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U.S.-EUROPE ANALYSIS SERIES

November 2004

Ratifying the EU Constitution: Referendums and their Implications

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At the June 2004 European Council meeting, the governments of the 25 EU member states signed a constitutional treaty for the European Union. This treaty had been two years in the making; it was drafted by an unprecedented “Convention on the Future of Europe” intended to allow input from voices not usually heard in the European integration process including national parliamentarians and civil society actors. From there, the draft was subject to a nearly year-long negotiation by the member state governments that, after fierce bargaining, eventually produced a treaty. But the process is not over; rather it has entered its final and perhaps most difficult phase. The text must be ratified unanimously by the member states, each according to its own national process. There is a real risk that the process may fail, an outcome that would have unpredictable and potentially serious consequences for the future of European integration.

The primary risk comes from the intention of many of the member states to hold referendums on the Constitution. A majority of member states are either committed to holding a national referendum for ratifying the Constitution or, at least, have not definitively ruled out this option. Only three member states have explicitly rejected recourse to a referendum: Malta, Sweden, and Germany. So why have so many national authorities decided to use a referendum as the instrument for ratifying the EU Constitution? (See Figure 1 and the appendix).

Figure 1: Countries Holding Referendums on the EU Constitution (as of October 2004)

Referendum?	Total	Countries
Yes	11	Belgium, Czech Republic, Denmark, France, Ireland, Luxembourg, Netherlands, Poland, Portugal, Spain, United Kingdom
Probably Not	6	Estonia, Finland, Hungary, Italy, Latvia, Slovakia
No	4	Cyprus, Greece, Malta, Sweden
Undecided	4	Austria, Germany, Lithuania, Slovenia

A referendum is not required to ratify an international treaty (and strictly speaking the EU Constitution is an international treaty) in any EU member state. At most, a referendum may be required to reform the national constitution in order to incorporate amendments needed to conform to an EU treaty. But only in the Irish Constitution, amended by means of a referendum after every new treaty since the Single European Act in 1986, is this requirement explicitly stated as a direct legal imperative. More commonly, a number of European constitutions exhibit a certain mistrust of referendums. In Germany, the domestic constitutional arrangements reflect the negative view of referendums inherited from the abuse of such instruments in a totalitarian past. The Greek Constitution allows them, but there exists no enabling legislation establishing the procedure, and the last one was held in 1974. In Italy, there is a widespread feeling that a referendum should be held on the European Constitution, but the Italian government argues that are certain “technical difficulties” to holding a referendum on the Constitution.

Legal arguments about the lack of constitutional grounds for a referendum should not obscure the fact that the decision to hold a referendum in any given country depends essentially on political factors. In both Germany and Greece, for example, the government and the main opposition party agree on the desirability of the EU Constitution, and referendums are therefore unlikely. In Germany, a proposal to hold a referendum by the small Free Democratic Party (FDP) was rejected by the parliament even though opinion polls showed that most voters favor a referendum. In all cases, the absence of specific provisions permitting a referendum is not an insurmountable obstacle. Even though all European democracies generally favor representative over direct democracy, almost of all them have sought a constitutional balance between these extremes. If necessary, traditions can change. Thus, for example, the Netherlands is implementing legislation to hold its first-ever referendum.

If referendums are permitted for changing the national constitution, the majority of cases require a decision as to the extent to which the EU Constitution modifies the “rules of constitutional engagement” of each member state, that is, whether and how adopting the EU Constitution requires changes to the national constitution. This process not only makes national constitutional courts important players, but it also means political agreement among parties becomes crucial. Finland illustrates a case in which nearly all of the major parties represented in the *Riksdagen*, the Finnish Parliament, accept the European Constitution. Hence, their interpretation that the Constitution does not mean any significant transfer of powers to the Union overrides any call for a referendum. Similarly, a number of new EU member governments assert that their EU Accession Treaties, approved in referendums, satisfied the need for a referendum on the Constitution. This is the case in Cyprus, Estonia and Slovakia, where despite popular support for referendums, they seem highly unlikely. In Latvia, a referendum will be sought only if the Constitution makes “significant changes” to the government of the EU.

Thus, rather than a legal imperative, the decision to call a referendum stems from politics. So which political factors explain why some member states are resorting to referendums and others are not?

- First, *a genuine commitment to the idea that the importance of the EU Constitution and the changes introduced requires a renewed expression of legitimacy in the form of citizens’ direct consent.* Much has been said about the symbolic importance of the

European Constitution and on the need to involve citizens in this new social contract. Denmark, where all previous treaties other than Nice have been voted on, is the obvious example, but Spain also falls into this category. The importance of this “idealistic factor” should not be downplayed. Referendums will be novelties in two of the eight member states that have decided to hold one: in Belgium and in the Netherlands. Although the result will not be legally binding on either government, the Dutch leadership has promised to respect the majority view. Even the German government is moving towards amending the Fundamental Law (the German Constitution) to allow an eventual referendum on the European Constitution.

- A second factor shaping the decision to hold a referendum is the *existence of a split between parliament and public opinion regarding EU matters*. In some member states, the parliament is more keen on the EU Constitution than the citizenry at large. In these cases, governments who do not want to risk a rejection have good reason to avoid a popular vote. Thus, in Malta (where EU membership was approved by a slim majority) and Sweden (where a referendum recently rejected adoption of the euro as the national currency), the EU enjoys broad cross-party support in parliament, but very questionable support in public opinion.
- Third, in a number of cases, *the referendum will act as an arbiter between parties with different views on the EU and the Constitution*. For example, the two Czech opposition parties (the Civil Democrats and the Communists) are opposed to the Constitution. Facing the risk of an eventual parliamentary defeat, the government yielded to the idea of holding a referendum. The main parties in both Latvia and Poland oppose the idea of a referendum, but in each case, they are under pressure from smaller opposition parties to hold one. In Latvia, the main opposition party, the Popular Party (20 seats out of 100), has called for a referendum to decide on the Constitution; the possibility of a referendum cannot be ruled out. In Poland, the *Sejm* rejected a motion in favor of a referendum in September 2003 and the two majority parties (the Democratic Alliance of the Left and the Civic Platform) are opposed to the idea. However, doubts have been raised as to the ability of a weakened prime minister to forge a parliamentary majority in favor of the Constitution. The parties opposed to it, Justice and Law and the League of Polish Families, have begun to campaign in favor of a referendum.

Complicating this mix, new parties, such as the United Kingdom Independence Party (UKIP) or the Movement for France of Philippe de Villiers, have sprung up with withdrawal from Europe as their sole reason for being. Both parties demonstrated their ability to attract broad swathes of voters in the recent elections for the European Parliament. In fact, together with the Swedish and Danish June Movements (*Junilistan* and *JuniBevægelsen*), plus the Dutch *ChristenUnie* and the League of Polish Families, they look set to establish a powerful eurosceptic movement within the European Parliament, with opposition to the European Constitution as their primary political ambition.

- A fourth and more telling factor explains the growing importance of referendums for EU issues. They *serve to resolve situations in which the parties are divided within*

themselves along anti-integrationist/pro-integrationist lines. This new cleavage threatens to overtake the classic left/right divide on which the party structure in most European countries is built. The two most obvious instances of this are France and the United Kingdom. “Europe” has long been a divisive issue for some of the traditional parties such as the UK’s Labour and Conservative parties. Now the French Socialist Party is also affected, following longstanding unrest within its ranks over the lack of “social” provisions in the new Constitution. In both cases, the aim is to allow the citizenry to mediate an issue that cuts increasingly through, rather than across, parties.

The use of referendums as a means of legitimizing the EU Constitution may well backfire. To begin with, the turnouts will probably be small, as they were in the recent elections for the European Parliament. The opinion polls show a persistent “diffuse support” for the project of European integration. But the pro-European camp appears to have much greater difficulty mobilizing its supporters than the Eurosceptics. For this reason, a low turnout will probably increase the proportion of “no” votes.

The referendum format itself may also prove more of a hindrance than a help. Referendums are notoriously unsubtle instruments, forcing voters to give a “Yea” or a “Nay” on issues of immense complexity. There is at least an even chance that many will vote for reasons that have little to do with the matter at hand. Many will undoubtedly be voting to punish their national governments. Even in those countries in which there is a widespread consensus in favor of the EU and the Constitution and the likelihood of a partisan political contest over the outcome is remote (Spain, for example), new demands (on the lack of recognition of regions, for instance) may trigger unforeseen and unexpected opposition (transforming the EU referendum, in the Spanish case, into a referendum on regional autonomy and self-determination).

Additionally, the new ideological cleavage between pro- and anti-European forces in many countries means a referendum battle might result in a significant shake-up in national politics. The battle over the Constitution has already created some strange bedfellows, as in France, for example, where part of the French socialists, the Communists, the Greens, the far Left, the “sovereignists” and the far Right (the National Front) all unite in their opposition to the Constitution—although for very different reasons.

In this context, appeals to “national interest” will probably trump the call to consider broader issues of European integration. The need to satisfy national aspirations and the need to obtain unanimous approval of the member states creates a daunting European-wide task: supporters of the Constitution must bring together sufficient majorities in every country, but each majority must be shaped by unique national circumstances. The daring proposal heard at the Convention to hold a Europe-wide referendum died a quick death, with only the Austrian Chancellor coming out in favor. On the other hand, a negative vote in just one country will affect all of the states of the European Union, preventing the Constitutional Treaty from being implemented anywhere.

The chances of a single country, such as the United Kingdom or Denmark, deciding not to ratify the Treaty are real. But because a negative outcome does not appear to have been contemplated by any of the member states, the means for dealing with such a situation are sketchy. The Final Act of the Intergovernmental Conference says that if only four-fifths of the member states ratify

the Constitution in the two years following its promulgation, the Council will take note of this fact; a vague formula indeed, and one which gives no indication of how to move forward in such circumstances. Moreover, the legal problems that would arise if a dissenting country wanted to remain within the EU have not even been addressed, much less solved.

APPENDIX

Table 1. Parliamentary Ratification Procedures in the Member States of the EU

State	Parliamentary Ratification
Austria	Simple majority of the Parliament (and of the Senate if its competences are affected);two-thirds of the Congress (and of the Senate if as above), if the transfer of powers implies constitutional reform (Articles 50, 42 and 44).
Belgium	Treaties affecting citizen rights must be approved by both Houses. If they affect the competences of the Regions, the Councils of both must also approve them (Article 163).
Cyprus	Adopted by the Cabinet and approved by the House of Representatives (Article 169).
Czech Republic	Approval by three-fifths of the Congress and the Senate (Articles 10 and 39).
Denmark	Approval by a majority of five-sixths; otherwise, a referendum (Articles 20 and 42).
Estonia	Simple majority and other procedures (Articles 120 and 121).
Finland	By law. Simple majority or two-thirds majority if it affects the constitution (Article 94).
France	By law (Articles 52-55 and 88). Discretionary referendum at the initiative of the President (Article 11).
Germany	By law. Majority of two-thirds of the <i>Bundestag</i> and two-thirds of the <i>Bundesrat</i> (Articles 23 and 79).
Greece	By law, majority of three-fifths (Article 28).

State	Parliamentary Ratification
Hungary	Majority of two-thirds of both Houses (Article 2a).
Ireland	No specific rule. Each reform of the EU requires a parallel reform of the constitution by means of referendum (Articles 29, 46 and 47).
Italy	Ratification by both Houses; no referendum (Articles 80 and 75).
Latvia	Parliamentary ratification, but if half the parliamentarians so wish, a referendum must be held (Article 68).
Lithuania	Parliamentary ratification; referendum required for treaties which affect major aspects of the lives of Lithuanians (Articles 135,1 and 5).
Luxemburg	By law. Approved by two-thirds of members of parliament (Articles 37, 49 and 114).
Malta	There are no constitutional regulations, unless ratification requires constitutional amendment.
Netherlands	By two-thirds parliamentary majority (Article 91)
Poland	By parliamentary procedure, the conditions of which are established in another Act of Parliament (Article 90).
Portugal	Parliamentary majority (Article 161)
Slovakia	Majority of three-fifths (Articles 7 and 84).
Slovenia	Majority of three-fifths (Articles 3 and 8)
Spain	Majority in the Congress (Article 93).
Sweden	Approval by three-quarters of the members of the <i>Riksdag</i> (Article 10.5).
United Kingdom	Parliamentary majority.

Sources: <http://www.uc3m.es/uc3m/inst/MGP/NCR/portada.htm> see also: <http://www.european-referendum.org/materials/di/refsum.pdf>

Table 2. Referendums in the European Union

State	Referendum on the Constitution	Previous referendums on the EU	Results
Austria	Undecided	Membership (1994)	Yes 66%; No 33%
Belgium**	Yes (2005)	No	–
Cyprus	No	No*	–
Czech Republic	Yes (June 2006)	Membership (2003)	Yes (77%); No (23%)
Denmark***	Yes (2005)	Membership (1972)	Yes (53%); No (33%)
		Single Act (1986)	Yes (42%); No (33%)
		Maastricht I (1992)	No (42%); Yes (41%)
		Maastricht II (1993)	Yes (49%); No (37%)
		Amsterdam (1998)	Yes (41%); No (34%)
		Adoption of the euro(2000)	No (46%); Yes (41%)
Estonia	Probably not	Membership (2003)	Yes (67%); No (33%)
Finland	Probably not	Membership (1995)	Yes (57%); No (43%)

State	Referendum on the Constitution	Previous referendums on the EU	Results
France	Yes (2005)	Enlargement (1972) Maastricht (1992)	Yes (68%); No (32%) Yes (51%); No (49%)
Germany	Undecided	No	–
Greece	Probably not	No	–
Hungary	Probably not	Membership (2003)	Yes (84%); No (16%)
Ireland	Yes (2005)	Membership (1972) Single Act (1987) Maastricht (1992) Amsterdam (1998) Nice I (2001) Nice II (2002)	Yes (94%); No (6%) No (54%); Yes (46%) Yes (63%); No (37%)
Italy	Probably Not	Constituent mandate for the European Parliament (1989)	Yes (88%); No (12%)
Latvia	Probably not	Membership (2003)	Yes (67%); No (33%)
Lithuania	Undecided	Membership (2003)	Yes (91%); No (9%)
Luxembourg **	Yes (2005)	No	–

State	Referendum on the Constitution	Previous referendums on the EU	Results
Malta	No	Membership (2003)	Yes (54%); No (46%)
Netherlands**	Yes (2005)	No	–
Poland	Yes (2005)	Membership (2003)	Yes (77%); No (23%)
Portugal	Yes (April 10, 2005)	No	–
Slovakia	Probably not	Membership (2003)	Yes (94%); No (3%)
Slovenia	Undecided	Membership (2003)	Yes (66%); No (34%)
Spain	Yes (Feb. 20, 2005)	No	–
Sweden	No	Membership (1994) Adoption of the euro (2003)	Yes (52%); No (47%) No (56%); Yes (42%)
United Kingdom	Yes (March 2006)	Membership (1975)	Yes (67%); No (33%)

(*) The referendum of 24 April 2004 in Cyprus was on reunification of the island.

(**) Belgium and Luxembourg will probably hold the referendum on the same date and the Netherlands may also join in.

(***) Denmark may hold two referendums: one on the Constitution itself and a second one on the question of whether it can participate in judicial cooperation at the EU. Denmark currently opt-outs of EU judicial cooperation.

Source: Various. For updates on the ratification process, see <http://www.unizar.es/euroconstitucion/Home.htm>.