly called for completion of the Internal Market in the first paragraph of the Conclusions to the Milan European Council (June 1985).¹ When they wanted a single currency, the Conclusions of the Hanover European Council (June 1988) explicitly embraced the goal and told the European Commission to come up with a plan, which, after a sequence of unanimous and explicit approvals from EU leaders, led to the Maastricht Treaty.

In sharp contrast, the C-word never entered in the leaders' unanimously agreed statements (the Conclusions of European Council summits) before the Laeken Declaration. Quite simply, there was never unanimous agreement that the EU needed a Constitution, although of course the idea had been around forever and some member states had always supported the idea. Yet in

¹ Paragraph 1 of the Conclusions reads: "[The European Council] instructed the Council [of Ministers] to initiate a precise programme of action, based on the white paper and the conditions on the basis of which customs union had been brought about, with a view to achieving completely and effectively the conditions for a single market in the Community by 1992 at the latest, in accordance with stages fixed in relation to previously determined priorities and a binding timetable." This quickly led to the Single European Act.

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2004, the heads of state or government of all EU25 signed the Constitutional Treaty and committed themselves to ratify it within two years. How did the EU come to need a Constitution that it had done without for a half century and five enlargements? The trail, in my view, begins in the early 1990s.

2.1 The trailhead: Enlargement-linked reform of EU institutions and the 1996 IGC

At their June 1993 summit in Copenhagen, EU12 leaders confirmed that the Central and Eastern European nations would eventually become EU members.² From this point, it was clear to everyone that EU institutions and procedures would have to be reformed.³ Structures designed for six members were groaning under the weight of 12 members. Adding more than a dozen newcomers would surely bring down the house.

The quest for enlargement-linked reform of EU institutions began formally in December 1993. The Brussels European Council⁴ added these issues to the agenda of the Intergovernmental Conference that was to be held in 1996 (an IGC in 1996 was stipulated by the 1992 Maastricht Treaty).⁵ In June 1994, the Corfu European Council set up a Reflection Group to prepare for the 1996 Intergovernmental Conference. This group is worth thinking about since its findings highlighted the enlargement-related problems that the EU has yet to tackle despite 10 years of trying. The group consisted of member state representatives and the President of the Commission, Jacques Santer. Its job was to study institutional reforms necessary to keep the EU on track after enlargement. In setting up the group, the Corfu

European Council explicitly mentioned two issues that its members should address:

- Council of Minister voting (specifically, weighting of votes and the threshold for qualified majority decisions); and
- Number of members of the Commission.⁶

The critical point here is that as far back as 1993, all EU leaders agreed that the Eastern enlargement made EU institutional reform – especially Council voting and Commission composition – critical. These were urgent and obvious problems.

The Reflection Group's report, also known as the Westendorp Report, was delivered to the European Council after 18 months of thinking about the future of Europe.⁷ The report presents the consensus it found on the nature of the problems facing Europe, especially those arising from enlargement-related pressures. This part of the report is remarkable from the perspective of 2006 since the list of problems is so similar to those tackled by the Constitutional Treaty. The report also lays out a thorough lack of consensus as to the solution of these problems. This part of the report is remarkable from today's point of view since the disagreements – big member vs small member, federalists vs intergovernmentalist, etc. – are almost identical to those that made negotiation of the Amsterdam, Nice and Constitutional Treaties so difficult. This dichotomy – general agreement on the problems but general disagreement on the solutions – has characterised every step of the 'trail to failure' up to and including many of the national debates on the Constitutional Treaty.

The 1996 IGC's agenda (set out in the March 1996 Turin European Council's Conclusions) extracted the essence of the Westendorp Report by listing three areas of focus for the IGC's work:

1. A Union closer to its citizens

Under this heading appears a grab-bag of concerns, but the first and last sentences sound very much like some of the goal's of the Constitutional Treaty: "The European Council asks the IGC to base its work on the fact that the citizens are at the core of the European construction: the

² Conclusions of the Presidency, Copenhagen, June 21-22 1993 (SN 180/1/93 REV 1); Paragraph 7.A (iii).

³ The IGC 1996, which was called for in the Maastricht Treaty, had its agenda expanded to include enlargement-related institutional reform issues by the European Council at its first meeting after it agreed to admit the Central and Eastern European Countries. For an early academic analysis, see Baldwin (1994); this argued that enlargement would require a reduction of the power of small nations if the EU was to maintain its ability to act post-enlargement.

⁴ Presidency conclusions - Brussels, 10 and 11 December 1993, SN 373/93, Declaration in Annex III.

⁵ The 1996 IGC was set up by Art. N of the Maastricht Treaty: "A conference of representatives of the governments of the Member States shall be convened in 1996 to examine those provisions of this Treaty for which revision is provided, in accordance with the objectives set out in Articles A and B." The relevant bit of Art. B is: "To maintain in full the 'acquis communautaire' and build on it with a view to considering, through the procedure referred to in Article N(2), to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with *the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community*" (emphasis added).

⁶ Verbatim, the assigned task was to: "... elaborate options in the perspective of the future enlargement of the Union on the institutional questions set out in the conclusions of the European Council in Brussels and in the Ioannina agreement. (weighting of votes, the threshold for qualified majority decisions, number of members of the Commission and any other measure deemed necessary to facilitate the work of the Institutions and guarantee their effective operation in the perspective of enlargement.)" The typos are in the original document. See Section IV. Preparation of the 1996 Intergovernmental Conference; (Conclusions of the Corfu European Council, 24-25 June 1994, Nr: 00150/94).

⁷ http://www.europarl.eu.int/enlargement/cu/agreements/reflex1_en.htm.

Union has the imperative duty to respond concretely to their needs and concerns.” And: “The IGC must ensure a better application and enforcing of the principle of subsidiarity, to provide transparency and openness in the Union's work, and to consider whether it would be possible to simplify and consolidate the Treaties.”

2. The institutions in a more democratic and efficient Union

The institutional reforms listed here have an eerie resemblance to those discussed five years later in the Laeken Declaration.⁸ To summarise, the questions the IGC's work should focus on were:

How to simplifying legislative procedures, making them clearer and more transparent?

How much to widen the application of majority voting (versus unanimity) in the Council of Ministers?

How to involve the European Parliament?

How and to what extent national parliaments should be involved?

How Council of Minister voting should be reformed, especially vote weighting and the threshold for qualified majority decisions?

How to reform the Commission's composition in the light of enlargement?

3. A strengthened capacity for external action of the Union

⁸ Here is the text verbatim: “In order to improve the European Union's institutions, and also in view of preparing the future enlargement, the Heads of State or Government stress the need to look for the best means to ensure that they function with greater efficiency, coherence and legitimacy. The Conference will have to examine:

- the most effective means of simplifying legislative procedures and making them clearer and more transparent ;
- the possibility of widening the scope of co-decision in truly legislative matters;
- the question of the role of the European Parliament besides its legislative powers, as well as its composition and the uniform procedure for its election.

The IGC should equally examine how and to what extent national parliaments could, also collectively, better contribute to the Union's tasks.

As regards the Council, whose functioning must be improved, the IGC should address the questions of the extent of majority voting, the weighting of votes and the threshold for qualified majority decisions.

The Conference will have to examine how the Commission can fulfil its fundamental functions with greater efficiency, having regard also to its composition and taking into account its representativity” (Turin European Council Conclusions, 29 March 1996). See footnote 5 for a comparison of the original agenda set out in 1992.

Under this heading were listed many questions that resemble those considered by the European Convention.

Institutional reform as a pre-condition for enlargement

Reform of EU institutions was a pre-condition for enlargement, but this assertion was only progressively reinforced. In the June 1993 Conclusions that announced the enlargement would eventually happen, it was merely implicit.⁹ The Essen Conclusions (December 1994) strengthened it by stating; “...institutional conditions for ensuring the proper functioning of the Union *must be created* at the 1996 Intergovernmental Conference”¹⁰ (emphasis added). When the IGC was formally launched in December 1995 in the Madrid Conclusions, a dominant goal was enlargement-related institutional reform.¹¹

Summary

Before moving on, it is worth summing up the ‘revealed preference’ lessons from this period. By the mid-1990s, EU leaders unanimously agreed that Eastern enlargement would require reform of the EU institutions. They agreed unanimously that the problems stemmed from the fact that enlargement would swell the number of members. They also unanimously agreed that this posed urgent and obvious problems for the Council of Ministers’ voting rules and the composition of the Commission – problems that had to be solved if the enlarged EU was to continue to operate with “efficiency, coherence and legitimacy”. Finally, there was unanimous agreement that it would be wiser to agree the reforms before the Eastern enlargement talks started. That way the Central and Eastern European countries (CEECs) would know what they were trying to join. The latter assertion started a pattern whereby EU leaders asserted that Eastern enlargement could not proceed unless the urgent and obvious problems were solved. As borne out by history, their bluff has been called three times.

⁹ “The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries.” Conclusions of the Presidency, Copenhagen, June 21-22 1993 (SN 180/1/93 REV 1); Paragraph 7.A (iii).

¹⁰ “The European Council has decided to boost and improve the process of further preparing the associated States of Central and Eastern Europe for accession. It is doing so in the knowledge that the institutional conditions for ensuring the proper functioning of the Union must be created at the 1996 Intergovernmental Conference, which for that reason must take place before accession negotiations begin.”

¹¹ “In this connection, having welcomed the Reflection Group's report, the European Council decided to launch the Intergovernmental Conference on 29 March 1996 in order to establish the political and institutional conditions for adapting the European Union to present and future needs, particularly with a view to the next enlargement” Madrid European Council, December 1995, Part A, Introduction.

2.2 Amsterdam Treaty: Failure #1

While the ambitions for the Amsterdam Treaty were high, the 1996 IGC proved very difficult; the disagreements identified in the Westendorp Report proved intractable. But the IGC did not end in failure. It produced a Treaty that was a success from the perspective of its original intent as set out in the Maastricht Treaty. In fact the Amsterdam Treaty is best thought of as a tidying up of the Maastricht Treaty. The substantive additions included a more substantial EU role in social policy (UK Prime Minister Tony Blair cancelled the British opt-out of the Social Charter), a bit more power for the European Parliament and the notion of flexible integration, i.e. the so-called ‘closer cooperation’ which would allow sub-groups of EU members to pursue deeper integration initiatives. From the perspective of the Turin Conclusion’s agenda and the Essen Conclusion’s dictum, however, the Amsterdam Treaty was a total failure.

For the purposes of this policy brief, the key lesson from 1996 IGC’s troubles is the list of essential reforms that emerged. When EU leaders study an issue (as in the Westendorp Report) or draw up an agenda (as in Turin), one observes a great deal of mixing up of critical issues – issues that absolutely must be part of any grand bargain that solves the urgent and obvious problems – and tangential wish-list issues. While many wish-issues are included in the grand-bargain package in order to make the reform package politically palatable to all member states, they are not the heart of the matter. Other forms of sweeteners could equally well take their place. To put it differently, hard-fought negotiations like the 1996 IGC act as a sort of ‘natural selection’ on agenda items. Very soon all participants realise which issues are urgent and obvious and which issues are ‘sweeteners’. As mentioned in the introduction, it is handy to know which issues are urgent and obvious when thinking about the EU’s next step.

In the case of the IGC, EU leaders identified three critical urgent and obvious problems that they could not solve but which they nevertheless agreed needed to be solved before enlargement. This list is found in the Amsterdam Treaty’s “Protocol on the institutions with the prospect of enlargement of the European Union”.¹² Moreover, the

¹² The Protocol reflects the state of the deadlocked negotiations in which the Council voting and Commission composition issues are linked: “At the date of entry into force of the first enlargement of the Union, ... the Commission shall comprise one national of each of the Member States, provided that, by that date, the weighting of the votes in the Council has been modified, whether by re-weighting of the votes or by dual majority, in a manner acceptable to all Member States, taking into account all relevant elements, notably compensating those Member States which give up the possibility of nominating a second member of the Commission.” The Protocol then goes on to call for another IGC to finish the enlargement-linked EU

Protocol provides much more information than a simple list. The Protocol reads like a snapshot taken of the negotiating positions when the Chairman called ‘time’ and the participants agreed to disagree. It states:

At the date of entry into force of the first enlargement of the Union, ... the Commission shall comprise one national of each of the Member States, provided that, by that date, the weighting of the votes in the Council has been modified, whether by re-weighting of the votes or by dual majority, in a manner acceptable to all Member States, taking into account all relevant elements, notably compensating those Member States which give up the possibility of nominating a second member of the Commission.

Despite this failure,¹³ the EU leaders’ bluff was called and accession talks with the CEECs were opened at the Luxembourg summit (December 1997). This put the CEECs and the EU in the awkward situation of negotiating membership when everyone knew that the Union that the CEECs were trying to join would change during the negotiations.¹⁴

At the Cologne June 1999 European Council meeting, EU leaders agreed to a list of issues that had to be solved before the enlargement – the so called ‘Amsterdam leftovers’ – and then agreed to launch a new IGC in 2000. The ‘leftovers’ were almost identical to the heart of the 1996 IGC’s agenda on institutional reform. Here is the list:

- Composition of the European Commission;
- Council of Ministers’ qualified majority voting rules; and

reform: “At least one year before the membership of the European Union exceeds twenty, a conference of representatives of the governments of the Member States shall be convened in order to carry out a comprehensive review of the provisions of the Treaties on the composition and functioning of the institutions.”

¹³ The inclusion of the Protocol list makes it obvious that the 1996 IGC failed to achieve the goal of implementing enlargement-related reforms. The admission of failure is made even more explicit by a declaration added by France, Italy and Belgium to the Treaty (Declaration 57), which states: “... the Treaty of Amsterdam does not meet the need, reaffirmed at the Madrid European Council, for substantial progress towards reinforcing the institutions”.

¹⁴ For the CEECs this made little difference. For them EU membership was a matter of national security. Having lived five decades under Soviet control, they wanted to be make sure that the next Iron Curtain would go down to the east of their borders, not to the west. Indeed, the very different situation in which Poland and Ukraine find themselves in 2006 with respect to growing Russian assertiveness seems to justify the CEECs’ ‘EU-or-bust’ attitude in the 1990s and early 2000s.

- Reduction in the number of issues decided by unanimity in the Council rather than by qualified majority voting.¹⁵

Importantly, the leaders also said that they would not enlarge the EU before the 'Amsterdam leftovers' were cleaned up: "As a prerequisite for enlargement of the Union, the operation of the institutions must be strengthened and improved in keeping with the institutional provisions of the Amsterdam Treaty." (Luxembourg European Council Conclusions, paragraph 3).¹⁶

Enlargement as hostage: Take two

Just as the opening of accession talks was supposed to have been held hostage to the outcome of the 1996 IGC, the Luxembourg Conclusions stated that enlargement itself was to be held hostage to the outcome of the 2000 IGC. The necessary institutional reforms generally harmed the interests of small members compared to those of large members (cutting the Commission size to less than one Commissioner per country would harm small members more since they rely more on the Commission to look after their interests than do large members, and every Council voting reform that improved decision-making efficiency did so by cutting the weight of small members' votes).¹⁷ The enlargement-as-hostage tactic meant that the big members could blame the small members if the 2000 IGC failed and the enlargement was postponed. As history would have it, the big nations took full advantage of this angle to push their national interests.

Summary

The lessons from this first failure to address the urgent and obvious enlargement-related problems are rich in importance for the future. EU leaders reaffirmed their unanimous agreement that enlargement – in particular the

¹⁵ Paragraph 52 of the Cologne Conclusions calls for the IGC 2000. Paragraph 53 sets out the 'leftovers' list:

"In accordance with the Amsterdam Protocol on the institutions with the prospect of enlargement of the European Union and the declarations made with regard to it, the brief of the Intergovernmental Conference will cover the following topics:

- size and composition of the Commission;
- weighting of votes in the Council (re-weighting, introduction of a dual majority and threshold for qualified-majority decision-making);
- possible extension of qualified-majority voting in the Council. (Presidency Conclusions - Cologne 3 and 4 June 1999, 150/99 REV 1)."

Note that this list is also in Declaration 57 of the Amsterdam Treaty.

¹⁶ With hindsight, it is curious that the summit that called the Essen summit's bluff set out a new bluff of its own.

¹⁷ See, for example, the analysis in Baldwin (1994).

increase in the number of members, especially small members – made EU institutional reform imperative. Hard bargaining and thinking between 1993 and 1997 whittled down the list of 'must do' tasks to just two: Council of Ministers voting rules (vote allocation and areas subject to majority voting) and Commission composition. Although these are exactly the issues highlighted in the June 1994 Corfu Conclusions, the fact that were still on the 'A list' after years of bargaining is important from the revealed-preference reasoning perspective. It indicates that these two areas really are the key reforms necessitated by enlargement according to the judgement of the men and women who are best placed to know.

2.3 Nice Treaty: Failure #2

The prime goals of the Nice Treaty were to adopt reforms that would maintain the Union's democratic legitimacy and its ability to act.¹⁸ Thus the IGC focused on the Amsterdam leftovers:

- Weighting of votes in the Council,
- Extension of the use of majority voting in the Council to areas currently subject to unanimity and
- Size and composition of the Commission.

At the June 2009 Feira summit, EU15 leaders added a fourth agenda item, namely:

- Closer cooperation, which subsequently came to be called 'Enhanced Cooperation'.

The 2000 IGC lasted about a year, with frequent meetings of national experts laying extensive groundwork for the institutional reforms. A handful of options for each of the four main areas were developed in preparation for the Summit.¹⁹

Given the Council of Minister's critical role in the EU's decision-making and the critical role of Council voting procedures in determining individual member's influence, voting rules had to be at the heart of any grand bargain on EU institutional reform.²⁰ As had been mentioned in several Conclusions and the Amsterdam Treaty,²¹ there were two main options for Council voting. The first was to retain the Qualified Majority Voting (QMV) scheme that had been in operation since the Treaty of Rome, but to re-jigger the allocation of Council votes in a way that would allow the Union to act even after enlargement. This option would hurt small

¹⁸ The section is based on Baldwin et al. (2001).

¹⁹ The 2000 IGC was the first where almost everything was posted on the web. See europa.eu.int/comm/archives/igc2000/index_en.htm for the complete archives.

²⁰ This is clear in the Amsterdam Treaty's Protocol on institutions reproduced in footnote 12.

²¹ See e.g. Treaty of Amsterdam's Protocol on the institutions with the prospect of enlargement of the European Union, Article 1.

members.²² Because the contemporaneous voting rules gave small members far more votes than population-proportionality would suggest and because the Eastern enlargement would bring in many small and very small members, any viable re-weighting would have to reduce the power of small members. The second option was more radical, to shift to a ‘dual majority’ system, i.e. one where a qualified majority would have to consist of nations that represented at least X% of the EU population and at least Y% of the member states – a system akin to the bicameral democratic procedures in many EU nations where X and Y are usually 50%.²³ The impact of this option on small nations is much more mixed since in essence it gives each nation’s vote two weights – one proportional to its share of EU population and here small states would lose, and one proportional to the number of members and here the small nations, especially the smallest would gain.²⁴

2.3.1 The lost weekend

EU leaders met in the French city of Nice on Thursday, 7 December 2000, to wrap up the year-long IGC talks and to sign a new treaty. France had the Presidency of the EU at the time, so the Nice Summit was under the guidance of French President Jacques Chirac. Chirac used the power of the chair to launch a stratagem that goes a long way to explaining the Nice Treaty’s failure. Rather than adopting one of the carefully thought-out and well-prepared ‘vote re-weighting’, or ‘dual majority’ options discussed in the IGC, Chirac pulled out a brand-new, highly complex proposal on Council voting – a proposal that was basically a shotgun marriage of re-weighting and dual majority.²⁵ This tactic threw off the summit’s

²² For a pre-Nice summit analysis of the power and efficiency implications of the various 2000 IGC voting proposals, see Baldwin et al. (2000). For an early and less sophisticated analysis of the impact of necessary reforms on the voting weight of small nations, see Baldwin (1994).

²³ For example, Germany’s lower house represents the population (it is elected according to proportional representation), while the upper house represents the Lander (seat are allocated equally among big and small Lander); passing a law requires approval of both – a dual majority.

²⁴ The dual majority system is like having two thresholds and two different weights for the votes of each member. For example, pre-Nice Luxembourg had 2 of the 87 votes in the EU15 Council of Ministers, i.e. about 2.3% of the votes while its population was only 0.1%. Under a dual majority system, Luxembourg’s vote would be counted with the weight of 0.1% for the population threshold, but 1/15th i.e. 6.7% for the member threshold. Whether Luxembourg gains or loses power from this switch involves some complicated simulations that are explained in many places, including Baldwin & Widgren (2004).

²⁵ For extensive analysis of the Nice voting rules’ impact on decision-making efficiency, democratic legitimacy and the distribution of power among EU institutions, see Baldwin & Widgren (2004).

timetable, forcing an extension since EU leaders had promised themselves that enlargement could not proceed unless they addressed the ‘Amsterdam leftovers’ and no one wanted to be blamed for delaying the enlargement. The motives of Chirac in adopting this stance are subject to dispute (see Box 1 for my view) and the implications of it were not immediately clear.

Box 1. What did Chirac gain from the stratagem?

France had always viewed the French-German duo as the motor of European integration with the Franco-German voting parity as an unspoken underpinning of the partnership (France and Germany had always had the same number of votes in the Council of Ministers). Up until the 1989 unification, this voting parity was natural given the near parity of the French and German populations; indeed, each of the four big EU members – Britain, France, Germany and Italy – had about 60 million citizens and 10 votes in the Council. Post-1989, however, Germany had about 80 million people, but no one suggested that Germany should have more votes – no one, that is, until the 1996 and 2000 IGCs got going.

The voting reform was driven by the impending expansion of the number of EU members, especially small members. And because the EU’s pre-Nice system granted far more votes to small members than their populations would suggest, there was no logical way of fixing the system without addressing the vote-population connection. Of course, the imperative was not coming from Germany’s shortfall of votes – it was coming from the over-allocation of votes to small members – but any logically consistent solution to the over-allocation of small nation votes would break the Franco-German parity. Chirac was just not willing to go down in history as the President that allowed France to become the junior partner in the Franco-German duo.

By proposing that votes be re-weighted in favour of the big nations (maintaining parity among the four big nations’ votes) while simultaneously adding the two ‘dual-majority’ thresholds – a minimum number of members in a winning coalition and a minimum share of the EU population represented by the winning coalition – Chirac managed to fuzz the issues enough to make it seem reasonable that votes should be brought more in line with populations, but only at the lower end of the population scale.

At 4:15 on Sunday morning under a hazy full moon, the longest European Council meeting in history announced political agreement on a new Treaty. Due to Chirac’s stratagem, the leaders did not have a legal text in front of them, so there as no actual Treaty for them to sign. Indeed, the summit ended before everything was settled; it took two months of post-summit negotiations to finalise the Nice Treaty and some numerical inconsistencies were left in the Treaty.²⁶ The final signing ceremony took place on 26 February 2001.

²⁶ Declaration 20 of the Final Act says the Council vote threshold for the 27 listed nations is 258, but Declaration 21

At the end, the small nations sacrificed power to allow the enlargement to proceed. In exchange, the Nice summit Conclusions had to declare the Nice Treaty a success and the enlargement could proceed. The Nice European Council Conclusions state:

This new treaty strengthens the legitimacy, effectiveness and public acceptability of the institutions and enables the Union's firm commitment to the enlargement process to be reaffirmed. The European Council considers that, as from the date of entry into force of the Treaty of Nice, the Union will be in a position to welcome new Member States once they have demonstrated their ability to assume the obligations of accession and the negotiations have been brought to a successful conclusion.²⁷

Three days later, Chirac told the European Parliament that the Nice reforms would be enough to allow the EU to function effectively and legitimately even after enlarging the club from 15 to 27. The transcript from the European Parliament (www.europarl.eu.int/dg7/debats/data/en/00-12-12.en) reads:

We feel satisfied that we overcame the difficulties blocking the path towards the much sought-after aim of fulfilling the commitments that were given at Helsinki to the candidate countries without destroying the Union, of enabling tomorrow's Europe to continue to function effectively. I think I can say that we met these conditions. ... It responds to the challenge we were presented with, which was to provide the Union with the ability to take decisions and to act once Europe has gone ahead with enlargement on an unprecedented scale. ... As we promised, there are no leftovers from Nice.²⁸

says that once all the listed nations are in and we have an EU27, the blocking minority is 91, which implies a winning threshold of $345-90=255$, which is notably different than 258, at least to anyone with a calculator to hand. Another oddity is with the threshold expressed in percentages. Declaration 21 says that while the enlargement has not yet been completed (i.e. not all 12 have joined), the Council vote threshold will move, "according to the pace of accessions, from a percentage below the current one to a maximum of 73.4%. When all the candidate countries mentioned above have acceded, the blocking minority, in a Union of 27, will be raised to 91 votes, and the qualified majority threshold resulting from the table given in the Declaration on enlargement of the European Union will be automatically adjusted accordingly." The QMV threshold at the time was 71.26%, and 91 votes to block in the EU27 implies a threshold of 73.91%. So where does the 73.4% come from?

²⁷ Presidency Conclusions, Nice European Council Meeting, 7, 8 and 9 December 2000, paragraph 4.

²⁸ Some of Chirac's colleagues on the European Council were more realistic. On 11 December 2000, the UK Prime Minister told reporters: "As far as Britain's national interest in concerned, this was a very successful summit in that we

2.3.2 *The leftovers from Nice*

The complexity of Chirac's proposal clouded issues for a while, but it rapidly became clear that the Treaty of Nice was not a success. There were indeed some 'Nice leftovers' and they were basically the same as the Amsterdam leftovers. On Commission reform, the Nice Treaty adopted a temporary, makeshift reform – temporary since it applied only up till the 27th member has joined; and makeshift since a long-term solution was not agreed. On the extension of qualified majority voting, the Treaty was basically a house-cleaning exercise with little or no change in the areas to be subject to majority voting. On Council decision-making reform, the Treaty of Nice actually made things worse, according to most calculations.²⁹ Having abandoned the months of preparatory work, the leaders had little more than hurried, late-night staff work and their political instincts to guide them. The result was a complex system which failed to maintain the EU's ability to act in an enlarged EU.³⁰ In the end, Nice shifted a lot of power to big members without meeting the goal of improving decision-making efficiency of the enlarged EU.

In fact, EU leaders at the Nice summit knew that the Treaty was incomplete. As part of the final political deal on the Treaty, they agreed to commit themselves to another IGC in 2004 in order to complete the reform process. This "Declaration on the future of the Union" highlighted four themes:

- defining a more precise division of powers between the EU and its members;
- clarifying the status of the Charter of Fundamental Rights proclaimed in Nice;
- making the Treaties easier to understand without changing their meaning; and
- defining the role of national parliaments in the European institutions.

Importantly, there was no mention of the need for an EU constitution. Nor was there any mention of institutional reform since EU leaders had to claim that the Nice Treaty solved all the enlargement-related institutional issues.

achieved everything we set out to achieve, for example on tax, social security, defence, more power for Britain within the EU. So far as Europe is concerned, we cannot do business like this in the future. The ideas that we outlined a few weeks ago in Warsaw on how we improve the way we work and take decisions have to be part of the agenda for the future. We now have the decision we need on enlargement but there are real improvements we now have to make in the way that we work." www.pm.gov.uk, Press Briefing: 11am Monday 11 December 2000,

²⁹ See for example, <http://www.esi2.us.es/~mbilbao/niza.htm#cont> and Baldwin et al. (2001), or studies published later such as Kandogan (2005) and Leech & Machover (2003).

³⁰ See Baldwin et al. (2001) for an analysis of the failures.

As history would have it, almost the same set of leaders who were in Nice on that chilly winter morning eventually agreed to a constitution they did not ask for because it solved a number of pressing matters – basically the four listed above, plus the fix-up of the Nice Treaty’s foul-up of institution reform, but that is getting ahead of the story.

2.4 Try #3: The Constitutional Treaty

Recognition that the Nice Treaty voting rules failed to address the urgent and obvious institutional problems posed by enlargement took some time. Moreover, EU leaders could not explicitly admit their failure because the small members were selling the Treaty to their national audiences as painful but necessary to allow enlargement to proceed. Since urgent and obvious problems still needed to be addressed, EU leaders adopted a new tactic. Instead of setting up a new IGC, and adding institutional reform to its agenda, they unanimously adopted a long list of questions that included the urgent and obvious problems. Then they set up a Convention to consider them.

2.4.1 The Laeken Declaration, 15 December 2001

One year after Nice, the European Council in Laeken adopted the “Declaration on the Future of the European Union” that started a process leading to the third try at EU institutional reform. Given that the 1996 and 2000 IGCs had failed to produce the necessary reform, and especially in light of the difficult Nice Summit talks, the Laeken Council decided to try a novel working method. It convened the “Convention on the Future of Europe” that came to be known as the European Convention. This was a gathering of representatives from member state governments, national parliaments, the European Parliament, the Commission and the candidate countries.

As its formal name suggests, the Convention was supposed to study the fundamental questions that enlargement posed for the future of Europe and to define various solution. The output of the Convention was then to be taken as a point of departure for standard intergovernmental negotiations at an IGC.

Admitting the Nice failure

The Laeken Declaration contains a long list of questions that the Convention was supposed to consider. The 56 questions were grouped into four main themes, two of which echo those of the Nice Declaration:

- A better division and definition of competence in the European Union;
- Simplification of the Union's instruments;
- More democracy, transparency and efficiency in the European Union; and
- Towards a Constitution for European citizens.

The Laeken Declaration included two crucial novelties compared to the Nice Declaration. First, the Declaration contains a volte-face where EU leaders implicitly admit that the Nice reforms were insufficient. One of the questions that the Convention was to consider was: “How we can improve the efficiency of decision-making and the workings of the institutions in a Union of some thirty Member States.” This is an admission that the Nice Treaty was a failure since – as we saw above – maintaining the efficiency of the enlarged Union was the main goal of Nice Treaty. It is a volte-face since EU leaders had asserted at the Conclusions to their December 2000 meeting in Nice that the Nice Treaty reforms were sufficient (see the quotes above).

From the perspective of 2006, it is striking that the EU leaders asked the Convention to consider reforms of institutional reforms that a) had been unanimously agreed just one year earlier and b) had not yet been tried (the Nice Treaty institutional changes took effect only with the Eastern enlargement and so had not been tested when the Laeken Declaration was written). It shows that the shortcomings of the Nice Treaty’s institutional reforms – especially the Council voting rules, which are the linchpin of EU decision-making – were absolutely obvious to EU leaders. So obvious were these shortcomings, in fact, that they were willing to take the risk that the Convention would un-do the delicate political grand-bargain reached in the Nice Treaty’s institutional reform – not something that EU leader would take lightly since these voting rules are one of the main determinants of their influence over EU policies.

Of course, these institutional reforms, which EU leaders implicitly admitted were deficient, are exactly what is in force now in 2006 and they are rules that will remain in force until a new Treaty is ratified. But once again this is getting ahead of the story.

The second innovation in the Laeken Declaration opened the door to what Peter Norman called the ‘Accidental Constitution’ (the title of his 2003 book on the Convention). While the Nice Declaration made no mention of a constitution and the Laeken Declaration did not instruct the Convention to write a constitution, the ‘C-word’ does appear in the Laeken Declaration – two-thirds of the way down the Declaration is a section entitled “Towards a Constitution for European citizens”. Commonsense tells us that EU leaders would not ask for something as monumental as a European Constitution in such a vague and indirect manner. That was not how they asked for the Single Market or the euro. If there had been unanimous agreement among the EU15 that a constitution was needed, then the Laeken Declaration would have explicitly said so.

Of course, words can mean many things to many people. Judge for yourself. Here is the whole relevant section of the Laeken Declaration verbatim:

Towards a Constitution for European citizens

The European Union currently has four Treaties. The objectives, powers and policy instruments of the Union are currently spread across those Treaties. If we are to have greater transparency, simplification is essential.

Four sets of questions arise in this connection. The first concerns simplifying the existing Treaties without changing their content. Should the distinction between the Union and the Communities be reviewed? What of the division into three pillars?

Questions then arise as to the possible reorganisation of the Treaties. Should a distinction be made between a basic treaty and the other treaty provisions? Should this distinction involve separating the texts? Could this lead to a distinction between the amendment and ratification procedures for the basic treaty and for the other treaty provisions?

Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights.

The question ultimately arises as to whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in the Union. What might the basic features of such a constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union?

It would take a very elaborate helix of logic to read this and conclude that the European Council really meant to say “the Convention should write a fully drafted constitution”, but that, of course, is exactly how the Chairman of the European Convention read it. And that is how the Accidental Constitution was born.

Peter Ludlow’s excellent book *The Laeken Council*, which was written just after the 2001 meeting and before the Convention turned into a constitution-writing body. It provides a fascinating account of how the C-word got into the document. For instance, it reproduces the draft that Belgian Prime Minister Guy Verhofstad took on his pre-summit tour of capitals and shows how various amendments by various EU members resulted the particularly oblique word above. More interestingly, Ludlow – one of the ultimate insiders to Europe’s machinations – writes that “it is furthermore highly questionable whether the 2004 ICG will be able to reach agreement. The Union has thus embarked on a highly risky venture”. He goes on to list the purposes of the future constitution (note that he was writing when it was the c-word rather than the C-word). Nothing in his list comes close to major institutional reforms like changing the Council of Ministers’ voting scheme or changing the composition of the Commission.

2.5 From ‘Convention on the Future of Europe’ to constitution-writing convention

The European Convention was run by former French President Valéry Giscard d’Estaing with the assistance of two Vice-Chairmen. It started slowly and many early observers expected its large size and ill-defined objectives to result in a muddled outcome. By mid-2002, however, President Giscard d’Estaing had managed to redefine the Convention’s purpose. The “Convention on the Future of Europe” set up by Laeken was transformed into a constitution-writing convention. The new goal was to present the EU heads of state and government with a fully written constitution. From that point forward, the tone of the Convention changed and EU member states started sending heavy-weight politicians in place of low-level representatives. All arguments over the need for a constitution were dropped; discussion turned instead to its content. All of this was done with the full knowledge of member states, but no formal acknowledgement.³¹

As Chairman, Valéry Giscard d’Estaing was firmly in charge. The Convention’s decision-making procedure involved no voting by representatives and indeed no standard democratic procedure of any kind. The Convention was to adopt its recommendations by ‘consensus’ with Valéry Giscard d’Estaing defining when a consensus existed. The representatives of the candidate countries participated fully in the debate, but their voices were not allowed to prevent a consensus among the representatives of the EU15.

Chairman Giscard d’Estaing had enormous control over the debate and final control over the actual text. One professor of political science who studied the Convention process closely, George Tsebelis, noted that Giscard:

... expanded the authority of the Convention, and shaped the document that it produced. By eliminating votes, he enabled the presidium and the secretariat (which means himself) to summarise the debates. By stretching the concept of agenda in order to place issues in the debate, by using time limits as a way of limiting possible opponents from making proposals, by selecting the staff members himself, and taking them away from every possible source of opposition, he was able to shape the document in a very efficient way. ... This is one of the reasons that the process is encountering significant problems for ratification (Tsebelis, 2005).

One point where the Chairman’s prerogative was crucial was in the list of the working groups that were set up. On the issue that would be central to the entire grand bargain, the issue that had been central in both the 1996 and 2000 ICG – namely, the reform of Council of Ministers voting

³¹ Giscard reported to several European Councils but the Conclusions merely took note of the progress. The C-word never appeared in the Conclusions of the European Councils that listened to Giscard’s progress reports.

rules – Giscard chose not to set up a working group. The proposal that he pulled out at the last moment and included in the near-final draft – a dual-majority scheme – attracted a good deal of criticism but Giscard suppressed the debate with time limits. The member states who knew they stood to lose massive amounts of power under Giscard’s scheme decided to hold their fire until the 2003 IGC where the elected leaders of the member states, not the unelected Giscard, would be in control.

The draft framework that Giscard d’Estaing presented in October 2002 was fleshed out into a draft that was presented to the June 2003 European Council meeting. Leaders of EU15 leaders accepted the draft as a starting point for the IGC (Conclusions, Thessaloniki European Council, 19 and 20 June 2003). The Commission, as required by the Treaty of Rome, gave its opinion on convening an IGC; it said the draft Constitution was a good start and that the IGC should not unpick the grand bargain by opening up the institutional reform question. In particular the Commission welcomed the new Council voting rule (double majority was the Commission’s position in the 1996 and 2000 IGCs), but it questioned the draft Treaty’s solution on the composition of the Commission.³²

2.6 The Italian failure: IGC 2003

The IGC that considered the draft Constitutional Treaty started in October 2003. Differences that had been papered over by the Convention’s autocratic decision-making procedure re-emerged. The most contentious issues were the same ones that caused trouble for the IGCs in 1996 and 2000 – institutional reforms, especially of Council of Ministers’ voting and Commission composition. In part this may have been due to ineffectual management by the Italian Presidency, which tiptoed around the most contentious issue – Council of Ministers’ voting. The issue was not broached until the fifth Ministerial IGC meeting at the end of November 2003, just weeks before the final December 2003 summit that was supposed to approve the Treaty. The Commission’s summary of the 28-29 November 2003 ‘conclave’ in Naples says it all: “As for the most contentious issue, i.e. double-majority voting in the Council, the Conference discussed the principle itself (double majority proposed by the Convention or retention of the voting system provided for in the Treaty of Nice) and the various proposals for amendment of States’

thresholds and population necessary to adopt a legislative measure. The Presidency did not make any specific proposals.” (europa.eu.int)

It is worth going into some detail on the negotiating history of the voting rules, since these rules still need to be fixed, and the debate in the 2003 IGC provides a good deal of information on what sort of arrangements could attract unanimous support of the EU25 (the 1996 and 2000 IGCs were conducted by the EU15, and the issue was decided by Giscard in the Convention, so the IGC 2003 is the best source of information on what member states’ positions might be in any future revision of the Nice Treaty rules). The Commission website’s summary of the debate states:

The Italian Presidency was unable to make a concrete proposal by the end of its six-month period. However, it proposed several options, which were presented informally to the delegations:

- preservation of the system laid down by the Treaty of Nice;
- establishment of a rendez-vous clause;
- agreement on the principle of the double majority, but with modified thresholds;
- preservation of the Convention's proposal.

None of these options was acceptable to all States and, when the Irish Presidency took over, there was still complete disagreement.

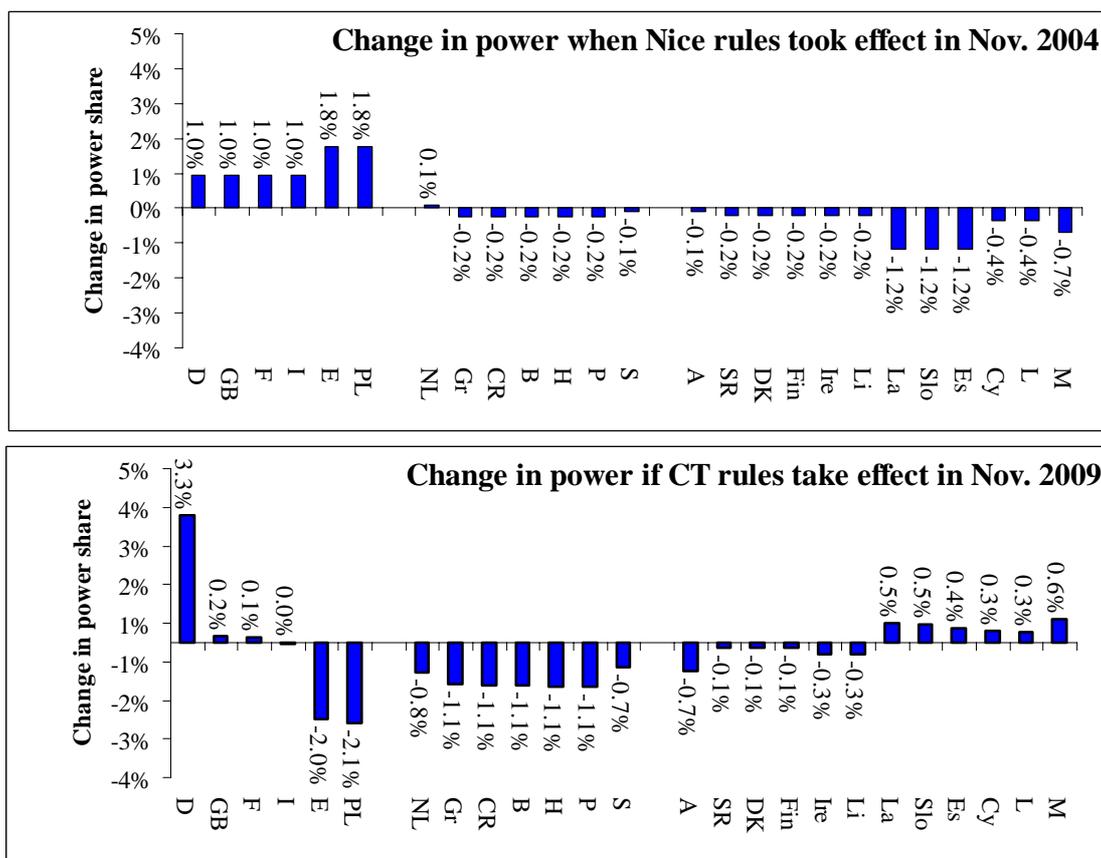
The final draft produced by the Italian Presidency was rejected by the European Council in December 2003. Although many members had problems with many parts of the draft, the final hold-up was the voting rules which greatly reduced the voting power of Spain and Poland (compared to the Nice Treaty rules) and greatly increased the voting power of Germany (see Baldwin & Widgren, 2003a, for a formal analysis of the power implications of the various rules).

2.7 The Irish Presidency’s compromise

Given this failure, enlargement and the European Parliament’s election proceeded without agreement on the new Treaty. The next European Council to consider the Treaty consisted of 25 members. Importantly, the Spanish Prime Minister José María Aznar, who so forcefully opposed the new voting rules in December 2003, lost his national election and the new Prime Minister, José Luis Zapatero, proved more flexible on the voting issue. This, combined with skilful diplomacy by the Irish Presidency, permitted a grudging and difficult but ultimately unanimous acceptance of the Irish Presidency’s draft of the Constitution at the June 2004 summit of EU25 leaders.

³² As Baldwin et al. (2001) show using a mathematical model of voting, double majority increases the Commission’s power by making the Council of Ministers less of a choke-point on EU decision-making. Since the Commission has the monopoly on initiative in the EU decision-making structure – i.e. the Commission has the first mover advantage – anything that makes the whole process more efficient gives the Commission more leeway in crafting proposals.

Figure 1. Winners and losers under the Nice rules and Constitution voting rules



Note: CT stands for Constitutional Treaty.

Source: Baldwin & Widgren (2004) (downloadable from <http://shop.ceps.be>).

The final compromise was a combination of the Italian Presidency's first and third options. The Constitutional Treaty retains the Nice Treaty rules up to November 2009 (to assuage Poland and Spain who lose so much power under the new rules) and it modifies Giscard's double-majority scheme by switching the majority thresholds from 50% to 55% of the member states and from 60% to 65% of the population (this increased all members' power to block a proposal).

It is worth noting that the Constitutional Treaty's fix-up of the Nice Treaty's foul-up undid the aim of Chirac's stratagem by breaking the parity between France and Germany. On the population threshold, Germany's vote counted about one-third more than France's; on the members' threshold, France, Germany and Malta's votes all counted the same. One wonders whether there would have been a Constitution if Chirac had pressed the case for a double majority back in December 2000.

Figure 1 shows which nations win and lose from the Nice rules (compared to the pre-Nice rules that were in effect for the first few months after the May 2004 enlargement) and from the Nice rules that are today in operation and the Constitutional Treaty rules that would go into effect if the Treaty is ratified. The reason for Spain and Poland's resistance in the IGC 2003 is quite obvious from the figure, as is Germany's rather strong support for the Treaty.

2.8 Summary

The Constitutional Treaty is a complex document that contains half a dozen radical changes in the EU's structure. It removes the three pillars that were put in place in the Maastricht Treaty to prevent 'creeping competencies'. It makes the Social Charter (i.e. Charter of Fundamental Rights) part of EU law. It creates a new way to make some modifications to the Treaty without the possibility of referendums (Passerelle). And, last but not least, it solves the urgent and obvious institutional reform issues that the Amsterdam and Nice Treaties failed to resolve satisfactorily – especially those concerning Council of Ministers' voting and composition of the Commission. The Treaty also contains a large number of other changes, many of which do not really need a Treaty change to implement. The bulk of the Treaty, however, is merely a reorganisation of the existing Treaties (the Constitutional Treaty repeals all the other Treaties).

The key point, for the purposes of this paper, is that the Constitutional Treaty's treatment of Council voting tells us a great deal about what EU leaders think about the Nice Treaty rules. The Nice Treaty voting rules were unanimously agreed by all EU15 leaders and all 15 members ratified these changes. But even before the Nice Treaty rules were due to go into effect, the EU15 leaders

agreed to a radically different set of voting rules – ones that lead to important shifts in member states’ power and an enormous increase in EU decision-making efficiency. Why would they do this if they believed the Nice Treaty rules would work?

The Constitutional Treaty process was politically painful for many EU members, so revealed preference reasoning tells us that the EU leaders must have believed that the Nice Treaty rules were insufficient. After all, they could have simply refused Giscard’s double-majority scheme in IGC 2003, taken the rest of the Constitution, and the Nice Treaty rules would have remained in force. In fact that was first option laid out by the Italian Presidency. In 2003, the EU15 leaders had a clear choice between the Nice Treaty voting rules and a new set of rules. The fact that they chose the new ones even before they had tried the Nice rules tells us that they believed the Nice rules would not be sufficient to meet the urgent and obvious problems posed by enlargement. In 2004, the EU25 leaders faced the same choice under the Irish Presidency and the outcome was the same – they rejected the Nice rules for a dual-majority system.

Why all this fuss about what EU leaders must have been thinking in 2003 and 2004? The answer, of course, is that the EU is now operating under the Nice Treaty rules and it has no plans to change the situation. If the EU25 leaders felt these rules were insufficient in 2004, then they are likely to think they are insufficient in the future. But once again this is getting ahead of the story.

2.9 Ratification difficulties and ‘un-necessary’ referenda

EU Treaties must be part of each member state’s law. This means that Treaties must be ratified by each member according to its own constitutional requirements. In many EU nations, this involves a vote by the national parliament. In others, it involves a referendum. For a variety of reasons, four EU nations that would normally have ratified by parliamentary vote opted for referenda; two of these voted ‘no’, one postponed the vote indefinitely and the fourth voted ‘yes’.

Early in the IGC process, British Prime Minister Tony Blair declared that the UK would put the Treaty to a referendum. This served his domestic political interest in that it removed the issue from the 2005 general election (Brits could reject the Constitution without rejecting Blair who supported it). But it also strengthened Britain’s hand in the negotiations. Britain could credibly claim that any Treaty that was too integrationist would be rejected by UK voters. Soon afterwards, French President Jacques Chirac also announced that he would put the Treaty to a popular vote. Again, this served his domestic political aims (the opposition Socialists were deeply divided over the Constitution and a referendum was expected to damage their cohesion before the 2007 presidential election, and in fact it did just that). It may also have been

viewed as a necessary counterweight to the ‘ultimatum’ created by the British referendum.

The Dutch referendum was called for by the Dutch parliament – and this against the wishes of the Christian Democrats, the biggest government coalition party. The Dutch referendum was to be the *first ever* held in the Netherlands since it became a parliamentary democracy in 1848. The vote was not to be legally binding although all parties agreed to respect the outcome. Likewise, Luxembourg scheduled a consultative referendum – its first since referenda got a very bad reputation in Europe in 1936 – and the parliament promised to respect the outcome.³³ The outcome of the unusual French and Dutch votes are well known while the outcome of the UK referendum will probably never be known. Luxembourgers voted ‘yes’ by a wide margin; the Luxembourg Parliament approved the Treaty two weeks *before* the referendum.

3. Conjecture about the Future

Enlargement of the EU would require institutional reform – everyone knew that. But so far the EU has failed to reform itself sufficiently. It tried and failed with the Amsterdam Treaty. It tried and failed with the Nice Treaty. The failure of the Nice Treaty reforms was so obvious to EU leaders that they agreed to reform the reforms even before the reforms had been tried. Since there are no plans to reverse the French and Dutch rejections of Try #3, the Constitutional Treaty, we probably have to count the Constitution as the third failure to redress the urgent and obvious institutional reforms made necessary by Eastern enlargement. The problem is that the Nice reforms that are so obviously flawed are now rules that govern the EU25. And they will continue to govern the EU until a new Treaty comes into force.

Plainly, something will have to be done, but what and how?

3.1 No means no

One line of thinking rejects the question, asserting that the Constitutional Treaty is not really dead. After all, the Maastricht and Nice Treaties survived ‘no’ votes. This reasoning is based either on wishful thinking or an incomplete analysis of the facts. The Dutch and French rejections are quite different to the Danish and Irish no’s, as Box 2 argues. It seems very unlikely that current or future French and/or Dutch governments will ask their citizens to vote again on the same Treaty.

³³ Students of European history will know that Hitler used referenda in the 1930s to consolidate his power.

Box 2. French and Dutch voters are different

The Danish voted no to the Maastricht Treaty, and the Irish said no to the Nice Treaty, but both entered into force. In those cases, EU leaders provided the reluctant voters with various assurances, and the voters reversed their rejections in second plebiscites. One might think the same could happen now, but the situations are really quite different.

First, the number of no-voters involved is quite different. In the first Irish poll on the Nice Treaty, less than a million people voted and only 530,000 said 'no.' In the French plebiscite, 29 million voters cast ballots with 15.5 million saying no. In the Netherlands, the 61.5% no-vote meant 4.7 million Dutch rejected the Treaty. While EU leaders could 'work around' 530,000 nay-sayers, it is hard to ignore a 'no' from 20 million voters.

Second, in the Irish and Danish cases, leaders could identify specific concerns held by specific groups of no-voters and this allowed them to make compromises that ensured enough no-voters would switch their minds in a second vote. EU leaders assured Danish voters that they would extend to Denmark the 'opt out' that Britain had won in the Maastricht Treaty concerning the right to stay out of the eurozone. In the case of the Irish 'no', the solution was to provide assurances that the Nice Treaty would not be a threat to Irish neutrality (an important concern to several fringe voting groups). In the case of the French and Dutch votes, it is impossible to identify enough specific, changeable issues to ensure the outcome would be different the second time around. In the case of France, a large swath of the no-voters seemed to reject the economic integration that has been the heart of the Europe since the Treaty of Rome. The same was true of the French near-no on the Maastricht Treaty, but at least in that case voters could understand what would be gained from the Treaty. The French political elite, and Jacques Chirac in particular, never managed to explain exactly why the Constitution was necessary.

3.2 Renegotiation will not be politically attractive

Another line of thinking asserts that the Constitutional Treaty can be renegotiated. This option is blocked, according to my thinking. The EU15 leaders never explicitly asked for a Constitution because they could not agree that the EU actually needed one. In the end, the Constitution's *ad hoc* nature was necessary to line up an *ad hoc* coalition of idiosyncratic national concerns behind the Constitution. This *ad hoc* nature is exactly why no one could ever explain exactly why Europe needed the Constitution it had lived without for half a century and five enlargements. The real argument – that Europe needed to fix the Nice foul-up – was not one that leaders like Jacques Chirac and Tony Blair could make since they told voters that the Nice Treaty was good enough.

Getting the 15 to agree to negotiate a new Constitution would be hard. But things are much worse now. Renegotiating the Constitution today would require the

unanimous agreement of 25 (soon 27) nations. Importantly, many citizens in these new members have a view of EU integration that is based on a very different historical context. For instance, most of the leaders of the 10 new member states grew up in nations where the secondary-school history books blamed WWII on capitalism, not destructive nationalism as in the West European history books. Thus the ever-closer-Union-is-necessary-for-peace perspective – a perspective that still holds a great deal of currency in Western Europe – creates much resonance among Central and Eastern European voters. Indeed, few leaders in these nations view the pooling of national sovereignty as a 'plus' of European integration. National security and the economic aspects of integration are the key benefits of EU membership; the pooling of sovereignty is viewed as a necessary sacrifice at best. This sort of attitude has become especially apparent in Poland recently. What this means is that one of the strongest forces for a renewed Constitution – the desire to ensure that enlargement does not end the European dream, the EU's continued drive towards an ever-closer union – is not nearly as strong in the EU25 as it was in the EU15.

Many of the new members are also at odds with 'Old Europe' on matters of social policy, taxation and labour market regulation at the EU level. The Constitutional Treaty did not, in so many words, implement Social Europe, but it slipped the thin edge of the wedge into the crack that might have become Social Europe. The combination of removing the pillars and adopting the Charter of Fundamental Rights (which includes many articles covering social policy) introduced a great deal of uncertainty into EU law. No one can know how the contradictions between the Charter and EU members' national laws would have been resolved, but it is quite possible that the federalist instincts of the Court and the Commission would have – over time – led to an expansion of EU control of the labour and welfare policies of EU members.³⁴ But this is not a goal that is as widely cherished in the newcomers' polities. Many of their citizens envy Irish income growth and British job creation, not the stagnation and unemployment that seem to be associated with French and German labour market institutions.

As we saw in the debate over the Services Directive, the new members are likely to view the imposition of West European social policies as a way of robbing them of their competitive edge. The social policies that are right for a rich nation like France might do a good deal of economic harm to nations like Lithuania or Latvia whose income levels are on par with developing countries like Mexico, Chile and Gabon.

³⁴ Ironically, the main thing that the French 'no' will have accomplished is terminating any chance of making the EU more 'social'. The 'non' may have been victory for the left against Chirac, but it was an 'own goal' as far as Social Europe is concerned.

As noted above, the new member states had little or no input into the critical issues decided in the Treaty of Nice, which remains in force until another Treaty is passed, or in the Constitutional Treaty since they had no vote over the Laeken Declaration, no say in the Convention's agenda and their voices could not block a consensus at the Convention. Things will be quite different during any renegotiation of the Constitution. Each new member will have a veto over everything from the renegotiation's agenda to the final text. They will use these to shape any new Constitution more to their preferences. Since these preferences are, on the whole, at least as economically liberal and less federalist than those in the average EU15 nation, any renegotiated Treaty is likely to be less to the liking of groups pushing for a more 'social' and more federalist Europe.

Once this becomes clear, no EU leader will push really hard for a renegotiation. Of course, some EU leaders will talk up the renegotiation issue to please their constituencies, but the leaders in power are unlikely to be willing to make the compromises necessary to launch talks knowing that the result is likely to be less pro-integration than the current version. The leaders who speak so starkly about the absolute necessity of the Constitution fear that Europe's progress to the 'European dream' – *la finalité politique* – will grind to a halt without the pro-federalist elements of the current Constitutional Treaty. But it is exactly these elements that face the highest risk of being excluded from a renegotiated text.

Moreover, since the 2007-13 Financial Perspective was viewed as having short-changed the new member states, we will not have a situation like the one in 1986, where the then-poor Iberian newcomers joined a club that had just doubled its spending on poor regions. The 2007-13 Financial Perspective cuts out any prospect of using the EU budget to provide financial sweeteners for the new members.

3.3 Next steps

Enlargement-linked institutional reform has been debated long and hard since the early 1990s. Hard bargaining has pared down the agenda to the bare essentials – reform of the Council voting rules and reform of the Commission's composition. None of the other institutional changes in the Constitution are essential to allow the EU to function effectively and legitimately – if they had been, then they would have been discussed in the IGCs that led to the Amsterdam Treaty and/or the Nice Treaty. The removal of the pillars, the Passerelle and inclusion of the Social Charter were included in the Constitution to balance the trade-off between federalists and intergovernmentalists that has plagued the EU since its start. Some aspects of these measures may be part of the next grand bargain, but there may be other ways of accomplishing the same

balance. There is, by contrast, no way to avoid Council and Commission reform, especially the former.³⁵

If the constitutional route is blocked by big and small obstacles, how can the necessary reforms be adopted?

The obvious point to make here is that the Nice Treaty reforms have been in place for less than two years. A wait-and-see-how-it-works tactic is thus likely to be part of any answer. Since 2001, my co-authors and I (especially Mika Widgrén) have written that the Nice Treaty rules will cripple the EU's ability to act, and several other groups of analysts have come to the same conclusion. If the academic calculations hold true, the wait-and-see approach will produce a string of decision-making crises that will help form a consensus in the EU27 – a consensus that the voting rules must be reformed and that narrow national interests are getting in the way of the progress that all EU nations want. It was exactly this sort of atmosphere that induced EU leaders to give up so much power in the Single European Act. EU leaders had tried the 'Old Approach' to Single Market liberalisation, with its unanimous voting, for 10 years with almost no success. After 10 years of failure, it was easy to find a consensus on the idea of formally agreeing to use majority voting (instead of unanimity) on Single Market issues – and this despite the fact that it reduced member states' ability to block directives they disliked (switching to majority voting reduced each member's power to block). Note that there are observers who believe the Nice rules are working well (Kurpas & Schönlaue, 2006), but I would argue that the new member states were on these 'best behaviour' up until December 2005. The point is that they were hoping for favourable treatment in the 2007-13 budget plan and so did not want to rock the boat too much, especially when they were just learning how EU decision-making works on the inside.

I believe we are already seeing this consensus start to gel. Each decision-making crisis swells the number of European leaders who publicly embrace the Nice-rule-are-broken view. As the British Prime Minister said in a recent speech: "I accept we will need to return to the issues around the European Constitution. A European Union of 25 cannot function properly with today's rules of governance. Having spent 6 months as EU President, I am a good witness to that."³⁶ I believe that at some stage, a 'tipping point' will be reached and a broad consensus will emerge in the EU27 that an institutional reform is necessary. It is impossible to predict what collection of sweeteners will be necessary to get the deal done, but it is easy to predict that the core of the grand bargain will involve the issues identified by the European Council in 1993 – Council of Ministers voting and composition of the Commission.

³⁵ The Nice Treaty's reform of the Commission composition should work well up until the 28th member joins.

³⁶ Speech on 2 February 2006, at the European Studies Centre at St Anthony's College, Oxford University.

It is notoriously difficult, however, to predict when a tipping point will occur. It seems safe, however, to suppose that it will not happen before 2008 or 2009. The next enlargement (Bulgaria and Romania) has long been foretold and will almost surely happen in 2007 or 2008. Once that is done, eyes will turn to the next enlargement (Croatia? other Balkan nations? Turkey?). At that point, the need to reform EU institutions may look fresh enough and the cumulative negative experience with the Nice Treaty institutions may look disappointing enough to justify a new treaty-revision exercise. Perhaps more importantly, almost all the national leaders who signed-off on the Nice reforms in December 2000 will be out of office by then; their successors will thus have someone to blame for the Nice shortcomings.

But all this is just conjecture over which reasonable analysts could differ. Only time will tell. In the meantime, we should re-start our thinking on what the optimal institutional arrangements for the enlarged EU should look like. The Westendorp Report would not be a bad place to start.

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Goals

- To achieve high standards of academic excellence and maintain unqualified independence.
- To provide a forum for discussion among all stakeholders in the European policy process.
- To build collaborative networks of researchers, policy-makers and business across the whole of Europe.
- To disseminate our findings and views through a regular flow of publications and public events.

Assets and Achievements

- Complete independence to set its own priorities and freedom from any outside influence.
- Authoritative research by an international staff with a demonstrated capability to analyse policy questions and anticipate trends well before they become topics of general public discussion.
- Formation of seven different research networks, comprising some 140 research institutes from throughout Europe and beyond, to complement and consolidate our research expertise and to greatly extend our reach in a wide range of areas from agricultural and security policy to climate change, JHA and economic analysis.
- An extensive network of external collaborators, including some 35 senior associates with extensive working experience in EU affairs.

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 Agricultural Policy

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The Future of Europe
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