

REJECTING THE DRAFT TREATY ON A EUROPEAN CONSTITUTION: *UN MAL POUR UN BIEN?*

Alberto Costi and Monique Egli***

Cet article résume les raisons qui pourraient expliquer le rejet du projet d'un traité sur une Constitution européenne par les voteurs de deux membres fondateurs de l'Union européenne (alors dénommée Communautés européennes). Les auteurs y analysent également les conséquences du "non" pour l'avenir de l'Union européenne.

This paper sketches out the motives that might explain why a majority of voters in two founding members of the European Union (then the European Communities) refused to give their assent to the Treaty on a European Constitution. It also provides an analysis of the consequences of the "no" vote for the future of the European Union.

On Sunday, 29 May 2005, French voters rebuffed, by almost 55 per cent,¹ the proposed Treaty Establishing a Constitution for Europe (Draft Constitution).² Three days later, on Wednesday, 1 June 2005, Dutch voters did the same, emphatically rejecting the Draft Constitution by nearly 62 per cent,³ plunging the European Union (EU) into a political crisis. In both cases, the margin was solid, thus casting serious doubts on the future of the EU as a vision and an institution, with current

* Senior Lecturer, Faculty of Law, Victoria University of Wellington; Member, External Advisory Board, National Centre for Research on Europe, University of Canterbury.

** Licence es sciences politiques, Master in Business Management (Brussels), M Phil International Relations (Cantab).

1 "La France devient le premier pays européen à rejeter la Constitution" (30 May 2005) *Le Monde* <Le Monde.fr> (last accessed 1 September 2005); E Sciolino "French Voters Soundly Reject European Union Constitution" (30 May 2005) *The New York Times* <www.nytimes.com> (last accessed 1 September 2005).

2 Treaty Establishing a Constitution for Europe (29 October 2004) [2004] OJ (C310) 1 [Draft Constitution]. Also available at <europa.eu.int> (last accessed 1 September 2005).

3 D Rennie "Now the Dutch say no" (2 June 2005) *The Daily Telegraph* <www.telegraph.co.uk> (last accessed 4 September 2005); "The referendum in the Netherlands. Dutch nees up" (4 June 2005) *The Economist* 49.

member states and hopeful candidates resigned to accept, as European Commission President Juan Manuel Barroso stated recently, that in "the foreseeable future we will not have a constitution."⁴

The idea of a EU Constitution had arisen at the European Council of Laeken in December 2001⁵ from an aspiration to "reorganize and simplify the existing EU Treaties in anticipation of the ... addition of ten new Member States in 2004"⁶ and "to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States."⁷ The Treaty of Nice of 26 February 2001 had already undertaken the painstaking task of amending the founding treaties and reforming the EU institutions to accommodate the new member states.⁸ It did not, however, gather the necessary political momentum to tackle some of the mounting criticisms against the EU and the substantial institutional reforms needed for its enlargement beyond the accession of the first wave of Eastern European candidates. The heads of states and governments decided to append a declaration to the Treaty of Nice calling for a "deeper and wider debate about the future" of the EU.⁹ On 29 October 2004, representatives of the 25 member states of the European Union (EU)¹⁰ signed the Draft Constitution, a document drawn up by a "convention" headed by former French President Valéry Giscard d'Estaing and finalised by the member states in June 2004 not without some tense negotiations.¹¹

4 Quoted in H Mahony "Barroso pessimistic about future of EU constitution" (1 September 2005) <euobserver.com> (last accessed 7 September 2005).

5 See Council of the European Union "Presidency Conclusions: European Council Meeting in Laeken" (14-15 December 2001) Doc SN 300/1/01 REV 1, Annex I, Laeken Declaration on the Future of the European Union [Laeken Declaration].

6 S C Sieberson "Worth Doing Well – The Improvable European Union Constitution" (2005) 26 Mich J int'l L 587, 588. Malta, Cyprus and eight Eastern European states, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, the Slovak Republic and Slovenia, joined the European Union (EU) on 1 May 2004.

7 Declaration on the future of the Union [2001] OJ (C80) 85, para 6 [Declaration of Nice].

8 Treaty of Nice amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (Treaty of Nice) (26 February 2001) [2001] OJ (C80) 1.

9 Declaration of Nice, above n 7, para 3.

10 Symbolically, the Draft Constitution was signed in Rome, "site of the 1957 birth of the European Economic community": C R McGuire "The Constitution of the European Union: Content, Prospects and Comparisons to the US Constitution" (2005) 12 Tulsa J Comp & Int'l L 307, 307 note 1.

11 For an authoritative account of the negotiations and controversies leading to the adoption of the Draft Constitution, see P Norman *The Accidental Constitution: The Making of Europe's constitutional Treaty* (2 ed, EuroComment, London, 2005). See also A Arnulf "Editorial. The Future of the Convention Method" (2003) 28 EL Rev 573-574; A Arnulf "The Member States of the European Union and Giscard's Blueprint for its Future" (2004) 27 Fordham Int'l LJ 503-543; "Deal gives Chirac nod to push for fast-set Europe" (21 June 2004) *The Dominion Post* B3.

The result of these two referendums, foreshadowed in the polls, are significant in many respects. First, the relatively high turnout (nearly 70 per cent in France and 63 per cent in The Netherlands)¹² renders untenable any argument playing down public opinion and shows on the contrary a certain malaise regarding the European long-term project. Second, voters in two founding members, traditionally considered to be among the EU member states most dedicated to European integration, appear to question the proposed developments. Third, the non-realisation of the Draft Constitution could signal a slowdown in the expansion of the EU, jeopardize the necessary reforms enabling the EU machinery to deal with increasing levels of bureaucracy and institutions brought to the fore by the latest wave of enlargement and threaten the EU's global role to face up to the United States' economic and political power. These views are echoed in the opinions of the many commentators who have attempted to assess the long-term damage to the EU of the "no" vote and in the reactions of the politicians who have tried to comprehend the apparent damning condemnation of the Draft Constitution.¹³

In fact, the consequences of these votes are extremely ambiguous. Calls for reforms have long echoed around the EU. First, the continuing expansion of the EU has obviously created the need for stronger institutions to support the infrastructure necessary to administer an ever larger organisation.¹⁴ Second, the EU has grown increasingly complex through its founding treaties and a number of other key treaties that have shaped its powers, institutions and personality.¹⁵ Hence, it has become increasingly difficult to understand the distinction between European Community and

12 P Chriqui and P Christian "Une large victoire du non, nouvel avatar de la crise de la politique" (30 May 2005) *Le Monde* <Le Monde.fr> (last accessed 1 September 2005); "The referendum in the Netherlands. Dutch nees up", above n 3.

13 K Bennhold and G Bowley "Charter 'not dead,' EU insists" (31 May 2005) *International Herald Tribune* <www.iht.com> (last accessed 7 September 2005); "The European Union constitution. Dead, but not yet buried" (4 June 2005) *The Economist* 47; J Graff "Brussels Burnout" (13 June 2005) *Time Magazine* <www.time.com> (last accessed 5 September 2005); "L'Union européenne après le Conseil européen des 16 et 17 juin 2005. Conférence menée en français et néerlandais par le GEPE, TEPSA, le Mouvement européen de Belgique et le Bureau d'information du Parlement européen à Bruxelles" (Trans European Policy Studies Association, Brussels, 30 June 2005); McGuire, above n 10, 346-350.

14 Bulgaria and Romania are tipped for accession in 2007. A number of other states are engaged in, or on the verge of starting, negotiations with the European Commission, including Turkey, Croatia and Macedonia. See generally M Petrovic "How Far and Soon to the East? The Prospects for Future EU Enlargement" (2004) 2 *Asia-Pacific J EU Studies* 121-136; "Meet the neighbours. A survey of the EU's eastern borders" (25 June 2005) *The Economist*.

15 The main treaties are: Treaty Establishing the European Economic Community (Rome Treaty) (25 March 1957) [1957] OJ (C340) 173; Treaty on European Union (Maastricht Treaty) (7 February 1992) [1992] OJ (C191) 1. Both have been amended by the Treaty of Nice, above n 8. Other major amendments include: Treaty Establishing a Single Council and a Single Commission of the European Communities (Merger Treaty) (8 April 1965) [1965] OJ (L152) 1; Single European Act (7 February 1986) [1986] OJ (L169) 1; Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts (Amsterdam Treaty) (2 October 1997) [1997] OJ (C340) 1.

EU and the division of powers between the EU and the member states. Third, the ensuing lack of clarity and transparency has been recuperated by critics who point at an apparent democratic deficit and who claim the EU is drifting away from the people.¹⁶ As a result, calls for the simplification of the structures of the EU to make them clearer and better understood became an important facet of the White Paper on European Governance of July 2001.¹⁷

Beyond its flamboyant title, the Draft Constitution represents a text of gigantic dimensions and grandiose aspirations.¹⁸ Preceded by a preamble describing the EU's origins, heritage and objectives, the Draft Constitution is divided into four main parts totalling 448 articles. Part I defines the EU, its competences and institutions. Part II recognises a number of fundamental rights underlying the EU and addresses the notion of EU citizenship. Part III describes the policies and functioning of the EU and the internal market and tackles the other subjects of EU law. Part IV finally contains disparate articles dealing inter alia with the repeal of the Treaty of Rome and the Maastricht Treaty, continuity of the EU and the procedures regarding ratification and entry into force. An analysis of the Draft Constitution is beyond the scope of this paper. It is, however, important to highlight some of its novel institutional, procedural and democratic features.¹⁹

At the institutional level, there are some important innovations:²⁰ first, the European Council is for the first time formally identified as an official EU organ²¹ and a more permanent presidency of the European Council with the election of the President by a qualified majority of the European

16 J Fischer, German Foreign Minister "From Confederacy to Federation: Thoughts on the Finality of European Integration" (Speech at the Humboldt University, Berlin, 12 May 2000); E Zoller "The Treaty Establishing a Constitution for Europe and the Democratic Legitimacy of the European Union" (2005) 12 *Ind J Global Leg Studies* 391, 391.

17 European Commission "European Governance: White Paper from the Commission to the European Council" COM (01) 428 final. Added to this the call for the adoption of a charter of fundamental rights, the Laeken Declaration, above n 5, 24, did simply recognise that the EU was coming to a crossroads and that time was ripe for a "Convention on the future of Europe" to be convened with a view to producing a starting document on the subject for discussion at a future inter-governmental conference.

18 For a critical assessment of the Draft Constitution as a momentous achievement in the history of Europe, see Gráinne de Búrca "The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?" (2004) 61 *Wash & Lee L Rev* 555-583. See also J Shaw "Europe's Constitutional Future" [2005] *Public Law* 132-151.

19 For a good summary of the changes brought about by the Draft Constitution, see the non-paper prepared by the European Commission "Summary of the Constitutional Treaty" (28 June 2004); Sieberson, above n 6, 594-599.

20 See generally M G Puder "Constitutionalizing Government in the European Union: Europe's New Institutional Quartet under the Treaty Establishing a Constitution for Europe" (2004-2005) 11 *Col J Eur L* 77-111.

21 Draft Constitution, above n 2, arts I-19 and I-21. The European Council should not be confused with one of the original EU organs, the Council of Ministers, whose role is provided for at art I-23.

Council (member states' leaders) for a term of two-and-a-half years, with possibility of re-election once;²² second, appointment of a new EU Minister for Foreign Affairs who would play a dual role by assuming the current tasks of the European Commissioner for External Relations and those of the High Representative of the EU for Common Foreign and Security Policy;²³ third, a smaller Commission from 2014 onwards, comprising 15 Commissioners, including the President and the future Minister for Foreign Affairs, to which delegated Commissioners from all member states that do not have a Commissioner would be added;²⁴ fourth, the election of the President of the European Commission by the European Parliament, on a proposal by the European Council;²⁵ and, finally, the European Parliament would comprise a maximum of 750 members.²⁶

In terms of procedure, the veto power of the member states would be further watered down with qualified majority voting within the Council and the European Council becoming the normal procedure. The formula for "qualified majority" voting would be revised to mean that a decision would need the support of "at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union," a kind of a double or even triple majority rule,²⁷ avoiding at the same time the risk that the work of the two Councils could be stalled by one obstinate member state.²⁸ Foreign and defence policy, social security, taxation and cultural matters would, however, continue to require the unanimous consent of all member states.²⁹ Moreover, the co-decision power of the European Parliament with the Council in adopting European laws or framework laws would be extended³⁰ and if the two institutions "cannot reach agreement on an act, it shall not be adopted."³¹

22 Draft Constitution, above n 2, art I-22.

23 Draft Constitution, above n 2, art I-28. The EU Minister for Foreign Affairs would be appointed by a qualified majority of the European council.

24 Draft Constitution, above n 2, art I-26. The "members of the Commission shall be selected from among the nationals of the member states on the basis of a system of equal rotation between the member states" (art I-26(5)).

25 Draft Constitution, above n 2, art I-27(1).

26 Draft Constitution, above n 2, art I-20(2).

27 Draft Constitution, above n 2, art I-25(1).

28 Draft Constitution, above n 2, art I-25(1): "[a] blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained."

29 Draft Constitution, above n 2, art I-23(3): "[t]he Council shall act by a qualified majority except where the Constitution provides otherwise."

30 Draft Constitution, above n 2, art I-34. The Draft Constitution in fact sees the powers of oversight of the European Parliament doubling to about 80 policy areas: Siebensohn, above n 6, 596.

31 Draft Constitution, above n 2, art I-34(1). The legal acts of the EU under art I-33 are European laws, European framework laws, European regulations, European decisions, recommendations and opinions.

The democratic deficit is addressed throughout the Draft Constitution. Part I aims at making the Draft Constitution more accessible to EU citizens by introducing the EU and its institutions whereas Part II contains an elaborate statement of fundamental human rights that must be guaranteed by and within the EU, including the right to vote and stand for election.³² The introduction of a citizens' initiative that would enable a group of persons, provided they number one million and come from a significant number of member states, to invite the Commission to submit a proposal to the Council is a very interesting concept, but it is difficult to see how it will work in practice.³³ Furthermore, the Draft Constitution enhances the role of national parliaments of member states in the process of Community decision-shaping by furthering the application of the subsidiarity principle.³⁴ Of particular interest are the principles gathered under the title "The Democratic Life of the Union", which call *inter alia* for equality, access to the EU institutions, personal data privacy and the assistance of an ombudsman to address grievances regarding EU institutions.³⁵ The contemporary character of the Draft Constitution is further evidenced through the insertion of a clause of solidarity between EU member states.³⁶ This provides for the mobilization of resources of all member states, should anyone of them suffer a terrorist attack or a natural or human disaster.

32 Although substantive individual rights are scattered throughout the text in no particular order. For instance, Draft Constitution, above n 2, art I-10 guarantees the right of EU citizens to move and reside freely in any member state while Part III Title II covers issues of non-discrimination and citizenship.

33 Draft Constitution, above n 2, art I-47(4). The provision goes on to say that "European laws shall determine the provisions for the procedures and conditions required for such a citizens' initiative, including the minimum number of Member States from which such citizens must come."

34 Draft Constitution, above n 2, art I-11(3):

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

See also Draft Constitution, above n 2, Part IV, Protocol on the Application of the Principles of Subsidiarity and Proportionality and Protocol on the Role of National Parliaments in the European Union. The latter comprises more detailed information about the role of national parliaments. Along with a number of other provisions, the Draft Constitution in principle provides a constitutional basis for the application of the subsidiarity principle, the protection of the prerogatives of member states, regions and local authorities while taking account of the administrative and financial impact of EU legislation on regional and local authorities: Sieberson, above n 6, 603-605. See generally N W Barber "Subsidiarity in the draft Constitution" (2005) 11 EPL 197-206.

35 Draft Constitution, above n 2, Title VI. Zoller, above n 16, 394-399, does not believe that the Draft Constitution enhances the democratic legitimacy of the EU as the two key requirements of what she describes as "representative democracy" are missing: laws to which citizens "have consented by electing those who make them"; and their enforcement by individuals who "must be accountable to the people".

36 Draft Constitution, above n 2, art I-43.

However, it is in relation to the need for simplification and substantive improvement that the Draft Constitution makes the greatest strides by clarifying the EU's legal instruments. First, the Treaty of Rome and the Maastricht Treaty would be merged into a single text. Second, the European Community would be replaced by the EU, which would finally obtain the legal personality that had so far eluded it.³⁷ Third, the division of competences between the EU and its member states would be clearly delineated although it appears that the actual balance of power would remain unchanged generally.³⁸ Finally, the three pillars set up by the Maastricht Treaty would be removed even if the subjects of activity remain intact.

The Draft Constitution is essentially designed to serve as a vehicle to streamline decision-making in the expanded EU and to enhance its democratic character. Hence, on paper, it has fulfilled the challenges set out in the Laeken Declaration to create a "Union [that] needs to become more democratic, more transparent and more efficient."³⁹ Unfortunately, an analysis of the Draft Constitution shows that it has only brought modest visible improvements; it has not altered the *sui generis* nature of the EU. From this observation it is arguable that the portrayal of the text as a "constitution" may have been the downfall of its drafters.⁴⁰ Indeed, the term constitution is synonymous in the mind of most voters with intangibility. Furthermore, it raises expectations spectacularly – such expectations could only be disappointed by the reading of such a massive document! The EU Constitution does not revolutionize the nature of European integration and the complexity of its decision-making process persists.⁴¹

Before the Draft Constitution enters into force, it will have to be ratified by all EU member states.⁴² The votes in the Netherlands and France must be seen in the light of the fact that the Draft Constitution has been ratified by 13 member states so far. Interestingly, Malta, Cyprus and Luxemburg proceeded with the ratification process in the aftermath of the "no" votes, thus

37 Draft Constitution, above n 2, art I-7.

38 See Sieberson, above n 6, 600.

39 Laeken Declaration, above n 5, 21. The details of the Draft Constitution project a degree of increased efficiency and transparency and strengthen the EU's democratic pedigree: see Sieberson, above n 6, 599-601.

40 See, for instance, de Búrca, above n 18, 570-582, who wonders whether the Draft Constitution represents a constitutional moment or rather a simple exercise in simplification and consolidation. See also Shaw, above n 18, 148-151.

41 There is widespread agreement in the literature that serious substantive and language improvements are necessary: see, for instance, G Grevi "Light and Shade of a Quasi-Constitution -- An Assessment" (EPC Issue Paper no 14, 2004); Sieberson, above n 6, 601-615; A Dashwood and A Johnson "The institutions of the enlarged EU under the regime of the Constitutional Treaty" (2004) 41 CML Rev 1481-1518; F Naert "European Security and Defence in the EU Constitutional Treaty" (2005) 10 J Conflict & Security L 187-207.

42 Draft Constitution, above n 2, art IV-447.

demonstrating there is still significant support for the Draft Constitution.⁴³ At the same time, the decision of some of the remaining member states, following the European Council of June 2005, to delay the ratification process in the light of the rejection of the EU Constitution by French and Dutch voters, raises some concern for the future of the Draft Constitution and the European project in general.⁴⁴ In fact, the Draft Constitution should be seen for what it is. Rather than a constitutional document in a domestic sense, it simply represents an attempt to simplify the basic texts of the EU spread around a number of superseding and complementary treaties as well as an initiative to create a framework ensuring that the EU becomes "more democratic, more transparent and more efficient."⁴⁵ In that sense, the French and Dutch negative votes and the doubts emerging in a number of other member states might result more from some discontent with the way the Draft Constitution was drafted, its content defined and its vision projected than with European integration as such. An analysis of the vote in both countries shows that these referendums have been used by non-coordinated and heterogeneous left-wing, right-wing, neo-conservative and euro-sceptic movements to voice their dissatisfaction with the governments in place. In France, rejection reflected voters' anger with the government's failure to "improve the country's troubled economy, as well as fear that the treaty would erode the country's generous cradle-to-grave social safety net."⁴⁶ Similar concerns affected the "no" vote in The Netherlands. The Dutch rejection was not about hostility towards the European project, but rather a reaction to the fear of losing "two things the Dutch hold dear: sound money and liberal social policies."⁴⁷

In reality, the future of the EU is not under threat. Its existing infrastructure and routine functioning are already assured by the Treaty of Nice adopted in preparation for the 2004 enlargement to 25 member states.⁴⁸ At the same time, it is difficult to agree with the view that this hiatus in the ratification process of the EU Constitution is, as hinted in June 2005 by EU leaders,

43 In chronological order: Lithuania, Hungary, Slovenia, Italy, Greece, Slovakia, Spain, Austria, Germany, Latvia, Cyprus, Malta and Luxemburg: see "Referenda on EU Constitution - state of play in the member states" (14 September 2005) <www.euractiv.com> (last accessed 15 September 2005). In Luxemburg, the Draft Constitution was ratified by referendum by 56% on 11 July 2005.

44 Original plans to hold a referendum in the Czech Republic, the United Kingdom, Denmark, Ireland, Sweden and Portugal have been suspended or cancelled: "Referenda on EU Constitution - state of play in the member states", above n 43.

45 Laeken Declaration, above n 5, 21.

46 Bennhold and Bowley, above n 13. See also Chriqui and Christian, above n 12.

47 "The referendum in the Netherlands. Dutch nees up", above n 3. For a comprehensive survey of the factors which determined the result of the Dutch referendum, the motivations of voters and the possible scenarios for the future, see EOS Gallup Europe "The European Constitution: Post-Referendum Netherlands" (Flash Eurobarometer 172, 2005).

48 Zoller, above n 16, 391.

nothing more than a "period of reflection".⁴⁹ Hopefully, this conspicuous setback will in fact yield positive results in the long term by forcing the EU political elite to listen more carefully to their constituents, to explain better the stakes linked to the realisation of the European project and to cease sending conflicting signals about the EU's future enlargement policy to hopeful accession candidates.

For too long, European integration has marshalled support through a top-down strategy. Recent examples include the adoption of a common currency: the Euro being considered responsible for higher inflation rates,⁵⁰ and the pressure on Ireland to hold a second referendum to wipe out the rejection of the Treaty of Nice in 2002.⁵¹ The political elite has not made much effort to explain the rationale behind the greater integration process. For instance, ruling parties have done little to dissipate feelings that national governments have increasingly devolved powers to Brussels, opened the immigration floodgates and agreed to the loss of national identity, creating suspicion and outright stereotypes about the practical impact of EU policies. Also, the actual size of the document makes it difficult to digest, even for experts in the field. At the wider European level, the EU finds itself again in an ambiguous position. On the one hand, the door has been open to welcome additional members, with Bulgaria, Romania and Croatia, along with Turkey, being given the signal that EU membership is a real possibility. On the other hand, concerns about EU expansion and the feared influx of migrants from the periphery of the EU have not been addressed and economic and social policies thought out exhaustively. Overall, the fact that voters in France and in The Netherlands have rejected the Draft Constitution, despite its promises of a more democratic, prosperous and efficient Europe that is closer to its citizens, shows a deep-rooted resentment towards the EU. Only a bottom-up approach in which EU citizens are treated as partners rather than as recipients of reforms might propel the EU train forward again. It will take some time for the political elite to complete a necessary and beneficial soul-searching exercise.

Needless to say, the prospects of further EU integration look grim. Without unanimous ratification before 1 November 2006, the Draft Constitution cannot enter into force. Apprehensive of future hurdles, the member states did, however, give themselves some political latitude by agreeing to review the situation where hypothetically four-fifths of the member states have ratified

49 Mahony, above n 4.

50 Many citizens in the EU believe the Euro is to blame for the rise in the cost of living and it was one of the considerations behind the "no" vote in The Netherlands: "The referendum in the Netherlands. Dutch needs up", above n 3. 49.

51 J Downing and A Cahill "Ahern warns against the rejection of Nice Treaty" (22 June 2002) *The Irish Examiner* <www.irishexaminer.com> (last accessed 1 August 2005).

it, but one or more have "encountered difficulties" in doing so.⁵² A few potential scenarios can be anticipated.⁵³

A first scenario would see the French and Dutch rejection mark the end of the Draft Constitution, with no rescue attempt to hold a second referendum, as was the case with the Maastricht Treaty in Denmark and the Treaty of Nice in Ireland. The Treaty of Nice would continue to govern the newly enlarged EU, thus shedding some doubt on any future enlargement.⁵⁴

A second scenario could envisage four-fifths of the member states being governed by the Draft Constitution. Their relationship with the member states that did not ratify the Constitution would be governed by the current rules. Such a scenario appears highly unrealistic as member states would find it extremely impractical to work under differing rules of voting arithmetic or institutional composition.⁵⁵

A third – and most far-fetched – scenario would be the withdrawal of France and The Netherlands from the EU. Legally speaking, neither the Treaty of Rome nor the Maastricht Treaty provides for such a right to withdraw whereas the Draft Constitution does.⁵⁶ Yet, despite these legal impediments, no one would dispute that a member state clearly intentioned to withdraw could unilaterally do so as the ultimate foundation of European integration is to be found in the constitution of each member state.⁵⁷ A contrario, no member state could be legally compelled to withdraw from the EU following a refusal to ratify a treaty. Politically speaking, in view of the central role played by France and The Netherlands, especially the former, in the integration process since the inception of the Communities, it is most likely some efforts would be invested to devise ways of keeping these two founding members inside the EU.

52 Draft Constitution, above n 2, art IV-443(4) states that if, after two years from the Treaty being signed, 20 member states have ratified it and others "have encountered difficulties", the "matter will be referred to the European Council."

53 For a complete set of potential scenarios regarding the future of the ratification process following the French "no" vote, see T Chopin "Les conséquences du 'non'" (Fondation Robert Schuman, 30 mai 2005) <www.robert-schuman.org> (last accessed 12 September 2005).

54 Should some member states be willing to further EU integration, they could rely upon the provisions governing "enhanced cooperation" in the Maastricht Treaty as amended by the Treaty of Nice, above n 8, art 43. In view of the cumbersome conditions attached to the implementation of such cooperation, it seems unrealistic to expect such an outcome.

55 It should be noted that such a scenario would, however, be lawful under international public law, and in particular under the 1969 Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331.

56 Draft Constitution, above n 2, art I-60. Such a rule, however, cannot be relied upon before the Draft Constitution enters into force. On the genesis of that provision, see R J Friel "Providing A Constitutional Framework For Withdrawal From The EU: Article 59 Of The Draft European Constitution" (2004) 53 ICLQ 407-428.

57 The only example so far is the withdrawal of Greenland in 1985, which did not meet any opposition.

In the short term, the status quo is the most probable scenario with the potential of some adjustments to the Treaty of Nice where necessary, whether formally or informally. Some provisions of the Draft Constitution could be inserted in the Treaty of Nice or applied outside the EU framework. Although a series of amendments to the Treaty of Nice might be the best compromise, such a "cherry-picking" exercise would not be in the long term a panacea to the crisis of legitimacy highlighted by the "no" votes.⁵⁸

It cannot be denied that the rejection of the EU Constitution in two founding member states has thrown the EU into crisis. Whilst it could be rightly argued that the EU has for too long suffered from ambiguity regarding its final destination – an ambiguity inexorably leading to a complex institutional architecture and an uncertain legitimacy – the "no" votes could lead to a persistent and imperfect status quo, and one deeply prejudicial to the EU. There is a real risk of the EU polarising its member states and their peoples into opposing camps, between rich and poor, integrationist and federalist, old and new, East against West.

At the same time, this depth of the crisis should not be overstated. The EU institutions are still working, the European Court of Justice is still applying Community law, the member states still continue to meet and govern EU affairs. In The Netherlands, for instance, 82 per cent of the population still believe, despite the "no" vote, that EU membership is a "good thing".⁵⁹ The reality is that the "no" marks a serious delay in the realisation of the next step of the EU project, not, as commented in some circles, its untimely death.⁶⁰ This apparent setback might in fact be beneficial in forcing politicians to listen more carefully to their electorates, to better explain the European project and to stop sending conflicting signals about enlargement policy.

To start with, the text of the Draft Constitution must be streamlined to ease its comprehension by removing textual fragmentation and repetition. As it stands, the level of ambiguity opens the door to misinterpretation. Better communication is essential. Another important challenge is to render attractive again the integration process project, through sound economic policies, to those citizens who feel most disenchanted with the European project – according to the French and Dutch votes, middle class citizens as well as younger and poorer voters.⁶¹

58 "The European Union constitution. Dead, but not yet buried", above n 13. For instance, it has been suggested that those parts of the Draft Constitution (voting and decision-making procedures, election of the European Council President and EU Foreign Minister) applicable without any apparent formal amendment of the Treaty of Nice could be implemented (Graff, above n 13).

59 EOP Gallup Europe, above n 47, 20.

60 R Bernstein "2 'No' Votes in Europe: The Anger Spreads" (2 June 2005) *The New York Times* <www.nytimes.com> (last accessed 14 September 2005); "Building a Better Europe" (4 June 2005) *The New York Times* <www.nytimes.com> (last accessed 1 September 2005); "The Europe that died" (4 June 2005) *The Economist* 11.

61 Bennhold and Bowley, above n 13; Chriqui and Christian, above n 12.

Most important, however, is the duty of EU leaders to treat the public with respect. Discarding the result of the French and Dutch referendums by insinuating that new referendums could take place at a later stage can only be treated with contempt. Also, it is important that all member states accept the same rules and discipline. For instance, France and Germany demand discipline of small nations but they show contempt for EU spending rules.⁶²

In the end, EU leaders must analyse the underlying reasons for the current malaise. They must change what is wrong with the EU, safeguard what is right and open a genuine debate on the future of the EU. The EU is perceived abroad as a peaceful and trustworthy power, a model of tolerance and a powerful incentive for countries to bring their governance and civil rights up to the highest global standards. These are attributes that are not easy to earn. It would be foolish to allow the current crisis to engulf the common political, economic and social heritage achieved by the EU over the past fifty years.

62 In recent years, France and Germany have regularly breached the terms of the Stability and Growth Pact of June 1997 (Resolution of the European Council on the Stability and Growth Pact of 17 June 1997 [1997] OJ (C236) 1), adopted to ensure the stability of the Euro by calling on member states to keep their budget deficits under three per cent of their GDP. The failure of the Council of Economic and Finance Ministers to punish Germany and France for the breach of the Pact has raised concerns about the commitment of the big member states to respect and uphold it. For a good overview of the Pact and some recent issues concerning its application, see S M Seyad "Destabilisation of the European Stability and Growth Pact" (2004) 19 J Int'l Banking Law & Reg 239-250.