

The European Council as a constitutional architect: Reacting to results of National Referenda

Points of Discussion

- The European Council as a constitutional architect: historical and legal role
- The European Council's role of monitoring and mediating: empirical evidence
- The European Council: A legitimized crisis manager?

Dossier on the basis of: Wessels, Wolfgang (2016): The European Council, Palgrave Macmillan.

Compiled by Marieke Eckhardt

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Introduction: A historical and legal role

One of the most significant early developments of the European Council's activities saw it take on the role of a constitutional architect in the context of treaty revisions. The European Council has provided the opportunity for several generations of national leaders to launch and steer 'Conference(s) of Representatives of the Governments of the Member States' (Art.48(4) TEU), more commonly known as Intergovernmental Conferences (IGCs), and thus to serve as 'treaty negotiators'. Claiming to be 'the driving wheels of the European construction' (Paris, October 1972), the highest political representatives of the 'masters of the Treaties' (BVerfG, 2009: para. 150) have used the European Council to exercise a range of functions associated with convening and concluding an IGC and monitoring the ratification of treaty revisions. The governmental heads themselves have taken essential decisions regarding both the procedure and the substance of treaty revisions. In deliberating and deciding on (quasi-)constitutional matters of treaty-making, the Heads of State or Government have designed appropriate concepts for both the vertical allocation of competences between the Member States and the EU level, and for horizontal decision-making procedures and their implied impact on the EU's institutional balance.

Table 1: The European Council and the Constitutional Decade 1999–2009: A significant case for the European Council's record

Year	Event
1999	<ul style="list-style-type: none"> - Amsterdam Treaty (coming into force) - 'Body' (Convention) for drafting a Charter of Fundamental Rights - Start of Monetary Union
2000	<ul style="list-style-type: none"> - Negotiating and concluding the Treaty of Nice - Declaration 23 (TEU (Nice))
2001	<ul style="list-style-type: none"> - Laeken Declaration
2002	<ul style="list-style-type: none"> - Copenhagen: Concluding negotiations with 12 applicant countries
2002–2003	<ul style="list-style-type: none"> - Convention on the Future of Europe: Drafting the Treaty Establishing a Constitution for Europe
2003	<ul style="list-style-type: none"> - Mandate for an IGC based on the Convention's draft
2004	<ul style="list-style-type: none"> - Irish Presidency Agreement on the Constitutional Treaty - Solemn signing of 'Treaty Establishing a Constitution for Europe' in Rome
2005	<ul style="list-style-type: none"> - Negative Referenda in France and Netherlands - Period of reflection
2006	<ul style="list-style-type: none"> - German Presidency mandated to pursue the treaty reform process
2007	<ul style="list-style-type: none"> - German Presidency: Preparation of the (Reform) Lisbon Treaty - Portuguese Presidency: Signing of the Lisbon Treaty
2008	<ul style="list-style-type: none"> - Irish Referendum: Rejection of the Lisbon Treaty
2009	<ul style="list-style-type: none"> - Agreement on legal guarantees to respond to Irish concerns - Irish Referendum: Approval of the Lisbon Treaty - Decision on the application of the Charter of Fundamental Rights to the Czech Republic - Lisbon Treaty (entry into force)

Source: Compiled by W. Wessels. (see also Phinnemore, 2013: 2).

Empirical evidence: Monitoring

The European Council in the ratification process

Following the signature of treaty revisions, the work of the European Council is not finished. In the phase of national ratifications ‘in accordance with their respective constitutional requirements’ (Art.48(4) TEU) governmental heads need to have the treaty amendments accepted by their respective domestic veto players, particularly by national parliaments, constitutional courts and occasionally through national referendums. Experience since the Maastricht Treaty has shown, on several occasions, how the European Council has had to become involved again when ratification difficulties occur in individual Member States. In these cases the Union’s leaders needed to monitor national follow-ups and mediate in cases of problems concerning specific articles in treaty revisions. Following rejection in the referendums in Denmark on the Maastricht Treaty in 1992, in Ireland on the Treaty of Nice in 2001, in France and the Netherlands on the Constitutional Treaty in 2005 and again in Ireland on the Lisbon Treaty in 2008, the European Council deliberated on options for dealing with these obstacles. In the cases of Denmark and Ireland, it formulated interpretations, explanations and opt-outs for those treaty provisions that were the main points of contention for national opposition groups. A recent example is the European Council’s reaction to the Dutch referendum on 6 April 2016 on the bill approving the Association Agreement with Ukraine. Within the December 2016 European Council the Heads of State or Government addressed the Dutch concerns in a common decision (see annex).

Reactions to Member States’ concerns

Table 2: Reactions to EU-related referenda over time

Date of Conclusion/ Referendum	Result	Reaction of the Heads of State or Governments / the European Council
26.06.1992 Irish constitutional referendum to permit the ratification of the Maastricht Treaty	approval	European Council ‘welcomes the result of the Irish referendum.’
11.12.1992 Danish Referendum on Maastricht Treaty	rejection	Agreements on - Citizenship - Economic and monetary Union
21.06.1993 Danish Referendum on Maastricht Treaty	approval	European Council welcomes ‘the outcome of the Danish referendum’.
15.06.2001 Irish constitutional referendum to permit the ratification of the Treaty of Nice	rejection	Before the referendum: - Assurances regarding the common defense policy under the Treaty of Nice After the referendum:

		<ul style="list-style-type: none"> - Confirmation of the conclusions made by the General Affairs council (11 June 2001) 'including willingness to contribute in every possible way to helping the Irish government find a way forward.'
24.10.2002 Irish constitutional referendum to permit the ratification of the Treaty of Nice	approval	European Council welcomes 'the positive result of the Irish referendum'.
20.03.2003 Maltese referendum on Membership	approval	European Council 'pays tribute to the Maltese people'
19.06.2003 Referenda of Malta, Slovenia, Hungary, Lithuania, Slovakia, Poland, Czech Republic, Estonia and Latvia on EU Membership	approval	European Council encourages new member states to keep up their efforts to be prepared for the accession in May 2004.
16.06.2005 Dutch and French Referenda on the constitutional Treaty	rejection	European Council <ul style="list-style-type: none"> - notes the outcome of the referendums in France and the Netherlands. - considers that these results do not call into question citizens' attachment to the construction of Europe. - formulates a need for to reflect together on this situation. (see also table 1)
11.12.2008/ 18.06.2009 Irish constitutional referendum to permit the ratification of the Treaty of Lisbon	rejection	Agreement on taxation policy, family, social and ethical issues, and Common Security and Defence Policy (CSDP) to address the concerns of the Irish people.
19.02.2016/28.06.2016 British Referendum on the continuation of EU-Membership	rejection	Before the referendum (February): <ul style="list-style-type: none"> - Agreement on a new settlement with the United Kingdom for the case that it remains in the Union After the referendum (June, Meeting of 27) <ul style="list-style-type: none"> - Rejection of any decision before an official notification of withdrawal by the UK - Debate on the future of Europe
15.12.2016 Dutch referendum on the Association Agreement with the UK	rejection	Agreement excluding inter alia the granting of a candidate status to the Ukraine, security guaranties, the introduction of rights to reside and work freely within the territory of the Member States or Ukraine.

Source: compiled by Marieke Eckhardt and Wolfgang Wessels on the basis of European Council conclusions.

Conclusion

The empirical evidence demonstrates the ability of the European Council to exercise its role as the highest instance of political appeal in moderating, mediating and eventually solving constitutional crises in the EU system. The political leaders considered it as their task to react to national referenda – thereby implying that they are fully legitimized to deal with worries and concerns of the citizens of the respective countries and to take the overall responsibility for the destiny of Europe.

ANNEX: Reactions to the Dutch Referendum in 2016

Box 1: European Council Conclusions, 15.12.2016

‘After having carefully noted the outcome of the Dutch referendum on 6 April 2016 on the bill approving the Association Agreement and the concerns expressed prior to the referendum as conveyed by the Dutch Prime Minister, the European Council takes note of a Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council (Annex), which addresses these concerns in full conformity with the Association Agreement and the EU treaties.’

Box 2: Decision of the Heads of State or Government on the Association Agreement with Ukraine (extracts)

A

(...)‘the Agreement does not confer on Ukraine the status of a candidate country for accession to the Union, nor does it constitute a commitment to confer such status to Ukraine in the future.’

B

‘The Agreement (...) does not contain an obligation for the Union or its Member States to provide collective security guarantees or other military aid or assistance to Ukraine’

C

‘While setting out the objective of enhancing the mobility of citizens, the Agreement does not grant to Ukrainian nationals or Union citizens, respectively, the right to reside and work freely within the territory of the Member States or Ukraine.(...)’

D

‘(...)The Agreement does not require additional financial support by the Member States to Ukraine, nor does it change each Member State’s exclusive right to determine the nature and volume of its bilateral financial support.’

E

‘The fight against corruption is central to enhancing the relationship between the Parties to the Agreement. Under the Agreement the Parties will cooperate in combating and preventing corruption both in the private and public sector.(...)’

F

'(...)The Parties are required to fulfil their obligations under the Agreement, the implementation and enforcement of which will be monitored. In accordance with Article 478 of the Agreement, each Party may take appropriate measures in case of non-fulfilment of obligations. In the selection of appropriate measures, priority will be given to those which least disturb the functioning of the Agreement. These measures may, as a last resort, include the suspension of any rights or obligations provided under the provisions of the Agreement.'

Source: European Council Conclusion, 15.12.2016, ANNEX

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