



The New European Constitution

The Treaty Establishing a Constitution for Europe (“the Constitution”) was signed by the heads of state and government of the European Union (EU) on October 29, 2004. In order to come into force, the Constitution must now be ratified, a process which in ten countries entails a popular referendum. This brief explains the developments that led to the drafting of the Constitution and outlines its major institutional and policy-oriented innovations. Finally, the brief describes the ratification process and discusses the likely outcomes of individual referendums.

Background – the Laeken Declaration and the Convention on the Future of Europe

The Constitution has its origin in the existing Treaties on which the EU is based, i.e. the Treaty of Rome of 1957 and the Treaty on European Union of 1992, as well as Treaties that have amended these, most recently the Treaty of Nice (2000). The main objective of the Nice Treaty was to prepare the Union for the enlargement of the EU to include another ten countries. Although the Treaty did take such steps, there was broad consensus in the European Council that further streamlining of institutions and decision-making procedures was needed. Because agreement upon the details of such changes could not be reached at the time, a declaration on the future of Europe was included as a component of the Nice Treaty. This declaration established four areas of future consideration, including more precise division of responsibilities between the EU and member states, the status of the Charter of Fundamental rights (proclaimed at Nice but not incorporated into the Treaty), the simplification of the Treaties and the role of national parliaments in the EU’s institutional architecture. At the subsequent Laeken European Council summit in 2001, the European Council adopted this declaration, which also committed the Union to becoming more democratic and transparent. It was agreed to establish a Convention for the Future of Europe composed of MEPs and national MPs, which would draft a constitutional document. The Laeken declaration specified four areas of attention: the division of powers between the Union and its member states, more rigorous definition of the tasks of the Union’s institutions, coherence of the Union’s external actions and strengthening of the union’s legitimacy.

Chaired by former French President Valéry Giscard D’Estaing, the Convention met from February 2002 and delivered its proposal for a draft constitutional treaty in June 2003. This document was subsequently used as the basis for discussions on reform during the Intergovernmental Conference that opened in October 2003. The negotiations were marred by disagreements. Nevertheless, the European Council approved the Constitution on June 18, 2004 with relatively few changes. After being signed by heads of state and government, the Constitution was endorsed by the European Parliament on January 15,

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2005 by 500 votes to 137 with 40 abstentions. Despite the large majority in favor, it should be noted that amongst British, Czech and Polish MEPs a majority of votes were against.

The Contents of the Constitution

The Constitution is divided into four parts:

Part I sets out the provisions that define the Union, including its objectives, values, powers, institutions and decision-making procedures. Areas of responsibility are divided into exclusive competencies of the EU and areas of shared competence between member states and the EU. The major innovations include:

- The spelling out of the principles that guide the division of responsibility between member states and the EU by emphasizing the principle of conferral, i.e. that the EU has no competencies by right. In other words, where competencies are not conferred upon the EU they remain within the member states.
- The abolition of the rotating Council presidency (whereby each state holds the presidency of the Union for six consecutive months). Instead the Union will have a permanent European Council President to be elected by the members of the European Council using Qualified Majority Voting (QMV). The President will be elected for a 2 ½ year period, renewable once.
- The President of the Commission will continue to be appointed by the European Council but must under the Constitution be elected by a majority of the MEPs. If the candidate does not acquire such a majority the European Council must suggest an alternative candidate within one month.
- Expansion of the use of QMV in the Council. This method is to be used unless the Constitution provides otherwise.
- Expansion of the use of the co-decision procedure (named the “ordinary legislative procedure”), which becomes the default decision-making procedure for internal policies (excluding matters of external relations such as the common foreign and security policy).
- QMV is to be defined as at least 55% of the members of the Council, comprising a minimum of 15 of them and representing member states comprising at least 65% of the Union’s population. These latter changes also apply within the European Council, however, if this institution takes a vote neither the Council President nor the Commission President (who is also a member of the European Council) can take part.
- The introduction of a Union minister for Foreign Affairs to be appointed by the European Council using QMV.
- A change of the number of Commissioners: in the initial period of office under the Constitution, there will be one commissioner from each member state. However, from 2014 the size of the Commission will be reduced to two-thirds of the number of member states using a system of equal rotation.

- The introduction of a citizens' initiative by which at least one million citizens from different member states can invite the Commission to propose legislation within its areas of competence.
- Procedures for voluntary withdrawal from the Union have been included whereby any state wishing to withdraw must notify the European Council who will then provide guidelines for the negotiation and conclusion of practical arrangements. Such an agreement is to be concluded by the Council acting by QMV and after obtaining consent from the European Parliament. (In this case QMV is to mean 72% of the members of the Council comprising at least 65% of the population of these states).

Part II contains the Union's Charter of Fundamental Rights, which despite being proclaimed on December 8, 2002, was not incorporated into the Treaty and hence had no binding legal force. Incorporating this Charter into the Constitution is thus a legal innovation because the Charter will now become binding and subject to interpretation by the European Court of Justice. Many of the rights are already granted Europeans by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) signed in 1950. However, where this document mainly focuses on negative rights, the EU's Charter includes a range of positive rights such as the right to good administration, the social rights of workers, the protection of personal data and bioethics.

Part III sets out the policies and functioning of the Union. Again, much is incorporated straight from the previous Treaties. However, there are some significant innovations:

- It is envisaged that the Council will act by QMV when adopting a European decision defining an EU action or position proposed by the Union Minister for Foreign Affairs. Given the fact that states may be uncomfortable with such procedures matters can be referred back to the Minister and if a solution cannot be found referred to the European Council (this is also known as a "handbrake").
- The Constitution introduces other provisions designed to provide a coherent foreign and defense policy, however, mainly of an intergovernmental nature.
- The Constitution expands the range of areas in which judicial cooperation can take place, although such matters are limited to areas that may have cross-border implications. Judicial cooperation will also be expanded in a number of criminal matters including the sexual exploitation of women and children, money laundering, counterfeiting, IT crime and organized crime.
- In regards to the above, provisions are made for national parliaments to scrutinize proposed EU legislation.

In Part IV the procedures for adopting and revising the Constitution are listed.

Ratification

Despite its name, the Constitution is still a treaty in legal terms. Consequently, the rules that apply when treaties are changed also apply in the case of the Constitution. This

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means that in order to come into force the Constitution must be ratified in accordance with national procedures for ratifying an international treaty. Such procedures depend on the internal constitutional conditions in each state. In a number of countries the national parliament can ratify treaties without the direct involvement of the public. Other states are holding a referendum either for constitutional reasons or at the discretion of the government (due to political pressure).

The EU Constitution cannot enter into force until one year after the last ratification and as a consequence, the EU will continue to be governed by current Treaties until this has happened. Should one or more countries fail to ratify the treaty in the two year period following signature, then a provision exists to refer the matter to the European Council.

Current Status of the Ratification Process

In Greece, Italy, Germany, Hungary, Latvia, Lithuania and Slovenia the Constitution has been ratified by national parliaments. In Austria, Belgium, Cyprus, Estonia, Malta, Slovakia, Sweden and Finland, national parliaments are expected to ratify the Constitution.¹

Spain held a referendum in February 2005 and voted in favor of the Constitution by 78.5 to 16.2%, albeit with a turnout of only 41.5%. The result of the Spanish referendum is non-binding and the Spanish parliament must still act to ratify the treaty.

Portugal is planning a referendum for 2005 and in Luxembourg a referendum has been scheduled for July 10, 2005. In both of these countries overwhelming support for the Constitution can be expected. Ireland is expected to hold a referendum in late 2005 or early 2006 and despite previous problems with public support (Irish voters rejected the Nice treaty in 2001 before finally supporting it in 2002), recent opinion polls suggest moderate support for the Constitution albeit with two thirds of the electorate undecided.

In France the referendum was held on May 29, 2005. The polls showed levels of support for the Constitution declined sharply in the months leading up to the poll with the No camp eventually securing a clear 55 percent majority. Such an emphatic rejection of the treaty caused shockwaves throughout the Union and led many commentators to speculate on whether the treaty will ever enter into force (and even whether the euro will survive).

The Dutch went to the polls four days after the French rejection of treaty in what was the first nation-wide poll in the history of the Netherlands. Although the poll was not constitutionally binding, the government promised to respect the outcome, which was a resounding 62-38% rejection of the Constitution. There remains a stable political majority in favor of the constitution in both chambers of parliament, which poses some

¹ In some of these states, however, there has been talk about a referendum: the Belgian Prime Minister has mentioned a possible non-binding referendum and in Finland, the justice minister has suggested that a referendum could be held to coincide with the presidential elections in 2006.

interesting questions about the fracture between the political elites and the people they govern. The French and Dutch referendum results have undermined the viability of the Constitution. The British and Portuguese governments have postponed their referendums and it looks likely that the whole Constitution will need to be renegotiated. The UK was highly likely to reject the Treaty in its referendum (polling showing a 65% vote against) whilst polling in Portugal shows consistent levels of support.

Poland will hold a referendum to coincide with the first round of the presidential elections on September 25, 2005; hence a higher turnout can be expected. Recent surveys show from 43%-60% in favor of the Constitution. Two days later, on September 27, the Danes will go to the polls. Although the current public mood is in favor, the Danes have previously rejected a treaty (Maastricht in 1992) and also rejected membership of the Euro in 2000. In the Czech Republic the political elite is perhaps more divided than in most other member states with the government in favor but the centre-right opposition campaigning for a “no”. A referendum is likely to be held in 2006. The latest polls indicate a majority in favor of the Constitution, but with a very large proportion of undecided voters (approximately 42%).

There is, then, considerable uncertainty about the future of the Constitution following the French and Dutch results and the near certainty of a British rejection of the Treaty should a referendum be called.

Summary

Two arguments dominate the debate about the impact of the EU Constitution: some commentators hold that the document is merely a tidying-up exercise aimed at increasing the clarity of the legal foundations of the Union. Others, however, see the Constitution as a move towards further political integration.

The truth lies somewhere in between. It is clear that Part I clarifies the division of responsibilities, particularly between the EU and member state level. Although the large majority of the clauses and provisions of the Constitution are unchanged, there are a number of innovations. These include methods of appointment of key figures such as the President of the Council, the addition of the Minister for Foreign Affairs, and the expansion of qualified majority voting and the co-decision procedure into additional policy areas. Finally, it should be recognized that the emphatic rejection of the treaty by France and The Netherlands has raised serious questions as to the future viability of the treaty, with several commentators already claiming it to be “dead and buried”.