

## **Referendums in the European Union: Defective by Birth?**

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### **ABSTRACT**

On the basis of a combined examination of normative claims and empirical evidence this paper discusses minimal criteria for the institutional design of referendums on EU-internal issues. These criteria concern the mandatory (vs. facultative), the simultaneous (vs. serial) and binding (vs. consultative) nature of referenda. The proposed criteria are demanding, both for the member states and the European Union, but experiences show that the EU is in fact participating actively in EU-issues referendums and member states as well as the EU need to surpass the current arbitrary use of plebiscites by governments. On a broader scale the paper

contributes to the insight that it might be time to fully address the use of direct democracy at the national and EU levels.

## INTRODUCTION

Despite wider theoretical debates between defenders and detractors of direct democracy (DD), there tends to be agreement among many scholars, politicians, and citizens that decisions are factually more legitimate if taken by popular vote. Notwithstanding mixed evidence in this regard, there is a strong normative component in favour of direct democracy. This is particularly the case with regard to the European Union, often accused of taking decisions far away from the European citizens. Introducing a vote in referendums at the EU level to the now very limited set of political rights could bridge the gap between EU institutions and EU citizens and promote perceptions of legitimacy of EU decisions among the European citizenry.

The idea of having a EU referendum has already been raised by several intellectuals (Habermas, 2001; Rose, 2013; Schmitter, 2000). According to Auer & Flauss (1997) and Rose (2013), the institutionalization of a EU referendum is the only option in order to increase democratic legitimacy in the EU, by securing the political commitment of the citizens (see also Lacey, 2017). Yet, intellectual discourse on the EU referendums is not reflected among the political elite. Quite to the contrary, referendums are viewed negatively among the political elites, as if they “see themselves as trustees acting for the collective good of Europe.” (Rose, 2013, p. 4). It is the task of this article to assess the potentiality of referendums at the

European level. To this end, we ask: how and what types of referendums have been used until now on EU affairs? And what can we learn from past experiences?

#### DIRECT DEMOCRACY: A NORMATIVE DEFENCE

One of the main controversies surrounding debates on DD departs from the assumption that direct democracy represents a pure model of democracy, which is in contradiction with representative democracy (Hug, 2008). Representative democracy is based on the idea of free and fair elections under conditions of rule of law and fundamental freedoms. A system that grants to citizens the right to a referendum and initiative combined with representative democracy in one form or another is usually called direct democracy, semi-direct democracy or hybrid democracy (Kirchgässner, Feld, & Savioz, 1999). There is indeed a conceptual difference between direct and representative democracy, but they are not mutually exclusive and co-exist in reality. Even in constitutional systems in which direct democracy plays a very important role, such as Switzerland, direct democracy is connected to a representative system and most legislation is proposed by government and passed by parliament. Where in place and properly applied, direct democracy is thus neither a totally separate element nor an appendix to representative democracy that leaves the rest of the system unchanged. It has a systematic influence on democratic decision-making. More importantly, direct democracy fulfils the strict notion of popular sovereignty even if connected to representative democracy, as the politically sovereign people reserves the right to revise, refuse and eventually replace law according to constitutionally guaranteed procedures (Pettit, 1997, pp. 187–200). We hold that the effective realization of the condition that the people be the authors and editors of law implies direct democratic instruments of referendum and initiative within constitutional boundaries. In other words, from a normative point of view, a combination of direct

democratic instruments and representative instruments seems to be the most desirable institutional setting, at any political level of government.

### Objections against direct democracy in the EU (and elsewhere)

Important objections have been raised against direct or semi-direct democracy. We review here the critiques that are particularly acute when applied to the European level: 1) the lack of competence of the average citizen to decide in referendums; 2) the impossibility to have DD in large political units; 3) the democratic bias towards interests groups; and 4) the fact that DD tends to favour expressive voting. As concerns the first objection, it is claimed that citizens lack the necessary competence to be able to take reasoned decisions in referendums. Since governmental representatives and political elites dispose of more information than the normal citizens, they are in a better position to make factually adequate decisions, and with less costs than the average citizen (Feld & Kirchgässner, 2000). The objection of the lack of competence of the citizens vis-à-vis the European decision-making procedures is particularly critical, since knowledge of EU politics of the average citizen is very low. Member states' media inform fundamentally about national politics, which makes it difficult to follow what happens in Europe. Yet, in Europe even more than at the national level, this criticism also applies to the institutions of representative democracy of the EU. Complexity of European policy-making and the fact that political parties mainly compete in the national arena makes it very hard for citizens to know who is representing them at the European level. From this perspective, it might be equally demanding for the EU citizens to vote on a specific issue by a referendum than to decide whom to vote for in EP elections.

The second objection states that direct democracy only works in small, manageable societies, but is inadequate for rather large modern nation states. It is particularly inadequate for a polity

as large as the EU. The impossibility of direct democracy in large states is a widely held view that was prominently presented by Montesquieu with regard to England (*Esprit des lois*, Book XI, ch. 6) and by Madison (Hamilton 2005 (Federalist 10)). Ever since an influential book posited the thesis that the quality of any democracy – be it direct or representative – declines if the population exceeds a certain size (Dahl & Tufte, 1973), it has often been repeated in recent research. Empirically, however, there is no evidence of a direct correlation between state size and democratic quality, although the democratization of very large countries seems unlikely without them being decomposed into smaller units (Boschler & Kriesi, 2013). All this indicates that the objection, if it applies at all, should not be raised against direct democracy specifically, but against the excessive size of the state, be it governed by representative or direct democracy. The excessive size of a state is detrimental to democracy and democratization in general. But also this thesis cannot give any definitive criteria regarding the requested precise size of a democratic or direct democratic country. On the one hand there exist conceptual controversies. Is democracy's relevant state size measured by the number of members, or also by its geographical extent, or also by the geographical distribution of the population? On the other hand, the variables that affect the ratio between size and democracy are constantly shifting due to technological changes in transport and communication. Hence it might be possible that a state used to be much "larger" at an earlier date, despite its much lower population size, than it is now. Correspondingly, democracy could be realized in "larger" units because they actually are, as measured by the conditions of communication, not larger at all. Both in theory and in practice, therefore, there seems to be no solid argument against the institutionalization of referendums at the European level, which would not apply also to representative institutions.

The third objection that direct democracy leads to a bigger influence of powerful pressure groups and well-financed interests than representative democracy is at odds with some studies

based on game theory and with empirical studies (Buchanan 2001). Yet, there is no complete evidence that the policy outcomes of hybrid or semi-direct democracies are closer to the majority's preferences than a purely representative system. In the US, the direct democratic instruments were introduced with the explicit intention of containing the influence of pressure groups on parliaments. This argument could also be applied to the European Union, where lobbying plays a major role in policy decision-making. A report of Transparency International shows that lobbying is extremely powerful in Europe and in the European Union in particular (Transparency International 2015). Contrary to other contexts, therefore, the use of referendums could partially help to avoid lobbies' influence in policy decisions at the EU level. Indeed, while the costs of lobbying might be affordable if centralized in Brussels, they might be less sustainable if obliged to sustain the campaign costs in all 28 member states. Thus, referendums could be a valuable instrument to reduce the power of interest groups in the EU.

The fourth objection, that direct democracy fosters expressive and emotional voting behaviour appears to be especially relevant in the European context, since European elections are normally ascribed as second order elections. There is considerable literature on the fact that European citizens use EP elections to express their dis/content with the incumbent government (Reif & Schmitt, 1980). The question is whether referendums would stimulate the same behaviour among EU citizens. Recent examples on the EU constitution are contradictory in this regard, and propel the idea that for expressive and populist votes to occur is very much dependent on the type of referendum being held (see below).

These objections provide neither enough reasons nor evidence to justify a ban of direct democracy. In fact, these objections are systematically framed as a contradiction between direct and representative democracy, without taking into consideration that both direct and

representative institutions might suffer from the same illnesses. Quite the contrary, our responses to these objections highlight that direct democracy might help to partially solve some of the problems related to democracy at the European level. We propose in the following section a possible institutional design for the European Union referendums, in which DD is in a complementary relationship with representative democracy.

#### EU REFERENDUMS: A POSSIBILITY FOR THE EUROPEAN UNION?

The EU emulates the representative system of the member states at the European level (yet with limited competences in some areas), but has only incorporated the citizens' initiative as a direct democracy mechanism at the European level. Referendums on EU issues are strictly held at the national level where legislation foresees very different uses of referendums. A basic distinction between direct democratic instruments in Europe comes down to who initiates the procedure: the citizens, the representative authority or the constitution itself. On the one hand, citizens can initiate a process to accept or refuse a text to amend the constitution or the legislation: it is a citizen right to statute and set the constitutional agenda. On the other hand, the representative authority may call a referendum on a major issue. Lastly, a referendum might be called because the Constitution provides dispositions in this regard. Mandatory referendums are triggered by a constitutional or legal disposition, whereas optional referendums are called at the discretion of the government or collective citizen action.

As for the characteristics of the different direct democracy regimes among member states, around 75per cent of the member states regulate direct democracy in the constitution (see

Table 1). Although almost all member states have institutionalized optional referendums (either in the constitution or in specific laws), mandatory referendums are far less common at the national level in EU member states (16 member states). Where institutionalized, referendums are mandatory specially to change the national constitution, and in a number of countries, to transfer authority to international bodies. On the contrary, virtually any important issue can be submitted to optional referendum: legislation is very open and the decision to hold a referendum is left totally to the discretion of governmental institutions. There are also differences across member states with regards who can initiate an optional referendum: in some countries only the president and/or the legislative majority is entitled to call a referendum (plebiscite); whereas in others, legislative minorities and registered electors can also initiate a referendum. Results of mandatory referendums are normally binding in all member states, but there are differences with regard to optional referendums. In some countries optional referendums are also binding (e.g. Denmark), in others they are sometimes binding (e.g. Austria), and in others they are never binding (e.g. Lithuania).

Table 1 shows the number of referendums related to non-EU issues and EU issues in all EU member states, as well as national legislation on both types of referendums (mandatory – column 4– and optional–column 5). As it appears, there is no strong correlation between how and what type of referendums are constitutionally regulated in a country, and the frequency with which this instrument is used in the same country. In the two countries where the most referendums have been held at the national level – Italy and Greece – only optional referendums are constitutionally regulated. In contrast, in countries where both mandatory and optional referendums are regulated (e.g. Spain and Portugal), very few referendums have been celebrated at the national level. Activation of direct democracy instruments, therefore, seems not only to be a matter of regulation, with tradition and political culture also potentially



playing a relevant role. The latter seems to be more difficult to circumvent than legal aspects, if an EU referendum were to be institutionalized.

< Table 1 about here >

However, the same pattern does not appear to hold in relation to referendums on EU issues. Until December 2016, there have been 43 referendums related to EU issues in the member states of the European Union (see Table 1). Despite having been increasingly used in relation to EU affairs (and there is indeed this optimistic view about the increased use of referendums on EU-related matters), the number of referendums remains very small: the mean number of referendums per year (from 1972, the date of the first referendum on EU issues) is less than one. As compared to other issues where direct democracy seems to be well entrenched within the electoral system, the use of referendums on EU affairs is limited. Of course quantity is not the only thing that matters, but it is certainly an indicator of the residual implementation of direct democracy on European affairs.

This becomes clearer as we examine the use of referendums across countries. As already seen, referendums on non-EU issues are far more numerous than referendums on EU issues. Even when considering that some countries have only recently acceded to the EU, therefore making it unlikely that they would hold referendums on EU issues before that, the difference is significant enough to question the limited use of referendums on EU issues. Table 2 indicates that, even with similar constitutional regulations, referendums on non-EU issues are very differently distributed across member states, with the exception of those where no constitutional regulation on referendums is provided (1 or less than 1 referendum has been held in these four countries). Yet, on European issues, a clear distinction can be made between the countries which provide for constitutional regulation for mandatory referendums for all constitutional amendments and those that either provide for partial constitutional

regulation or for none: in Ireland and Denmark, the number of referendums held on EU issues is substantially higher than in the other countries. The difference in the use of referendums related to EU issues as compared to non-EU related referendums might be indicative of the fact that European governments avoid calling for EU referendums when they are not obliged to do so.

Table 2 describes the type of referendums on EU issues from 1972 to 2016 in the EU member states. Of the 43 referendums, 26 have been mandatory, while 17 have been called voluntarily by the incumbent party. Apparently, there is no relationship either between the type of referendum (optional vs. mandatory) and the type of EU issue that is voted in the referendum (accession vs. treaty/policy).

< Table 2 about here >

These cross-national differences provide two sorts of insights. The first is that different practices and legislations at the national level might prove difficult to translate in a common institution at the EU level. Second, optional referendums seem to give more room to manoeuvre to national governments than mandatory referendums. Contrary to mandatory referendums, they can be called at the discretion of the governments (in most countries only by the majority government itself) and results are rarely binding. At first sight, then, there is a notable asymmetry between mandatory vs. optional referendums with regards effectiveness of citizens' capacity to control and influence the decision-making process.

#### A possible model for European referendums

We have argued above in favour of a combination of representative and direct democracy. The concrete implementation of such institutional setting can take on many different forms (Kessler, 2005), which might not be equally valid for all contexts and all times. The judgment

becomes particularly complex in relation to the European Union, for a number of reasons. Firstly, the European Union does not totally match the notion of representative democracy, as we know it for the national level, although this is explicitly stated in Title II, Article 10.1 of the Treaty of Lisbon. Secondly, as just shown, most member states already have experience with direct democracy at the national, regional, or local levels, which makes it a complex situation to establish a single direct democratic instrument. And thirdly, there has so far been no common referendum at the EU level to judge whether indeed direct democracy is a feasible option in the European Union. Yet there are both normative and empirical reasons that lead us to propose a certain model for the EU.

From a normative point of view, we argue that the calling of a referendum needs to be based on a constitutional disposition or citizen action in order to fulfil the democratic condition that the citizens have the right to revise, refuse and eventually replace law. The combination of direct democracy instruments and representative democracy is only effective if citizens can directly control the decision-making process through procedures constitutionally guaranteed.

Previous experience with referendums on EU issues provides the empirical justification for our model. A number of deficiencies have indeed been noted in relation to the current use of referendums in relation to EU issues: 1) the use of referendums as plebiscites; 2) the unequal negotiating power resulting from the use of referendums; and 3) citizens' discrimination produced by referendums.

As for the first, there is evidence that optional government induced referendums are likely to prompt a partisan logic (Mendez, Mendez, & Triga, 2014, p. 78). Since authorities have discretionary power to call for a referendum, they might use it only on the issues of which they know they will receive stronger support from their partisans. Referendums can therefore be used as plebiscites in hands of the government, to justify specific actions. To the contrary,

mandatory referendums leave little room for the government to use referendums as a plebiscitary tool, since they cannot decide on which issues they have to call a referendum.<sup>1</sup> In relation to the EU, optional government induced referendums not only tends to activate a partisan logic, but also second-order voting (Reif & Schmitt, 1980). The referendums on European issues at the national level tend indeed to become a projection point for second-order voting, guided by all sorts of frustrations that stem from national or local politics, but might have little to do with the European issue at stake.

Optional referendums are also more likely to produce unequal negotiating power of the member states, especially if not carried out simultaneously (see (Hug & Schulz, 2007) in relation to the EU Constitutional Treaty). In the European Union, due to large cross-country differences in the institutions of direct democracy, member states can decide whether, on what and when a referendum is held. As such, referendums might be used to influence the negotiation outcomes, if member states perceive there is something to win from it. In fact, referendums that (when called) are not simultaneous in all member states tend to reinforce the negotiation power of some countries against others. Related to the different negotiating power of members states, is the veto power inherent to optional referendums. Since referendums are held only in a few countries, these countries increase their bargaining power.

Lastly, there has been very little reflection on the discriminatory effect (on the basis of ‘one man one vote’) of actual referendums on EU issues (an exception is (Rose, 2013; Rose & Borz, 2013). It is yet (and precisely) the fact that referendums are not institutionalized at the EU level that promotes EU citizens’ discrimination; more specifically that the use of referendums is left to the will of national governments. Optional referendums do indeed

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<sup>1</sup> This does not imply that the logic of partisanship never does show up in mandatory referendums, only that it is less probable.

favour that citizens are discriminated against. Since the decision whether to call a referendum is left to the discretion of the government, citizens from some member states are given the possibility to participate in the decision, whereas citizens from other member states are not afforded the same possibility. As such, in its current practice, referendums are highly discriminatory in the European Union, as citizens of the member states that do not conduct referendums are disadvantaged relative to citizens of the member states that do conduct referendums.

Both normative and empirical arguments point to the fact that lack of simultaneity of referendums in all member states and optionality are the main problems of referendums on EU issues. We propose therefore an alternative institutional design for EU referendums: referendums on EU internal issues regarding secondary EU legislation should be held in all member states simultaneously, triggered by a legal disposition. This would solve the normative concern about the lack of authorship of the EU law (and consequently increase legitimacy at the EU level). Against the implementation of direct democracy on EU issues only at certain levels of government, EU referendums could also limit the plebiscitary use of referendums from the part of the national governments and deactivate second-order voting. This problem is more likely to be overcome by EU referendums held simultaneously in all member states, where the issue is contested in all EU countries at the same time and thus more likely to be assessed from the point of view of a more aggregated generalized interest. Simultaneity of the voting is also intended to ensure non-discrimination. Indeed, in case of aggregation of voting outcomes of several constituencies or peoples, the sequencing of voting dates also introduces distortions that do not guarantee the same formal procedure to all citizens. Constituencies (member states) who get to vote earlier have an advantage over those who vote later because they can set a trend and create pressure; constituencies who vote later have information at hand about the vote of those who voted earlier, etc.

Some important additional conditions apply to the institutional design of EU referendums we have outlined. Research on direct democracy shows that if the issue voted on is a package of more than one topic, the aggregation of votes cumulates veto positions and a formal veto bias is introduced in the decision-making procedure. Even if, as (Mendez et al., 2014) suggest, European treaties are not appropriate to single issue voting in referendums, partial amendments might be more accessible to voters. Finally, EU referendums' results should be binding. This seems to be a very strong condition but its justification becomes quite obvious given the actual practice. If results of referendums are not taken into account the democratic legitimacy of the EU is undermined and citizens are further estranged from the institution. This has happened in the case of the vote on the Constitutional Treaty whose articles are now in the Lisbon Treaty despite being rejected in France and the Netherlands, as well as in Greece with the rescue package that was rejected by referendum only to be implemented anyway. Table 3 provides a summary of the characteristics of the ideal EU referendums we propose against the actual referendums held at the national level on EU issues.

< Table 3 about here >

Further points could be added: Not all Treaty reforms could be subject to mandatory referendums. The TEU contains the basis of European law. It determines the nature and values of the polity. The TFEU on the other hand, is a secondary text that is constituted and constrained by the TEU in view of an articulation and implementation of the TEU's goals. According to (Lacey, 2017), mandatory referendums should therefore be restricted to TEU modifications<sup>2</sup> whereas an optional, citizen induced referendum should be introduced for changes to TFEU. This procedural constraint would limit direct democracy to fundamental acts of sovereignty.

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<sup>2</sup> Accession or exit is thus excluded from this proposal and is in the competence of the member states.

## EMPIRICAL EVIDENCE

Even if the institutional design that has been proposed above is supported from a normative and empirical point of view, it is not possible to empirically test the potential benefit of the institutionalization of EU referendums, and there is little empirical evidence to fully assess how well/badly referendums on EU issues work in Europe at large. In this sense this section does not seek to prove that EU referendums will have a general positive impact on EU democracy. But it is only focused on evaluating existing practices of referendums as an attempt to provide additional support to the theoretical prescriptions presented above. For this purpose, we take on two different units of analysis: referendums on EU issues in general; and the referendums on the EU Constitutional Treaty.

### Referendums on EU issues

It has been shown above that in the vast majority of member states – except for those where referendums are mandatory on EU issues – the use of referendums on EU matters is left to the discretion of the national governments. We analyse the effect of this asymmetry in the use of referendums due to its optional character, in relation to 1) the partisan logic; 2) the unequal negotiating power; and 3) the discrimination of the citizens.

The partisan logic: Mendez et al. (2014) provide an excellent classification on the overriding logic for holding a referendum on a EU issue: the logic of constitutionality, the logic of appropriateness, and the logic of partisan calculus. Under the logic of constitutionality a referendum is called when it is constitutionally mandatory or legislative.<sup>3</sup> The logic of appropriateness is driven by legitimacy concerns: a referendum is called either because there are external factors that push for referendum (e.g. other member states having a referendum)

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<sup>3</sup> As the authors argue, however, “Only in very few cases, however, is an element of political discretion completely absent.” (Mendez, Mendez, & Triga, 2014, p. 75).

or pressure from the inside (e.g. citizens who are strongly in favour of referendum). The logic of partisan calculus follows partisan considerations on electoral benefits of the referendum. This classification is used in Table 4 against the two types of referendums which are of concern in this piece: mandatory vs. optional. As it can be seen from Table 5, optional referendums on EU issues tend to activate the partisan logic more frequently than mandatory referendums. Whereas only 2 of the mandatory referendums on EU issues have been called under the partisan logic, 12 out of 18 optional referendums have fallen under this logic (see Mendez et al 2014). As it appears, in so far as decision on whether to call a referendum is concerned, optional referendums are more frequently used as plebiscites. This exacerbates the formal inequality of political rights of the citizens regarding EU matters and it enhances the strategic options of governments for domestic politics.

< Table 4 about here >

Previous studies confirm that this is in fact the case, even if the type of referendum is generally not taken into consideration. To start with, there is evidence that EU citizens' votes in referendum on EU issues are directly related to partisanship and evaluations of the government (Franklin, Eijk, & Marsh, 1995); this is also found by (Lubbers, 2008) for the Dutch case on the Constitutional Treaty. As such, it seems probable that incumbent governments will make use of referendums to gain electorally. This is further confirmed by most recent findings. During the process of ratification of the EU constitutional treaty, for example, government parties which expected electoral gains supported referendums. On the contrary, incumbent parties that expected electoral losses opposed the referendums. This trend was highly reinforced in cases where national elections were very close to the date of the referendum, and where there was high levels of support among the public for the constitutional treaty (Dür & Mateo, 2011); similar arguments can be found in (Closa, 2007)). (Crum, 2007) finds also that mainstream parties of countries where a referendum on the EU



constitution was called endorsed the constitutional treaty, therefore increasing their changes to profit electorally. Similar findings are reported by (Hug, 2003) for a different period. (Mendez et al., 2014) also come to the conclusion that about a third of the referendums related to EU issues are triggered by partisan calculus, especially when consensus between the incumbent and the opposition is low (see above). Although there is little evidence regarding mandatory referendums and the activation of the partisan logic, existing evidence seems to support Table 4. The partisan use of referendums seems indeed to be partially avoided when referendums are mandatory, as is the case in Ireland. In the two referendums on the Treaty of Nice, issue-voting predominated over second-order voting, which reflects the limited capacity of using referendums as a plebiscite when they are mandatory (Garry, Marsh, & Sinnott, 2005). As it appears, issue voting increases (and second order voting decreases) as the salience of the EU issue becomes greater and politicization of the EU issue is greater. Plebiscitary democracy seems therefore more likely to emerge if optional referendums are used.

Negotiation power: (Dür & Mateo, 2011) have investigated the influence of bargaining power of EU member states on their negotiating strategies. They find indeed that a stronger bargaining power leads to a higher capacity of the member states to influence the negotiation of the Financial Perspective 2007-2013, through strong criticism and even with the threat of a veto. There is less evidence that optional referendums are also used as a threat to increase the negotiation power (see Hug and Schulz 2007). We use here the classification of Dür and Mateo on bargaining power to observe whether there is a correlation between this and the use of referendums – either mandatory or optional.

Figures 1 and 2 show the correlation between the number of mandatory (Figure 1) and optional (Figure 2) referendums and the negotiating power index as defined by Dür and

Mateo 2010<sup>4</sup>. We do not expect to find any specific relationship between the number of mandatory referendums and the negotiating power of the member states, since the law determines the call of the referendum. Yet it is interesting that there is a negative correlation between number of mandatory referendums and negotiating power of the states, as it might well illustrate the fact that mandatory referendums are less likely to produce member states' differences.

< Figure 1 about here >

Contrary to mandatory referendums, the use of optional referendums is positively associated with the strength of the negotiating powers of the member states: the higher the rank of bargaining powers of a member state, the higher the number of optional referendums held in that same member state (Figure 2). The existence of a correlation might be an indication that optional referendums on EU issues are frequently used as a tool to influence the negotiating process in the European Union. Interestingly so, this tool seems to be particularly efficient among countries that already have strong bargaining powers, especially if they are big contributors to the EU budget or if the country's citizens are highly eurosceptic. As it appears, optional referendums might help to increase initial bargaining differences between member states, something which seems to be avoided by mandatory referendums.

< Figure 2 about here >

Discrimination of citizens: Citizens' discrimination in relation to EU referendums can be evaluated from two different angles: citizens' perceptions of discrimination as a consequence of not having been given the opportunity to participate in EU referendums; and effective participation of EU citizens in EU referendums. Unfortunately, there is no data on citizens' perceptions of discrimination in relation to referendums, and we therefore rely on the

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<sup>4</sup> See (Dür & Mateo, 2010) for a complete description of the index.

effective participation of EU citizens in referendums to assess levels of discrimination. Rose and Borz show the percentage of EU citizens who have participated in referendums (either mandatory or optional), as compared to the percentage of EU citizens who have not been directly consulted on treaties (Rose & Borz, 2013, p. 622). They show that, in terms of political rights, a large proportion of citizens are discriminated against: on average (for the period 1982-2015) only 8 per cent of Europeans have been given the right to decide on a referendum on Treaty reform. As it stands, these data indicate that the fact that referendums are left to the discretion of national governments is highly discriminatory in the European context, since most governments opt not to use this democratic instrument. Only where referendums are mandatory – as in Ireland – do governments call for referendums systematically.

#### Referendums on the EU Constitutional Treaty

Although referendums on EU issues had already been held at the beginning of the integration process (first referendum was in 1972), it was not until the referendum on the European constitution that a full awareness of the potential repercussions was aroused. Up until that moment, the majority of referendums on EU issues were related to accession to the European Union. Voting in referendum therefore only affected a few citizens, namely those who were to join the European Union. Referendums on treaty ratification or policy matters were more infrequent and were basically held in two countries: Ireland and Denmark. As such, referendums on treaty ratification or EU policy matters did not have troubling consequences, since it only affected the countries where the referendum was held. With the Constitution of the European Union, it could be seen for the first time how the results of the referendums have had an impact on the whole constituency of the European Union.

Calls for an EU-wide referendum gained considerable prominence during the convention process that produced the Draft Constitutional Treaty. Initially some thirty-five of the convention's members put forth a proposal for an EU-wide referendum to be held on the Constitutional Treaty on the same day across all the member states, and for it to be binding where constitutionally possible; by the end of the convention process some ninety-seven convention members had signed a petition for a Europe-wide referendum which was also supported by the Liberals and the Greens in the European Parliament. The Praesidium, however, chose not to pursue this option (Mendez et al., 2014, p. 195). The idea was thus forgotten, and the decision to hold a referendum was left to the discretion of each member state. From June 2003 to July 2004, ten countries announced they would have a referendum (in that order: Spain, Luxembourg, Denmark, Netherlands, Portugal, Czech Republic, Poland, United Kingdom, Belgium – then withdrawn – and France)<sup>5</sup>. The first referendum was held in Spain, where the yes-vote was only marginally victorious. The following referendums were held in France and the Netherlands, where the Constitutional Treaty was rejected. Despite the triumph of the yes-vote won in Luxembourg after France and the Netherlands, the process was stopped, to begin a period of reflection after the defeat of the Treaty in France and the Netherlands. In a way, the use of referendums (even if optional) had a positive impact, since it promoted reflection and deliberation on an issue that was of major relevance for the integration process and the European citizens. On the negative side, due to the fact that referendums were not mandatory and were not held in all member states simultaneously, the referendum had a de-legitimizing effect on the constitutional treaty in particular, and the EU as a whole. Since referendums were optional, member states could withdraw their announcement of referendum at the time the Lisbon Treaty was ready for ratification. This further conveyed the impression that the Lisbon treaty suffered from a lack of legitimacy. In

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<sup>5</sup> The referendum was not announced in Ireland since it was required.

relation to the referendums as an instrument of direct democracy, the feeling prevailed that referendums only promoted disruption and deadlock of the integration process, and the idea of a EU referendum was dismissed by the political elites.

Interestingly, negative views on the constitutional referendums have rarely considered that their malfunction might have been caused by birth defects, namely the fact that the referendum has not been mandatory in all EU member states, and that they have been held sequentially (Cheneval, 2007). An in-depth study of the constitutional referendums by Hug & Schulz (2007) shows that calling for a referendum has in fact lead to an advantage to negotiations during the EU constitutional process, especially if governments had scheduled a referendum before the Intergovernmental conference and voters had a strong preference for the status quo. In addition, partisan logic was activated in three out of the four constitutional referendums (Luxembourg, Spain and the Netherlands) (see Mendez et al 2014), although first order voting seemed to prevail (Glencross & Trechsel, 2011).

This experience had important implications at the time of the ratification of the Treaty of Lisbon. Firstly, there was no other attempt to introduce direct democracy instruments to legitimize the new Treaty. Secondly, the Irish referendum (the only country where a referendum was mandatory) was used in some countries to influence the ratification process. Purporting past experiences with referendums on EU Treaties, the no-vote in the first Irish referendum was used as a tool by some countries to delay approval of the Lisbon treaty in the parliament (and it was in fact the main reason why the treaty was not approved in January 2009 as initially planned). In the Czech Republic, it was decided not to sign until Ireland has ratified the treaty; in Poland, after the no-vote in the Irish referendum the prime minister said that it would be pointless to sign the treaty before a solution to the Irish referendum was

found. Either way, therefore, referendums were prey to tendentious use by member states governments and parties alike.

## CONCLUSIONS

While one might be inclined to think that countries that do hold referendums on EU Treaty change contribute to the legitimacy of the EU decisions, important inequalities are introduced by current practices that potentially cancel the positive effect altogether or even turn it into a negative effect. Citizens who get to vote in a Treaty referendum have greater control over the European constitutional project than those who do not. Moreover, the lack of simultaneity between countries that actually do hold referendums produces distortions. Positive results in earlier referendums asymmetrically impact public debate on referendums held elsewhere later on, whereas negative results by earlier referendums effectively cancel the results of later referendums still to be held in other countries. The meaning and opportunity for public debate that the referendum is supposed to engender is thereby undermined.

Following a close examination of normative claims and empirical evidence, we have proposed in this article a model for an EU referendum: referendums on EU internal issues should be held in all member states simultaneously, triggered by a legal disposition. This model is demanding, both for the member states and the European Union. There is indeed a fear that European integration will be blocked if left to the will of the European citizens and this argument has been used as the main justification employed against the use of referendums both by national and EU politicians (Mendez et al., 2014).

Recent experiences show that the EU might need to take matters into its own hands to surpass the current uncertainty. Increasingly more, the EU is in fact participating actively in EU-issues referendums. For example, in the Greek 2015 referendum the European Union campaigned actively against the 'No' in the referendum with increasing pressure on the Greek

government. The European Union adopted therefore a strong position in a national referendum, and played an active role in the referendum process.<sup>6</sup> The Brexit referendum is also an example in this regard, in which the EU was highly opinionated. Yet, both games were played at the national arena, with important repercussions both in the two countries and the EU as a whole. It might thus be time to fully address the use of DD at the national and EU levels.

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<sup>6</sup> [http://europa.eu/rapid/press-release\\_STATEMENT-15-5314\\_es.htm](http://europa.eu/rapid/press-release_STATEMENT-15-5314_es.htm)

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## Tables and Figures

Table 1 Number of referendums on EU/non-EU issues by member state and constitutional regulation (until 2016)

	Number of referendums on:		Constitutional provisions for:	
	EU issues*	Non-EU issues*	Mandatory referendums	Optional referendums
Austria	1	3	Yes	Yes
Belgium	0	1	No	No
Bulgaria	0	6	No	Yes
Croatia	1	3	Yes	Yes
Cyprus	0	1	No	No**
CzRep	1	0	Yes	No**
Denmark	8	15	Yes	Yes
Estonia	1	3	Yes	Yes
Finland	1	3	No	Yes
France	3	8	Yes	Yes
Germany	0	0	Yes	No
Greece	1	36	No	Yes
Hungary	1	11	Yes	Yes
Ireland	9	30	Yes	Yes
Italy	1	71	No	Yes
Latvia	1	13	Yes	Yes
Lithuania	1	20	Yes	Yes
Luxembourg	1	10	-	Yes
Malta	1	3	Yes	Yes
Netherlands	2	0	No	No
Poland	1	15	Yes	Yes
Portugal	0	4	Yes	Yes
Romania	1	8	Yes	Yes
Slovakia	1	17	Yes	Yes
Slovenia	1	21	Yes	Yes
Spain	1	2	Yes	Yes
Sweden	2	13	No	Yes
UK	2 <sup>a</sup>	1	No	Yes
Total	43	318		

\*Only those held at the national/federal level

\*\* But ad hoc referendums are possible

<sup>a</sup> Includes Brexit

Source: own elaboration, based on Méndez et al. 2014, and c2d database (Centre for Direct Democracy, Aarau).

Table 2 Number and type of referendums on EU issues

	N	%
<b>Optional</b>		
Accession	5	11.6
Treaty/policy	12	27.9
<b>Total</b>	<b>17</b>	<b>39.5</b>
<b>Mandatory</b>		
Accession	13	30.2
Treaty/policy	13	30.2
<b>Total</b>	<b>26</b>	<b>60.5</b>
<b>Total</b>	<b>43</b>	<b>100</b>

Source: c2d database (Centre for Direct Democracy, Aarau). Authors' update with most recent referendums.

Table 3 Ideal EU referendums vs. Real national referendums on EU issues

	EU referendums (Direct Democracy)	National referendums on EU issues (Plebiscite)
Trigger of individual vote	constitutional/legal disposition or citizen action	government- induced
Political level of application (city, state, country, EU)	European	strategically targeted (state)
Unity/simplicity of subject matter	Yes	Depends on case
Sequencing	No	Yes
Result legally binding	Yes	Depends on case

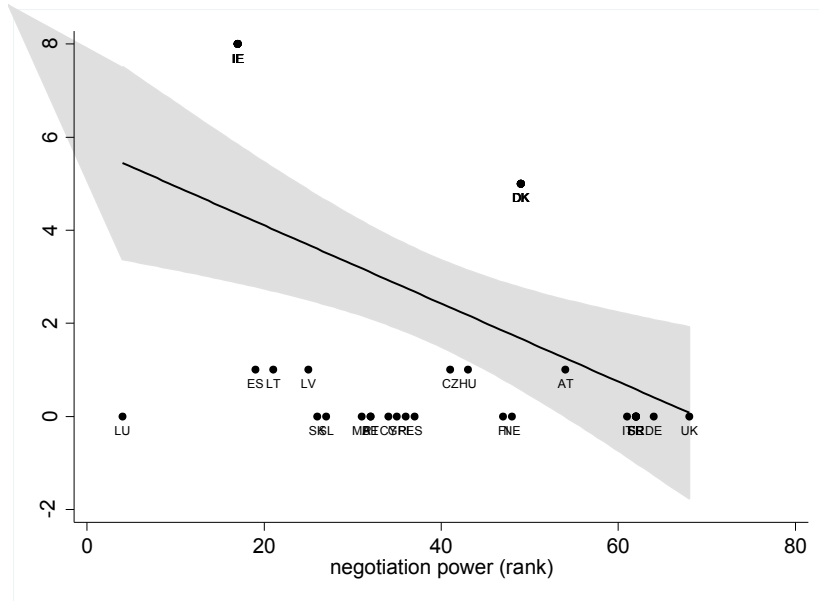
Table 4 The logic and type of referendums on EU issues

	Mandatory <sup>a</sup>	Optional	Total
Logic of Constitutionality	11	0	11
Logic of Appropriateness	7	6	13
Logic of Partisan calculus	2	12	14

<sup>a</sup> No data on the referendum on Accession to European Unified Patent Court (UPC), Denmark 2014

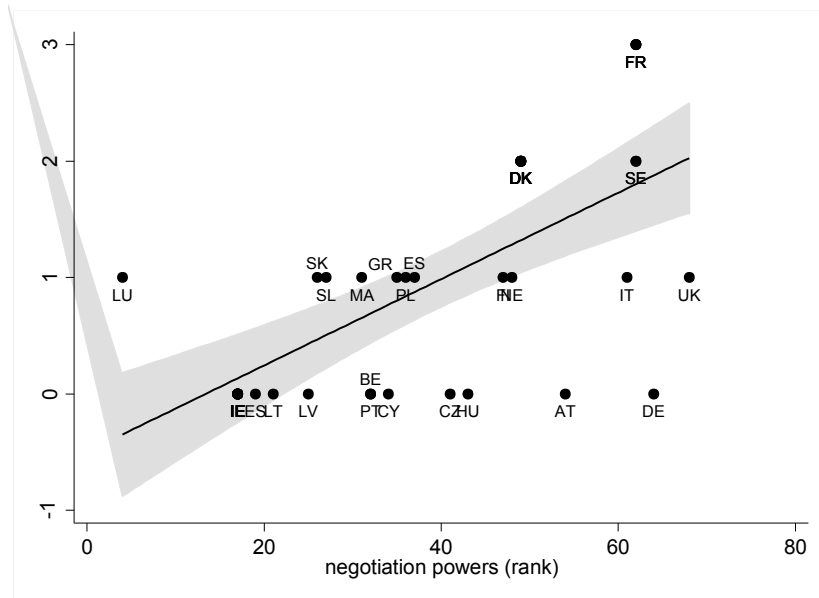
Source: own elaboration, based on Méndez et al. 2014, p. 86-87, and c2d database (Centre for Direct Democracy, Aarau).

Figure 1 Correlation between number of mandatory referendums in a country and negotiating power



Source: own calculations, based on (Dür & Mateo, 2011), and c2d database (Centre for Direct Democracy, Aarau).

Figure 2 Correlation between number of mandatory referendums in a country and negotiating power



Source: own calculations, based on (Dür & Mateo, 2011), and c2d database (Centre for Direct Democracy, Aarau).