

Non, Nee, Ne, Nie or No – Consequences, Options, and Recommendations if the Constitution is Rejected

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Key Points:

- A French No vote on 29 May 2005 would be a serious setback for the ratification process. However, the European Constitution would not be dead, neither legally nor politically.
- In case of a No vote in the constitutional referendum
 - the EU governments, the Commission, and the EP should declare as soon as possible that the ratification process will continue. The negative outcome of the referendum should be taken as an opportunity to intensify the constitutional debate on both the national and the transnational level.
 - the referendum should be repeated within a year, as this will be the only way to eventually attain the entry into force of the Constitutional Treaty.
 - certain provisions of the Constitutional Treaty should be introduced into EU practice even without prior ratification. However, only the entry into force of the new primary law can guarantee that the progress made in the Constitution will be implemented in full.
- If the ratification of the Constitutional Treaty should ultimately fail, it cannot be assumed that the non-ratifiers will voluntarily leave the EU. Since the extent of the ensuing “constitutional crisis” will not be particularly high, it also seems unlikely that the ratifiers will establish a new Union with institutions of its own.
- In case the ratification fails, the member states will intensify their efforts to implement as many of the innovations of “Constitution I” into political practice by other means (Inter-Institutional Agreements, Rules of Procedure, “small” intergovernmental conferences, in the framework of future accession treaties). However, as a result of the legal and political constraints of the “Nice Plus” option, one can assume that the Treaty of Nice will be reformed in the shape of a “Constitution II” in a few years time.
- Until a new primary law is adopted, full use should be made of the potentials of differentiated integration within or outside the EU framework. The public discourse about the borders of Europe and the extent of European politics should be intensified.

The ratification process of the European Constitution enters into a decisive phase. On 29 May 2005 French citizens will vote on the Constitutional Treaty. The scheduled introduction of the Constitution in November 2006 requires the ratification of the new primary law – which brings together and replaces the present plethora of Treaties – in all EU member states. When President Jacques Chirac announced the referendum in July 2004, it was expected both in and outside France that the referendum would be successful. At the beginning of 2005 the opinion polls suggested that there would be a comfortable two-thirds majority for the Constitution.

In the months that followed the mood changed. Since February/March 2005 various opinion polls showed that a small majority of the electorate intends to vote against the Constitution. A few weeks before the referendum the latest opinion polls show that the supporters of the Constitution are on the rise.

There are different reasons why voters are against the Constitution: On the one hand, the referendum is seen as a welcome opportunity to “punish” the French government – which has come out clearly in favour of a ratification – for its domestic economic and social policies. On the other hand, European policy issues also play a role: many French voters, particularly those on the left of the political spectrum, think that the Constitutional Treaty fosters the establishment of a neo-liberal Europe. Their criticism is directed primarily at the new EU service directive. Furthermore, the mood of the public is still adversely affected by persistent reservations about EU enlargement in 2004 and the associated fear of a loss of French influence in an EU-25. In addition, there is the negative attitude of a majority of the French electorate to the question of Turkey joining the EU.

Although these issues have little or nothing to do with the actual contents of the Constitutional Treaty, they may have an adverse effect on the outcome of the French referendum. The numerous advantages of the new primary law have receded into the background. Yet even in the event of a No vote, it is hardly possible to call into question the fundamental desire of the French elites and the population for further integration. Since the majority of the French are pro-European, a rejection of the Constitutional Treaty will not be the result of “too much Europe”, but of “too little”. The French population is not fundamentally against a constitution, but it would rather like to have a different constitution.

In view of a potential failure of the referendum, the following questions arise: What would be the specific consequences of a French No vote? How could one react to a rejection of the Constitution? What happens if the ratification of the Constitution fails in France or in other countries? What are the options in such a case, and which options seem realistic?

Consequences of a French No Vote

There will be a number of consequences if there is a French No vote on 29 May 2005:

- *No end of the Constitution:* Even in the event of a No vote on 29 May 2005, the new European primary law would not be dead, neither legally nor politically – even though many eurosceptics hope that this will be the case. A negative outcome of the referendum would merely mean that the Constitution cannot (yet) be ratified in France. However, this does not mean that the ratification process has failed and that the entry into force of the Constitution has become impossible.
- *Negative effects on the overall ratification process:* A French No vote would be a serious setback for the ratification process. It would considerably influence the adoption of the Constitution in other EU member states, particularly in those countries in which a referendum is still pending. Thus a No vote in France could have a negative impact on the referendum in the Netherlands, which takes place only a few days later on 1 June 2005. Its outcome is also still uncertain. Dutch voters could decide not to go to the polls in the belief that the constitutional process had come to an end as a result of the French No vote, and that their vote no longer matters. Moreover, the public pressure for a Yes vote, prompted by the wish not to fall out of line with those member states which had voted in favour of the Constitutional Treaty, could decrease.
- *Reaction of EU partners:* In the event of a French No vote, the governments of the EU member states would have to react. A political declaration by the Heads of State and Government issued in October 2004 says that the European Council will deal with the question of rejection by one or more member states, if the Constitution is not ratified within two years of its signing on 29 October 2004. However, in the case of France the EU partners will not be able to wait that long. In order to deflect the potential political and economic effects of a French No vote, governments will have to formulate a joint declaration on the future of the ratification process at the EU summit in June 2005 at the latest.
- *Weakening of the French role and the Franco-German tandem:* In case of a No vote France would lose some of its political effectiveness in the EU. France could no longer do full justice to its stated aim of actively shaping the European integration process. The weakening of the French voice would also affect the Franco-German motor of European integration. The leadership role of the Franco-German tandem, which has already declined in recent years, would be weakened even further.

Recommendations in Case of a Negative Outcome of the French Referendum

On account of the far-reaching consequences of a French No vote on 29 May, a series of specific measures should be adopted:

1. Political signal to continue and intensify the ratification

The governments of the EU member states, which negotiated and adopted the Constitutional Treaty in the Intergovernmental Conference in June 2004, the European Commission, and the European Parliament (EP) should declare as soon as possible, and before the Dutch referendum on

1 June 2005, that the ratification process will continue despite the No vote in the French referendum.

There should not be a pause or a complete halt in the national ratification processes, as has been called for, especially by opponents of the EU and the Constitution. On the contrary, a No vote in France should not lead to a period of resignation, but should rather be taken as an opportunity to intensify the constitutional debate on both the national and the transnational level.

A French (or Dutch) No vote could provide an opportunity to conduct a pan-European debate about the contents and the significance of the Constitution. Such a public discourse occurred neither during the consultations in the European Convention, nor at the time of the Intergovernmental Conference. The lack of publicity is, however, one of the main reasons why citizens have a sceptical attitude towards the Constitution and in the final analysis towards the EU.

The public debate on the Constitution must primarily concentrate on the need to dispel the widespread (though largely unjustified) prejudices about the new primary law. It will also be important to spell out not only the advantages but also the limits of the Constitution. The new Constitutional Treaty will fundamentally change the political and institutional system of the EU-25+. However, the contents and making of European policy are not predetermined by the Constitution – the new primary law merely provides the political framework. In the final analysis, the Commission, the national governments, the parliaments of the member states, and the European Parliament are fully responsible for EU decisions.

The public will only take an interest in the debate on the Constitution if the participants include Europe's political, intellectual, and cultural elites. The political elites alone will not be able to convince the European public to ratify the Constitution.

Among France's EU partners, Germany should play a particularly active role. In order to maintain and strengthen the significance of the Franco-German tandem for European policymaking, a French No vote on 29 May 2005 should lead to a further deepening of the bilateral relationship between Berlin and Paris. This could include cooperation projects especially in the fields of fiscal, economic and defence policies.

2. A second French referendum

In the event of a negative outcome, the May referendum should be repeated within one year, in case (and this seems probable) the Constitutional Treaty has been rejected by only a small

majority of voters. As in Denmark after the initial No vote in the referendum on the Treaty of Maastricht, or as in Ireland after the initial rejection of the Treaty of Nice, a second referendum is the only way to attain the entry into force of the Constitutional Treaty.

Experiences in Denmark and Ireland have demonstrated that the electorate's awareness of the actual content of the treaty reforms and the political consequences of a negative referendum is greater in a second poll. Furthermore, experience has shown that in a second referendum citizens who intend to vote Yes are especially motivated to go out and vote. In addition to this, domestic political issues, which may have contributed to a rejection of the Constitution in the initial poll, as a rule tend to fade into the background in the second referendum.

Holding a second French referendum would weaken both the argument that the Constitutional Treaty was no longer on the agenda as a result of the French No vote and the argument that the French No justifies a rejection also in other EU countries. For this reason the second referendum should be held before the referendums in the United Kingdom and in the Czech Republic.

A number of measures should be adopted in order to increase the chances of achieving a positive result at a second referendum:

- *Intensive political marketing:* One should design a more effective information campaign about the advantages and the limits of the Constitutional Treaty. Its primary task will be to counter the numerous "naysayers" who argue that the Constitution cements a neo-liberal Europe. It must be made quite clear that the Constitutional Treaty is not based on one specific economic policy concept. By including numerous social aims, values, and basic rights, the EU's social dimension has been strengthened. However, in practice the Constitutional Treaty does not inevitably lead to a neo-liberal or a social Europe. The EU's basic economic orientation is not determined by the new primary law, but on the grounds of concrete political decisions taken by the actors involved, in particular the member states and the Commission.
- *Symbolic and declaratory measures:* Like after the failure of the first Irish referendum on the Treaty of Nice in June 2001, the European Council could attempt to dispel fears about certain consequences of the Constitution through a special declaration – without changing the new primary law. The Heads of State and Government could e.g. react to the anxieties of many French voters concerning the loss of national sovereignty and identity. A declaration could emphasize that the Constitution does not interfere with the basic political and constitutional structures of the member states. Furthermore, it could be made clear that there is no link between the entry into force of the Constitutional Treaty and a decision about Turkish EU membership.
- *Domestic policy measures:* In order to counter the widespread anxiety about the erosion of national competences, it might be helpful to strengthen the role of the French National Assembly in the formulation of national EU policy. The ability to exercise parliamentary control over the French government's European Policy could be enhanced by changes in

national law. This would counter both the perceived loss of French power and latent criticism concerning the lack of democratic participation. Such measures were also introduced by the Irish government after the Irish No vote in 2001.

On the other, it would not be possible to concede opt-outs, as was the case with Denmark, with regard to the Common Foreign and Security Policy and the Economic and Monetary Union. The Constitutional Treaty does not include a significant increase in EU competences, which would have made it possible to concede opt-outs in certain policy areas. The reforms enshrined in the new primary law primarily pertain to the powers, the organization, and the composition of European institutions.

In addition to the measures outlined above, a second referendum could be linked to the question of France's membership in the EU. Spelling out such harsh consequences of a No vote would limit the effects of superficial populism. However, the option of a French withdrawal from the EU does not seem realistic (see below). Thus, a threat of this kind would not only fail to make its point, but might even have a negative effect on the outcome of a second referendum.

3. Early implementation of various Constitutional provisions

The retention of the Treaty of Nice ("Nice forever") is no feasible option in view of the EU's existing deficits with regard to democracy, efficiency and transparency. Thus, in the event of an initial French No vote, some innovations of the Constitutional Treaty should be implemented into practice – as far as this is legally possible without a prior ratification of the new primary law.

Although the Constitutional Treaty has not as yet been ratified, certain provisions have already been implemented or at least initiated in EU practice. These include the establishment of the European Defence Agency, the preparations for the creation of the European External Action Service, the implementation of the Constitution's solidarity clause after the terrorist attacks in Madrid, and the election of Jean-Claude Juncker as chairman of the Eurogroup.

This practice should continue in the event of a French No vote on 29 May, or in the event of a No vote in other EU countries. The early implementation of certain constitutional innovations will not only improve the ability of the EU-25 to act and to take decisions. It will also create a political state of affairs from which the EU member states will find it difficult to retreat even if the ratification of the Constitution should ultimately fail.

However, this should be done in a cautious manner. In order not to reduce the chances for a successful continuation of the ratification process, it is imperative not to give the impression that an adoption of the Constitution is unnecessary. This would not only negatively affect the remaining referendums. It would also not correspond to the facts: early implementation of certain constitutional provisions can by no means be applied to all aspects of the Constitution.

In fact, the central reforms of the Constitutional Treaty cannot be implemented in this politically pragmatic manner. This applies not only to the introduction of a single legal personality, the abolition of the three-pillar structure, the creation of a catalogue of competences

and the (few) additional EU competences, but above all to many institutional innovations. These include the introduction of a President of the European Council, the establishment of “double majority” as the new voting procedure in the Council of Ministers, a reduction of the number of Commissioners, the extension of majority decision-making in the Council, the creation of an EU Foreign Minister, and an enhancement of the rights of the EP and the national parliaments.

Such reforms can be implemented indirectly by concluding Inter-Institutional Agreements or by changing the Rules of Procedure of individual EU bodies. However, in the majority of cases the introduction of certain reforms laid down in the Constitution would still require a formal amendment of the current European Treaties. Instead of conducting comprehensive renegotiations, specific aspects of the Constitutional Treaty (e.g. “double majority”) could be implemented in the framework of a “small” intergovernmental conference or through the incorporation into future accession treaties. Since this would involve only a limited number of changes to the European Treaties, most of the member states could avoid a new referendum.

However, the implementation of certain reforms in the absence of a ratified Constitution would come up against legal and political barriers. On the one hand, it would create an opaque patchwork of widely dispersed provisions. This would negate one of the central aims of the constitutional process, namely to improve the transparency of the EU’s legal foundations for its citizens. On the other hand, such a practice would require the approval of all member states. Numerous important innovations, which were the subject of heated debates in the European Convention and in the Intergovernmental Conference, could fail to surmount this hurdle, especially since the usual package-deal method would be far more difficult to employ than in large-scale intergovernmental conferences. These innovations include in particular the voting procedure of “double majority”, the reduction of the number of Commissioners, or the introduction of a President of the European Council.

In the final analysis only the ratification of the new primary law can guarantee that the progress made in the Constitution will be implemented in full.

Options in Case the Constitution is Not Ratified

Even if the first or perhaps the second French referendum were to be successful, this would still not clinch the entry into force of the Constitutional Treaty. In addition to the Netherlands, a referendum is scheduled in the Czech Republic, Denmark, Ireland, Luxembourg, Poland, Portugal and the United Kingdom. Whereas one can expect an approval in Denmark, Ireland, Luxemburg, and Portugal, the outcome of the referenda in the Netherlands, Poland, and the Czech Republic are still uncertain. It is generally believed that the result in the United Kingdom will be a No vote.

Yet what will happen if the Constitution is not ratified in all EU member states? Which of the much-discussed Plan B options can be excluded? And which of them seem to be realistic?

- *Voluntary withdrawal of non-ratifiers:* Due to the grave political and economic consequences for the states concerned it seems very unlikely that the countries which were unable to ratify

the Constitutional Treaty will leave the EU voluntarily – even though the Constitutional Treaty for the first time includes the possibility of a voluntary withdrawal. The exit clause option could also be problematic from the point of view of the ratifiers, for it might weaken the Union. The option of France, one of the most important founding nations, leaving the Union can be excluded for both reasons. And even in the event of a failed ratification in the UK, a British withdrawal from the EU would have severe consequences. In this case, the further development of the European Security and Defence Policy would become almost impossible.

- *Entry into force of the Constitution only in those states which have ratified it:* For political and legal reasons the coexistence of two foundations of primary law within one Union is not possible. This theoretical option assumes that the Constitutional Treaty will apply only to those EU member states which have ratified the new primary law. The rest of the Union would continue to adhere to the Treaty of Nice. A legal construct of this kind would lead to irreconcilable contradictions between the Treaty of Nice and the Constitutional Treaty (diverging legal norms, instruments, and procedures, and different institutional structures). The coexistence of two treaties cannot be reconciled neither with European law nor the national constitutions.

Against this background, there are two general options in case the ratification of the Constitution fails:

Option 1: "Nice Plus" and reform of the primary law in a few years

The Treaty of Nice continues to be the EU's legal basis, at least for the foreseeable future. As described above, the member states could reach a decision to implement certain reforms – agreed to in the Constitutional Treaty – into political practice via Inter-Institutional Agreements, the adoption of certain Rules of Procedure, "small" intergovernmental conferences or in the framework of future accession treaties.

Furthermore, a smaller group of member states willing to cooperate even further could intensify its cooperation in certain individual cases or in certain policy areas. Such cooperation could be deepened either within the EU – for example, in the form of enhanced cooperation in the context of the Eurogroup, with respect to the introduction of a European Prosecutor, or in the areas of social and fiscal policy – or outside the EU framework – e.g. in the field of security and defence. This could apply either to projects originally included in the Constitution (e.g. Permanent Structured Cooperation) or to certain areas of cooperation which are covered neither by the Treaty of Nice nor the Constitutional Treaty.

In addition to this "Nice Plus" option and after some time has elapsed, the attempt to elaborate a new primary law could be repeated in the framework of a convention and a subsequent intergovernmental conference. The consultations on a "Constitution II" could profit from the work on the first Constitutional Treaty. It might even prove possible to overcome certain deficits concerning the structure and content of "Constitution I". The fact that the failed

ratification process for the original Constitutional Treaty did attract some public attention might strengthen the interest of the citizens and the media in a new constitutional process.

Option 2: Creation of a new Union

A group of member states, which is not convinced that the previous option is a viable basis for an EU-25+, could establish a new Union. A new treaty negotiated, approved, and ratified by this group of member states would serve as the legal basis of this community. The content of the existing Constitutional Treaty could provide a basis for the negotiations on the new treaty. The foundation of the new Union would go hand in hand with the establishment of new institutions. The cooperation of the member states in this new community would be dominated by the legal, political, and institutional framework of the new entity.

Concerning the establishment of a new Union, two sub-options seem conceivable: In a first version the member states aspiring to establish a new Union of their own could voluntarily leave the present EU. In this case the legal conditions for exiting the EU would have to be negotiated in detail. In a second version the foundation of a new Union could occur without the prior withdrawal of certain member states. Instead there would be a de facto "Union within the Union". In this case the old EU, to which all countries of the present and the new Union belong, would form a kind of bracket between the two entities, which otherwise would be legally independent.

The creation of a new Union seems realistic only under certain preconditions: First of all, the failure to ratify the Constitution would have to lead to a fundamental integration crisis. Only then will the public and political pressure be high enough to bring about the establishment of a new Union.

Furthermore, it would have to be clearly evident that the ratification of the Constitution in certain EU member states failed due to a lack of willingness to engage in a further deepening of integration. In the final analysis the establishment of a new Union would be the answer to the fact that it was no longer possible to reconcile diverging kinds of integrational logic among EU member states. France could become a member of a new Union, even if it failed to ratify the Constitution. The French could argue that its citizens had rejected the new primary law not because they lacked integrational will, but on account of the insufficient extent of the reforms.

Moving Forward After a Ratification Failure

If the ratification of the Constitution in France or in any other country should fail in a first referendum, the poll should be repeated – this should apply to all EU member states, including the Netherlands and the United Kingdom. Only if a second attempt to ratify the Constitution in one or more member states has been unsuccessful, will the approval and the entry into force of the original Constitutional Treaty have ultimately failed.

In this case it cannot be assumed that the non-ratifiers (one or more) will leave the EU voluntarily. It also seems unlikely from a current perspective that a group of member states will found a new Union. Even if an overwhelming majority of EU states could in theory participate in it, the extent of the “constitutional crisis” will be insufficient to enter into such a venture.

If the ratification process fails, it is far more likely that the member states will attempt to implement as many of the innovations of “Constitution I” as possible in the upcoming years, even in the absence of a ratified Constitution (“Nice Plus”). However, it will soon prove impossible to implement many of the reforms, either due to imponderable legal reasons, or due to a lack of consensus between the member states. For this reason one can assume that there will be another attempt to reform the primary law in the shape of a “Constitution II” in a few years time.

In the meanwhile the time should be used productively:

- The failure to ratify the Constitution must not lead to a stagnation of the unification process. For this reason it is important to make full use of the potentials of differentiated integration, which permits a group of member states to go ahead in certain policy areas – if possible within otherwise even outside the EU framework. However, the option of differentiated integration should not be confused with the notion of a core Europe, which includes only a small and exclusive group of states. In case the ratification of the Constitution fails, the vast majority of member states will declare itself in favour of further cooperation projects – let alone to prevent the establishment of a closed leadership circle inside the EU. The past “core Europe” debate has generated a great deal of suspicion in Europe. In many countries it is construed as the harbinger of a future two-tier Union. This is not only detrimental to the integration process as a whole. It also obscures the fact that it is necessary to construe differentiated integration as a strategic opportunity.
- Public discourse in the upcoming years should not be restricted to the Constitution. The constitutional debate is in large parts a substitute for debates about other issues which still remain unsolved: The debate is not first and foremost about the new primary law, but about open questions concerning the borders of Europe, the extent of European politics, or the loss of national identity and sovereignty. So far these questions have not received an adequate answer, and for this reason they have surfaced with great urgency in the context of the constitutional debate. Only when the EU institutions, the national governments, and the parliaments of the member states address these questions openly will it be possible to ensure that the constitutional process, and, in the final analysis, the European integration project as a whole, progress successfully. If this is not the case, the extent to which European citizens approve of the European unification project – and thus the legitimacy of European policymaking – will continue to decrease.