



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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**Looking ahead: pathways
of future constitutional
evolution of the EU**

In-depth Analysis for the AFCO Committee





DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS

CONSTITUTIONAL AFFAIRS

**Looking ahead: pathways of future
constitutional evolution of the EU**

IN-DEPTH ANALYSIS

Abstract

The effects of the economic and fiscal crisis and the institutional instruments created to deal with it have led several actors (from governments and EU bodies to scholars) to propose different EU reforms. Several options exist to accommodate future constitutional development which, in some cases, may require Treaty revision. In this case, future constitutional evolution faces the challenge that the very stringent EU revision requirement (i.e. unanimity) poses. Other available options do not seem totally satisfactory.

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AUTHOR(S)

Mr Carlos Closa Montero

RESPONSIBLE ADMINISTRATOR

Mr Petr Novak
Policy Department Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: poldep-citizens@europarl.europa.eu

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ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its monthly newsletter please write to:
poldep-citizens@europarl.europa.eu

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LIST OF ABBREVIATIONS

- CAP** Common Agricultural Policy
- ECI** European Citizens Initiative
- ECJ** European Court of Justice
- ECSC** European Coal and Steel Community
- EDC** European Defence Community
- EFSF** European Financial Stability Facility
- TESM** Treaty on the European Stability Mechanism
- TEU** Treaty on European Union
- TFEU** Treaty on the Functioning of the European Union
- TSCG** Treaty on Stability, Cooperation and Governance (Fiscal Compact)

1. EXECUTIVE SUMMARY

Background

The economic and fiscal crisis has demanded EU responses which, in formal terms, adopted a heterogeneous form: EU secondary legislation, revision of the TFEU and, most noticeable, the negotiation of new treaties which bound EU member states outside the EU treaties themselves, were negotiated outside of EU prescribed procedures and required less than unanimity for entering into force. These instruments did not close all issues opened by the crisis and this, together with EU's own development itself, has prompted the revision agenda. Actors (involving national government, EU bodies and scholars) have opened the discussion on new reforms needed which comprise from a repatriation of EU powers back to member states to creating a fully-fledged economic and political union. Independently of the substance of the changes implemented, future constitutional evolution faces the constraint posed by the strictness of the EU revision requirement: unanimity. In fact, extra-EU Treaties (i.e. the TSCG and the TESM) have already applied a less than unanimity requirement for entering into force and these alternative rules have proved their efficiency.

Options and challenges

This analysis presents several options through which future EU constitutional development may advance. Each of them combines specific advantages and disadvantages and specific solutions on how to address the issues of democratic receptiveness and accountability in constitution making (even if constitution making implies a reduction of EU powers) legitimacy, and efficacy (i.e. the possibility for each of these procedures to deliver successful treaty revision and/or constitutional development). None of them provides an optimal mix of these criteria, nor does one of them seems to be more likely than the others. Main EU actors (both institutions and governments) may face tough choices if EU constitutional development is taken seriously.

2. THE AGENDA FOR EU CONSTITUTIONAL DEVELOPMENT

The reform of macroeconomic and fiscal governance during the crisis has left a number of pending issues both on the substantive dimension (such as the “constitutionalization of the Partnership Agreements contemplated in the Two Pack or the issue of the eurobonds) as well as institutional issues (such as the improvement parliaments’ role in the scrutiny of fiscal and macroeconomic governance including *inter alia*, for instance, Troika’s accountability to the EP). A number of actors, mainly from governments and EU institutions, have suggested lines for reform that take in the direction of future constitutional development. Additionally, some actors have argued strongly in favour of reforms for the EU that may include a repatriation of powers to member states. Three types of issues compose the agenda for EU constitutional development:

2.1. Merging of Treaties

A significant number of actors have proposed explicitly merging the TSCG within the TEU. For instance, Vice-President Timmermans declared that “*the full integration of the TSCG in the legal framework of the EU is something I intend to work towards with Member States*” (Neville; 2014) and the current Chair of AFCO has also supported the incorporation of the TSCG into the EU Treaty (Hubner; 2014).

Article 16 of the TSCG mandates the incorporation of the “*substance of this Treaty within the legal framework of the European Union*” within five years at most. Member States can bypass this mandate: Being a Treaty outside the EU strictly speaking, that provision does not oblige the EU itself, its institution or member states. Merging is rather an obligation for the signatory states of the TSCG which the EU could perfectly ignore without any legal consequences. Additionally, the wording does not require an explicit merging of Treaty provisions but refers to the “*substance*”. Hence, it could be argued that the *Six* and *Two* Packs already integrate the substance of the fiscal compact into EU law. On the other side of the argument, several reasons support the case for merging. First, the main reason for the creation of the TSCG, namely, giving treaty rank to states’ fiscal obligations would require precisely translating some of the TSCG (and/or *Six* and *Two* Packs) provisions to the TEU. Second, in substantive terms, no perfect symmetry exists between the TSCG and the Packs: the TSCG obliges to have budgets *in equilibrium* or surplus (article 3.1) *vis-à-vis* the requirement of “*close to equilibrium* or surplus” of the *Six Pack*. The TSCG also develops more Euro governance throughout the formalization of the euro summits and the election of its President (article 12), or the control mechanism that allows the ECJ to scrutinise a member state fulfilment of its obligation to introduce constitutional or quasi constitutional rules acting on the request of another member state (article 8.2). Finally, the TSCG creates a locking mechanism for its signatories when acting in the framework of the sanctioning mechanisms of the *Six Pack*: *the Contracting Parties whose currency is the euro commit to supporting the proposals or recommendations submitted by the European Commission where it considers that a Member State of the European Union whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure* (EDP) (article 7). Truly, it results somehow awkward that obligations for member states behaviour in EU secondary legislation procedure derive from an external norm. In this case, like in the others listed above, the substantive contents of the TSCG are not exactly the same than under EU law and hence their proper integration would require treaty revision.

The TESM does not have similar merging requirement and could perfectly function outside the TEU proper. However, given the interrelated nature of the several fiscal instruments, it seems logical that the merging of these provisions with the TEU should happen in parallel to a TSCG merging. The Commission suggested to integrate the European Stability Mechanism and other intergovernmental agreements into the Community framework in its *Blueprint for a deep and genuine EMU* and current Commissioner Dombrovskis has committed himself to work towards that objective during the upcoming mandate (Dombrovskis; 2014). The EP suggested that the ESM could be integrated into the EU's legal framework via the flexibility clause (article 352) in conjunction with the revised article 136 (EP; 2012).

Finally, the Intergovernmental Agreement on the transfer and mutualisation of contributions to the Single Resolution fund¹ also establishes in its article 16.2 a similar fusion mandate: *Within ten years of the date of entry into force of the Agreement (...) the necessary steps shall be taken, in accordance with the TEU and the TFEU, with the aim of incorporating the substance of this Agreement into the legal framework of the Union.* As in the TSCG case, the vague commitment refers to the "substance" of the agreement and, again, it could be argued whether this could be achieved by means other than treaty revision.

2.2 Macroeconomic and fiscal policy issues

Contractual agreements

The proposal of contractual agreements appears in a number of different documents under different names. If adopted on the model of the already existing Corrective Action Plans (Regulation 1176/2011), the only possible legal form is as no legally binding *Memorandum of Understanding* (Repasi, 2013: 22-23). Under the existing treaty rules, the Commission cannot conclude specific agreements with Member States. Making the Commission a legal party in subscribing these agreements requires formal treaty revisions. Hence, the German government suggested a significant revision of "Protocol 14" of the EU Treaty, adding tangible powers for the European Commission,² such as the right to conclude, with each euro country, some sort of agreement to improve competitiveness, investment and budgetary discipline. Such "contractual arrangements" would be riddled with figures and deadlines, so that they could be monitored and possibly even contested at any time (Bloome et al. 2013).

An EMU fiscal capacity

This proposal has appeared in several reports but its real meaning remains vague (Repasi; 2013). In substantive terms, it seems to mean making funds available for EMU states if they implement correctly "contractual agreements". The creation of a euro budget and making new funds available for these contracts seems legally feasible within the Treaty although it may raise significant problems related to its integration with the ordinary EU budget. The creation of a specific Euro-budget outside the TEU raises problems of democratic accountability. The Dutch government clearly indicated that it would oppose any proposal for moving in the long term towards an autonomous budget for the euro area with

¹Agreement on the transfer and mutualisation of contributions to the Single Resolution fund Brussels, 14 May 2014 8457/14 LIMITE EF 21 ECOFIN 42

<http://register.consilium.europa.eu/doc/srv?!=EN&f=ST%208457%202014%20INIT>

² Protocol 14 regulates the informal meetings of the Eurogroup and gives no formal power to the Commission.

a stabilising, countercyclical function as proposed by the Commission (Ministerie van Buitenlandse Zaken, 2013).

Separation of the monetary and supervisory functions of the ECB

Before the approval of the banking union regulations, the German government insisted on the legal separation between the single supervisory mechanism (SSM) and the governing council of the European Central Bank (the ECB) (i.e. the separation between the ECB's monetary and supervisory functions) by means of a treaty change. This position reflected the preferences of the *Bundesbank* which, in its July 2012 Report, argued that "an effective separation of monetary policy tasks and supervisory tasks is not possible without changes to the institutional framework of the ECB, as enshrined in the EU treaties" (Pop, 2013). By May 2013, the German government gave up its insistence on treaty change as a mechanism for banking union, since the banking regulations accommodated its demands. Specifically, the Single Resolution Mechanism foresees the creation of an intergovernmental body among euro members and outside the treaties. However, the German Council of Economic Experts recommended in its 2014 annual report that *German government should strive for a change in the European treaties. This would make it possible to create a European banking supervisory authority that would be institutionally separate from monetary policy and would allow for more effective bank resolution* (German Council of Economic Experts, 2014).

Eurobonds and pooling of debts

Demands for the creation of some sort of relief for debt struggling countries have been voiced since the beginning of the crisis. In November 2012, the Commission presented its plan for a genuine economic and monetary union (European Commission, 2012). This suggested a three-stage approach, in which formal revision would be the last stage, and required deeper coordination in the areas of tax policy and the labour markets, and a debt redemption fund, eurobonds or stability bonds to enhance the EU's fiscal capacity via financing through borrowing. Former President Barroso created an *Expert Group Report on a debt redemption fund and eurobills*, whose final report (Tumpel-Gugerell et al.:2014) concludes that without EU Treaty amendments, joint issuance schemes could be established only in a pro rata form, and – at least for the debt redemption fund/pact - only through a purely intergovernmental construction, which would raise democratic accountability issues. Treaty amendments could be necessary to set up joint issuance schemes including joint liabilities, certain forms of protection against moral hazard and appropriate attention to democratic legitimacy, the report says. German Finance has questioned explicitly the creation of Eurobonds (Schäuble; 2014).

2.3 Institutional reforms for fiscal and macroeconomic governance.

Institutional reforms in EU's fiscal and macroeconomic governance correlate with policy reforms: whilst the latter have provided technical solutions to the problems and issues raised by the crisis, a significant number of scholars and leaders have noticed that providing democratic legitimacy to these policies remains a key issue. In the institutional side, the EP approved a Resolution (EP; 2012) which confirmed that it would make use of its prerogative to submit to the Council proposals for the amendment of the Treaties in order to complement a genuine EMU by enhancing Union's competences, in particular in the field of economic policy, and by strengthening the Union's own resources and budgetary capacities, the role and democratic accountability of the Commission and Parliament's prerogatives. Proposals for institutional reform are not systematic and many of them have

not advanced beyond a brief sketch. Technically, most of them could be implemented with the framework of the existing Treaty, actors propose treaty revision either to make the commitments more solid or because of reasons of democratic accountability and legitimacy.

Creation of a full-time President of the Eurogroup (Schäuble; 2014)

Current Treaty provisions allow the creation of this position but questions of democratic accountability will immediately emerge. Experience from the past shows that informal institutional innovations require, in the medium term, an explicit formalization in treaties.

Formalization of the relations between the euro and the non-euro member states

The British government has voiced its uneasiness with the increasing economic and fiscal coordination among euro members and the possible effects on the non-euro EU members. The Chancellor of the Exchequer, George Osborne, wanted to obtain constitutional guarantees that member states that were not euro members would have their rights preserved. He feared that the qualified majority rules entering into force in 2016 would convert the Eurogroup to a structural majority, able to approve any financial services regulation for the whole of the EU, and that this would affect the City of London (Osborne, 2014) since the UK government could not veto any financial regulation that could potentially be harmful.

Parliamentary accountability of euro macroeconomic and fiscal governance

The set of mechanism anticipated in the TSCG and the Packs create a weak accountability structure for the Commission, the BCE and, eventually, the Troika. In parallel, there is the issue on whether non-euro MEPs could vote on measures that apply only to euro-states. Several options have circulated (Bertoncini, 2013) *inter alia*, the creation of a separate Eurozone parliament (Schäuble, 2014). Vice-President Timmermans made very clear that his position is that "there should not be stand-alone Eurozone parliament" (Neville; 2014). Also, the issues of democratic accountability related to the *contractual agreements* have not passed unnoticed and hence the proposal that if the European Council finally decides to conclude arrangements of a contractual nature with individual member states, the EP should be entitled to authorise the budget appropriations and the agreements should be put to a vote in the national parliaments (Hubner et al.; 2014)

Treasury minister

This means upgrading the role of the Commissioner for Economic and Financial Affairs with two different functions. On the one hand, he/she would become the supervisor of national budgets, as proposed by the SPD-CDU/CSU coalition agreement which wanted the Commissioner "*achieving extensive, communal control of national budgets, of public borrowing in the 28 EU capitals and of national plans to boost competitiveness and implement social reforms*" (Blome et al., 2013). The EP aimed in the same direction although it did not extensively specified the new powers in relation to national budgets (EP; 2013). In November 2014, German Finance Minister Schäuble called explicitly for a veto power for the Commission on national budgets. According to him, this could be achieved without Treaty revision.³ On the other hand, the notion of a "treasury minister" could also be associated with the proposal of creating a specific euro-budget (see above). There is scope either for informal solutions (i.e. one of the Commissioners may take up this role factually) or for accommodation within the existing treaties (in fact, the EP itself has suggested that a European Treasury Office and Minister could be set within the existing treaties by means of the flexibility clause (article 352 TFEU) (EP; 2012). However, this would immediately raise issues about democratic accountability which may lead, in the medium term, towards a significant institutional reform via Treaty amendment.

³ Berlin favorable à un veto sur les budgets nationaux *Le Figaro* 24.11.2014
<http://www.lefigaro.fr/conjoncture/2014/11/24/20002-20141124ARTFIG00273-berlin-favorable-a-un-veto-sur-les-budgets-nationaux.php>

Alternatively, the creation of a new euro-budget authority could be fitted within existing treaties (Repasi; 2013). However, the same kind of democratic accountability issues will emerge.

2.4 Other institutional reforms

Next to institutional reforms related to crisis driven new instruments of governance, a number of other proposals advance additional ideas for institutional change:

- Switching to generalised qualified majority voting and integration of the reverse qualified majority as foreseen in the TSCG and the *Six Pack* into primary law (specifically, articles 121, 126 and 136 TFEU) (EP, 2013).
- Inclusion of the EP in the process of appointment of the President, Vice-President and members of the Executive Board of the ECB. The EP has argued that it should consent to Council recommendations.
- The EP called for the next convention to study the possibility of introducing a special legislative procedure, requiring four-fifths of the votes in Council and a majority of Parliament's component members, for the adoption of the multiannual financial framework and the decision on own resources (EP; 2013).
- The reinforcement of the mechanism for monitoring compliance with rule of law principle in article 2 has also attracted proposals for Treaty revision. Former Commissioner Viviane Reding proposed amending article 7 (mechanism for controlling violation of article 2 values) in order to make it more easy to apply. This would entitle lowering the thresholds to activate the first stage of the procedure (Reding, 2013). She also added the proposal to derogate article 51 of the EU Charter of Fundamental Rights in order to make EU fundamental rights directly applicable to all member states, including the right to effective judicial review of the Charter. This would imply recognising the Commission to initiate infringement actions for the violation of fundamental rights by Member States even if this did not happen in the implementation of EU law. The EP also added significantly to the agenda of Treaty revisions related to reinforcement of the mechanism for the effective protection of EU values contained in article 2. In its 2014 Resolution on the situation of the fundamental rights in the European Union (EP; 2014), the EP called for:
 - revision of Article 7 of the EU Treaty, adding an 'application of Article 2 of the EU Treaty' stage, separating the 'risk' stage from the 'violation' stage, with different thresholds for the majorities provided for, a strengthening of technical and objective (not only political) analysis, enhanced dialogue with the Member States' institutions and a wider range of detailed and predictable penalties which are applicable throughout the procedure;
 - drawing on Article 121 of the Treaty on the Functioning of the European Union to devise a stronger and detailed fundamental rights coordination and supervision mechanism;
 - extending the scope for redress and the powers of the Commission and the Court of Justice;
 - including a reference to the FRA in the Treaties, including a legal base making it possible to amend the Agency's founding regulation not by unanimity as is currently the case but via the ordinary legislative procedure;
 - the deletion of Article 51 of the Charter of Fundamental Rights;
 - enabling Parliament to launch proceedings on the violation of Article 2 TEU on an equal footing with the Commission and the Council, and for the FRA to be able to contribute its necessary specialised support to the procedure;

- reviewing the unanimity requirement in areas relating to respect for and protection and promotion of fundamental rights, such as equality and non-discrimination (e.g. Article 19 TFEU);
- Revision of the European Citizens Initiative (ECI). A recent review of the ECI (Ballesteros et al: 2014) has suggested a revision of article 11 (4) to clarify the reach of the Initiative including a possible expansion of its scope to include proposals for revision of the Treaties themselves.
- Formalization of the *Spitzen*candidate process. The agreement of the European parties to support the most voted *Spitzen*candidate as President takes to the limit the interpretation of the procedure envisaged in article 17.7. As it has happen in the past, the EP may aspire to formalise this informal constitutional change. Some governments (i.e. the UK) have already reacted proposing that this informal constitutional change should be explicitly rejected.
- The EP has proposed that any future treaty change should affirm differentiated integration as a tool for achieving further integration while safeguarding the unity of the Union (EP; 2013).
- Creation of a European Justice Minister (Reding; 2012; 2013). This new EU role would be in charge of implementing the European area of freedom, security and justice and making sure it does not remain incomplete.

2.5 Repatriation of powers/ competences

Repatriation of powers is mainly (but not exclusively) a proposal of the British conservative government. David Cameron argued that power(s) must be able to flow back to member states, not just away from them. He proposed a thorough examination of what the EU as a whole should do and should stop doing. He launched a review on the balance of competences (Cameron, 2013), having in mind a *possible repatriation*. This "Balance of Competences Review" consists of around 32 sectoral reports (which are actually similar to the 35 chapters of the accession process), of which the first six were published in July 2013. An assessment of these first six found that the EU competences were about right, so far (Emerson & Blockmans, 2013). This assessment will form the basis of the UK government's negotiating position if a new revision is proposed. British positions have found some echo in German actors. In December 2013, Angela Merkel told the Bundestag that *those who want more Europe, also have to be prepared to review the competences* (Budestag; 2013). And the CDU endorsed this stance in its 2014 EP electoral manifesto declaring that *In order to strengthen political union that is near to its citizens and democratically constituted, a repatriation of competences to the national level should be possible* (CDU; 2014).

The clearest demands from the British Prime Minister refer to measures related to immigration (Cameron; 2014a): key demands are the requirement to have a job offer before entering into the UK (which might conculcate the basic market freedoms); the expelling a job seeker if she/he does not found a suitable job after six months and reinforcing (and putting on equal grounds with UK citizens situation) the right of non-British EU citizens to bring an EU spouse into Britain. Additionally, the British Prime Minister demanded refusing in-work benefits (tax credits) and housing benefits for non-British EU citizens if they have not been resident during 4 years in the country. The much more Euroskeptic Conservative Fresh Start Project together with the Euroskeptic think tank Open Europe (Fresh Start Project: 2014) proposed an agenda of 12 reforms which included greater powers to national parliaments to enforce subsidiarity; legal safeguards for the single market and Eurozone öuts; differential application of the "ever closer Union" expression to different states; liberalisation of cross-border EU trade in services; better regulation (sic); increase the conclusion of free trade agreements; regaining national

control over access to welfare benefits; reform the CAP and the regional policy; de-regulation and greater national flexibility of social and employment law; remove the UK from ECJ jurisdiction in policing and criminal justice; secure an opt-out from the Chapter of Fundamental Rights and eliminate the Strasbourg EP seat.

Previous experiences of EU constitutional development demonstrate clearly that once reform appears on the table, it is highly unlikely that its agenda can be totally controlled by some actors and the menu of issues may expand to accommodate the demands of different member states and EU institutions as well.

3. PROSPECTS FOR TREATY REVISION AND THE LIMITATIONS OF CURRENT PROCEDURES FOR CONSTITUTIONAL EVOLUTION

Few governments have endorsed constitutional development via treaty revision. Among the exceptions, the German Finance Minister Wolfgang Schäuble argued that the debate on [EU] treaty changes would come back to the table and he explicitly called for a formal treaty revision since the Lisbon Treaty only reflects the European reality of 2014 to a limited extent and European integration has significantly deepened in recent years. His key proposal referred to the transformation to the community method of the intergovernmental solutions adopted during the crisis (Schäuble; 2014). German chancellor Merkel also argued that in a constantly changing world, the Lisbon Treaty may need amendment to adjust (Merkel, 2013). The *Future of Europe Group* comprised a significant number of euro and non-euro foreign affairs ministers who met during 2012 under the leadership of the German foreign affairs minister Guido Westerwelle and drafted a list of ambitious and substantive proposals for revision of the Union. Although they favoured working within existing treaties, they explicitly stated that they did not rule out more far-reaching reform measures in the medium term (Westerwelle, 2012). Implicitly, the group called for new treaty changes, to be agreed upon on the basis of a convention (Future of Europe Group, 2012).

Despite of these examples, governments and other institutional actors by and large do not prioritise constitutional development via Treaty revision. Leaders have articulated these sceptical views mainly as a reaction to the demands voiced by the UK Conservative leadership for repatriation of powers (on issues such as free movement of people) which may require treaty change. Thus, French Prime Minister Manuel Valls told that re-opening the treaties to satisfy the UK would be "perilous" and deflect attention from dealing with European economic problems. He rejected both re-opening the Treaties or re-writing the rules on free movement of people since this would call into question the very basis of the EU (Hall and Rigby; 2014). In the same vein, Finnish Prime Minister Alexander Stubb discarded the possibilities of a renegotiation of British membership which would involve treaty change giving three reasons to justify his position. Firstly, successful revision would be impossible with 28 member states; second, Institutional reinforcement of economic governance can proceed without Treaty change and third, Member states cannot pick and choose membership options at their own will (Stubb; 2014). Also former EP President Martin Schulz warned Merkel privately that he would not back any change to the EU treaties. He favoured using the instruments that had already been created (i.e. the new treaties outside the EU and the *Six* and *Two* packs) without treaty changes. Schulz feared that a treaty change would take too long and that the referendums necessary in some

countries could not be won given the current poor public support for the EU (Blome et al., 2013).

Reticence to proceed with treaty revision does not derive from a mere assessment of the necessity of substantive changes but rather, it follows from the past experiences with treaty revision and, specially, with the 2005 experience of the ratification of the project of the EU Constitution. This revealed clearly the limitations that the current procedures possess for successful ratification of any agreement with relative indifference to its contents.

Current procedures for treaty revision (i.e. article 48) prescribe unanimity and the application of domestically mandated constitutional procedures. In the context of an ever-growing membership and increasingly significant treaties, unanimity has empowered a large group of veto players. The number of potential veto players intervening in each round of domestic ratification processes has increased dramatically over time. This leads towards a long and difficult process in which any unexpected event may trigger failure of the revision process.

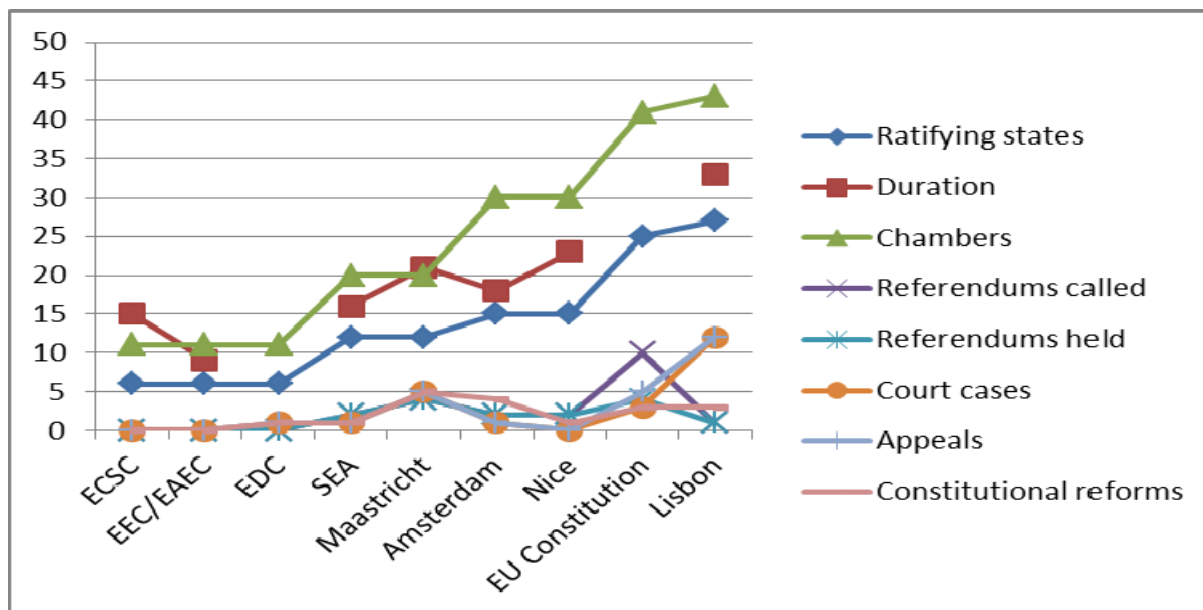
3.1. The unanimity requirement and its effects

Certainly, there is nothing undemocratic with unanimity. The founders of the constitutional economy school, Buchanan and Tullock (1962) considered it the optimum rule for designing "constitutional agreements" since it gives the opportunity to every actor to define these rules. However, the unanimity rule creates a "paradox": given the opportunity to receive payments on the side, each voter (or actor) will have incentives to falsify his preferences, generating negative externalities for other voters. Hence, even if all voters agree in principle to a policy proposal, they are likely to fail to reach a unanimous consensus, if subjected to the unanimity rule (Parisi & Klick, 2003: 11). Unanimity might produce deadlocks and, in this sense, be inefficient. Because of this, its main proponents for constitutional design, Buchanan and Tullock (1962) argued that unanimity operates as a kind of "aspirational" rule that *inspires* operational rules.

Despite of these predictions, the EU has been able to complete a number of successful *negotiations* under unanimity although this has become progressively more burdensome. Constitutional developments in the EU depend on a two level game (Putnam; 1988): intergovernmental negotiations require unanimity and, afterwards, a different set of domestic actors have to unanimously ratify the result of the former negotiations. In the simplest possible situation, it could be assumed that, in parliamentary democracies, a government that negotiates a treaty has also a majority in parliament to support its ratification. However, the real situation is far more complicated: majorities for ratification can be larger than simple (i.e. 50% of votes +1), requiring perhaps the support of opposition parties that may have different preferences. Also, several chambers may intervene in ratification and these may have different composition. Or an election may intervene between negotiation and ratification changing the composition of the government and the set of initial preferences. Higher courts, whether Supreme or Constitutional, may be called to adjudicate on treaties' constitutionality (Closa; 2013). Last but not least, referendums have become an increasingly used procedure for ratification, and this has created deep obstacles for successful treaty revision in several occasions. Altogether, the growth in the number of member states intervening in treaty revision has provoked a huge increase of the number of veto players (i.e. domestic actors with the power to block ratification) creating an authentic minefield (Closa; 2004). Among all these, referendums are arguably the most powerful obstacle to treaty ratification. In any case, it must be stressed that is the unanimity requirement the one that transform domestic procedures into

devastating devices in an ever growing membership union. The figure 1 below summarises some basic facts regarding ratification of EU revision treaties.

Figure 1 Ratification of EU Treaties



Source: Own elaboration

The graphic illustrates some telling facts about the ratification processes in the revision of EU treaties. Their duration measured in months (red line) has increased from a little more than a year in the foundational treaty (the ECSC Treaty) to almost three years with the Lisbon Treaty. Duration co-varies in relation to the number of states involved and the number of chambers intervening (respectively, the blue and green lines). Duration is taken as a proxy for difficulty in obtaining successful ratification and, in fact, the two missing dots in the line correspond to the two cases of ratification failure (i.e. the EDC and the EU Constitution). Leaving aside the number of states and chambers intervening, the two most decisive veto players have been Courts and, above all, citizens vote (i.e. referendums). Significance of Courts derive from the fact that they can transform a process of treaty ratification into another one of constitutional reform with much stronger procedural requirements and giving entrance to new additional veto players.

Among all procedural requirements, referendums have created the biggest obstacles to successful ratification. They are mandatory in Ireland; quasi-mandatory in Denmark (subject to an alternative majority of five-sixths in parliament) and, in both cases, their results bind the government. Further than these two mandatory cases, a number of governments have held them even if they were not mandatory because of different reasons (Closa, 2007). Once held, the results of referendums are in reality the same, regardless of whether or not they are mandatory or binding: no government seems prepared to challenge the result by going in the opposite direction (as the case of the Netherlands with the EU Constitution in 2005 well proves). Knowing their potentially devastating effects, the current political mood in most governments favours the avoidance of referendums. However, they may not be avoidable in the future in some cases (see below).

3.2. Constitutional evolution via external treaties and ratification under less than unanimity: the TSCG and the TESM

The rigidities of the ordinary revision procedure, the demands of the British government, the urgency required by the crisis and the fact that the new treaties affected mainly euro members created the conditions for using alternative requirements for the entering into force of the new instruments for fiscal and macroeconomic governance (i.e. the EFSF, the TESM and the TSCG). Instead, revision of article 136 proceeded via the ordinary ratification requirement of article 48 (unanimity and remission to domestic constitutional procedures). The EFSF did not require domestic ratification since it is constructed as a private law agreement among Member States. However, there existed heated parliamentary debates on the approval of financial contributions in several member states (i.e. Slovakia, Germany) and in one case, its approval motivated the fall of a government (i.e. Slovakia). The other two instruments for constitutional development (i.e. the TSCG and the TESM) applied different requirements for their entering into force.

Both the TSCG and the TESM are not EU revision treaties (nor even, strictly speaking, EU Treaties) and they required less than unanimity to enter into force. The TSCG demanded ratification by 12 out of 17 euro members in order for it to enter into force. This threshold permitted the effect of potential veto players (such as the Irish voters through a referendum) to be neutralised since an eventual rejection will not threaten its ratification. In practice, the treaty was ratified very quickly (within ten months) by 23 states (even though five of these – Latvia, Lithuania, Hungary, Sweden and Poland – adhered only to the governance provisions of Title V). At the end, only the UK has not signed nor ratified the TSCG since the Czech Republic finally adhered and ratified the Treaty in 2014.

The TESM did not mention a minimum number of states for entering into force since it required ratification by euro states holding 90% of the fund capital. In these conditions, the minimum possible number of states ratifying was 8 since the four biggest euro members accounted for 77.3% of the capital. This meant that the participation of Germany, France, Italy and Spain, was unavoidable for the treaty to enter into force (since each of them had more than 10% share of the fund). It took eight months to gather the minimum number of ratifying states and *all euro member states finally became party to it*. Both cases prove that successful ratification is possible under less than unanimity and they show that states may also accommodate their specific demands in these conditions.

The comparison between the two new external treaties (i.e. the TSCG and the TESM) with the limited revision of the TFEU (Article 136) permits to assess the role that domestic actors may play under different ratification requirements. The revision of Article 136 proceeded under unanimity and the general assumption that it did not grant new powers to the EU, as well as the fact that the Article applies solely to the members of the euro area, guided the analysis by the governments of certain EU member states (e.g. Denmark, Greece, and Latvia). This allowed them to submit it to less constrictive ratification procedures and an easier passage even though all the customary domestic veto players were entitled to participate. Given its limited significance, not many potential veto players perceived it as a threat, and only the Czech President (Vaclav Klaus) used the opportunity to threaten to veto the ratification by refusing to put his signature on the Czech instrument.

The use of a less-than-unanimity requirement transformed subtly the playing ground for the other two treaties. The single most salient consequence is the non-externalization effect: whilst any state may not ratify the treaty, the consequences cannot be externalised to the whole of the Union. This increases the need for governments to secure a successful

ratification which meant implementing soft strategies to limit or, at best, control, veto players.

The next two sections describe how these ratification processes proceeded in practice. It is worth noticing that several states opted for the joint ratification of two or even the three (i.e. including the revision of article 136) treaties. Thus, Germany, Greece, Italy ratified jointly TEU revision on art. 136, the TSM and the SCG and Spain ratified jointly the reform of article 136 TFEU and the TSM. This choice lowers significantly the costs of facing more than one vote on closely related treaties. Possibly, attention and potential criticism targets one of the instruments minimising the costs on the others.

3.2.1 The ratification of the TSCG

Usually, European states involve their Parliaments in ratification processes. This secures a minimum of control and democratic accountability in an area traditionally controlled by executives (i.e. treaty negotiations). However, governments do still retain the power to ratify international instruments in certain situations. This executive privilege has never been used for EU major treaties. But executive ratification happened with the TSCG. Thus, the Cyprus government used Article 169(1) of the Cypriot Constitution which permits ratification by an Act of the Council of Ministers without a vote in parliament. Initially, the Malta government also wanted to ratify via an order of the Prime Minister and bypass parliament. But criticism forced the government to backtrack and get Parliamentary approval.

Parliamentary ratification, though, is the common procedure. In parliamentary systems, it may assume that the government that negotiates a Treaty possess also a simple majority in parliament that supports it. Political obstacles to ratification may emerge when the majority supporting the government is lower than the required ratifying majority. In the case of the TSCG, 9 states parliaments required majorities larger than 50%+1 of votes. More interestingly, several member states apply more than one majority requirement for parliamentary ratification. The application of the higher majority depends on whether or not it is considered that the Treaty implies or not a transfer of sovereignty. No doubt, the use of less stringent majority requirement (if more than one is available) makes easier ratification. This option depends on a preliminary determination on whether treaties imply or not a transfer of sovereignty. In general, if the Treaty implies a transfer of sovereignty/powers/competences, this requires higher parliamentary majorities or, else, it may require a constitutional reform. In four cases, states opted for the most demanding procedure. Thus, Czech Parliament concluded the Treaty transferred new competences to the EU and, hence, it required a 3/5 majority for ratification. Similarly, the Hungarian Constitutional Court ruled that the Treaty transferred sovereignty to the EU (despite that Titles III and IV would not bind Hungary) and hence it required a 2/3 majority (as per article E 2&4 HC). In Latvia, the predominant interpretation was that the treaty delegated a part of the national competences to international institutions. This requires a vote of a "constitutional majority" (i.e. 2/3 majority). In Luxembourg, the *Conseil d'Etat* thought it was not totally clear whether a transfer of competence was involved or not, since a combination of articles 3.(2) and 8 TSCG may lead to a transfer of competence. This required that the ratification law should be by a 2/3 majority (article 114 Lux C)⁴. Parliamentary committee on Finance and Public Budget decided to vote by 2/3 although the

⁴ The Council of State of Luxembourg advised ratification by a two-thirds majority since the treaty gave new control powers to the Commission and the ECJ.

government disagreed. The *Conseil* concluded that no constitutional reform was needed though. Finally, in one case (i.e. Slovakia), the interpretation was that the TSCG transferred powers to an international organization and it hence required ratification by law but this led to an ordinary law requiring simple majority. Most governments could negotiate support larger than simple majority even though in the case of Latvia this came with a price (i.e. 2 governmental positions for the non-majority party supporting the vote).

Noticeably though, several Member States decided that the *TSCG did not imply a transfer of sovereignty/powers/competences*. In Finland, this interpretation permitted ratification by simple majority rather than the 2/3 mandated for constitutional laws. In Greece, government parties (PASOK and ND) argued that the TSCG and the TESM did not expand competences. The government invoked article 28.1 which does not specify the majority required (i.e. simple majority would do). Hence, the regular parliamentary procedure of article 70f GC applied (simple majority). Opposition groups in parliament demanded applying a 3/5 majority (i.e. Syriza which also demanded constitutional reform). Although governmental parties had enough seats, Syriza argued that they did not want to follow the 3/5 rule to avoid creating a precedent for future votes. Some other parties demanded the application of article 28.3 (absolute majority of members of parliament).

In two other cases, the application of the most lenient procedure was possible by interpreting that the state only partially committed to the TSCG and future deepening of these commitments would require additional voting. Thus, the Swedish government and *Riksdag's* Committees on Finance and on the Constitution coincided that the TSCG neither implies a transfer of competences nor amends the Constitution. Additionally, both coincided that the Treaty would be only legally binding on Sweden the day it introduces the euro as its currency. (In the view of the Government, ratification implied support for the Eurozone. At the same time, Sweden preserved its influence and it prevented a division between euro and non-euro members). And the Polish government also argued that there was no transfer of competence and hence article 89.1.3 applied (i.e. simple majority). The government also opined that accession to Titles III & IV of the Treaty would require a separate ratification in future.

Litigation against the Treaty was relatively reduced in comparison, for instance, to the 12 Court cases the Lisbon Treaty. The TSCG had only three court cases. Court intervention may become crucial since their rulings may transform a ratification process into a process of constitutional revision (which normally has more stringent requirements). Beyond the mandatory participation in ratification processes of semi-judicial advisory bodies (such as the Spanish *Consejo de Estado*), the only executive that decided to involve Courts was French Presidency Sarkozy who asked the Conseil d'Etat on the basis of article 59 FC. The *Conseil d'Etat* decided⁵ that the ratification did not require reform of the Constitution.

Ratification involved constitutional reform in the Irish case only and, because of this, a referendum. However, given the ratification requirements, the (Irish) referendum did not affect the entry into force of the treaty. The calculus that the Irish government and voters could make on the eventual result differed radically from previous referendums: a negative vote would not prevent the entering into force of the TSCG and Ireland would have to assume unilaterally the cost of the decision. In this situation, the key issue was the formal linkage between treaties: ratification of the TSCG was the condition for obtaining ESM funds so if Ireland was unable to ratify, the funds would not be available in future. The issue played a very salient role in the campaign and, despite the harsh conditions that the Troika

⁵ Decision no. 2012-653 Dc 9 August 2012

had imposed on the Irish government and the straight-jacket on domestic fiscal policy imposed by the TSCG, Irish voters supported the ratification of the treaty.

Thus, none of the traditional veto points emerged during the ratification process and, paradoxically, the biggest stumbling block was the change in the French Presidency, since François Hollande made ratification conditional on the addition of provisions on growth as a necessary supplement. The face-saving financial package approved at the European Council on 28-29th June 2012, which provided growth-related funds, allowed Hollande to proceed via an accelerated ratification. Those other traditional spoilers of treaty ratification, the courts, have kept a low profile: three courts reviewed the constitutionality of the new treaty according to their domestic canons, but none of these reviews had any effect on the process.

3.2.2 The ratification of the TESM

The TESM provoked similar divergences among the way in which different member states decided on the proper qualification under domestic constitutional law. Three states (Estonia, Germany and Luxembourg) opted for the most stringent requirement (i.e. 2/3 majority). Whilst in the German case this was a governmental cautionary move in order to prevent problems of constitutionality, in the other two cases the prevailing interpretation was that the TESM transferred competences and hence the enabling provision had to be applied. In three other cases, though, the dominant interpretation was that no sovereign transfer was involved and hence the less lenient procedure could apply.⁶ Moreover, several governments (those of Cyprus, Malta and Poland) even considered its possible ratification via an act of government, but eventually only Cyprus took that approach.

As in the case of the TSCG, executives had little appetite for involving courts via preliminary adjudication on the constitutionality of the TESM. Leaving aside the mandatory involvement of quasi-judicial bodies, only Estonia's Chancellor of Justice initiated the Constitutional Review Procedure at the Supreme Court on the TESM. This limited appeal to courts reduced the chances to ratification turning into constitutional revision. However, given its content (i.e. the provision of national funds for the ESM), the Treaty attracted a significant degree of litigation from other actors and, all together, Courts ruled on 5 cases. Among these, the Irish and German cases were the most salient ones.

In the Irish *Pringle* case,⁷ an individual requested a court injunction, under which the government would be prohibited from pursuing the (merely) parliamentary approval of the TESM (and also of the amendment of Article 136 of the TFEU), on the grounds that this would be in violation of the Irish Constitution. He also argued that both legal instruments were, anyway, in breach of primary EU law. The Irish Supreme Court rejected the demands on appeal, but it referred several questions to the Court of Justice. The ECJ decided to sit "as a full court", that is, with all 27 judges, which is a very exceptional occurrence. Moreover, its President decided to prioritize the dossier, indicating that the use of the accelerated procedure was necessary "in order to remove as soon as possible that

⁶ In relation to the TESM, the Finnish Constitutional Law Committee considered that no sovereignty transfer was involved and, hence, the ordinary legislative procedure which required simple majority applied. In the Netherlands, it was also considered that the ordinary legislative procedure applies. In Greece, different parties disputed on whether the TESM involved a transfer of sovereignty or not. In the first case, article 28.2 GC would apply requiring a majority of 3/5. In the second case, article 28.3 requires an absolute majority. The later interpretation prevailed.

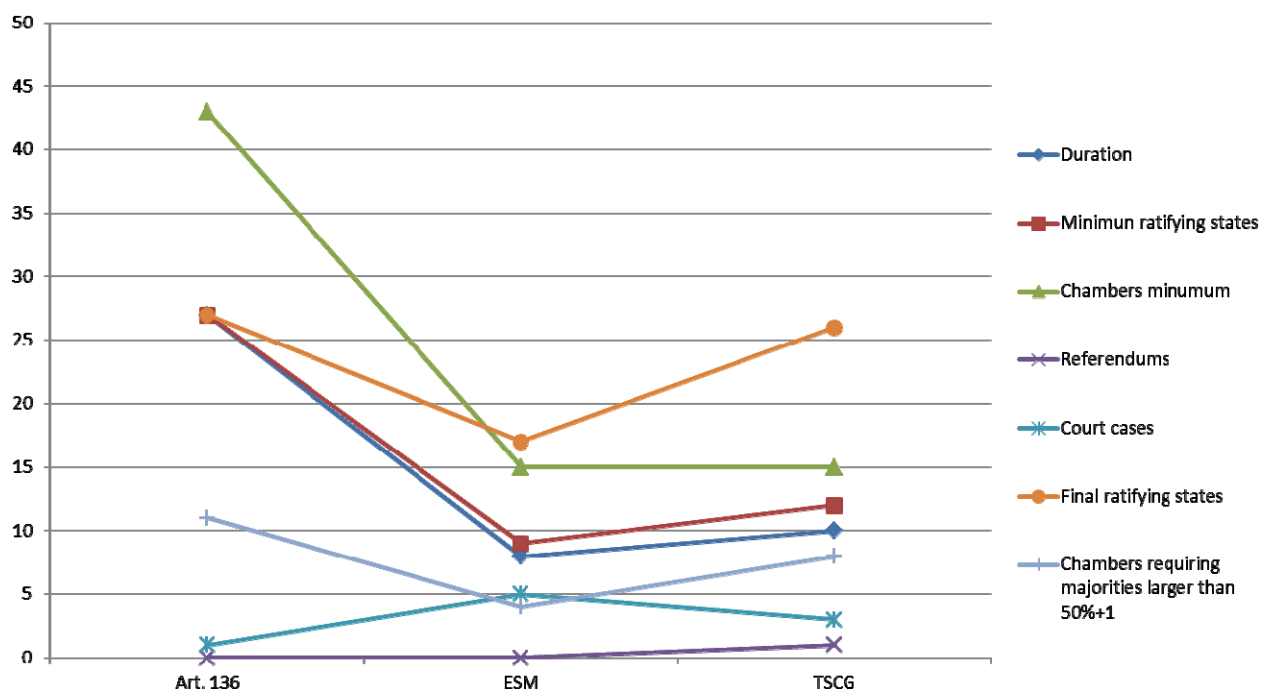
⁷ Case C-370/12, *Thomas Pringle v Government of Ireland, Ireland, The Attorney General*, Judgment of the Court of Justice (Full Court) of 27 November 2012

uncertainty, which adversely affects the objective of the EMS Treaty, namely to maintain the financial stability of the euro area". The Court delivered its judgement on 27th November 2012. The central legal question submitted to the Court was whether the 17 member states of the EU had, by concluding the TSEM among themselves, acted in breach of EU law. Hence, the resolution of the case affected not only Ireland but the whole EU. The ECJ ruled that Member States could ratify the TSEM and this does not require an authorisation from the EU since both (EU and TSEM) are legally independent. This ruling cleared the way to proceed.

The German against the TSEM case was also crucial: Germany represented 27% of the capital of the ESM and giving the ratification rules, the Treaty could not enter into force without Germany. The Court faced a dilemma: both the *Bundestag* and the *Bundesrat* had ratified the treaty and only the signature of the President was left. Completion was vital, since speculation against the euro and its ability to sustain members with budgetary difficulties was mounting dramatically. The Court chose to issue a preliminary ruling that declared that the ceiling for German contributions must coincide with that established in the relevant annex to the treaty and that the limit could not be exceeded without the express approval of the German representative to the ESM. Moreover, the German government should obtain a binding recognition of this limitation and of the absolute need for German parliamentary approval for any increase. In response to this demand, the representatives of the parties to the ESM issued a declaration designed to address the conditions requested by the German Constitutional Court, referring in particular to Article 8(5). Any increase in the liabilities of the member states would require their prior agreement and "due regard to national procedures". The Court also clarified that Articles 32(5), 34 and 35(1) should not prevent the provision of comprehensive information to the national parliaments. These conditions permitted the conclusion of German ratification and cleared the way for the entering into force of the TSEM.

Finally, the TSEM did not require any referendum. In *Pringle vs. Ireland*, the Irish Supreme Court ruled that the TSEM established a clear and limited commitment to participate in an international organization (no delegation of policy making). Hence, no constitutional reform and referendum was needed.

The key lesson from the analysis of the ratification process of both the TSCG and the TSEM is that national authorities freely choose ratification procedures according to their domestic requirements and preferences. Hence, the removal of unanimity requirement does not imply affecting at all the domestic sovereignty to freely choose determine how to ratify a Treaty. Figure 2 below summarises the aggregate effect of these choices.

Figure 2 Ratification of new macroeconomic and fiscal governance treaties

Source: own elaboration

The results are revealing. Duration (darker blue line) more than halved if the revision of the TFEU (unanimity), on the one hand, is compared with the ratification of either the TSCG or the TESM, on the other hand. The data provide a simple explanation for this: the diminution of the minimum required number of ratifying states (red line) strongly correlates with the duration (which, again, is a proxy for difficulty of ratification). The final number of ratifying states (orange line) tells yet another more important lesson: despite requiring less than unanimity, all EU states (but one) have ratified the TSCG and all euro states have ratified the TESM. This leads to assume that, applying less than unanimity as a ratification rule, the final result may come very close to unanimity.

4. OPTIONS AND CHALLENGES

Former sections have summarised the two alternative ratification requirements (unanimity and less than unanimity) as they have applied in the revision of EU Treaties via article 48 and the entering into force of macroeconomic and fiscal governance treaties outside the procedure of article 48. Taking into account these two alternatives and the list of issues in the constitutional agenda, this section presents the several options that permit EU constitutional development. Each of them combines specific advantages and disadvantages and none seems to be optimal nor any of them seem to be more likely than the others. Whilst the prevalent mood seems to try to accommodate these within the existing legal framework of the Lisbon Treaty, the nature of some of these issues may require a Treaty revision.

4.1. Option 1 Constitutional development without former treaty reform.

Constitutional development *without* Treaty change results a very appealing option in the current political climate. In fact, several European leaders have taken the view that changes are feasible and desirable within the existing treaties. Dutch Prime Minister opined that *there is no need to rewrite the treaties. What we need is for the European Council, the European Parliament and the European Commission, shortly after the elections in May, to reach a political deal setting out what the EU's priorities will be over the next five years, and in what areas the EU will refrain from activity, so that those areas can be left to the member states. The Dutch government believes that in the next five years it is essential to focus on the main tasks, abandon side issues, and ensure that the major changes that the EU has undergone are properly consolidated* (Rutte, 2014). Capturing the dominating mood, the EP called to proceed swiftly by maximising the possibilities afforded by the existing Treaties and their elements of flexibility and at the same time to prepare for the necessary Treaty changes in order to guarantee legal certainty and democratic legitimacy (EP; 2013). The 2013 EP Report aimed mainly at identifying the main inter- and intra-institutional weaknesses in the EU decision-making process and to propose concrete recommendations to improve the organisation and functioning of the EU that would not necessitate a reform of the treaties. Current EP AFCD Chair had subscribed the view that once the next European Parliament and European Commission take office, the EU should undertake a number of institutional changes within the confines of the current treaties to improve the efficiency and democratic legitimacy of the EU institutions and protect its integrity (Hubner et al.: 2014). However, her institutional position became softer arguing that treaty reform might be unavoidable – and even advisable – in the future but today's political climate is not favourable (Hubner; 2014). Equally, British Prime Minister Cameron has called for changes in the EU by means "different to Treaty changes" (Cameron; 2014b).

Few of the issues presented in section 2 above require unavoidably treaty revision for addressing them and most of them could be accomplished within the existing current EU legal framework (Piris; 2014). In fact, Commission Vice-President Timmermans had suggested, in his former position as Dutch foreign affairs minister, that a number of ambitious institutional changes could be achieved without treaty reform (Timmermans, 2013). Examples include agreeing a European Governance Manifesto that lays down what the EU should and should not do; the creation of a smaller, reformed Commission with a president and vice-presidents heading a limited number of policy clusters and having the sole authority to initiate legislation; and the reinforcement of the national parliaments' function of supervising subsidiarity. Some of these suggestions (such those on Commission's policy clusters) have already been implemented and several others are also on the agenda.

The panoply of alternative instruments to treaty revision contains (depending on the issue and the reach of the reform) inter-institutional agreements (article 295 TFEU); enhanced cooperation (article 20 TEU and articles 326 to 334 TFEU); European Council Decisions (such as the ones in 1992 in Edinburgh in relation to the EMU and Denmark); European Council decisions; the flexibility clause (article 352 TFEU) and intergovernmental treaties (see below 4.4). These instruments trade-off their easier availability (*vis-à-vis* treaty revisions) with their level of petrification (i.e. they can be amended more easily than treaties). The clearest instrument are the Inter-Institutional Agreements which serve to informally develop EU constitutionalization filling in gaps in the EU Treaty (Christiansen and Reh; 2009). They may be used, for instance, for the creation of an hypothetical "red card" for national parliaments, for better regulation or for mitigating the influence of ECJ

judgments on social and employment law (sic) (Fresh Start Project, 2014). However, there are limitations associated with the broad and ambiguous nature and scope of the agreements (Maurer; 2005): rightly so, they must be conceived as a stepping stone towards formal constitutionalization (Chryssochoou; 2001: 153). Next, European Council Decisions and unilateral declarations could serve to some goals, such as the British Conservative leader demand to qualify the meaning of the expression "an ever closer Union" for different states. In fact, the European Council made, at the request of the UK, an interpretation on the expression "an ever closer Union": it *allows for differentiated paths of integration for different countries, allowing those that want to deepen integration to move ahead, while respecting the wish of those who do not want to deepen any further.*⁸ Third, secondary legislation may serve to accommodate a key British Prime Minister demand on immigration: refusing in-work benefits (tax credits) and housing benefits for non-British EU citizens if they have not been resident during 4 years in the country, could be accommodated within existing treaties by changing existing legislation (Chalmers and Booth; 2014).⁹

Whilst opting for constitutional development without treaty revision is relatively low cost in comparison to formal revision, the disadvantage of this option is that it does not address some of the most pressing issues raised by economic and fiscal governance changes. Moreover, specific issues may be addressed through the use of ad hoc instruments. There exist also deep normative objections: the systematic utilization of alternative means to Treaty revision in order to secure a deep and thoughtful reform at the service of a specific ideological agenda amounts to a "constitutional mutation" of the Union, i.e. a change in the constitutional substance of the pact without bothering with the formal procedural requirements for doing precisely that. This affects essentially to the issues on democratic accountability and legitimacy via the holding a convention with different interested actors and limiting the transparency of the exercise.

4.2. Option 2 Constitutional development via existing revision procedures (article 48)

Current revision provisions (article 48) contemplate two different procedures: the ordinary and the simplified one. The *ordinary procedure* requires a Convention (including EP and national parliaments' representatives) which the European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene should this not be justified by the extent of the proposed amendments. An intergovernmental conference follows and the revisions require unanimity for entering into force. The ordinary procedure includes a *rendez-vous* clause (48.5): If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council. However, the practical meaning of this provision (which existed equally in the 2004 draft EU Constitution) seems inexistent.

The *simplified procedure* (article 48.6) applies to the revision of all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union. The European Council takes the decision to amend the TFEU by unanimity after consulting the European Parliament and the Commission, and the

⁸ European Council 26/27 June Conclusions Point 27 page 11 2014 EUCO 79/14
http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf
http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf

⁹

European Central Bank in the case of institutional changes in the monetary area. The revision cannot increase the competences conferred on the Union in the Treaties. The Treaty does not explicitly say whether the simplified procedure can apply for the repatriation of powers (which is explicitly contemplated within the scope of the ordinary procedure). An exegetic analysis of the provision may come to the conclusion that since withdrawal of competences is not explicitly forbidden (as it happens with the increase of competences), then the procedure can apply in this case. Although consistent with the letter, this would no doubt violate the spirit of the procedure. In any case, the simplified procedure requires also unanimity of member states ratifications.

The *passarell provisions* (article 48.7) applied to the passage to qualified majority voting of provisions in either the TFEU or Title V TEU and the passage from the special legislative procedure to the ordinary legislative procedure in the TFEU. The European Council decides by unanimity on these revisions after obtaining the consent of the European Parliament. Ratification proceeds assuming initial unanimity and giving a short period for vetoing the revision: If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph shall not be adopted. In the absence of opposition, the European Council may adopt the decision.

Broadly speaking, both procedures (ordinary and simplified) differ in relation to the substance of the revision: if powers are either transferred to or withdrawn from the EU, then a Convention is needed. If no power transfer/withdrawal is involved and revision is limited to the TFEU, a Convention is not needed. In both cases, negotiations and ratifications are needed and unanimous. The *passarell* provision can be activated to satisfy some of the EP demands on moving towards generalised qualified majority voting (see above, EP; 2013). But even if the changes obtain unanimity within the European Council, it is likely that some national parliament may vote against.

The options for applying the simplified procedure exist (for instance, to integrate part of the substance of the Fiscal Compact into EU primary legislation) but it will not be uncontentious and for some other issues (such as institutional changes or affecting the “ever closer union” expression) is doubtful whether this could be used. The ordinary procedure relies on a Convention and this provides democratic accountability, receptiveness and legitimacy to the constitutional evolution. Moreover, the ordinary procedure serves for the whole scope of changes suggested. But its weakness lies in ratification.

As discussed above, current ratification rules combine the unanimity requirement with full discretion for member states to choose the agents taking part in ratification processes. Although these rules have permitted 7 EU treaty reforms, the growing number of EU member states and veto players taking part in ratification clearly show their limits. The collapse of the EU Constitution and several other instances of partial failure to ratify (i.e. Denmark in 1992, Ireland in 200 and 2008) illustrate these limitations. Ireland will require a referendum to reform its constitution if substantive changes to the Treaties happen and in Denmark a referendum is also likely. The use of referendums has become an issue even for states such as Germany which have rarely or never held them. A number of voices, including those of government ministers, have suggested that Germany may need a referendum for future revision of EU treaties (Schuseil, 2012), and some reputable intellectuals have also favoured a plebiscite on a new EU constitutional text (Habermas, 2012). The issue emerged during the negotiations between the CDU/CSU and the SPD to form a governing coalition. The direct consultation obligation would apply in three cases: the significant transfer of new competences to the EU, the accession of new members and

any future additional German financial contribution (Gómez, 2013). Although no formal position has been taken, the issue may resurface in future. Also, the Dutch parliament debated a proposal from the "Citizens forum-EU" on the need for a referendum on transferring new powers to the EU in January 2014. The mainstream parties (with the exception of the ruling VVD) were not unsympathetic to the proposal. France may also require a national referendum if major changes are made to EU law (Spiegel & Peel, 2013).

However, the biggest veto point may be the UK newly created referendum lock on future treaty revisions. As opposition leader in 2007, David Cameron offered a "cast-iron guarantee" to hold a referendum on the Lisbon Treaty. When he arrived in office, the treaty had already been ratified. Cameron pledged that a future Conservative government would hand the British public a referendum lock to which "only they had the key". The coalition agreement between the Conservatives and the Liberal Democrats agreed on amending the 1972 European Communities Act, so that any proposed future treaty that transferred areas of power, or competences, would be subject to a referendum on that treaty – a "referendum lock". Similarly, the use of "*passerelle clauses*", which change a requirement for a unanimous vote to a qualified majority in the EU Council of Ministers, would require primary legislation (HM Government 2010).¹⁰ In 2011, the UK Parliament approved the European Union Act 2011, which requires that any "significant" EU treaty changes must be approved by a national referendum in the future. The device has rightly been called a "lock" since it diminishes the government's discretion. Whilst a minister may declare treaty revisions to be "not significant", this decision may be challenged in the courts. Ministers only have discretion over a very narrow area of EU treaty change, not over all decisions to put a matter to a referendum – the vast majority of these are automatic under the Act, which lists 56 policy areas where a referendum would be needed.¹¹ The current government threat to hold a referendum on membership by 2017 has added teeth to the lock: the prospect of disguising the promised referendum on membership as a referendum on further treaty revision may appear very appealing. The Labour Party has ruled out an in/out referendum on EU membership before 2020 unless a new EU treaty proposal bids to transfer more power to Brussels (Miliband, 2014).

In summary, whilst there exist convincing arguments in favour of using the conventional revision procedures, the growing number of veto points in ratification processes in member states cast serious doubts on its feasibility. Specially, the introduction of the so-called referendum lock in the UK and the need to use referendum in some member states, together with the possible courts' decision on the constitutionality of the new treaties are the main (but not only) potential obstacles to obtain unanimous ratification.

4.3. Option 3 Reaching out beyond the current procedures

This option assumes the use of existing procedures for Treaty revision and ratification but it provides an emergency mechanism for an eventual ratification failure. Essentially, this is the path proposed in 2002 by the European Commission Penelope Project (European Commission, 2002) through its *Agreement on the Entry into force of the Constitution*. The project designed an ingenious solution. First, all member states would ratify the Constitution, thus fulfilling the requirement of unanimity. Second, but at the same time,

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¹¹ According to the former Chief of the Council Legal Service, Jean-Claude Piris, it will be up to the remaining member states to determine whether this Act and the referendum lock respects the loyalty requirement of the TEU. If they consider that the referendum lock means that treaty revision is practically impossible, it cannot be ruled out that the compatibility of the Act with international law may become an issue. Piris, Jean-Claude, Letter to the House of Lords (on file with the author).

they would approve a *Solemn Declaration* confirming their decision to continue to be part of the EU. Should a member state fail to approve this declaration, it would then leave the Union and conclude an agreement with the Union that would regulate its future relationship. Third, the treaty on the constitution would enter into force according to the conditions laid down in the agreement (specifically, with a three-quarters majority of the member states making the declaration). It would apply to states that, by making the declaration, wished to remain in the Union.

The Penelope Project presented some moot points despite its attractiveness: could failure to ratify the declaration cancel the former commitments assumed by a member state or, in other words, could the withdrawal of a member state be imposed by a subsequent obligation? And, at the end of the day, Penelope did not solve the real political question: why would a member state that could foresee its inability to ratify the said declaration consent to be left on one side and leave the way clear for the other member states to advance without it?

The Penelope proposal had the background of the substantive revision negotiated within the 2002/03 Convention. Hence, governments and other actors could perfectly calculate the policy and institutional consequences of removing unanimity in ratification. Separating formal changes to revision rules from policy/institutional changes permits to bypass that calculus. Firstly, article 48 could be revised in isolation to any other substantive change. Afterwards, substantive revisions may happen or not. The substance of the revision is that unanimity should not apply to the rules for entering into force for future revisions. In parallel, no member state should be forced to enter into a treaty which has not ratified. Hence, the revision of article 48 should also contain provisions to respect the rights and obligations of the non-ratifying state(s). Whilst this takes into deep legal complexity, the procedure offers fairness and legitimacy precisely because, keeping current procedures gives respects fully legality and, simultaneously, gives still one chance of using unanimity. But the proposal suffers the same weaknesses as the Penelope: namely, a state may choose to be very strategic and not ratify a formal reform. In this scenario, the avenue opens for the next option (which is the one rehearsed with the TSCG and TESM) which guarantees de facto exclusion.

4.4. Option 4 By-passing EU treaties and acting outside the EU formal structure

EU member states have in the past used this path to deal with issues related to the EU by means of an extra-EU treaty. Both the Schengen Agreement and the Prüm Convention illustrate the procedure, and the more recent TESM and TSCG also follow this approach. The advantages of this path are large: these treaties have normally bypassed the unanimity requirement and have entered into force only for those member states that ratify them. Hence, they introduce flexibility and secure efficacy since they have dealt with the challenges raised, in particular, during the crisis.

But this approach has significant limitations: firstly, external treaties cannot be used to change the content of the EU Treaties but only to add extra rules. Secondly, the drafting of both the TESM and the TSCG shows also limitations of alternative constitution-making. They by-passed the formal requirement of a Convention in article 48 TEU and the involvement of EP and national parliaments was null (despite the anecdotal involvement of the EP President in an informal capacity). Hence, the democratic quality of the process is very low and, in parallel, constitution-making lacked transparency (although TSCG drafts were leaked). Finally, the result of this approach creates a variable geometry within the

Union which could be extended *ad infinitum*. The EP approved a Resolution stating that no intergovernmental agreement between Member States should create parallel structures to those of the Union (EP; 2012) and the current AFCO chair has opined that the adoption of inter-governmental treaties outside the EU legal framework should be confined to exceptional circumstances (Hubner et al.; 2014) and this seems an opinion widely shared among several other actors.

5. CONCLUSION

Constitutional evolution seems to be inherent to EU nature. By and large, it has proceeded in the past via *formal* Treaty revision. Given past difficulties with ratification, the main question seems to be whether constitutional development is possible under the current rules, what its cost is and what the alternatives are. This paper outlines four possible future pathways. One of them consist mainly of avoiding formal treaty revision which appears, in any case, as a transitory solution. The other three propose formal treaty revision and they address the question of whether future changes can proceed within the strictures of Article 48: i.e., the requirement for unanimity and the discretionary addition of veto players (such as voters in referendums), which create a true minefield for successful ratification.

Practical cases and theoretical reflections have offered alternatives for bypassing the unanimity requirement. In practical terms, external treaties (i.e. the TSCG and the TESM) have entered into force through ratification requirements that applied lesser requirements than unanimity. In more hypothetical terms, proposals such as the Commission's Penelope Project have also discussed procedures that formally apply unanimity whilst offering an escape route under less than unanimity. But alternatives do not take us far.

On the one hand, legal bridges (such as the Penelope Project) between current procedures and escape routes to unanimity present real feasibility problems: unanimity has to be *unanimously* revised. On the other hand, the appeal of totally new external treaties is strong. They offer the attractiveness of a smoother ratification (as the TSCG and the TESM prove). However, they present thorny political issues: constitution development outside article 48 may suffer from democratic deficits and, in any case, this pathway consolidates differentiated integration or *a la carte* Europe.

In summary, States may decide to postpone *sine die* any revision of the treaty, given the difficulties of reaching a successful negotiation, first, and ratification, afterwards. In a second scenario, states may decide to muddle through with an untidy mixture of current rules and new *ad hoc* requirements. The effect, no doubt, will be the reinforcement of a hard nucleus and the potential exclusion of recalcitrant states. This is hardly appealing as the portrait of future EU constitutional evolution.

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