



## The Future European Constitution: The Polish Point of View

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**Theme:** The author presents the Polish point of view on the controversy surrounding the decision-making process by a qualified majority in the future European Constitution.

**Summary:** At the European Council's session of 25/26 March of this year real prospects of achieving a compromise on the text of the Constitutional Treaty finally became evident. The Council emphasised that 'agreement on the Constitutional Treaty should be reached no later than the June European Council'. This statement referred to the Irish Presidency's opinion that there was a real possibility of reaching a compromise on decision-making by a qualified majority, 'based on the principle of double majority', which 'must allow for greater efficiency in the decision making process than the provisions in the current Treaties, and must have due regard to balance among all member States and to their specific concerns'. In reference to other complex issues, such as the size and composition of the Commission, the scope for qualified majority voting and minimum seat thresholds in the European Parliament, the Irish Presidency considered that an overall solution could be found 'if there is sufficient political will and flexibility'.

**Analysis:** If the Irish Presidency's surmises are correct, this is good news for everyone: for the 'old' member States, for the Union as a whole, for Central and Eastern Europe and, of course, for Poland. The conflict over the Constitutional Treaty should not be overstated: sooner or later a solution will be found since the Nice Treaty (which was somewhat forgotten in the discussions in Poland) included 'a temporary institutional package' for 27 member States which will in any case have to be reconsidered on the accession of a 28<sup>th</sup> member State, while the Union can continue functioning even without a Constitutional Treaty.

However, the conflict over the European Constitution –on the eve of the Union's enlargement– brought other problems to the surface:

- In the 'old' member States it became a sign of a 'return to the past', suggesting a lack of confidence in the new member States and a considerable anxiety towards the forthcoming enlargement. Ultimately, the process was considered to lead to the weakening of Germany in the Union, undermining its position in Central and Eastern Europe, and simultaneously only apparently strengthening the Franco-German axis, since it put off the solution to the EU's power-sharing problems until later.
- It weakened the feeling of solidarity with the new member States which had gradually been built up during the previous years. This was aggravated by the turbulence caused by transatlantic disagreements on security issues and by the temptation of

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imposing a 'multi-speed' Europe by the larger 'old' member States to ensure their political leadership in the future Union.

- In Central and Eastern Europe the conflict brought narrowly domestic interests to the fore, undermining Central-European regional cooperation as an important factor for European integration.
- Finally, for Poland the deepening of the conflict led to a break in the foreign policy implemented up to its accession to the EU. It would now enter the Union in conflict with its most important neighbour, Germany, with the situation further aggravated by the poor bilateral relations resulting from the lack of a political vision for the future and consequently weakening the role of the 'Weimar Triangle' as a catalyst for cooperation in Central and Eastern Europe. The result was that Poland's intention of playing a substantial and constructive role in the Union's so-called eastern dimension (including its relations with Russia) would become a mere illusion.

Since the consequences of the deepening crisis surrounding the Constitutional Treaty project are so serious, it is necessary to reflect on the causes which led to this situation.

Most of all, the crisis revealed the weakness of the connection between the 'old' and the new member States, with poor political communication also being caused by a lack of trust, despite the long-drawn accession negotiations and membership of the North Atlantic Alliance. This political communication deficit was marked by statements such as that suggesting that it would be the best for the candidates to remain silent, revealing the apparent difficulties in accepting the change in status from candidate countries to partners. Poland's response was an outburst of political anger resulting from its sensitivity regarding its recently regained sovereignty (which is not fully understood in Western Europe), further aggravated by a difficult, not to say catastrophic, domestic political situation (which was also not taken into account by the 'old' member States).

The dilemmas facing the 'old' member States derive from the fact that the Union's population will not only double but that the differences between member States will dramatically increase –especially from the point of view of their economic capacity–. Thus, ensuring –in the new conditions– the capacity and coherence of the future Union is a substantial challenge. However, the method adopted to reach a solution during the Convention and in the initial stages of the Inter-governmental Conference (IGC) was more than problematic. Furthermore, the 'old' member States had great difficulty in agreeing on a common position, being unable to subsume their own national interests, although the much criticised Nice Treaty was of their own creation, while the impact of the candidate countries on the IGC 2000 was very limited. Neither did they take into account that strengthening 'the EU Community area' is in the objective interest of the new member States.

Consciously or not they chose the following methods:

- The *fait accompli*. Among other things, there was a lack of detailed discussion in the Convention regarding the formula for making decisions by a qualified majority: objections were ignored and the procedure was speeded up, leaving no time for discussions afterwards (which –particularly in Poland– would have been indispensable) and leading to the establishment of the IGC before the enlargement of the Union.
- The 'back against the wall'. Last year in Brussels the discussion at the highest political level was reduced to a 'yes or no' solution, with no deeper exchanges of views taking place. If there had been a greater exchange of views in the first months of 2003 the

later debate would have been different, especially in Poland (at least among experts), where the advantages of the so-called 'double majority' were underestimated.

Furthermore, Poland failed to act effectively: Polish diplomacy realised too late that decision-making by a qualified majority was one of the most important decisions proposed by the Convention, while the Convention itself was treated almost until the end as merely a kind of 'scientific seminar'. Deficient political communication with the main players in the debate, France and Germany, led to positions being radicalised. Superimposed on this was a growing domestic political crisis that led to certain especially negative consequences:

- Following the June 2003 accession referendum the general attitude towards the Union reversed under the influence of increasingly populist agitation resulting from the confrontation between the ruling party and the opposition.
- With such a domestic political situation the government's stance became 'Nice or death'. Getting out of the deadlock was not made easier by the EU blaming Poland for the crisis and thereby covering up the essence of the problem.

#### *A possible area for compromise*

The conflict had a mainly political character but there was still substantial room for manoeuvre to reach a compromise. A detailed discussion was however needed. A compromise could –at least theoretically– be found in the Nice formula and the formula proposed by the Convention:

- A compromise based on the Nice formula could be based on differentiating the decision-making power of the various member States, especially in the group of larger states –to the advantage of Germany–. It could also be based on making the decision-making process more flexible by lowering the percentage threshold of weighted votes necessary for approval or blocking. Other interesting ideas were also presented.
- A compromise based on the double majority formula proposed by the Convention could have several variants, depending on the number of States necessary to approve a proposal (over 50% according to the Convention's proposal) and the required demographic representation (at least 60% in the Convention's proposal). There were also suggestions that the demographic threshold could be made more flexible in a way similar to the so-called 'Ioannina compromise'.
- A further independent solution appeared in the guise of the so-called *rendez-vous formula*, whose essence was to empower the Council in the Constitutional Treaty to decide on a formula based on a qualified majority. Obviously, the decision had many controversial aspects, mostly concerning the mechanism by which the Council would make its final decision (whether unanimously, by a qualified majority or in any other way).

In order to reach a compromise, on the one hand what should be taken into account are the interests of Poland and Spain, which by virtue of the Nice Treaty were provided with an especially strong position. On the other hand, it should also be considered that the double majority ensures a greater flexibility of the decision-making process and simplifies it. While the 'double majority' would allow the larger States, such as Germany, to fulfil their full potential in the decision-making process, the Convention's proposal –especially the proposed 60% demographic threshold–would allow them to do so at the expense the 'medium-large' States (ie, Spain and Poland). This assessment is corroborated by the so-called Banzhaf index.

Finding a compromise therefore requires a detailed discussion of the existing possibilities. Poland and Spain consider it essential to retain the decision-making power resulting from the Nice Treaty although it might also be guaranteed within the framework of the double majority but providing some form of political compensation in institutional terms (mainly in the allocation of seats in the European Parliament). Eventually, a coherent decision-making process for the future Union must be adopted, but not just as regards the formula itself but also (and perhaps more importantly) about the areas in which the qualified majority mechanism is to be applied.

#### *Possibility of a compromise*

If no compromise is reached, and thus no Constitution adopted, the situation would be politically disadvantageous from all points of view. There would also be negative consequences of a legal and political nature. The Nice package has a temporary nature as it is envisaged for a 27-member State Union. The possibility of incorporating a 28<sup>th</sup> state would again force the Union to fall back on a qualified majority and an appropriate solution would have to be established in the subsequent accession treaty (alternatively it would be necessary to call another Inter-governmental Conference on the basis of Article 48 of the EU treaty). Placing such a burden on future accession negotiations would be very risky. The conclusion appears to be clear: the Constitution should include a decision-making formula by a qualified majority.

A further problem would be to determine the date on which the new qualified majority system should enter into force. Most of all it should be noticed that the Nice agreement will be formally in force until the accession of the 28<sup>th</sup> member state. The Convention's proposal sets the entry into force of the new formula for 1 November 2009 (it does not explain how the system will work if before that date the number of member States exceeds 27). It is therefore worth considering the relation between the entry into force of the new qualified majority and accession to membership of the EU by the 28<sup>th</sup> member state. Such a solution would guarantee a gradual transition from the Nice system to the new qualified majority system. The application of the *rendez-vous* formula might also be considered in this context.

As to the actual formula itself, it will doubtless be based on the so-called double majority. As mentioned above, such a formula might –in principle– be accepted by Poland if it retains 'decision-making power' comparable to the position guaranteed by the Nice Treaty. This could be achieved in two ways:

- By considering the thresholds of states number and population potential required to the decision making.
- By establishing specific rules for achieving a blocking minority.

In the latter area some very interesting proposals have appeared recently, setting blocking minorities as a combination of a certain population percentage along with a specific number of States. The system should seemingly guarantee –within the framework of the double majority– an acceptable decision-making power (comparable to that guaranteed by the Nice Treaty) to the 'middle-large' states (Spain and Poland). A disadvantage of the proposal is that further enlargements will make it necessary to redefine the number of states required to establish a blocking minority. Perhaps it would be better to decide on the number of States required to establish a blocking minority in another way –eg, at one-fifth (ie, five with 25 member States)?

Finally, it should be borne in mind that a compromise regarding decision-making by a qualified majority must also take other circumstances into account. On the one hand, it should be considered that the larger member States renounced a commissioner in the course of the present enlargement process and that they are justified in expecting some

form of political compensation. On the other hand, decision-making by a qualified majority in the Council is connected with the allocation of seats in the European Parliament: the areas covered by qualified majority decisions are usually covered by the 'co-decision procedure' (Article 251 of the EU Treaty). Some compensation for the interests of Poland and Spain could also be sought in this field.

**Conclusions:** The aim of the IGC is not only to decide upon a compromise to make possible the signing of a Constitutional Treaty, but also to make it possible for the Treaty to be ratified, ie, to ensure its political and social acceptance in each of the member States.

It should be borne in mind that the domestic political situation in Poland is especially difficult and that prospects for the next few years remain unclear. In any case, the attractiveness of populist arguments is on the increase (and not only in Poland). The two or three years subsequent to entry into the EU will be difficult, as was the case with the 1995 enlargement which involved countries that had far more stable political systems than Poland has at present.

What should be the response to such a challenge? In Poland it is indispensable to create a pro-union platform, over and above the present political parties, to ensure ratification of the Constitutional Treaty. Ratification will be difficult, since what is required is the consent, either expressed in a statute adopted by a two-thirds majority in both chambers of parliament or by consent as expressed in a nation-wide referendum of more than half of those entitled to vote. It is evident that, under the currently unstable political circumstances in Poland, the creation of a such a multi-party platform will be complicated while the incentive to engage in populist manipulation will be significant.

Such a situation must be taken into account by the 'old' member States. A substantial change from the methods employed in previous years is necessary: patience, detailed and insightful analysis of the problems involved and a balancing of interests will be required while the new member States adapt to the new decision-making mechanisms.

The compromise agreed on in the IGC must meet the approval of not only the political elite but most of all it must gain social acceptability: it will then be the time to start benefiting from the opportunities of the closer regional and local contact fostered by the Union.

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