

Plan B

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The resounding French ‘non’ will have important effects on French domestic politics. It may also change the way EU leaders proceed with future Treaties. But I do not believe that it will be the ‘political tsunami’ for the EU that many observers have predicted. Two reasons buttress this belief. First, the EU was headed towards rough water regardless of the Constitution’s fate. Even if it became law by the end of this year, the botched Nice Treaty voting rules would be in place until November 2009.¹ This means that the many important and difficult decisions the enlarged EU must make in the coming years would be extremely difficult in any case. Of course, some EU leaders will construe these difficulties as proof that the French and Dutch voters should have followed their advice, but informed observers will know better.

Second, I believe that there is a simple, viable ‘Plan B’, consisting of four steps, as follows:

Step 1. *The world’s greatest political damage-control exercise.*

Politicians will be trying to convince about 450 million citizens in 25 nations that the sky is not falling. The common theme will be “The French did not say ‘non’ to Europe”, but apart from that, national reactions will be a very public *Rorschach* blotch test.

Step 2. *The ratification process will be stopped.*

Continuing the process would involve almost no political gain and huge dollops of political pain – a virtual Chinese water torture for mainstream politicians that would give great joy and morale boosting to Europe’s extreme left and right. Since politicians get to make the decision, EU leaders will stop the process at their June summit. And they’ll have the perfect cover story. In a democracy, unanimity means that a ‘no’ from anybody is a ‘no’ for everybody.

Step 3. *EU leaders will implement many of the positive elements of the Constitutional Treaty.*

The articles in the Constitution fall into three groups:

- i. *Non-changes and tidying-up:* These codify existing practices (e.g. supremacy of EU law) or are renumbered articles from earlier treaties. These will continue to operate with or without the Constitution.

¹ See Annex 3 of CIG 85/04 PRESID 27.

- ii. *Non-laws*: Many of the best innovations in the Constitution are not legal changes, but rather political and administrative changes that do not require a Treaty change. These include the greater advisory role of national parliaments on subsidiarity, creation of the Council President and modifications of the rotating Presidency, creation of Mr Foreign Policy and reorganisation of EU foreign policy and the possibility of popular initiatives. The EU has long experience with making big changes outside the law when political consensus exists. For example, the Council of Europe guided European integration for 12 years before it was even mentioned in a treaty.
- iii. *Major legal changes*: The three major legal changes in the Constitution are: the new voting rules, the Social Charter, and the removal of the 'pillar' system that limits the influence of the EU Court and Commission to 'first pillar issues' (mainly Single Market issues).

Step 4. *EU leaders will implement only one of the three major novelties in the Constitutional Treaty – the voting rules – and they'll do this in the Accession Treaties of Bulgaria and Romania in 2007 or 2008.*

The voting rules are essential – a point that everyone in Europe will appreciate after the string of decision-making crises that will be hallmark of the EU during the next couple of years under the Nice Treaty rules. The first decision-making deadlock will probably concern the 7-year budget plan. Importantly, these deadlocks would occur with or without the Constitution since the new voting rules would not have taken effect until 2009 in any case.² These deadlocks will inevitably be construed as evidence of the consequences of the French 'non' and the need to agree new voting rules. The hard-fought consensus on the Constitution's sensible voting rules will probably prevail, but it will probably be presented as a pragmatic solution to a pressing problem rather than family silver snatched from a burning house.

Every enlargement requires a Treaty and these treaties always change voting rules. Usually the changes are mechanical, but by 2007 all EU members will view reform of EU voting rules as an imperative. This is why it will be natural to put voting rule changes in the 2007 Accession Treaties.

The other two major legal changes are 'optional extras' – extras in the sense that there is no plain-as-the-light-of-day argument for these changes. The EU worked well for half a century without them. The left may say that enlargement makes it more necessary, but the right cites the same reason for them being even less appropriate. These elements will not be taken up since they require treaty changes to incorporate them into EU law. This will not now get done since federalists and leftists no longer have the leverage of the voting rules; the link among the three stemmed from the hocus pocus that Giscard created at the Convention. Magic and idealism will be the last thing on the minds of EU leaders after the salutary decision-making crises of 2005, 2006 and/or 2007.

² Draft Council Decision relating to the implementation of Article I-24. See Baldwin and Widgren, "Council voting in the Constitutional Treaty: Devil in the details" Baldwin-Widgren, 23 June 2004. CEPS Policy Brief No. 53 for more extensive analysis of the voting rule changes and failures of the Nice Treaty rules.

Five Critical Fallacies

The amount of nonsense that has been written in the mainstream press about the French and Dutch rejections is astounding. The banner headline of the International Herald Tribune, for example, was “EU in disarray.” Much of this nonsense probably stems from the ‘cry wolf’ campaigns of the ‘yes’ camps. Many serious political leaders solemnly declared that rejecting the Constitution would cause a crisis. I suspect that they knew this to be an exaggeration but found it one of the few ways they could convince voters to say ‘oui’. Here I list the 5 fallacies that I believe are critical to the debate.

- **Fallacy #1. The Constitutional Treaty was necessary to adapt EU institutions to meet the challenges of enlargement.**

False. That was the job of the Nice Treaty. From this narrow perspective, the Constitutional Treaty’s only role was only to fix up the omissions and mistakes of the Nice Treaty (e.g. the composition of the Commission, voting rules, etc.). In my oversimplified reading of history, EU leaders accepted the Constitutional Treaty since it was a face-saving device that allowed them to correct their mistake without admitting an error. This political choice, however, backfired since it did not allow them to make the strongest case for the Constitution – the need to correct the Nice Treaty. In 2003, EU leaders told their citizens that the Nice Treaty was necessary for enlargement. This was something people could understand – ten new members would require rule changes. But once enlargement had happened, it was very hard to explain why further rule changes were necessary – especially since the new rules had not even been tried – unless EU leaders were willing to admit that they erred in Nice. This was especially difficult for Jacques Chirac. He chaired the Nice summit and was, in my reading of history, primarily responsible for the botched Nice Treaty voting rules.

Ironically, it was Chirac’s double manipulation of European integration for purely domestic goals that got him into his current domestic political difficulties. The first manipulation was the botched voting rules in the Nice Treaty (the Nice Treaty flaws find their origin in the gymnastics that were necessary to achieve Chirac’s goal of maintaining Franco-German voting parity despite the fact that the German population is one-third larger than the French population); the second was scheduling of an unnecessary referendum to divide the French left in preparation for the French Presidential elections. Members of the French political elite hold referenda for political purposes – not because they really want to know what “le peuple” think about a 200+ page legal document. Well, as they say, ‘what goes around comes around’.

- **Fallacy #2. The Constitution will be re-negotiated.**

False. EU leaders never asked for a Constitution. Giscard d’Estaing stretched the Laeken Declaration mandate by a mile and created a mood where reluctant nations were characterised

as selfish trouble-makers.³ In the end, the Constitution's ad hoc nature was necessary to line up an ad hoc coalition of idiosyncratic national concerns behind the draft Constitution. This ad hoc nature is exactly why no one could ever explain exactly why Europe needed the Constitution it had lived without for nigh-on 50 years and five enlargements. Giscard's only hard constraint was to produce a draft that was acceptable to the leaders of the EU15. The EU15 agreed that his draft was "a good basis for starting in the Intergovernmental Conference" in June 2003, but subsequently rejected it, modified it and only barely adopted it in June 2004 – after the enlargement had already happened.

During any renegotiation of the Treaty, the voices of the ten new members would have much greater weight than they did at the Convention. These countries want Irish income growth and British job creation, not the stagnation and unemployment that seem to be associated with French and German labour market institutions. There is almost zero chance of the Social-Charter-without-pillars emerging from a new set of negotiations, and forget about anything even more ambitious, like Social Europe. Given this reality, no one has a strong interest to push for renegotiation.

- **Fallacy #3. The Constitution could be much better.**

False. The EU cannot have a Constitution that looks like a constitution in the traditional sense of the word – i.e. a succinct statement of goals and a description of the allocation of power among decision-making institutions. This would create a new level of EU law (the Treaties are now the highest level with Directives and the like forming secondary law). The problem is that this new top level of law would pose a threat to legal certainty throughout the EU legal system. One could never be sure when a judicial interpretation of ambiguities between the Constitution and other Treaties might alter existing law. As the Convention concluded, a real constitution "might well prove a permanent source of conflict."⁴ This is also why the Constitutional Treaty repealed all the existing Treaties. Nations need constitutions before they make their laws, not after.

- **Fallacy #4. The EU would work smoothly, if the Constitution were ratified.**

False. A political deal in June 2004 meant that the Constitutional Treaty voting rules would not have come into effect until November 2009 in any case.⁵ That means that regardless of what happens to the Constitution, the EU will have had to live with the botched Nice Treaty rules for the entire life of this Commission and Parliament. The same is true for most current EU leaders since few of them will still be in power in November 2009. My bet is that even with the Constitution ratified, the EU would have agreed to implement the Constitutional

³ Laeken says: "In order to pave the way for the next Intergovernmental Conference as broadly and openly as possible, the European Council has decided to convene a Convention composed of the main parties involved in the debate on the future of the Union. In the light of the foregoing, *it will be the task of that Convention to consider the key issues arising for the Union's future development and try to identify the various possible responses.*" (Emphasis added). Most people would not read this as saying, "Please narrow down the options to a single draft Constitution."

⁴ CONV 250/02, as quoted in Peter Norman's excellent book, "The Accidental Constitution" page 64.

⁵ Draft Council Decision relating to the implementation of Article I-24. See Baldwin and Widgren "Political Decision Making in the Enlarged EU" 2004 for more extensive analysis of the voting rule changes and failures of the Nice Treaty rules.

voting rules with the 2007 Accession Treaties. They really cannot live with the Nice rules. The lack of crises up to this point tells us nothing since EU leaders and the Commission have been tip-toeing around difficulties in order to reduce the chances of upsetting referendum voters in France and elsewhere. For example, discussion on CAP reform was postponed for this reason, but once this issue arises, we shall see real fireworks between the rich Northern European farmers who get most of the CAP cash, and the poor EU farmers in Central Europe.

○ **Fallacy #5. The French 'non' was a victory for social Europe.**

False. Ironically, the main thing that the French 'non' will have accomplished is terminating any chance of making the EU more 'social.' 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 become Social Europe. The combination of removing the pillars and adopting the Social Charter 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 a significant expansion of EU control of the labour and welfare policies of EU members. Given the pro-market attitudes of the new members, however, there is no chance of even this limited progress towards social Europe emerging in coming years.

The 'non' may have been a leftist victory against Chirac, but it was an 'own goal' as far as Social Europe is concerned.