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THE EUROPEAN CONSTITUTION: HOW TO PROCEED IF FRANCE OR THE NETHERLANDS VOTES “NO”

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The European Constitution: How to Proceed if France or the Netherlands Votes "No"

What would happen if France and the Netherlands voted "no" in the coming referendums on the Constitutional Treaty of the European Union? What would be the most effective strategy for finding a solution to the crisis that this would inevitably precipitate? Would it be best to suspend or continue the ratification process? What kind of initiatives should the member states and the European institutions undertake? This paper ponders what road should be taken to deal with a crisis that would be serious and complex. In particular, it discusses the question that is bound to come up first, and that is whether – in the event hypothesised – the ratification process in the other countries should be continued or stopped.

Stop or continue the ratification process?

At the heart of the debate over the French and Dutch referendums on the European Constitution is one question: if a "no" vote prevails, what approach should the other member states adopt towards the ratification process, should they stop it or continue?

This question is to some extent new, even though a ratification crisis has always loomed as a possibility. In fact, in order to enter into force, the Constitutional Treaty (CT) has to be ratified by all member states. In a 25-member Union, the risk of some member states failing to ratify is high, even in statistical terms. Hence, the question as to what should be done in that event has always been on the table, and the authors of the present paper participated in the debate.¹ Until recently, however, discussion essentially revolved around the so-called Plan B, that is, alternative solutions to the entry into force of the CT. The possibility that failure to ratify in one member state could halt the ratification process in the rest of Europe only began to be discussed when it became clear that ratification was at risk in France. Before that, it was taken for granted that ratification would continue as planned: alternative solutions would be considered

¹ Gian Luigi Tosato, Ettore Greco, "The EU Constitutional Treaty: How to Deal with the Ratification Bottleneck", *The International Spectator*, Vol. XXXIX, No. 4, October-December 2004, pp. 5-24.

once ratification procedures were completed and an overall assessment made.

Is there reason to reconsider this assumption? Certainly, France is not just another member state of the European Union. As for the Netherlands, it is a founding state. However the question must be put in general terms, no matter what nation fails to ratify. Whether it is a small or a large member state, a founder or not, a member of the Eurogroup or not, all these factors are certainly not without relevance; nor are the reasons for not ratifying and the margin by which the “no” vote prevails. But they will be of more importance for the measures to adopt once the national ratification procedures have been completed than for the process itself. For the entry into force of the CT, all member states are equal as far as ratification (or non-ratification) is concerned. All it takes is one “no” to block it. The issue of what to do (continue or halt the other ratification procedures) must therefore be addressed in general terms, regardless of what state(s) pose(s) the problem.

Arguments in favour of stopping ratification

The reasons for stopping the ratification process can be summed up as follows: going ahead (despite failure to ratify by France, the Netherlands or others) would be useless from a legal point of view and politically damaging.

It would be useless to continue because the Constitution would be dealt a mortal blow that could hardly be remedied by the subsequent ratification of other member states (as mentioned, the CT has to be ratified by all member states in order to go into effect). Therefore, it is better to halt a costly and controversial process that would never be able to achieve its goal.

The political arguments are more varied. For Euro-sceptics, the idea of a Constitution was a mistake from the beginning. It should have been halted during the European Convention or the Intergovernmental Conference and the Treaty never signed. The sooner the whole matter is shelved, the better. The idea of suspending the ratification process, however, is also advocated by some supporters of European integration. Naturally, they have different concerns; the risk of imitation or a snowball effect, the possibility of a French “no” being followed by a series of other “nos” could have a devastating effect on the future of European integration. Better to

call the process off before it causes irreparable damage. A period of reflection would be the lesser of two evils. It would allow member states to get back on track towards European integration – albeit with some changes in timeframe and methods – without jeopardising the general direction.

The legal arguments mentioned above, and the political ones made by those in favour of Europe are certainly very serious and must be duly weighed. But the authors of this paper are not in favour of halting ratification and support the view that the ratification process should carry on.

The case for continuing: legal considerations

Declaration no. 30 annexed to the CT reads: *“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.”* This statement is important for various reasons.

The first concerns the convening of the European Council: if at least four fifths of the member states (that is twenty) have ratified the Treaty within two years of signature, the European Council is obliged to meet to examine the situation. Of course, the European Council can meet even if this quota is not reached, however the meeting must take place if it is. Therefore, twenty ratifications of the CT are an important threshold. Reaching it does not mean that the Treaty enters into force, as some would have liked. It does however oblige member states to meet and work together loyally and in good faith towards a positive outcome.

Second, the Declaration does not make a distinction between which states ratify the CT and which do not. It simply refers to the four-fifths threshold. Therefore, each member state has the same weight, regardless of its size or seniority in the European Union. These factors will undoubtedly come into play when trying to find a way out of a ratification crisis, but in terms of the procedures provided for in Declaration no. 30, all member states have equal standing.

The third consideration concerns the two-year deadline. A twofold obligation for the member states stems from the Declaration. First of all,

member states must plan internal ratification procedures so that they are completed within two years of the signing of the CT. Secondly, and this is the point that interests us most, no member state may decide to stop the ratification process because, for example, another state has chosen not to ratify. The Declaration requires that the process go ahead. In fact, this is the only way to see whether or not the threshold of 20 ratifying states has been reached within two years. The only exception would be if more than five states had already rejected ratification. In that event, since the twenty state threshold could no longer be reached, a state would be entitled to suspend the ratification procedure. In all other cases, the obligation outlined above remains valid.

From a legal point of view, the conclusions that can be drawn from Declaration no. 30 are sufficiently precise: each member state must see to completing its ratification procedure within two years of the signing of the CT; failure to ratify by any one member state does not authorise the others to stop their ratification process unless more than five states have already rejected ratification; if at least twenty states have ratified the CT within two years, the member states are called upon to do everything possible within the European Council to safeguard the future of the Treaty or at least its contents. Therefore, it is both useful and obligatory to continue with ratification, in spite of a “no” from the French or others: it is essential to be able to verify whether the threshold of 20 ratifications has been reached, with all the relative consequences.

There is no point in objecting that Declaration no. 30, in that it is annexed to the CT, has no legal value until the Treaty enters into force. It is obvious that there are provisions, even in treaties subject to ratification, that become effective from the time the treaty is signed. This is true of those relative to ratification and entry into force of the Treaty or conduct pending the latter (Art. 24.4 of the Vienna Convention on the Law of Treaties). Nor can it be said that a declaration like the one in question is not binding in that it is a mere expression of intent. The legal value of a declaration annexed to a treaty does not depend on its denomination but rather on its content. Moreover, Declaration no. 30 must be interpreted in the framework of the EU system, particularly in light of the principles of good faith and loyal collaboration, which the Court of Justice has repeatedly emphasised in its judgements. The rules that can be deduced from Declaration no. 30 are a specification of these principles: they indicate what the member states are obliged to do, in a spirit of good faith and loyal collaboration, as regards the ratification process. The legal value of these rules cannot be questioned.

With Declaration no. 30, the member states committed themselves to completing their ratification procedures within two years of signature of the CT. Conclusions will be drawn at the end of this period: if at least 20 states have said “yes”, the declaration seems to indicate that the European Council should do everything in its power to implement the CT; if, on the other hand, more than 5 states have rejected ratification, the Treaty can be reopened for discussion. Member states can always agree to change Declaration no. 30, but they will all have to be convinced that it is best to halt the ratification process.

Political considerations

Those advocating suspension of ratification claim that continuing the process would be damaging for European integration. Still, it is not necessarily true that there would be a “snowball” effect. On the contrary, a “no” in France, the Netherlands or other states – presumably by a narrow margin – could lead to a renewed commitment to ratification on the part of European and national institutions and more active mobilisation of supporters of the Treaty.

On the other hand, it seems rather unlikely that a pause could avoid greater damage and allow the process of integration to start up again on a more solid and shared basis (this is the other argument in favour of suspension). The proposed Constitution may have many shortcomings; one could even agree that being in favour of Europe does not necessarily mean being in favour of all European projects. But it is unrealistic to believe that it would be better, if the treaty is rejected by one country, to dismiss it straight away and start out on a new initiative.

The CT contains a number of reform measures that are essential to the functioning of the present Union at 25 and will be even more so after the foreseen enlargement to other countries. Hence the need to explore first options that do not imply abandoning the Treaty, should difficulties in ratification arise. The outcome of possible new negotiations is not at all certain. If they were to centre on changes in the Treaty, it is unlikely that the states that had already ratified would be willing to water down a text on which they had spent much time and effort and which had received the approval of a broad majority of members of parliament or voters. Having to choose between which innovations to keep and which to eliminate could also prove highly controversial and provoke opposing political reactions.

Rather than facilitating a solution to the political crisis, the reopening of negotiations could actually worsen it. And it is even harder to imagine that a non-ratifying member could be the one to promote new negotiations: the credibility of such an initiative in the other countries and its political feasibility in the non-ratifying state itself would be extremely low.

Thus the advantages of halting the ratification process are not very clear, while the damage it would cause is more certain.

Nine member states have already approved the CT, and others should soon be added to the list. It is likely that almost half of the member states, including three of the six “big” countries, will have approved ratification – and done so with a large parliamentary or referendum majority – before the two referendums in France and the Netherlands take place. In Spain, 77 percent of voters approved ratification. Moreover, the majority of countries that have not yet expressed themselves on the issue have already defined the timeframe and methods for ratification, and the forecasts are prevalently positive. To halt the ratification process under these circumstances would mean nullifying the wide consensus already given the Treaty in a number of countries. It would show little consideration for the outcome of ratification in those countries that still have to vote and expose their political leadership to accusations of being too acquiescent in political developments that take place elsewhere.

Suspending the ratification process would also mean drawing a distinction between member states. It would signal that some countries count more than others, in that they can unilaterally influence the future of the European Union even though they are an absolute minority. All this would be in open contrast to Declaration no. 30, and would have a strong negative impact on the Union’s image and democratic credibility, precisely at a time when there is a widespread perception that it suffers from a “democratic deficit”.

The impact would be even greater if one considers the precedents. Following the negative results of the Danish referendum on the Maastricht Treaty on 2 June 1992, the General Affairs Council promptly declared on 4 June that “the ratification process in Member States will continue on the basis of the current text and according to the established timetable.” The Lisbon European Council on 26 and 27 June 1992 confirmed this position. Things went in a similar fashion after the Irish referendum on the Treaty of Nice on 7 June 2001. On that occasion, the other member states immediately reaffirmed during the General Affairs Council and Goteborg

European Council (on 11 and 15-16 June 2001, respectively), that the ratification process would go ahead according to the timeframe and methods that had been established.

Continuing the ratification process (in line with the aforesaid precedents) would keep some Union states from feeling like second-class members. Moreover, it would facilitate a positive way out of the crisis. At the end of the two-year period, the overall picture regarding national positions on the CT will be complete. At that point, it will be possible to identify the most appropriate solutions on the basis of concrete data from all member states and not simply opinion polls and assumptions. The two-year period will also make it possible to play down the crisis. While the ratification process is under way, discussions can begin with those member states that have rejected the Treaty to gradually find a way to regain their consent.

Seeking a way forward

The last point mentioned is worth examining. In parallel to continuing the process of ratification, diplomatic talks should commence between the non-ratifying states, the other member states and the European institutions.

It is essential that the positions and initiatives taken in the countries that fail to ratify be in tune (or at least not in contradiction) with those taken by European institutions and the member states collectively. In fact, only through constructive interaction between the national and the European political processes can a strategy to overcome the crisis be effectively worked out and pursued. The Danish and Irish precedents have shown that a negative referendum outcome can be remedied if there is the necessary cooperation between national and European leaderships.

Certainly, France is not comparable to Denmark or Ireland. But this only means that, in the event of French non-ratification, even greater efforts must be made to find a solution, not that the method should be changed. This is all the more true as a part of the French “no” is constituted by voters in favour of the European integration process. Profoundly divided on the reasons for voting “no”, those opposing the Treaty are no less split over the political implications should they win the referendum. For those rejecting the Treaty because it does not give the Union sufficient powers in the economic and social fields, it will be hard not to engage in a national

debate on how to get out of the impasse and ensure a continued active role for France in the Union.

The political responsibility for finding a way forward rests first and foremost with the leaders of the countries that reject the CT. They should abstain from hastily asking for a suspension of the ratification process or the immediate opening of new negotiations on the Treaty and acknowledge that the European institutions and other member states (or the majority of them) intend to go ahead as planned. They should also start an extensive national debate involving all political and social forces in the country and, finally, open a dialogue with the European institutions and the leaders of the other states, attentively assessing their suggestions.

Equally important will be the role of the European institutions and the other member states, starting with Commission President Barroso and European Council President Juncker, who should immediately clarify three points: the vital importance of the Treaty for the future of the enlarged Europe; the intention to go ahead with the ratification process and to complete it by October 2006; the willingness to enter into open dialogue with those nations that have voted against the Treaty, provided the two previous points are safeguarded. The General Affairs and External Relations Council and the European Council (which will convene shortly after the French and Dutch referendums, on 13 June and 16 June respectively) should take a similar stance. This could contribute to promoting a constructive political debate in those countries where ratification of the Treaty has been rejected, helping national leaders to present politicians and the public opinion with clear and realistic options.

At the same time, specific initiatives could be developed at the European level to facilitate solving the difficulties that emerged in the member states. For example, a declaration by the European Council on the principles that inspire the economic and social policies of the Union could be helpful in France, where the Constitution has been accused of being ultra-liberal, thus leading to the progressive destruction of the French social system. The accusation is unfounded: the Constitution explicitly refers to a social market economy model in which the functioning of the market and social safeguards are balanced. It would be appropriate for the European Council to reassert this point.

In any case, every effort must be made to keep a French or Dutch “no” from blocking the Union’s activities. Nothing could be worse. Rather, overcoming the crisis would call for an updating and relaunching of Union

initiatives in those sectors, such as economic and social policies, with which European citizens tend to be most dissatisfied. More in general, it is essential that the Union give proof of its capacity to react: if it remains paralysed after a negative outcome of a national referendum, its credibility would suffer.

Furthermore, efforts to introduce informally some of the Treaty's reform measures that appear to be more urgent or require long preparatory work should hopefully continue. This is the case, for example, with the European Defence Agency and the European External Action Service. It could be objected that informal application of Treaty provisions loses legitimacy after a "no" vote in one or more countries. However, anticipated application of some innovations, like the ones mentioned, does not seem to raise opposition – not even in those countries in which the outcome of ratification is most at risk.

Conclusions

The point of view expressed in this paper is that, should France or other countries reject the CT, the ratification process must be carried on in the rest of the Union as planned. This is required by Declaration no. 30 annexed to the Treaty. It also satisfies a basic condition of democracy, which is that each member state can make its voice heard on a par with every other. At the same time, it makes it possible to verify the entire range of opinions of European citizens and work out the most suitable solutions on that basis. Not very convincing is the idea that the ratification process should be halted to avoid a negative chain reaction. Even less convincing is the idea that a new phase of renegotiation could be immediately taken up with success. It is unlikely that such an operation would be feasible, especially if the promoter were a country that had rejected the Treaty. Basically, suspending ratification would worsen the crisis and not contribute to solving it.

The ratification process should continue, even in the event of a possible French, Dutch or other "no". But a parallel political and diplomatic process should be started up promptly to work out possible solutions by the October 2006 deadline. In the year that lies ahead, the countries that have rejected the Treaty should commit themselves to fostering a broad national debate on the proposals to put forward at the European level. On their part, the European institutions and the other member states should declare their willingness to engage in a constructive dialogue to define a strategy to solve the crisis, while declining renegotiation of the Treaty. The

European Council could also promote initiatives, such as a declaration on the principles of the social market economy, aimed at responding to some of the concerns of those who voted “no” without necessarily being contrary to European integration.

In the meantime, the European Union must not remain paralysed; rather, it must continue and intensify its efforts to relaunch its policies, even by implementing in advance, where possible, the provisions of the Treaty that do not meet with open opposition. By doing so, it will demonstrate its vitality and capacity to react in the face of difficulties – something that could contribute in no small measure to overcoming them.