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AN ITALIAN STRATEGY FOR RELAUNCHING THE EU CONSTITUTIONAL TREATY

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Rome, IAI, May 2007

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1. The need for clarity

The subject of the European Union's institutional future is once again at the top of the European agenda – the European Council at the end of June 2007 will be dedicated to it – and a deadline has been set (the 2009 European Parliament elections) for the entry into force of the new rules.

The reopening of the debate on this issue responds to an inescapable need for clarity. Almost seven years have gone by since the Nice Declaration on the Future of Europe, six since the analogous and more detailed Laeken Declaration, five since the opening of the Convention in Brussels, almost three since the solemn signing of the Constitutional Treaty (CT) in Rome by all member states. Now that eighteen of them have ratified it, it's time to exit from this situation of ambiguity and uncertainty.

That there would be a pause for reflection after the shock of the French and Dutch "nos" was to be expected. But the pause cannot go on forever, blocking all alternatives. Without the reforms that it so urgently needs, the EU cannot live up to the expectations of its citizens and keep apace of contemporary global challenges. Further enlargements are also now far more problematic. And that's not all. It would be wrong to consider the results achieved up to now irreversible: a prolonged stalemate could trigger a process of involution, if not the actual disintegration of the European construction.

What is needed therefore is an open and loyal discussion on the future of Europe – soon. This is demanded by the basic obligation of good faith and correctness that is imposed on member states, especially those that have not yet ratified the CT. Hopefully, such a discussion will give rise to an agreed blueprint for a common house. The premises for such a general agreement exist; should difficulties prevail however, alternative solutions must realistically be considered.

It is not surprising that there are differences on the future of Europe in a community of 27. But it is in the interests of all to overcome this period of stalemate which can generate dangerous frustrations and tensions. Each country is free to decide whether or not it wants to adhere to the new Treaty. But it must be clear to the dissenting countries that they cannot keep the others from pursuing the objective of an "ever closer union". Especially if "the others" are a large majority of European governments and peoples. It can only be hoped that, should insurmountable differences nevertheless arise regarding the new Treaty, an agreement can be reached between the two sides that would accommodate their positions towards the EU with reciprocal satisfaction.

2. A difficult compromise

For objective reasons, two distinct camps have formed around the issue of the future of the Constitutional Treaty: on the one hand, the eighteen states that have already ratified, plus the two (Portugal and Ireland) that declared themselves "friends" of the European Constitution, and on the other, the states in which the "nos" prevailed in the referenda and the five remaining states that have postponed ratification. The former believe that the ideal solution would be to leave the Constitution as it is; the latter call for substantial changes, some of them would even prefer to shelve the Treaty altogether.

It is clear that the two groups' positions are mutually exclusive. If an agreement is to be reached, a compromise will be inevitable. But on what terms? Those in the first group are right in claiming that the second group has to make the biggest negotiating effort since they are the ones who created the problem in the first place. But the difficulties of the non-ratifying states cannot realistically be overlooked if a positive outcome to the negotiations is desired.

Thus, a solution will have to be sought that satisfies both requirements: those of the ratifying states which cannot give up the essential points of the CT, and those of the non-ratifying states, which rule out presenting again a text that is substantially unaltered and has been rejected by popular vote or strongly criticised domestically. It is unlikely that any solutions that do not take these dual requirements into account will be successful.

Numerous ways to overcome the current stalemate in the ratification process have been proposed in recent months. The main options are the following:

- Nice plus
- The CT as it stands
- CT plus
- CT minus.

3. Two solutions that are unfeasible

Nice Plus. Simply adding a few provisions to the Treaty of Nice would mean throwing out two years of negotiations in the Convention on the Future of Europe and the various decisions of the European Council, in particular the fundamental one in Laeken in 2001. It should not be forgotten that the text of the Constitutional Treaty was signed by all 25 member states and was set as a condition for entry for Bulgaria and Romania, which ratified it while entering the European Union. It is true that the European Defence Community Treaty of 1952 was signed by six states, including France which later rejected it. But this rejection was essentially due to the fact that it was too advanced for the time and hard to digest only a few years after the war (it called, among other things, for a European army). The same cannot be said of the CT which is a continuation of institutional reforms begun in 1986 with the Single European Act.

The CT as it stands. Keeping the CT unaltered would avoid reopening long and difficult negotiations like the ones that led to its drafting in the Convention and subsequently the Intergovernmental Conference. Should this hypothesis prevail, all political efforts would have to be concentrated on convincing the states that have not already done so to ratify the Treaty. The first targets would be the two governments that defined themselves as "friends" of the Constitutional Treaty in Madrid, Ireland and Portugal (among other things, the latter will hold the next EU Presidency); the next would be Denmark and Sweden, which seem to be relatively open on the issue. But apart from the fact that it's too late for this hypothesis since the European Council of June 2007 has already been tasked with discussing the reopening of negotiations, it is also intrinsically weak since France and the Netherlands cannot present the same text for ratification again. Both countries have ruled this out. Furthermore, the United

Kingdom and Poland (and to a certain degree the Czech Republic) have already *de facto* rejected it without undertaking the ratification procedure.

4. Two possible solutions

CT plus. This is the position upheld at Madrid by the Eighteen, as well as by the two "friends" already mentioned. It involves leaving the text as it is and adding a strong emphasis on the social aspects of the European Union (the social charter) and a list of policies perceived as important by the European public, ranging from environmental policy and criteria for enlargement to energy security, immigration and economic governance. This would bring together those who give priority to actions and policies with those in favour of improving the functioning of the institutions in order to make the policies more feasible and effective.

The proposal nevertheless comes up against some important obstacles: first it would mean presenting the same text in France and the Netherlands that has already been voted upon, even if enhanced with policies of a social nature. Furthermore, it would mean weighing down even further the Treaty's text – already difficult to comprehend – with policies, procedures and institutions, and making policies less flexible by conferring upon them a constitutional nature. Finally, it would mean opening negotiations on particularly thorny questions relating to the kinds of policies to be included in the Treaty, on which it would be hard to come to an agreement quickly.

CT minus. This solution is in some ways symmetrical but opposite to the preceding one. Instead of adding things to it, it would reduce the current text. Cuts could be more or less extensive. Proposals range from a mini-Treaty limited to taking up a few of the institutional reforms, to a "core Treaty" which would contain all the main innovations of the CT. For some, such a reduced Treaty would complete the reform process; for others, it would only be the first step in a two-step process: a mini-Treaty now and a new Treaty with more incisive reforms at a later date.

The "CT minus" solution is seen as the lesser evil in Euro-sceptic countries; moreover it would allow those countries in which the referenda failed to claim that the new Treaty is different from the old one. There would nevertheless be two difficulties: the reluctance (not to say downright opposition) of the "friends" of the Constitution to accept cuts (or postponements) to a text that has been discussed at length, is already the product of compromise and has been ratified by eighteen countries. In addition, it could open a "Pandora's box" – the reopening of negotiations and the consequent search for a problematic balance between the parts that can and cannot be deleted from the text.

5. A two-tier Treaty

A simplified and re-ordered architecture. It is unlikely that the new Treaty can be directed wholly in either one of the two directions outlined above, neglecting the other. It is much more probable that some "pluses" will be balanced with some "minuses". In any case, additions and cuts will presumably be modest as more important changes in either direction would be unacceptable to the two opposing sides. Might it not be

desirable then to try a different tack, involving not only the Treaty's contents but also its architecture?

The Nice Declaration already underlined the urgent need for the simplification of the Treaties. In fact, the EU system as it stands today is highly complex. While this can be explained by the pragmatic and discontinuous way in which it developed, it makes it foreign and inaccessible to European citizens. The same need for simplification and re-ordering was reiterated in the Laeken Declaration.

The Constitutional Treaty made considerable progress along this line: it overcame the dualism between Union and Community, eliminated the division into pillars, unified the Treaties and reduced the myriad EU acts to a few well defined typologies. It did not however eliminate one complexity of the European system that has characterised it from the beginning, the simultaneous presence in the treaties of statutory or constitutional elements and provisions regulating specific sectors (sometimes in great detail). A structure like that, justifiable at the time of the European Coal and Steel Community which dealt with a single sector, became less justifiable with the European Economic Community and even less so with the European Union and the progressive expansion of European competences following the various revision Treaties, from the Single European Act to the Treaty of Nice.

The CT only partly remedied this problem, grouping the principles and basic institutional structures in Part One and regulations for EU policies and modalities of functioning in Part Three. Actually, Part One is closely connected to Part Three by means of a number of references. In addition, Part Three contains various provisions that, by their nature, should be located in Part One. If you add – perhaps most importantly – that the two groups of rules are put on the same plane formally in that they are contained in the same act, under the same denomination (Constitution) and with the same (or almost) procedures for revision, the result is a ponderous text, in terms of both size and contents. One that does not seem to conform to the usual models of constitutional charters and continues to be difficult to understand by European citizens (and voters).

Two tiers: a fundamental law and an organic law. The reopening of negotiations provides the opportunity to bring to completion the rationalisation started but not completed. It would be a good idea to distinguish between two kinds of provisions, which should be placed on two different levels. The first would represent the essential nucleus of the EU system, its founding and constitutive principles, in other words, its fundamental law. Belonging to this level are all those provisions that describe the objectives, the values, the competences and the institutional framework of the EU, plus its relations with member states and with European citizens. These are the ones contained in Part One of the CT, as well as some of a similar nature contained in Part Three (for example, those referring to the European diplomatic service, structured cooperation in the field of defence, new budget regulations). To them should be added, after some adaptation, the last provisions of Part Four. All are of the utmost importance for the EU's normative system. They can not be derogated by any member states: it is unthinkable that a state that does not accept them fully could be part of the EU. These provisions call for a stable commitment over time; as a result, the procedure for their revision could still be the one envisaged for the revision of Treaties (convention, IGC, ratification by all members).

The second level of provisions is composed of those that regulate EU policies and the functioning of its institutions. These are the provisions contained in the current Part Three of the CT, minus those that would be included in the first level. To a large extent, they are provisions of the Treaties already in existence, except for a few innovations (relative, for example, to CFSP and ESDP), which should be maintained. These provisions are more of a legislative than a constitutional nature; they do not call for that kind of stability and inderogability that the provisions of the first group do. By their very nature, these provisions call for more frequent amendments to account for changes in circumstances and political trends. Greater flexibility regarding the procedure for their revision and for the concession of derogations (opting out) would therefore be justified. The revision procedure could be simplified (no ratifications, approval by qualified majority) and as for the opting out of dissidents, it could allow for a further reduction in unanimous decision-making in favour of the ordinary decision-making procedure (codecision, double majority).

In a word, the provisions of the second group would in some way be downgraded (or "deconstitutionalised"). While the provisions of the first group constitute the "fundamental law" of the Union, those of the second represent a kind of "organic law", a law subordinate to the fundamental law, but at the same time superior to ordinary European legislation which would have to conform to it (as well as to the fundamental law).

It goes without saying that an innovation of this kind would have to adhere to the revision procedure set down in Art. 48 TEU. At the moment, all the norms contained in the existing Treaties are put on the same level and revision of them is subject to the same procedure. Therefore, none can be "downgraded" without the approval of all member states. The distinction between "fundamental law" and "organic law", as well as the setting of simpler revision rules for the latter would only enter into force in the future and only if the new Treaty were ratified.

Elements of continuity and discontinuity. This would create a new two-tier architecture, one based on the current Part One of the CT, the other on Part Three. The Charter of Human Rights, the current Part Two, would remain a separate document, outside of the new Treaty. This is not to diminish its essential role within the EU, but it presently is a stand-alone text and its inclusion as a whole would in some way weigh down the "fundamental law". Nor should it be rewritten, given the delicacy and difficulty of a job of that kind. It would suffice to insert a clause to grant the Charter binding force and establish it as the primary source of the fundamental rights protected within the EU.

In this two-tier architecture, the two normative blocks of which it is made up would have to be distinguished not only by the material and formal elements described, but also by the use of different names. The first level block could be called basic Treaty or fundamental Treaty. It would be best to avoid the word Constitution, which has caused such perplexity and widespread fears (particularly frightening is the connection between Constitution and state). For the other block, the name could be Agreement, Convention, Protocol. In summary, there would be a Treaty that adopts a fundamental law for the EU, integrated by an Agreement (Convention or Protocol) that establishes an organic law, or if a single act is preferred, a basic Treaty for the EU divided into two parts, one for the fundamental law and the other for the organic law.

This solution would respond to the need for simplification and re-ordering of the European system so strongly felt. On the other hand, it could also provide a reasonable compromise between those who do and those who do not want to change the CT. A two-tier Treaty would have elements of both continuity and discontinuity with respect to the current text: continuity with regard to the contents, which would remain basically unaltered; and discontinuity as regards the structure, which would be quite different.

In the new architecture, the centre of gravity would be the first level of the Treaty, the EU's fundamental law, a text that identifies the basic features of the Union in a concise and comprehensible way. European citizens' attention would be directed to it. As a consequence, the importance of the second level, that of the organic law, would be attenuated, and perceived by the public opinion as a substantial re-ordering of existing provisions.

6. Procedure

What is about to begin with the decisions of the European Council next June is not an *ex novo* revision procedure of the Treaties, but the continuation of an ongoing procedure, which remained open in spite of the French and Dutch "nos", as confirmed by the latest ratifications of Finland in December 2006 and of Bulgaria and Romania upon adhesion in January 2007.

Since the procedure is not starting from scratch, it can be simplified. Thus, a new Convention may not be required, in that the work of the last one in preparing the constitutional text is still valid. This does not mean renouncing a practice (the conventional phase prior to the intergovernmental conference) which should now be considered acquired. As for ratifications by the Eighteen, the Treaty would have to be ratified again only in case of substantial changes to the preceding text. Otherwise, the previous ratification should suffice or require confirmation in a simplified form.

For approval of the new Treaty, the idea of a pan-European referendum to be held on the same date throughout the EU has been put forward. This solution should be taken into consideration for future revisions. But at the moment, it does not seem to be compatible with the provisions in force, which call for ratification by the individual states in conformity with their respective constitutional rules. Its introduction would require a prior agreement among all partners, that would probably have to be ratified within each. It must be added that a pan-European referendum would put all member states on the same plane – something which might not be considered politically acceptable by the states that have already ratified the Treaty.

If the deadline of the European elections in 2009 is to be respected, as repeated in the recent Berlin Declaration, action must be taken now. The European Council of next June will have to produce a green light for the intergovernmental conference with a "closed" rather than generically open mandate, and a calendar for procedures. In turn, the work of the intergovernmental conference will have to be concluded in the second half of 2007, so that the new text of the Treaty is ready for signature no later than the beginning of 2008. That would leave an entire year for completion of ratifications.

An intergovernmental conference can also be convened by the Council by majority, as occurred in 1985 in view of the Single European Act (Mrs. Thatcher was opposed to it). Instead, the approval of all governments is necessary for the signing and adoption of the text of the new Treaty in its entirety, as is ratification by all member

states to allow it to enter into force. Simplified procedures will only be valid in the future. Yet some deadlines could be set for signature and ratification. If they were, each member state, notwithstanding its freedom not to sign or not to ratify, would be obliged to announce its intentions by the set date. In fact, ratification procedures of the new Treaty could also take place at the same time throughout Europe: the European Council could decide to have all ratifications or possibly referenda carried out within a very short period of time – a few days. European public opinion and the parliaments of European countries would then have the perception of being involved in a common act of value more for Europe than for their home country.

Is the 2009 deadline by which the Union should be placed on a renewed institutional basis, unrealistic or inappropriate? The representatives of some Euro-sceptical governments stated this at the recent Berlin meeting. This opinion must be countered. There is no time for further delays. As already underlined, the future of Europe has to be clarified rapidly. The very short time allowed for ratification and, as a consequence, for the work of the intergovernmental conference, must somehow be taken as a warning. If, by that deadline, a satisfactory agreement (not just any agreement) among all member states has not been reached, those states wishing to advance towards integration will be able to take this into account and start to think of new ways to go ahead – a kind of plan B by which a broad majority of European states and people can choose to "opt in" to the new Treaty or devise other solutions to refound the European Union. This is a hypothesis to keep in mind in the event – not to be excluded – that the European Council of next June comes to no conclusion.

7. Political alliances and Italy's role

We are faced with a series of extremely delicate political and decision-making steps. Therefore, it is time to turn to the subject of the alliances required to approve the idea of negotiations that basically leave the CT intact, while simplifying and rationalising its structure, as mentioned earlier.

- The starting point is, once again, France. Although it has sidelined itself and now plays a role that is less central that it was fifty years ago, it is essential that the country be brought back into the logic of the CT. This is beyond discussion in that it is impossible to imagine a European Union without France.
- The second point is that the motor of European integration is still agreement between Paris and Berlin, even if this is no longer the only engine, as in the past. Nevertheless, the original finality of the European Union and its internal security cannot realistically do without strong agreement between the two capitals, in particular on institutional reform. The French-German motor may work intermittently and poorly, but has to be repaired if the European integration process is to continue.
- While France and Germany are necessary elements, it is evident that they are not sufficient to avoid minimalist solutions as regards institutional reform. A large coalition of countries must be built up that represents a "qualified" majority of Union members and people. The reference groups cannot be the 13 Euro countries nor the Schengen countries: they can act as support groups, but their representativeness with respect to institutional reforms is not strong enough. The reference group has to be the Eighteen that have already ratified the CT, plus the

two "friends" (Ireland and Portugal) and the undecided (Sweden and Denmark). This grand coalition, once France has been brought aboard, could constitute the "qualified" majority group that will be tasked with persuading even the most reluctant partners (the Netherlands, Poland, Czech Republic and, naturally, the United Kingdom) to approve the new version of the Treaty – those countries that, were the new Treaty to be rejected, would decide on an "opting in" described earlier.

In this scenario, Italy is faced with two tasks: the first is to adopt its own proposal for the opening of negotiations; the second is to help in "coalition building" and exert pressure to favour an agreement that safeguards all the most important aspects of the CT.

- As concerns our own negotiating line, the two-tier Treaty proposal just described could achieve two ends. On the one hand, it could safeguard those aspects of the Treaty that interest our country the most, on the assumption that deepening the integration process is still an essential part of Italy's conception of Europe and of its national interest. On the other, it could offer the other European countries an instrument of compromise between those that do not want to touch the CT and those that would like to modify it in part or entirely. Above all, having our own proposal for a solution during negotiations can help us assess with greater clarity the room for flexibility and compromise with respect to alternative proposals.
- As for "coalition building", pressure must be put on Paris and Berlin to take action in the direction and within the timeframe required. Even if it is important to support the German presidency, it would be a mistake to look only to Berlin. Favouring an agreement between the two key countries could help make it more credible and acceptable to the others. "Europeanising" agreement between France and Germany has traditionally been one of Italy's more positive tasks and it could once again help to launch the necessary "entente" between Paris and Berlin. The next action would be to enlarge consensus in agreement with the future presidencies towards and beyond the reference group of the Eighteen.

In supporting this strategy, our government must be able to count on the backing of the competent commissions in the Italian parliament and possibly a mandate from the entire Italian parliament.

8. European Union: objectives and new generations

The negotiations for the revision of the Constitutional Treaty cannot be confined behind the closed doors of an intergovernmental conference, even if it is bound by a mandate that preserves the work carried out in a transparent and democratic way by the Convention that drafted the CT. It has to be accompanied by a public debate not only on EU policies, but on the very finalities of the European integration process.

It is impossible to think that, however improved and simplified as described here, the text of the Treaty would be able in and of itself to persuade national public opinions to approve it. To say, for example, that without reform of the Treaties, an EU of 27 cannot be properly managed or that it cannot work effectively outside of its

borders without the new instruments envisaged in the CT is not in itself enough to obtain consensus, as proven by the French and Dutch referenda.

Given that this is a new Treaty and not simply a revision of previous ones, it may be a good idea to take up once again the basic issues which, after fifty years, still justify the progress to be made along the road to integration. These are objectives that the older generations jealously cherish in their memories, but which have to be transmitted to the new generations, destined to decide on the future of the European Union. Objectives that have to be updated to the new times, but above all that have to become part of the patrimony of young people today, without the contribution of whom the integration process could die out.

To this end, the Berlin Declaration on the fifty years of the Treaty of Rome could be a useful starting point, in particular the less celebratory part of it that looks to the future. It underlines the need for European states to proceed together in the construction of the EU to safeguard and disseminate the values on which it is based. It is our opinion that a broad debate should be promoted, as the Commission has attempted to do with the triple D (democracy, dialogue, debate) initiative.

Definition of the finalities of the European Union is certainly more complex and less immediately comprehensible today than it was at the end of the Second World War, when pacifying the continent was an absolute priority. Yet, the basic elements still exist, even if they have to be updated to the new challenges.

Saving democracy and integration, internal and external security, multilateralism and global challenges are sets of objectives that still represent the nature of the integration process and the links between the goals of the past and the requirements of the present.

Protecting democracy and integration. It has to be reiterated that the nature of the integration process is *per se* a factor of real democratisation and that the member states that participate are strongly conditioned and "protected" by this original characteristic intrinsic to the Union and its multilateral nature. Under this common roof, the rule of law has been strengthened, the four fundamental freedoms of movement have become widespread, the project of a social state has been protected, diversity and subsidiarity have been enhanced. Therefore, there should be less talk about democratic deficit and more about the democratic model embodied in the very concept of the integration of states, a finality that can now be projected beyond the EU's borders with neighbourhood and enlargement policies.

Internal and external security. While the founding element of the integration process was internal security up to 1989, meaning the elimination of the possibility of war among the EU's member states and, in particular, France and Germany, since then internal security has become a dependent variable of Europe's ability to project stability and security externally. Hence the new requirements of stability and projection of security to the EU's neighbouring regions assigned to the CFSP/ESPD since the Maastricht Treaty. The CT simply consolidates and increases the effectiveness of this new role and responsibility, already manifested with policies of development aid and reconstruction in crisis areas. Then again, external stability is a precondition for internal security, especially in those fields of "civil/soft" security such as the integration of immigrants and management of their flows which continue to be among the foremost concerns of the European public. It is on this that the political message must be focused.

Multilateralism and global challenges. Finally, Europe represents the most advanced and effective model in the world of shared sovereignty and regional political and economic integration. In addition, the EU's international action has long been based on a vision and the practice of multilateralism, which considers international organisations – in particular the United Nations – as the source of legitimacy for international behaviour. If, in recent years, the decision of the United States to launch its intervention in Iraq without the authorisation of the UN has weakened multilateralism, it risks being further jeopardised by the rise of a multi-polar system in which other great powers (Russia, China, India, Brazil) come onstage alongside the United States as the main actors in international relations. The danger is that, in such a new context in which multilateralism and therefore the rule of law give way to a renewed concert of great powers, the EU would play a secondary role. Thus, the EU must prevent the development of a scenario in which global governance is replaced by new forms of competition among major regional blocs. At the same time, it must ensure that the multilateralism that the EU promotes is really effective and able to deal with the main threats to international security, which range from challenges to the environment and the spread of infectious diseases to financial and monetary instability and international terrorism.

Consequently, a new and broad public debate must be undertaken in parallel to the diplomatic and political negotiations among EU governments. This debate has to be aimed specifically at the younger generations in order to share with them the project of European reform and its dynamic development.