

## Federal Trust Policy Commentary

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### Four routes to the new Europe

#### Possible solutions to the problem of the Constitutional Treaty

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The No votes in the two referendums in France and the Netherlands brought the process of ratification of the European constitutional treaty to a sudden halt. Never before had a treaty failed in two member states, two of the founding member states at that. This was an unprecedented setback.

The European Council called for a “period of reflection”, as time to take stock, and think what to do next. That period has produced several plans and proposals regarding what to do next. This paper sorts through the different ideas, to describe what they have in common and also to look at how they differ. There are four basic analyses upon which the different plans are based.

#### 1. Abandon institutional reform, and focus on policy delivery instead

The immediate reaction in a number of political quarters to the French and Dutch No votes was to call for the abandonment of the treaty process altogether. For some politicians, that remains the case. Instead, they call for the European Union to focus on policy delivery. Become better at doing the things that Europeans want, they say, rather than thinking about institutional reform.

There are some improvements to the institutions which can be made without amending the treaties, but more is, on this view, neither necessary or desirable. For example, national parliaments can be informed about forthcoming European legislative proposals, and more legislative sessions of the Council of Ministers can be held in public. These innovations are already taking place, and are largely uncontroversial. The argument put forward is that these moves are an alternative to more far-reaching reform rather than a prelude to it.

There are two problems with this option. First, one of the reasons why the EU is not as good at delivering policy outcomes as we would like is precisely because the institutions are not reformed.

For example, if Europeans want the EU to have a stronger voice in the world, they will be left waiting in vain until the methods for making and expressing foreign policy are improved. If Europeans want their fundamental rights respected

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by the European institutions, then somehow the EU has to become subject to the same human rights guarantees that apply to the member states. If Europeans want the EU budget spent more efficiently and accountably, the directly-elected European Parliament has to have more control over it, particularly over the 40 per cent or so that is spent on agriculture.

Secondly, it is not clear that a choice that has to be made between better delivery and institutional reform. Surely it is possible that better policies and better institutions can be developed side-by-side, rather than one before the other. Are the European leaders who say this choice is necessary admitting that they cannot think about more than one thing at a time? As the Scottish Labour MP James Maxton once said, "If you can't ride two horses at once, you shouldn't be in the bloody circus."

## **2. Ask the French and Dutch to think again**

The second reaction at the time of the French and Dutch No votes was that those two countries should be asked to think again. The text of the constitutional treaty represented the European political consensus, supported by 27 EU national governments, as well as by most representatives from the European Parliament and national parliaments, including both government and opposition political parties. This consensus should not be abandoned lightly. The text has now been ratified in 15 out of the 25 member states, and the popular vote in referendums where they have been held is 26.7 million Yes votes against 22.7 million No.

If France and the Netherlands are the countries out of step, then the onus is on them to come back into line. There is precedent for this. After the Danish No vote on the Maastricht treaty and the Irish No to Nice, a second referendum was held in each country a year later. That gave the voters a chance to

rethink: did they want their country to be the one to drop out of the EU? In each case, after more debate and discussion, the No vote was succeeded by a Yes and the treaty was finally ratified.

This time, though, the prospects for repeat referendums in France and the Netherlands look rather bleak. This is for three reasons.

The first is that, while France and the Netherlands are the only two countries to have voted No, it might be correct to say that they are the only two that have voted No so far. There are eight countries where ratification has barely commenced, and in perhaps four or five of them, including Poland, the Czech Republic, Denmark, Sweden and the UK, ratification would be difficult. In this respect, the experience of the Maastricht and Nice treaties is not a precedent. The case then was that Denmark and then Ireland were isolated in their non-ratification, with unknowable consequences if they remained that way. It is not possible to argue that this is true of France and the Netherlands while so many other member states remain to ratify: those other member states on the other hand will not take any risks with their relationship with the EU until they are sure it is worth it.

Secondly, it is difficult to try to reverse the results of the French and Dutch referendums without undermining the whole concept of popular referendums. Cynics already point to the Danish and Irish experience to say that, when it comes to referendums on European treaties, Yes means Yes but also No means Yes. That is not really democracy, they say. To go straight back to the French and Dutch voters, as though they were re-sitting an exam they had failed, would serve to confirm that view.

Thirdly, any repeat of the referendums in France and the Netherlands would

require the support of the French and Dutch governments (although the first Dutch referendum was actually called by the parliament, not the government). There is no sign from any prominent political figure in either country that they are willing to do this. They would prefer to say that they are listening to their own voters and correspondingly adopting a new approach.

## **3. Rewrite the text of the treaty**

The main aspect of this new approach is to look again at the text of the constitutional treaty itself. The original text contained 448 articles in four parts, stretching over 230 pages. It was a far cry from the text that Jack Straw, British foreign minister at the time, had hoped would fit in his jacket pocket.[1]

To make things more complicated, 322 of those articles, making up part III of the treaty on individual policies, were in large part not even new. They were restatements of the previous position, and so would remain in force even if the treaty were not ratified. For example, Article III-227 on the objectives of the common agricultural policy is identical to Article 39 of the original Treaty of Rome.

Against this background, it is hardly surprising that so many conflicting and contradictory claims were made about the constitutional treaty and what it would and would not do. Changes to the text might simplify things for the voters and also pacify some of the critics.

Several different proposals have been along these lines. Jo Leinen MEP, chair of the European Parliament's constitutional affairs committee, has suggested that the text should be slimmed down by removing all those parts relating to policy areas which are not new. Ratification debates would then focus on the institutional issues and policy changes only.[2]

Andrew Duff MEP, also a member of the constitutional affairs committee, suggests adding new articles on five areas – the economic governance of the union; Europe’s social model; sustainable development and climate change policy; enlargement policy; and the reform of the EU’s finances – to deal with the areas of difficulty and uncertainty that led people to vote No.[3]

Both of these proposals are intended to preserve as far as possible the existing text of the treaty. The text embodies a careful balance between the different institutions and also between the different member states. It was agreed as a package, requiring compromise on all sides. To choose some elements and not others will upset this balance and, in practice, might actually prove impossible to get agreed. Any member state that thinks it is disadvantaged by the new deal can simply block it.

A more far-reaching approach to re-writing the treaty has been put forward by Nicolas Sarkozy, French interior minister and likely candidate for the French presidency next year. He has suggested a “mini-Treaty”, stripping out quite a lot of the former constitutional treaty text, but retaining some of the most important institutional changes. Other proposals being floated are more restricted still. A package of measures drawn from the constitutional treaty to deal with foreign policy, for example, has been suggested (a mini-Treaty, it has been called).

Sarkozy is careful, in his proposal, to point out that the mini-Treaty would not replace the constitution, but rather postpone it. The mini-Treaty could be agreed before the next European elections, and the constitutional process would recommence afterwards.[4]

He is also careful to say that the mini-Treaty could be ratified by parliaments and would not therefore trigger another round of referendums. If the

Leinen or Duff proposals would be easier to negotiate, the Sarkozy proposal, he believes, would be easier to ratify.

#### **4. Rethink the methods for ratification and entry into force**

This is the last of the approaches to be thought about in any rescue plan for the European Union. Up until now, it has not really attracted much attention, but it should from now on.

The current principle is that each amendment to the treaties must be agreed by all member states and ratified by all. This is true even when it does not apply to all. The creation of the single currency, for example, did not apply to the United Kingdom and Denmark, but they were still required to ratify its creation on behalf of the other 10 member states.

The picture would be different if a European initiative were to be taken outside the current institutions. The Schengen group, for example, was set up separately from the then EU treaties by a smaller group of just five member states, and only incorporated into the EU treaties later. However, given that a central purpose of the constitutional treaty is to reform the existing EU institutions, this is not an option open this time.

Each national government having agreed the new treaty, it then has to ratify the treaty according to its own national law. In some countries, e.g. Ireland, this must be by referendum. In other countries, e.g. Germany, this must be by parliament alone. In a third group of countries, e.g. the UK or France, the formal ratification will be by parliament but it can be made conditional on a successful referendum, thus giving the referendum political but not direct legal significance.

The effect of this, say its critics, is to create a series of national debates on

the future of Europe, rather than a single European debate on the future of Europe. National debates might be appropriate when a country is considering whether or not to join the EU, but once it is a member those national debates make no sense. The treaty, whatever it might say, was the result of a collective negotiation and can only be understood as such during ratification.

The Union of European Federalists (UEF) has therefore proposed that ratification of the new treaty should be by means of a European referendum, held everywhere in the EU on the same day (at the same time as the next European elections). This would tackle the problem identified by Nicolas Sarkozy but from the opposite direction. He fears that the existing text cannot be ratified by the current method, and would therefore change the text: the UEF would change the method.[5]

In some member states, there is a constitutional prohibition on the holding of referendums. There are two possible means of dealing with this. The first is to treat the referendum result as consultative, i.e. to give it political rather than legal significance, on the French model. The second would be to start with a commitment by those member states that can hold referendums, that they should all do so on the same day, and then see the effects that this might have on the others. When direct elections to the European Parliament were first proposed, the proposal was adopted by only seven of the then nine member states, the UK and Denmark declining to take part. When those two member states realised subsequently that their own citizens would visibly be excluded from a democratic decision about the future of Europe, they reversed their stance and followed the first seven. In June 1979, elections were held in all nine countries at the same time. These were the first ever supranational elections; perhaps the EU will see the first ever supranational

referendum thirty years later.

The last consideration in plotting a route to the new Europe is actually the point at which this article started: what happens if a member state votes No. It happened in France and the Netherlands last time; it could happen anywhere next time. This possibility was considered during the negotiations over the constitutional treaty, but no decision was reached as to what to do. Declaration 30 recorded only that, should this arise, "the matter will be referred to the European Council."<sup>[6]</sup>

This recognises the potential problem, but falls short of proposing a solution. Here again, the UEF has a suggestion. Assuming there is a double majority of member states and citizens voting in favour, the constitution should come into force in those member states that have voted Yes even if there are other member states that have voted No. It implies that the text of the treaty is structured in such a way as to make this possible, and it poses all kinds of legal and technical difficulties. If the alternative, though, is stalemate or expulsion, then the solution to these difficulties might well prove attractive.

## Conclusion

The German government, which will hold the presidency of the European Council for the first six months of 2007, has said that it intends to restart the debate about the future of the constitutional treaty. The four factors outlined above will all have to be discussed, and any likely solution is going to include elements of all four of them. Certainly it will be necessary to improve the way that the EU deals with business within the terms of the current treaties. Greater openness and transparency will help build confidence in values, principles and practice of European integration.

Secondly, there will be French and Dutch politicians and campaigners

who are going to have to go back and recommend the approval of a new text.

The French and Dutch No votes last year did not settle the issue, whatever some of the No campaigners at the time might have thought or hoped.

Thirdly, there will have to be some changes to the text. It would be absurd to go back to the French and the Dutch as though nothing had happened; it would also mean missing the opportunity to improve and clarify the proposal.

Lastly, and perhaps most importantly, the member states need to recognise that ratification is not a formality. National governments are no longer entitled to assume that the voters will simply do their bidding. The citizens are now a factor in European politics in their own right.

Whatever approach is adopted, furthermore, it is necessary for each country to realise that its own participation in the European Union is a matter of importance for all the others. Whatever decisions European countries and European citizens take about the future of Europe, they have to take those decisions together.

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