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Between a rock and a hard place: the future of EU treaty revisions

Abstract

In the heat of the economic crisis, the demands for treaty revision have re-emerged in the EU agenda. However, any future reform will have to deal with the strictness of the revision procedure, which is caused by the obstacles that the combination of the unanimity requirement and powerful veto players may create at any moment during ratification. The alternatives are not particularly attractive, since they have significant political costs and effects. Caught between a set of less than optimal alternatives for proceeding with treaty revision, the European Union seems placed between a rock and a hard place. This paper explores whether revision is at all feasible under current or alternative procedures, and argues that any option is sub-optimal.

1 Introduction

The history of the EU shows that treaty revision is almost essential to its existence: since 1951, there have been at least five rounds of successful treaty reforms (i.e. the Single European Act (SEA), Maastricht, Amsterdam, Nice and Lisbon), a big failure (i.e. the European Constitution) and some minor revisions (the 1967 Merger Treaty, etc.), not to mention the revisions brought about through enlargement. Article 48 of the Treaty on European Union (TEU) details the revision procedures and offers two options. The first one, named the ordinary procedure, requires that a convention be held (involving national and European parliamentarians, members of the Commission and national governments). The alternative procedure applies to minor revisions (i.e. those that do not involve a transference of powers to the EU), and can be implemented by means of a Decision of the European Council without a convention. The two procedures have the same requirements in order for revisions to enter into force: unanimity, and ratification through domestic constitutional procedures. Unanimity was standard practice in the period before World War II, and the requirement was put in place when fewer members were at stake (i.e. six states in 1951). Once introduced, it created a Catch 22 situation: unanimity can only be reformed unanimously and, so far, no unanimous agreement to revise the requirement has emerged.

The remission to domestic constitutional procedures has left the fate of treaties in the hands of domestic actors. In these circumstances, the number of veto players has increased significantly, as a result of both the larger size of the EU and the importance of the issues dealt with in possible revisions. The increase in numbers, combined with the increasing unpredictability of the veto players and the unanimity requirement, creates a true minefield for the successful completion of revisions (Closa, 2004) even though governments have designed mechanisms to deal with partial ratification failures

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(Closa, 2013). On occasion, such as in the aftermath of the EU constitutional negotiations, this involved long and difficult processes. In fact, after the Lisbon Treaty many political actors expressed their scepticism about any possible revision in the near future.

And yet demands from several actors have put treaty revision back on the agenda. This paper assesses the viability of treaty revision via the existing procedures. The central thesis is that these are too rigid and, hence, that national governments are increasingly tempted to channel reform via treaties outside the EU (i.e. external treaties) which can bypass this rigidity. These options are, however, sub-optimal. The argument is constructed as follows. First, the paper presents the new demands for treaty changes (section 2). As all of these concern EU powers (either adding to or subtracting from them), the ordinary procedure (involving a convention and unanimity followed by domestic ratification requirements) applies. The paper describes the obstacles that current ratification requirements pose, and compares these with external treaties for which unanimity was avoided (section 3). Then it discusses the alternatives at hand (section 4). The conclusion emphasizes the difficulties and limitations for future revisions within current procedures (section 5).

2 The demand for new revisions

The appetite for new rounds of treaty revisions seems to have been reactivated in recent years following the changes in governance of the euro area and the EU macroeconomic and fiscal policies. After the Treaty on Stability, Coordination and Governance (TSCG) and the Treaty on the European Stability Mechanism (TESM), some national governments (i.e. those of Germany and the UK) have argued in favour of accommodating pending governance issues via treaty revision. The next section presents three different groups of proposals: the proposals of the German government related to banking union, the proposals of those who see treaty revision as a means to reduce EU powers and the proposals of national governments and EU institutions who seek to increase EU powers along the classical path of an ever-closer Union. All of these concern major revisions (i.e. revisions affecting EU powers).

2.1 The German government's proposals for reform

The German government's demands for treaty revision derive from its model of banking union. For the German government, 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) required a treaty change. "Non-euro European countries are not going to join the SSM without this", worried Berlin (Scally, 2013). The German government reflected, in turn, 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).

Germany's preferences and calendar did not fit with those of its own major partners. In 2012, the proposal was rejected by Germany's partners at a Eurogroup meeting (Wishart, 2012). The French government favoured accommodating any change needed for banking union within existing treaties, and argued that treaty change (…) "must not be used as a pretext to stop banking union" (Strupczewski & Hughes, 2013). Even the German government's closest allies on fiscal matters, the Finnish and Dutch governments, felt that "Schäuble had pulled treaty change out of his sleeve at the 11th hour to postpone banking union and barricade the door to direct recapitalisation of European banks – a politically unpalatable prospect for the German government ahead of September's general election" (Scally, 2013). The Commission also disagreed with the need for a treaty change: according to Olli Rehn, treaty change was not needed (Strupczewski & Hughes, 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.

In parallel to these treaty revision negotiations that were closely tied to banking union, the German government was also aiming for treaty revisions for enhanced control of national fiscal policies. The new German coalition government's aim was "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). Revision would mean a significant overhaul of "Protocol 14" of the EU Treaty,

adding tangible powers for the European Commission,[1] 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. In return, new funds would become available to individual countries, an additional euro-zone budget with sums in the double-digit billions for obedient member states. Protocol 14 could also be used to create a full-time head of the Eurogroup (Blome et al., 2013). The German agenda for treaty revision might include more ambitious objectives such as a euro budget, the merging of the TESM with the TEU and the change to qualified majority voting for ESM decisions (Schwarzer & Wolff, 2013). The Coalition Agreement between the CDU/CSU and the SPD refers to a number of aspects (such as a "stronger role" for the European Parliament and the "close involvement" of national parliaments in the decision-making process; a standard minimum threshold for the allocation of seats in European elections and a "single European district" (i.e. the allocation of some seats on a Europe-wide college) to add to stable majorities in the European Parliament; and a "stringent and efficient" set of Commissioners) that may require treaty revision.

2.2 Proposals for limiting EU powers via treaty revision

Paradoxically, the British government also has treaty revision on its agenda, although with a very different objective and content to the German proposals. 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. The Chancellor of the Exchequer, George Osborne, indicated the British demands more precisely: obtaining 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.

The second component of the British position refers to increased flexibility. Flexibility would allow the accommodation of those members that are aiming at much closer economic and political integration and those others, including Britain, that would never embrace that goal. Rather than a "one size fits all" approach which implies that all countries want the same level of integration, a "pick and choose" approach on the basis of national needs should be implemented. According to Cameron:

> the European Treaty commits the member states to "lay the foundations of an ever closer union among the peoples of Europe". This has been consistently interpreted as applying not to the peoples but rather to the states and institutions compounded by a European Court of Justice that has consistently supported greater centralisation. We understand and respect the right of others to maintain their commitment to this goal. But for Britain – and perhaps for others – it is not the objective (Cameron, 2013).

Flexibility, as the British government understands it, may also involve the demand for repatriation of certain powers in social, immigration and other fields.

The British review of competences followed the subsidiarity review that was launched by the Dutch government and completed in June 2013 (Ministerie van Buitenlandse Zaken, 2013). Although the Dutch exercise is more concerned with pending legislation, it also gives some hints on the future negotiating position of the Dutch government: thus, it clearly indicated that the government will oppose any proposal for moving in the long term towards an autonomous budget for the euro area with a stabilising, countercyclical function as proposed by the Commission. Furthermore, the Dutch foreign affairs minister has suggested that a number of ambitious institutional changes could be achieved

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

without treaty reform (Timmermans, 2013). Examples of such changes 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.

2.3 Governmental and institutional proposals for reinforcing EU powers via treaty revision

The *Future of Europe Group c*omprised 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). Individuals such as Tony Blair have added to the debate – Blair called in October 2012 for a "grand bargain" on Europe that would be put to "direct popular consent" (Blair, 2012).

Institutions have also tabled proposals for treaty revision. 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, as well as a debt redemption fund, eurobills or stability bonds to enhance the EU's fiscal capacity via financing through borrowing. In his 2012 speech on the state of the Union, Barroso called for:

> a federation of nation states (not a super-state). A democratic federation of nation states that can tackle our common problems, through the sharing of sovereignty in a way that each country and each citizen are better equipped to control their own destiny. Creating this federation of nation states will ultimately require a new treaty (Barroso, 2012).

Barroso promised to put forward "explicit ideas for treaty change in order for them to be debated before the European elections (Mahony, 2013).

Being a traditional proposer of treaty revision, the European Parliament has had a much more restricted view. Its President 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). Schulz also questioned the viability of the UK's reform proposals (Traynor, 2014). Nevertheless, the more federalist *Spinelli Group* has tabled very ambitious proposals for:

> a "Fundamental Law of the EU" which creates a constitutional union in which different levels of democratic government are coordinate, not subordinate. Treaty revision is inescapable if the more fiscally integrated Union is to be put on a surer foundation. A new treaty is needed to mark the important fresh stage in European integration in which the eurozone is transformed into a fiscal union run by a federal economic government. To fail to make this transformation jeopardises the EU's very survival (The Spinelli Group, 2013).

These proposals have different levels of importance and lack coherence. They may even contradict each other. But all of them will appear on the agenda for a future treaty revision. Their feasibility depends partly on the procedure selected: in particular, the British demands depend very much on a potential veto and this, in turn, is guaranteed within current procedures. But this clashes with the objectives of other actors such as the German government who may prefer to circumvent existing procedures. The next section examines these procedures and, more specifically, the difficulties that ratification under the condition of unanimity raises. Section 4 will present the alternatives.

3 The limitations of current procedures: unanimity and veto players

Current procedures prescribe unanimity. 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. Parliaments always play a role, and this may

be affected by the requirement for a majority and the composition of the chamber at any moment, as well as by the intervention of an election between negotiation and ratification. Courts have increasingly intervened in ratification even though they have seldom exercised a power of veto *stricto sensu*. Voters, via referendums, have become the latest addition to the ever-increasing list of veto players. At a minimum, this means that the duration of the ratification process when unanimity is required has increased significantly. This section presents the arguments behind the unanimity rule (3.1), and it compares ratification requiring unanimity with ratification requiring less than unanimity (3.2). It also looks at an actor that has been key whenever it has been brought into the process: the electorate, by means of referendums (3.3).

3.1 The unanimity requirement: theory and practice

Hypothetically at least, unanimity appears to be the best possible constitution-making rule: constitutional politics, in contrast to ordinary politics, deal with decisions on the set of framework rules that establish the boundaries on what ordinary politics (i.e. decisions – often taken by a majority – in legislative assemblies) can and cannot do. Majority rule in ordinary politics may produce results that are both inefficient and unfair *but* that rule (i.e. the rule of the majority) is permissible for ordinary politics if there is a consensus on the framework rules, i.e. the constitution (Buchanan & Tullock, 1962; Buchanan, 2003). Although the EU treaties are not a constitution *stricto sensu*, legal literature has extensively used the analogy in relation to the functional properties of the treaties and, in particular, the possibility of deriving secondary legislation from them.

Buchanan and Tullock equated consensus with unanimity, and they considered it both desirable and achievable: since constitutional rules will be stable over a wide temporal sequence covering a large range of options and policies, individuals cannot identify (in this temporal and material range) concrete interests, nor they can calculate the effect of the functioning of the constitutional rules. Actors can be deemed to have been placed in a situation in which they are almost wearing a "veil of ignorance" (i.e. a situation in which they ignore the future effects of the rules they agree among themselves). Hypothetically, if the actors cannot calculate, the maximisation of utility dictates that generalizable criteria such as fairness or justice guide the calculus of constitutional rules. In their opinion, it was easier to reach an agreement on the rules rather than an agreement on the eventual alternatives that can be agreed with these rules.

These theoretical assumptions rely not only on an easily falsifiable belief about the real conditions of constitutional negotiations (i.e. the existence of ideal conditions under a veil of ignorance). The assumption of efficiency is also disputed (Berglöf, Burkart & Paltseva, 2007; Parisi & Klick, 2003), since the unanimity rule presents 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). Buchanan and Tullock (1962) themselves were aware that unanimity might produce deadlocks and, in this sense, be inefficient, and they argued that unanimity operates as a kind of "aspirational" rule that *inspires* operational rules.

Despite these theoretical predictions, the EU has been able to deliver a significant number of successful ratifications, although failures also exist (i.e. the European Defence Community and the EU Constitution). The failure of the EU Constitution, together with an awareness of the increasing probability of partial failures to ratify and of specific domestic veto players (such as the Irish voters in 2008 with the Lisbon Treaty), has opened the way towards a questioning of the unanimity requirement. Few have defended this theoretical position against unanimity in the past, but political actors have increasingly supported this option. Thus, the *Future of Europe Group* argued that in an EU with 28 or more member states, treaty reform will be more difficult. Most members of the Group believed that both the adoption and the subsequent entry into force of treaty revisions (with the exception of enlargement) should be implemented by a super-qualified majority of the member states and their populations. The belief underlying this opinion is that a large majority of member states should not be restrained from further advances in integration because of either a lack of political will or significant delays in the ratification processes. A minimum threshold – representing a significant majority of European member states and their citizens – should be established for the entry into force of amendments to the European treaties. These

amendments would be binding on those member states that have ratified them (Future of Europe Group, 2012). The *Spinelli Group* proposed more specific thresholds:

> amendments would be agreed by three quarters of the states. The European Parliament gains the right of assent to treaty changes. Any future new treaty will enter into force either once ratified by four fifths of the states representing a majority of the EU population or, if carried in a pan-EU referendum, by a simple majority. This less rigid approach to constitutional amendment will bring the EU into line with all other international organisations and federal states, and help to avoid situations in which one recalcitrant state can take the rest hostage (The Spinelli Group, 2013).

In summary, unanimity seems an increasingly costly rule and actors are already speculating with possible alternatives. The next section precisely describes the experience with other treaties ratified under different requirements.

3.2 The experience of ratification by less than unanimity

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 only euro members created the conditions for using alternative requirements. Ratification with less than unanimity happened with the two external treaties, the TSCG (Fiscal Compact) and the TESM. The first of these required 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. 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).

The requirement of the TESM demanded ratification by euro states holding 90% of the fund capital. The minimum possible number of states ratifying would be nine (since the four biggest euro members accounted for 77.3% of the capital). The treaty entered into force after a round of ratification of eight months, and all euro member states finally became party to it. Both cases prove that treaties can be ratified more easily under less than unanimity requirements, and show that states may also accommodate their specific demands in these conditions.

The series of two new external treaties (i.e. the TSCG and the TESM) plus the limited revision of the Treaty on the Functioning of the European Union (TFEU) (Article 136) permits us to compare 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), allowing them to submit it to less constrictive ratification procedures. This allowed 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 more substantive contents of the TSCG attracted more activism from actors willing to shape or influence its ratification: three court cases and one referendum. Given the ratification requirements, the (Irish) referendum did not affect the entry into force of the treaty and, as table 1 below shows, the treaty could have entered into force with a minimum hypothetical approval of 15 chambers, (i.e. the minimum number of chambers corresponding to 12 euro members) less than one third of the possible total number of chambers voting (although in fact it entered into force with 23 votes). Moreover, only four of the total number of chambers (i.e. Germany, Hungary, Latvia and Luxembourg[2]) required a majority larger than 50%. 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

[2] 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 CJEU.

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.

As for the TESM, most euro members treated it as a standard international treaty (with the exception of a couple of countries such as Estonia), and applied the relevant, less constrictive, rules to its ratification. 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. Given its content (i.e. the provision of national funds for the ESM), the treaty attracted a significant degree of litigation, with the Irish *Pringle* case[3] being the most salient case. 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 Court 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 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 TESM among themselves, acted in breach of EU law. The most important case was that of Germany (since it represented 27% of the capital of the ESM). 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.

Table 1: Domestic ratifying actors and processes

Treaty	Duration in months	Minimum states	Total states	Partial ratification	Chambers minimum	Chambers effective	Total chambers voting	Referen-dums	Court cases
TSCG	10	12 (euro)	23	5	15	23	47	1	3
TESM	8	9 (90% ESM capital)	17	–	15		25	0	5
TFEU Art. 136	24	27	27	–	51	51	51	0	0

Source: Own elaboration

[3] Case C-370/12, Thomas Pringle v Government of Ireland, Ireland and The Attorney General, Judgment of the Court (Full Court) of 27 November 2012, not yet reported.

In summary, using the current procedures for revision creates significant difficulties for successful ratification. On the other hand, experience shows that procedures with a threshold lower than unanimity guarantee quick ratification, and all the signatory states finally become parties to the treaty. But this procedure is only possible outside the EU legal framework and, importantly, not all EU members are part of the external treaties. The next section ponders the options, taking this background into consideration.

4 Alternative revision procedures

Future revisions must address an essential question: do member states want to stick to the unanimity requirement of Article 48 and can they do so? If the answer is yes, this means accepting a two-level game in which governments cannot fully guarantee the successful ratification of any revision that is unanimously agreed, given the large (and unpredictable) structure of veto players. If the answer is no, member states need to find alternatives to bypass the strictures of Article 48 through different revision procedures. The next two sections examine these two options, while section 4.3 deals with the highly sensitive issue of referendums.

4.1 Option 1: adhering to the existing procedure

Actors with very different preferences for the final outcome of treaty revision have come out in favour of adhesion to the current procedure. Thus, the outcome that the British government favours, a flexible EU, is possible if it is implemented through unanimous revision. Hence, the British government makes its whole strategy depend on the maintenance of unanimity so that the threat of a referendum is credible.

On the opposite side of the spectrum, federalist-minded groups such as the *Spinelli Group* have coincided in their endorsement of the existing procedures. However, the Group takes a different view on flexibility as the result of unanimity. Whilst recognising that EU states cannot be forced against their will to take the federal step, the Group argues that, at the same time:

> such states cannot be allowed an open-ended possibility to pick and choose what they want from the EU and discard the rest. The point has been reached when yet more à la carte opt-outs and derogations risk fracturing the cohesion of the acquis communautaire. Free-riding means disintegration (The Spinelli Group, 2013).

The Group has made a proposal for a Fundamental Law which creates a new category of associate membership for any member state which chooses not to join the more federal union. Each associate state would negotiate its own arrangement with the core states. Rights and duties would have to be clear. Institutional participation would necessarily be limited. Continued allegiance to the Union's values would be required, but political engagement in the Union's objectives would be reduced (The Spinelli Group, 2013). The proposal, though, does not clarify how and why recalcitrant existing member states would be convinced to move into the class of associate members.

The adhesion to the existing revision procedure grants legitimacy to the outcome. However, this immediately raises the issue of feasibility: it seems that in a Union of 28 member states, the costs of reaching a deal under unanimity have increased dramatically. Moreover, even if an agreement is reached, obtaining a successful ratification, given the increasing number of veto players, renders the current rules less attractive. Hence, actors have considered other alternatives.

4.2 Option 2: bypassing the TEU revision procedures

The German government has already warned that a treaty "will be done on an inter-governmental or bilateral level where it cannot be done within the current legal framework" (Wishart, 2012). Two procedures permit the revision of the treaty to be released from the strictness of Article 48. The first of these is the double revision that was contemplated by the (Commission sponsored) *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, 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 second alternative would be that a majority of member states would appeal to the provision *rebus sic stantibus* of the Vienna Convention on the Law of Treaties, and adopt a new treaty among *themselves*. 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. These precedents make it appealing for those such as the *Glienicker Group* (a group of German academics) who call for a new euro treaty that would replace previous piecemeal reforms. In the opinion of this group, this strategy of revision would re-focus public debate on Europe's political needs and wishes, away from the current preoccupation with what is legally feasible. The *Glienicker Group* subscribe to the idea of a Europe of different speeds built around the entire euro area. In order to avoid a division of Europe, the interests of all member states, especially the smaller ones, ought to be considered (Glienicker Gruppe, 2013). As a modification of this second alternative, EU member states could opt for the collective application of Article 50, which regulates withdrawal from the Union, and a parallel and simultaneous conclusion of a new treaty that assumes the EU *acquis*.

Neither of these two alternatives looks particularly feasible. On the one hand, *Penelope* depends in the end on the goodwill of the member state(s) being sidelined to let others move ahead without concessions. On the other hand, the agreement on a new treaty outside the EU has been possible in the exceptional circumstances surrounding the euro crisis and specifically for euro members. Using this procedure to deal with the whole of the EU *acquis* seems unfeasible. In any case, either procedure will have to deal with the thorny issue of referendums.

4.3 The issue of referendums

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. In the past, a number of governments have held them even if they were not mandatory, for 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. Thus France, for example, may require a national referendum if major changes are made to EU law (Spiegel & Peel, 2013).

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). Also, in January 2014 the Dutch parliament debated a proposal from the "Citizens forum-EU" on the need for a referendum on transferring new powers to the EU. The mainstream parties (with the exception of the ruling VVD) were not unsympathetic to the proposal.

However, the biggest referendum threat emerges from the UK, which has created a true 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, and a probable negative result in a referendum would affect its validity for the whole Union. Cameron pledged that this would "never, ever" happen again: 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.[4] 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.[5] 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.

5 Conclusions

Appetite for treaty revisions seemed to vanish after the constitutional saga that ended with the Lisbon Treaty. And yet treaty revision is now back on the agenda and, given past difficulties with ratification, again raises questions of whether revision is possible under the current rules, what the cost is and what the alternatives are. Specifically, any future treaty revision would at some point need to address the question of whether future changes can proceed within the strictures of Article 48: chiefly, the requirement for unanimity and the discretionary addition of veto players (such as voters in referendums), which create a true minefield for successful ratification. Even if ratification were to be achieved, the minimum price for this seems to be an increasing internal differentiation or flexibility, granting different statuses to different countries.

Alternatives to the bypassing of unanimity have emerged in practical and theoretical forms. 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. 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.

Legal bridges (such as the *Penelope Project*) present real feasibility problems, and the price to pay would be to leave some member states behind. The same applies to the possibility of totally new external treaties: whilst they offer the attractiveness of a smoother ratification (as the TSCG and the TESM prove), they present similar political dilemmas, with the marginalisation of those states that are not prepared to move.

Future scenarios are not very stimulating. 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. At this point, the Union, as far as its future revision is concerned, seems to be caught between a rock and a hard place.

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5 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).

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