

European Policy Brief

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What happens if the Constitutional Treaty is not ratified?

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1. Ratification of the Treaty establishing a Constitution for Europe requires unanimity amongst the Member States. The Constitutional Treaty will not enter into force if one or more Member States fails to ratify in accordance with their national constitutional requirements. Such flexibility as will exist for future amendments once the Constitutional Treaty has entered into force (Article IV-444 – the simplified revision procedure) does not apply to the initial ratification. Non-ratifying states could be said to be ‘vetoing’ the Constitution. In practice this terminology hardly seems apt for the situation of non-ratification. It may well be the case that in a national referendum the debate is dominated by national issues rather than the question of whether the Constitutional Treaty is the correct way forward, both collectively for the EU and its Member States, and individually for the specific state which is holding the referendum. In that context, the citizens would not in any sense be seeing themselves as vetoing the Constitutional Treaty in the same way that a Member State voting ‘no’ in the Council of Ministers to a piece of EU legislation which requires a unanimous vote must undoubtedly see itself (and wish to portray itself) as exercising a veto.
2. It is possible that the ratification process for the Constitutional Treaty may be very difficult. More than ten Member States will hold referendums – possibly many more. Although the European Parliament is calling for a consolidated and

CONTINUED OVERLEAF

EDITOR'S NOTE

This is the sixth in a series of regular *European Policy Briefs* produced by the Federal Trust. The aim of the series is to describe and analyse major controversies in the current British debate about the European Union. Forthcoming papers will consider the possibility of a ‘two-speed Europe’ and the changes made to the EU Constitution by the IGC.

We would welcome comments on and reactions to this policy brief. It and its successors will be available on the Federal Trust's website www.fedtrust.co.uk

Brendan Donnelly (Director, Federal Trust)

coordinated approach to ratification, in practice each of the ratification processes is likely to be a national issue, contextualised in different ways by European issues and especially the relationship between each Member State, its partners and the EU institutions. The most that is likely to occur is that there may be a coordinated information and communication campaign, in which the European Parliament plays a central role. Ratification will be drawn out at least into 2006, and possibly well beyond, especially if one or more Member States hold more than one referendum. In that case, the question will arise as to the timing of the next Enlargement of the EU, likely to involve Romania, Bulgaria and Croatia. Should they accede on the basis of the Nice settlement, and ratify the Constitutional Treaty later? Or should accession be delayed until the Constitutional Treaty comes into force, so that the national accession referendums themselves are conducted on the basis of the Constitutional Treaty?

3. Declaration No. 30 appended to the Constitutional Treaty will apply to the scenario of non-ratification:

The Conference notes that if, two years after the signature of the Treaty establishing a Constitution for Europe, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council.

Since it has already become practice for the European Council to debate questions arising from ratification difficulties, it is hard to see what this adds to the existing arrangements, other than to institutionalise the role of the European Council, and to signal that all have been aware, throughout the process of reform, of the possibility of non-ratification by one or more Member States. No one could claim to be surprised if this eventuality transpires.

4. The question of ratification could provide some clues on the related question of whether the envisaged future arrangements for the EU based on the Constitutional Treaty represent a 'treaty' or 'constitution'. It is clear that at best the current process of transformation and reform might produce

a mixed arrangement for the EU, with elements of constitutionalism in the classic sense combined with a framework which continues to rely upon international law. *Pace* the Commission's attempts to imagine some other more flexible scenario for ratification of the Constitutional Treaty in its 'Penelope' contribution, it is hard to see how the current constitutional settlement for the EU, rooted as it is in international law, could be altered otherwise than as a result of the common consent of the Member States. That is not to say that all the Member States would necessarily have to be involved in any future constitutional settlement. It is perfectly possible under both international and national law to envisage a situation in which the Member States decide unanimously for the future to divide up into two or more groups, or for ratification of a future treaty to be associated with the voluntary withdrawal of a dissenting Member State, thus removing the impediment to ratification by the remaining Member States. All such arrangements would need to be fitted into the national constitutional settlements of the various Member States.

5. In broad terms, ratification in the Member States will involve national parliamentary consent and/or a binding or advisory referendum. In some of the Member States organised as federations there is additional input from the regional or state level. Strictly speaking in the United Kingdom, ratification of an international treaty requires merely an executive act on the part of the Foreign Secretary, acting on behalf of the Crown, in exercise of the Royal Prerogative. However, the so-called Ponsonby Rule since the 1920s has effectively required that a treaty subject to ratification be laid before Parliament for 21 sitting days before ratification, for information and to give Parliament the opportunity to debate such a treaty. In practice, ratification of treaties such as the Constitutional Treaty requires an Act of Parliament (an act amending the original European Communities Act 1972), because of the domestic and budgetary effects of such amending treaties. This also extends to accession treaties, which also require an act of Parliament. In addition, it has been announced – but few further details are available at present –

- that the UK will have a national referendum, after a parliamentary process has been undertaken. Such a referendum could be made binding in the sense that the Act of Parliament providing for its occurrence could make ratification contingent upon a 'yes' vote. However, since Parliamentary sovereignty would continue to apply, it would be conceivable that such a Constitution or Referendum Act itself could be repealed by a further Act of Parliament reverting to the conventional parliamentary system for ratifying EU treaties which the UK has used hitherto.
6. Unless the entire Constitutional Treaty project has already foundered by that time, the UK referendum is likely to be held in the first half 2006 – after an anticipated General Election (probably May 2005), after the end of the UK Presidency (second half of 2005), and before the beginning of the World Cup Finals in June 2006 (it would be rash indeed to hold a referendum on EU-related matters in the United Kingdom during a major football tournament to be held in Germany, especially when many in England believe this country was robbed of the 'right' to host the tournament in 2006). The circumstances in which the holding of a referendum was announced in April 2004 by Prime Minister Tony Blair have already given rise to much media comment. There was no debate in Cabinet about the proposal before it was announced in Parliament. It would appear to have been a tactical move on the part of Blair with a view to the performance of his party in both the European Elections of 2004, and the anticipated General Election of 2005, and to remove a rhetorical weapon regarding the role of plebiscitary democracy from his political opponents.
 7. Non-ratification of the Constitutional Treaty will involve both questions of law and questions of politics. Ratification is a legal process and a legal requirement, governed by aspects of international law, EU law and national law. However, such legal questions cannot conceivably be viewed in isolation from the political conditions in which they are raised.
 8. It is possible to respond to the challenges raised by the upcoming ratification debates in the Member States purely pragmatically. From a pro-Constitution perspective, these debates raise strategic and tactical challenges about the optimum approach to campaigning, and appropriate responses to parliamentary or referendum decisions against ratification. What should happen next if Member State A does not ratify? Should a repeat referendum/parliamentary vote be held? What response should the European Council make, in accordance with the role which has been institutionalised for it by Declaration No. 30? These are issues which raise questions at both the national and the European levels, and especially in respect of the interaction – such as there is – between the two levels. In addition, however, there are questions of (constitutional) principle which are raised by the issue of ratification as a whole, the role of referendums, the question of popular sovereignty and the implications for constitutional politics of the types of pragmatic response hinted at above.
 9. In relation to ratification, let us first examine some examples from history.
 - a. The first instance of a ratification crisis resulting from non-approval was the case of the European Defence Community in 1954, and the refusal of the French *Assemblée Nationale* to approve the Treaty. In that case, the Treaty initiative was abandoned, even though the French stood out alone against the proposal. European integration efforts were re-focused on functional and economic questions, and the result was the Treaty of Rome in 1957 establishing the European Economic Community. Only in the 1990s did political integration really return to the forefront of debate, when Germany insisted on having an IGC on political union alongside the (Maastricht) IGC on economic and monetary union.
 - b. The more recent examples belong, precisely, to the era of intensified political union. They concern the cases of Denmark (Treaty of Maastricht, 1992) and Ireland (Treaty of Nice, 2002). In both cases, second referendums were held and the Treaty was finally ratified and entered into force, after a meeting of the European Council had made appropriate soothing noises and allowed the adoption of strictly

non-binding declaratory measures intended to make the Treaty more palatable to the electorate.

10. Some interesting hypotheses could be elaborated on the basis of these rather thin data:

a. *Political* rather than *economic* questions appear to raise greater sensitivities in national political institutions and national electorates. As an aside, it should be noted that anecdotal evidence suggests that members of the European Movement who campaigned for a 'yes' vote in the 1975 UK Referendum on membership of the EEC were encouraged to stress the *economic* rather than the *political* aspects of membership. The consequences of that emphasis can definitely be felt in the UK debate at the present time.

b. The *size* of the Member State matters (France is big; Ireland and Denmark are small, or at least would be regarded as small in the context of an EU of 12 or 15, even though the question of relative scale has been altered somewhat by the 2004 Enlargement);

c. The *age* (in EU terms) of the Member State matters (France was a member of the original founding club of six Member States; Ireland and Denmark acceded in 1972, along with the UK);

d. Absent an intervening general election and change of government, parliamentary rejection is more *final* than popular/referendum rejection. It is worth noting that in the case of Ireland, turnout on the second referendum was much higher than for the first. The 'no' vote remained relatively constant through the Amsterdam referendum and the two Nice referendums, but the 'yes' vote fluctuated sharply.

11. Two other variables, which the cases set out here do not address, concern the question of *when* the rejection occurs (early or late in the increasingly drawn out process of ratification which now involves 25 Member States) and what the effects may be of *multiple rejection*. In the case of Maastricht, the French referendum was extremely close (barely 51% in favour), and the Germans experienced a number of legal difficulties with ratification associated with a certain famous Constitutional Court case. However, it remains the case that the Danish rejection of Maastricht and the Irish rejection of Nice were singular events. This

may not of course be the situation with the Constitutional Treaty, as substantial doubts also hang over whether Denmark and the Czech Republic, along with the UK, might ratify, and there are some doubts about the fate of the Constitutional Treaty in France and a number of other Member States.

Scenarios

12. Working out which option(s) might be taken in the event of non-ratification by one or more Member States will be affected by these principal variables. A number of possible scenarios will now be explored in more detail:

a. A second (or even third) attempt at ratification is made within the state(s) in question.

b. The Constitutional Treaty is dropped, and the current Treaties are retained for the foreseeable future.

c. Various steps are taken to introduce aspects of the Constitutional Treaty by measures short of Treaty amendment.

d. An IGC is convened (with or without a Convention preceding it), and attempts are made to change the Constitutional Treaty to achieve a situation in which the Treaty would be more likely to be ratified at national level, or it is attempted to negotiate a wholly new Treaty.

e. The non-ratifying Member State(s) voluntarily leave(s) the EU and the Constitutional Treaty enters into force as between the remaining Member States.

f. Those Member States which have ratified the Constitutional Treaty agree to enter into a new Treaty without the non-ratifying state(s).

13. Should non-ratification by a given Member State be regarded as a final statement, or would it be possible to try again to obtain ratification on the basis of a legally unaltered, but politically 'improved' or 'sensitised' text? Such 'improvements' would normally involve the adoption of political resolutions by the European Council in the context of its Conclusions, or the addition of a Declaration on the part of the Member State which specifically draws attention to particular difficulties which

- might have emerged during the ratification process. The hypotheses elaborated above may help to guide reactions, building on past experience. However, if the rejection comes from the United Kingdom – a big state – and involves a resounding ‘no’ vote on the basis of a reasonably high voter turnout, there seems little chance that any government which is not prepared to commit political suicide would wish to put the Constitutional Treaty to a popular vote for a second time. The only exception would be if it felt that the risk of putting the Treaty to referendum for a second time was outweighed by the potential political costs to the UK of being ‘left behind’, as the only Member State not to ratify. In other words, if the referendum were premised on a stark choice between being inside or outside the European Union. Furthermore, it is hard to see what inducements on the part of the European Council to improve the Constitutional Treaty could feasibly be offered to the UK electorate to persuade it to change its mind. Logically, the question in a second referendum would have to be different – i.e. ‘in’ or ‘out’ – even if it remained formally the same (Constitution – yes or no?). However, that scenario would not be conceivable if the underlying question of the UK’s membership of the EU had in essence been the primary terrain of debate first time round. In other words, it could only work if the terms of the debate had been more limited in the first referendum, offering an opportunity to widen the debate in a second referendum. It seems likely that all parties to a UK referendum debate will be quickly drawn into discussing the wider question of the UK’s EU membership, despite the official positions of the largest parties, which seek to separate the question of the Constitution from the question of membership. This would rule out a second referendum, if the larger questions had already been canvassed before and ruled upon by the electorate. Furthermore, although ratification could still strictly speaking proceed just on the basis of parliamentary ratification (on the basis of a further Act of Parliament repealing an earlier Act establishing the referendum), taking that option in the event of a referendum ‘no’ would also be political suicide for any governing party.
14. Experience from the past has indicated that there may be circumstances in which a second referendum can work positively in the sense of offering a legitimacy surplus because levels of awareness and understanding about the EU are raised as a consequence of the resulting debate. In Ireland, the Government focused in a positive way upon the issues raised by the Treaty of Nice and Enlargement in particular during the second referendum campaign, whereas the first referendum campaign was dominated by domestic issues and the apparently omnipresent dissatisfaction with national governments which again played itself out in June 2004 in the European Elections. An Irish National Forum for Europe attempted to foster constructive conditions for informed debate. Those who argued against the Treaty were faced with difficult questions about the implications of a ‘no’ vote for Enlargement and also for likely future perceptions of Ireland in the new Member States. On the other hand, the pressure of being seen to ‘hold up’ the ratification of a Treaty approved by every other Member State had some negative effects, with the electorate in some ways seeing itself as held to ransom.
 15. Non-ratification by one or more Member States may result in the Constitutional Treaty as a whole being dropped, so that the current Treaties are retained in force for the foreseeable future. The abandonment of the work of the Convention and the IGC obviously has a number of costs, including reputational costs for those who have invested time and effort to turn the vague concerns of the Declaration on the Future of the Union appended to the Treaty of Nice and the questions raised by the Laeken Declaration into a concrete output which is seen – at least in elite political circles – as an acceptable compromise of the various interests concerned, and certainly a practical improvement on what exists at present. Only time will show whether the EU is truly unworkable under the Nice arrangements, especially since many of these, including the revised arrangements of qualified majority voting, will only enter into force in November 2004. Of course, the current round of enlargements is not yet complete, with Bulgaria,

Romania and Croatia yet to be accommodated into the structures. However, these three candidate states are unlikely to be the 'straws which break the camel's back', and consequently it should be possible by early 2005 to have some clearer sense of how EU enlargement under Nice is actually working. On the other hand, the question of Turkey, its possible accession and the impact of this upon how the EU works raises huge questions which perhaps even the Constitutional Treaty does not address. Consequently, it is pointless to hold this particular eventuality up as a reason to argue why it is imperative not to abandon what might be termed the achievements of the Constitutional Treaty in favour of settling for what we know and what we have, namely the settlement based on the Treaty of Nice.

16. In conjunction with the formal abandonment of the Constitutional Treaty, it would be possible for various steps to be taken to introduce aspects of the Constitutional Treaty by measures short of Treaty amendment. There are numerous examples from the present and from the past of the anticipatory bringing into effect of innovations contained in new Treaties in advance of ratification. These include the Employment Policy Title of the Treaty of Amsterdam, which was implemented through various European Council 'processes' from the mid 1990s onwards, well in advance of the entry into force of the Treaty in 1999. More recently, the Member States are already taking steps to put into effect the innovations of the Constitutional Treaty, especially the proposal to have an Armaments Agency, even before the Constitutional Treaty is signed, let alone ratified. This type of approach is possible because not everything that is in the Constitutional Treaty requires Treaty amendment to bring it into force. A whole raft of procedural possibilities are raised here.

a. The possibilities offered by Article 308 EC – now popularly called the 'flexibility' clause – could be explored as a legal base for certain institutional or policy innovations.

b. Some innovations could be given a 'soft' legal base and introduced by political action alone without formal institutionalisation, or could be introduced

by means of collective action of the Member States outwith the scope of the EU Treaties, although such action, if it involved an international treaty, would also require ratification at the national level before it came into force. Schengen – as a laboratory for further integration in relation to the removal of frontiers and border-free travel – is the best example of the long term pursuit of integration objectives under international law. As is well known, Schengen eventually became part of the Treaties, by virtue of the Treaty of Amsterdam, but without the participation of the United Kingdom. Long term flexibility through a combination of international law and opt-outs is clearly a conceivable option for the EU.

c. The framework for enhanced cooperation under the EU Treaties, as it applies post Amsterdam and post Nice, could be explored as a means to bring certain innovations into force for the Member States willing to make changes. This procedure has never been used, and continues to be hedged around by procedural and substantive safeguards.

d. Action could be taken at national level to institutionalise a stronger role for national Parliaments, in order to assuage some of the democracy and participation concerns which the Constitutional Treaty has brought to wider attention. Many of the concerns about subsidiarity raised in the context of the Convention could be met by a combination of such national action and greater political responsibility and self-discipline on the part of the EU institutions with regard to the question of subsidiarity and the exercise of shared competences.

17. None of these mechanisms can be used to change the existing legal bases or procedural arrangements for decision-making under the EU Treaties, such as changing from unanimity to qualified majority voting in the Council of Ministers, enhancing the role of the European Parliament, or changing the basis of qualified majority voting. Since the Constitutional Treaty is very little concerned with the policy scope of European Union, but much more with institutional arrangements and what might be termed the rearrangement of the institutional deckchairs with a view to achieving something which is more pleasing to the eye, flexible interpretation of existing competences or the use of enhanced cooperation will be to little or no avail.

Enhanced cooperation is of little assistance, in any event, in the field of CFSP, and is explicitly ruled out under Nice in relation to matters having defence and security implications. Here, the Member States would have to look outside the confines of the EU to find collective solutions to their concerns about security and defence, and the potential role of the EU in the military arena.

18. Non-ratification may result in the convening of a new IGC, which may or may not be accompanied by a preceding Convention. This IGC could attempt to make changes to the Constitutional Treaty which would be more likely to be ratified at national level, or alternatively to negotiate a brand new Treaty. However, it is not apparent why such a further trip around the circuit of negotiation and amendment would be any more successful or popularly acceptable than has been the case with the current one. Indeed, as increasing numbers of commentators suggest, the real malaise is less about what the EU is or is doing, and much more about governments and politicians more generally. Reconvening the IGC may therefore be futile without addressing the underlying causes of discontent and distrust of politicians.

19. The non-ratifying Member State(s) may choose voluntarily to leave the EU. The UK Referendum of 1975 over membership was not strictly speaking a referendum over ratification, but it would be relevant to the case in point in so far as it seemed clear from the debate at the time and since that no serious objections could be made if the UK, as a sovereign state, had decided to withdraw from what were then the European Communities. Since that Referendum resulted in a 'yes' vote, the EU has little experience with secession or withdrawal (Greenland's withdrawal was *sui generis*, not least because it was not the withdrawal of a state, but of a sovereign territory of a Member State), and indeed it has often been argued that the decision to include a withdrawal clause (Article I-60) in the Constitutional Treaty is an important innovation which offers additional legitimation to the EU, because it makes it clear that the EU is ultimately a voluntary association between sovereign states. As things stand, withdrawal would involve a

combination of national law, EU law, and international law, not to mention a lengthy negotiation period, and would itself require an international treaty to give effect to any political declarations of intent. No Member State could withdraw unilaterally, without negative legal consequences arising at all levels for the state in question. In particular, individuals affected by a unilateral secession could presumably seek judicial protection in national courts, which could bring about a constitutional crisis involving a conflict between the courts on the one hand, and the executive and legislature on the other. The UK judges might have indicated they would always follow Parliament in the past. This may no longer be the assured result in the era of the Human Rights Act. What would happen to the withdrawing state is also unclear, since it might try to enter into an arrangement akin to the European Economic Area, again requiring the intervention of international treaties. In any event, successful withdrawal certainly opens the way with relatively few formalities for the Constitutional Treaty to enter into force as between the remaining Member States. On the other hand, if it is a big state which withdraws, this will weaken the EU in many different ways, not only in relation to economic weight within the global economy, but also in relation to its bargaining power in bilateral and multilateral international fora, such as transatlantic relations and the World Trade Organization. The withdrawal of a big state could fundamentally change the dynamic of the integration process, which has been premised ever since the first decision of the original Six to proceed towards enlargement in the early 1960s on the logic of enlargement rather than the logic of withdrawal.

20. Increasingly complex legal scenarios would arise if voluntary withdrawal occurred after steps had been taken by those Member States which had ratified the Constitutional Treaty to agree to enter into a new Treaty without the non-ratifying state(s). It is conceivable that two unions could then subsist in parallel, under the Vienna Convention on the Law of Treaties. Both sources of law would be binding on the participants. However, their co-existence

as co-equal unions under international law, each comprising a binding legal order and adjudicatory system headed by a Court of Justice with more or less identical powers, would undoubtedly make it difficult for any Member State involved in both unions not to transgress the rule systems of the two unions at different times. Some institutional arrangements would come into obvious conflict, such as the proposal to introduce a Minister of Foreign Affairs. It is of course possible that the effective re-founding of the European Union by the willing Member States and the political abandonment of the old EU would result, in effect, in *de facto* acceptance by all parties of a new state of affairs. But many would argue that this would amount to expulsion, and this would raise questions of law, especially under international law. It does not seem a desirable approach to the resolution of difficulties which would be brought about because one or more Member State had failed to give its consent to the new Constitutional Treaty coming into force, and there are formidable political and legal obstacles to be overcome before it could be put in place.

21. Here is not the place to consider the question of how representative democracy in the form of parliamentary ratification (on the assumption that European integration represents one of several questions which inform the decision-making of electorates in general elections which constitute parliamentary majorities) shapes up against an act of popular sovereignty in the form of a referendum approving or disapproving the Constitutional Treaty. But it cannot be doubted that all of the above scenarios, which to a greater or lesser extent are conceivable or likely, and which have been treated here so far as possible in an objective way, raise interesting questions of principle for the EU. There remains uncertainty at the present time as to what the treaty basis of European Union will be in the future (Constitution or Nice), whether it will or will not be faced with a substantial *crise existentielle* in the event of ratification difficulties, and what its membership configuration might be in five or ten years time. The question of 'treaty or constitution' was alluded to at the beginning. In truth the answer to this question both at present

and in the near future is probably both mixed and contingent, since the EU displays in some respects a multitude of faces at different times and in different fields of its activity. This would not be fundamentally changed by the Constitutional Treaty despite its formal abandonment of the Maastricht pillar system, and its creation of legal personality for the EU as a whole. In some respects in both its internal and external dealings the EU continues to be treated by others and indeed act as an international organisation. In other respects, especially with regard to some of the implications of European integration for citizens and residents of the Member States, it has at least a quasi-constitutional force and effect. These aspects would be reinforced greatly by the formal adoption of the Charter of Fundamental Rights as a constitutive and binding element of the EU legal order, notwithstanding the restrictive effects of the so-called 'horizontal clauses'. Ironically, the very fact that the Constitutional Treaty will be the subject of referendums in so many Member States (albeit not a single common ratification referendum which would allow the citizens of the Member States to act as an incipient common European political *demos*, as well as acting as separate national *demos*) does reinforce its constitutional character, since it is hard to imagine why something which is essentially merely an international arrangement between sovereign states ought otherwise to involve the invocation of so many acts of popular sovereignty.

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