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Revising the European Treaties: A plea in favour of abolishing the veto

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VISIONS OF EUROPE

Revising European treaties: A plea in favour of abolishing the veto

After nine years of debate on institutional reform, the entry into force of the Lisbon Treaty brings to a close a turbulent chapter of European integration. Many are of the opinion that the European Union should now focus its attention on other issues. Yet an important lesson can be learned from this saga: the current procedure for revising treaties is doomed to fail and could ultimately paralyze the Union because it increases the number of members who hold veto rights. This is why it is imperative that it be reformed. But how? And when?

This study, which is the result of an expert group's collective endeavour, presents several concrete proposals for achieving this goal.

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Revising European treaties: A plea in favour of abolishing the veto

Hervé BRIBOSIA

On the basis of the contributions of an expert group including :
Bruno DE WITTE, Renaud DEHOUSSE, Jean-Guy GIRAUD, Franz C. MAYER,
Paolo PONZANO et Gaëtane RICARD-NIHOUL.

Our Europe Unser Europa
La nostra Europa A nossa Europe
Nuestra Europa ons Europa η Ευρώπη μας
Vårt Europa L-Ewropa taghna Noastrã Europa
Vores Europa A mi Európánk Naše
Evropa Nasza Europa Наша Европа Meie Euroopa
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Revising European Treaties: A plea in favour of Abolishing the Veto

by Hervé BRIBOSIA

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Introduction

On 3 November 2009, Czech Republic President Vaclav Klaus formally ratified the Lisbon Treaty, thereby bringing to a close the ratification procedure and allowing the Treaty to enter into force on 1st December. This marked the end of a long crisis which arose following the unavoidable abandonment of the Draft Treaty establishing a Constitution for Europe, and of the numerous obstacles which had impeded the course of Lisbon Treaty ratifications in some European Union Member States. The failure of the first Irish Referendum had plunged the Union right back into an all-too-familiar crisis. Even after the second vote's positive outcome, a delaying law suit before the Czech Constitutional Court and the threat made by the British Conservative Party's leader to challenge UK ratification in a referendum will have kept Europe in suspense.

Notre Europe feels that the present period of new-found serenity provides an excellent opportunity to learn from the recent crisis. The end of the saga triggered by the failure of the Constitutional Treaty seems to call for

reconsideration of a critical issue for the Union's future – that of the Treaty revision procedure upon which its development relies.¹ In this paper, we argue that the reform of this procedure should be guided by the long-term evolution of European integration, rather than the necessity to come up with some makeshift solution to save a particular draft treaty. We hope that our proposals will be considered more credible, inasmuch as they cannot be suspected of being opportunistic, nor of seeking to change the rules in mid-stream. Our goal is not to put out a fire but to prevent new ones.

I - The Issue

The first crisis symptoms associated with the Treaties' revision procedure date back to the Union's very creation by the Treaty of Maastricht. Indeed, an initial Danish "No" response had to be overcome, as well as a weak French "Yes," in their respective referendums. Since then, the Union has had to expend considerable efforts to reform itself and to come to grips with new challenges, starting with its unprecedented geographical extension. The only way the Treaty of Amsterdam could be successfully concluded was to postpone negotiations on institutional "left-over matters." Even the authors of the Treaty of Nice admit it was a near-miss, rescued by a second referendum in Ireland, and an opportunity for acknowledging the limitations of conference diplomacy for such an exercise.

A new reform was immediately planned, thanks to the Declaration on the Future of the Union, and the Laeken Declaration one year later, which devised a new method for revising Treaties: the Convention method. Despite the progress thus made in terms of transparency and democratic

¹ See the study carried out by the European University Institute, Florence, on behalf of the European Commission, "Reforming the Treaties' Amendment Procedures – Second report on the reorganisation of the European Union Treaties," D. Ehlermann and Y. Mény (Coordinators), H. Bribosia (Rapporteur), 2000.

participation, the resulting Constitutional Treaty was once again defeated, this time by negative referendums in France and in the Netherlands, not to mention the referendums still scheduled in close to one-third of the Member States. Hence the Lisbon Treaty signed on 13 December 2007, which largely reproduces the substance of the Constitutional treaty, though in the –more traditional- form of a list of amendments, without the constitutional “window-dressing”, deemed too cumbersome.

The Irish “No” of 15 June 2008 sparked a new crisis. The European Council session of 11-12 December 2008 provided for transitional regimes concerning the European Parliament’s composition, the nomination of the future Commission and the Presidencies of the European Council and of the Council of Foreign Affairs. Furthermore, the context was unlikely to stimulate European citizens’ interest in the 2009 European Parliament elections, which ultimately had to proceed according to the terms of the Treaty of Nice. The Irish government finally agreed to seek ratification of the Lisbon Treaty by means of a second referendum, in exchange for certain guarantees granted by the European Council.

This episode should not be allowed to conceal other, albeit less publicised, problems which plagued the Lisbon Treaty’s ratification process. It took until 6 May 2009 for the last EU member’s parliamentary assembly – in this case that of the Czech Republic’s Senate – to finally approve the Treaty. Then, as mentioned earlier, it was not until 3 November 2009 that a reticent President Vaclav Klaus finally signed the Treaty. President Lech Kaczynski, for his part, announced that Polish ratification would be contingent upon results of the second Irish referendum, even though the Diet had already approved the Treaty. Appeals brought before the Constitutional Courts of Germany and of the Czech Republic also delayed the process. All of these snags show that a ratification procedure’s success is highly dependent upon the Member States’ internal political developments. They are also a reminder that ratification by the head of state is, in the final analysis, an

international act which does not end with a legislative chamber’s approval or that of a population voting by referendum.

Consequently, in view of the number of Member States and the broad diversity of their constitutional orders, any reform of the Treaties inevitably appears to be an extremely arduous undertaking.

How can we prevent any future attempt on the part of the European Union to reform itself from leading it into another crisis? How can we ensure that the EU will not have to sustain its present status quo for many years to come in a world changing at an ever-greater speed? How can the Treaty revision procedure, and even more particularly the ratification procedure, be reformed and made more flexible?

This is an admittedly delicate matter, inasmuch as it calls into question the essence of the existing unanimity-based procedure. It is difficult to imagine, under the present circumstances, that a revision treaty might be imposed upon a Member State against the latter’s will, such as the Lisbon Treaty on Ireland after the initial popular “No” vote. On the other hand, the fact that a single State should be able to block a reform sought by all other Member States unquestionably raises a democracy problem, in that it allows a tiny minority to nullify the will of a large majority. What is needed, then, is to strike the right balance.

Our analysis is meant to build upon an earlier *Notre Europe* study on the future of the Convention method.² The latter undoubtedly provides an initial and partial response to our question, since it is by making the reform preparation process broader and more democratic (notably by improving the Convention method and bringing it into more general use), that one will more readily agree to waive unanimity in the decisional phase.

² G. Ricard-Nihoul, *The Convention moment: Six arguments for its continuation six proposals for its reform*, *Notre Europe*, Policy paper, 31 December 2007.

The following is an attempt to explain why it is no longer possible to accept the current Treaty revision procedure (II.). We will propose a radical but necessary reform – namely that Member States abandon the individual veto right they each currently enjoy, while offering guarantees to minority countries (III.). There are also other solutions for facilitating the ratification procedure process (IV.). This paper’s conclusion will notably stress the advantages of limiting and targeting to a greater extent the amending treaties’ scope.

II - The Unsustainable Status Quo of the Existing Treaties’ Revision Procedure

The Treaties’ revision procedure upon which the European Union relies has remained fundamentally unchanged since the creation of the European Economic Community. As was the case in concluding the initial Treaties, this procedure relies upon double unanimity. First, during the Intergovernmental Conference (IGC) which convenes representatives of all Member States for the purpose of amending the Treaties under consideration; then later, during the ratification phase, which calls for an approval procedure within each Member State. The latter are free to implement this procedure as they see fit, according to their own constitutional framework. This normally entails approval by the national parliament or by referendum. The Lisbon Treaty did not challenge these principles other than by creating a so-called “simplified procedure,” which can be used to activate “passerelles” [“footbridges”] (which make it possible to switch from one decision-making procedure model to another). This will be discussed again later.

The status quo in such matters does, however, pose some real risks.

The first is the need to perpetually live with the existing Treaties; i.e., as amended by the Lisbon Treaty. Such Treaties include ad hoc arrangements – not to mention countless details secured through laborious compromises, which do not really belong in a major Treaty and are often characterised by inconsistency. The ongoing Treaty revision process to date attests to the need for frequent adaptation. In a constantly evolving world, the European Union must be able to reform itself. The existing procedure favours conservative Member States which, though comprising a minority, are in a position to block any change without having to offer any alternative proposal, other than to maintain the existing situation.

The second risk concerns future attempts to revise the Treaties (when the need to adapt will nonetheless be more keenly felt than the small likelihood of reaching an agreement). Barring any change in the current practice, the same causes will continue to produce the same effects: namely, more crises. Almost nine years elapsed between the Nice Declaration on the Future of the Union and the Lisbon Treaty's entry into force. The failure of the Constitutional Treaty, due to a coalition of groups with opposed preferences, and later the Irish "No" to the Lisbon Treaty, generated doubts serious enough, in some cases, to stall the activities of European institutions, which occasionally lost some of their audacity. Considerable efforts were then expended in developing scenarios that would help the EU emerge from the crisis.³

Crises can certainly be salutary at times and can bring a rebound. However, their constant recurrence can be more harmful and even lead to a break-up. For example, they could induce a certain number of Member States to

³ See for example B. de Witte, "Saving the Constitution? The Escape Routes and Their Legal Feasibility," in G. Amato, H. Bribosia and B. de Witte (eds.), *Genesis and Destiny of the European Constitution*, Brussels, Bruylant, 2007; Ph. de Schoutheete, "Scenarios for Escaping the Constitutional Impasse," *Europe's World*, Summer 2006; S. Peers, "Can the Treaty of Lisbon be ratified or implemented? A legal analysis," <http://www.statewatch.org/news/2008/jun/analysis-lisbon-june-sp-2008.pdf>.

withdraw from the Union, or even create a new parallel structure. Calm and thoughtful deliberation as to the best way to reform the revision procedure would prevent the necessity of having to adapt this procedure hastily, when a new crisis occurs.

Moreover, it is a great temptation to "push for" the adoption of a new Treaty when the latter is blocked by a given Member State. A striking example of this is the December 1992 Edinburgh Decision which followed the first Danish referendum rejecting the Treaty of Maastricht. The aim of this European Council decision was to address Danish concerns, particularly regarding defence matters.⁴ Its legal nature is still in dispute.⁵ Since the entire ratification process could not be done over from scratch, this decision had to be implemented without ratification. It was therefore deemed to be an international agreement in simplified form and of a purely interpretative nature (since a modification would have necessitated starting the ratification procedure all over again),⁶ which, at the very least would have been highly debatable. After the failure of the Irish referendum on the Treaty of Nice, two declarations were adopted at the Seville European Council in June 2002: one by the European Council and the other by Ireland in order to reassure the latter as to the perpetuity of its neutrality status.⁷ These served as a pretext to justify holding a second referendum.

An analogous solution was used to justify holding a second referendum on the Lisbon Treaty in Ireland. Having formally acknowledged the Irish people's concerns,⁸ the European Council agreed to provide it with the necessary legal guarantees (without specifying when or how) in fiscal matters, as well as with respect to the right to life, family life, education and

⁴ Presidency Conclusions of the Edinburgh European Council of 11 and 12 December 1992, "Le Dane mark et le traité sur l'Union européenne," *Journal officiel*, C 348 of 31 December 1992.

⁵ On this subject, see J. Ziller, "La ratification des traités européens après des référendums négatifs : que nous disent les précédents danois et irlandais?" in *Rivista italiana di diritto pubblico communio*, 2005, p. 365.

⁶ B. de Witte, see "Saving the Constitution," 2007, p. 921.

⁷ Presidency Conclusions of the Seville European Council of 21 and 22 June 2002, Annexes III and IV.

⁸ See Annex I of the Conclusions of the European Council of 11 and 12 December 2008.

Ireland's neutrality. The European Council also rallied to Irish demands that the idea of a Commission with fewer members be abandoned and that one Commissioner be maintained for each Member State, which, incidentally, could weaken the Commission and consequently the Community method.⁹

As for the Czech Republic, whose President was balking at finalising the act of ratification, the European Council of 29 and 30 October 2009 agreed to append – on the signature date of the next Accession Treaty (probably the one concerning Croatia) – a protocol aimed at conferring upon the Czech Republic the same exceptional status as Poland and the United Kingdom with respect to the Charter of Fundamental Rights.¹⁰

Although such pragmatic solutions managed to be implemented to save a Treaty, they cannot serve as a model for the future.¹¹ They give an adverse impression of manipulation, or of a refusal to respect the will of the people, which is certainly not the best way to bring Europe closer to its citizens. Moreover, it would not always be possible to pinpoint the specific concerns which, if considered, might change a referendum's outcome. How could a single statement have been an adequate response to the multiple reasons for the French and Dutch "No's"?

Reforming the revision procedure would also make it possible to avoid more subtle "abuses of procedure." The Treaties have, for example, at times been adapted or supplemented by means of declarations, institutional agreements, or internal regulations. When implemented, they have occasionally been broadly construed by institutions, depending on the needs to be met. A flexible revision mechanism would prevent this sort of drift.

⁹ See Conclusions of the European Council of 11 and 12 December 2008, pp. 1 to 3.

¹⁰ See Conclusions of the European Council of 29 and 30 October [toujours incorrect dans le texte français !] 2009, pp. 1 and 2, and Annex I.

¹¹ Along these lines, see R. Dehousse, "Au-delà du plan B : comment réformer les clauses de révision des traités," in G. Amato, H. Bribosia and B. de Witte (eds.), *Genèse et Destinée de la Constitution européenne*, Brussels, Bruylant, 2007, p. 947.

Lastly, another trend associated with Treaty revision deadlocks consists of conferring special status or rules upon reticent States, which make the system increasingly complex. Their legitimacy is not always obvious, as exemplified by the protocol which allows some restrictions on the right of foreigners to purchase secondary residences in Denmark, or even the Maastricht Social Protocol. Similarly, in the absence of a consensus on any particular issue, governments wishing to move ahead will be inclined to reach agreements outside of the Union's framework, as shown for example by the Treaty of Prüm, signed in 2005, to step up cross-border police cooperation between certain Member States.

In short, the current Treaty revision procedure poses many risks, which include being permanently stuck with the existing Treaties, or triggering a new crisis in case a reform is attempted. It encourages the States to resort to pragmatic solutions that cannot be repeated *ad infinitum*, or even to untested manipulations that have little in common with transparency and democratic ideals.

III - A Radical but Necessary Reform: Abandoning Member States' Individual Veto

3.1 Legitimacy of the process

Our main proposal is simple. The time has come to stop allowing single States to block all efforts to carry out any institutional reform by merely opposing it. This is all the more urgent, in view of the fact that the number of EU Member States is expected to grow even larger within the next decade. It is therefore imperative to eliminate individual veto right provided under the Treaty revision procedure.

Although this proposal may seem radical in the context of the European Union, it is not revolutionary in relation to other comparable systems.¹² Many international organisations have adopted a “majority rule” – often consisting of two-thirds of their Member States – to amend their founding charter. Such is the case of the United Nations and of such global organisations as the World Health Organisation, the World Trade Organisation,

¹² See G. Ricard-Nihoul, *Réviser les traités européens*, p. 12 *et seq.*

and the International Labour Organisation.¹³ This also applies to the amendment procedure of the Statute of the Council of Europe, whose number of Member States will probably not be much higher than that of the European Union in the long term.

The “double unanimity” required when the European Communities were created was justified by the limited number of its members. It was later rationalised as the last safety net before a certain number of policies whose development would directly affect Member States’ interests were admitted into the Community system. Today, without having become a federal super state, the Union has attained a sufficient degree of maturity and sense of solidarity to consider abandoning the unanimity rule.

It is in all of the Member States’ best interest that the Union continue to reform, even if one government may occasionally have to accept a rule which it does not favour. We are also convinced that, at this stage of the integration process, abandoning the veto right would satisfy the Union’s growing aspirations for greater democracy and transparency.

The unanimity rule disregards the Union’s twofold legitimacy principle based upon not only its Member States as such, but also upon their populations. Is it right that the refusal of a few hundred thousand inhabitants should be allowed to block a reform desired by the representatives of five hundred million people? Is it reasonable that a reform’s success should be dependent upon the consent of six or seven different parliamentary assemblies, in a federal country such as Belgium? By way of comparison, an organisation such as the International Monetary Fund, which affects the financial sovereignty of these members, resorts to a mixed approach: amending its Statutes requires a “dual majority” of three-fifths of the Member States, representing 85% of the allocated votes weighted

¹³ It should be stressed that, in the case of the UN Charter, the Security Council’s five permanent Member States must also approve the amendments. *Idem* for the ILO, which requires the approval of five out of the ten most industrialised countries.

according to each member’s financial contribution.¹⁴ Why should the Union uphold a crippling rule?

Unanimity also tends, in another way, to favour the “large” Member States whose greater political weight is irrefutable: while no one contemplated the possibility to have the French vote again after their “No” response to the European Constitution, the Irish, were induced to repeat a fruitless referendum on two occasions?

Lastly, the unanimity rule determines how, and in what spirit, the texts of the Treaties are to be negotiated. The latter, often subject to bargaining or sometimes even blackmail, are highly complex and the result may ultimately lack overall coherence. Abolishing the veto right would mean that individual positions could no longer be decisive. This would lead to more open debates, obliging the protagonists to defend their positions, and would make it easier to strive for a common interest that would not merely correspond to the sum of individual interests. This would also allow other actors, such as the European Parliament and the national parliaments, to better make themselves heard. All of this it should be stressed, without threatening the Member States’ fundamental interests, because giving up the right of veto does not imply switching to a purely majority-rule approach and is not incompatible with maintaining a highly consensual procedure.

3.2 A concrete proposal: The entry into force of a Treaty ratified by four-fifths of the Member States

As seen above, unanimity is actually required at two stages: when the Treaties are signed and at the ratification stage.

¹⁴ Article XXVIII of the IMF Statutes.

The Constitutional Treaty's setbacks, and later on those of the Lisbon Treaty, show that the thorniest problems arise at the time of ratification. It would nonetheless seem advisable to take a larger step further and also waive unanimity at the Intergovernmental Conference level. Without that effort, a "common accord" in the IGC is likely to be even more difficult to obtain inasmuch as the Member States know that they would no longer enjoy their individual veto rights at the time of ratification one should therefore envisage a sort of "superqualified" majority at the IGC stage – four-fifths of the Member States, for example, representing four-fifths of the population, in order to meet the dual legitimacy requirement. Furthermore, it could also be ruled that a blocking minority can only be constituted by rallying at least two or three Member States, the idea being to mitigate the preponderance of the most populated states, in accordance with the new definition of "qualified majority" set out in the Lisbon Treaty (which requires a blocking minority to include at least four Member States).

With respect to the ratification procedure, it would appear advisable to refer back to the provisions of the Draft Constitutional Treaty, which provided that, after a given time limit following the signing of the Treaty, if the latter had been ratified by four-fifths of the Member States, and "*one or more Member States have encountered difficulties in proceeding with ratification (...)*", the matter should be referred to the European Council.¹⁵ It was not stipulated, however, what the European Council could do, and that is the crux of the problem. It would be appropriate to at least allow the European Council the option of setting a new time limit for ratifications not yet completed.

¹⁵ Declaration 30 annexed to the Draft Treaty Establishing a Constitution for Europe. The same formulation was retained for the entry into force of any future revision treaty (Article IV-443, § 4 of the Draft Treaty Establishing a Constitution for Europe). The Lisbon Treaty also retains the formulation within the framework of the Treaty revision procedure, Article 48, § 5 TEU).

The Treaty ratified by four-fifths of the Member States would enter into force *erga omnes*, meaning that it would also bind the States which would not have ratified the Treaty. Here too, it could be required that this majority include four-fifths of the population (particularly if this ratio has not already been attained at the IGC stage), and the terms relating to the blocking minority should be similar to those contemplated for the ICG.¹⁶

3.3 Minority State guarantees: Withdrawal, differentiation and institutional protection

The principle of withdrawal from the Union on a purely voluntary basis, and irrespective of a revision procedure, is now unanimously accepted: after being established by the Constitutional Treaty, it was reiterated in the Lisbon Treaty.¹⁷ This settles a doctrinal debate on the subject, and the withdrawal procedure was spelled out, notably providing for the signing of an agreement between the Union and the State wishing to withdraw in order to set out the terms of the withdrawal while taking future relations into account. However, it would be justifiable, when a Member State chooses to withdraw from the Union because of a Treaty revision which it deems unacceptable, to grant it additional guarantees in terms of certain established privileges. It might notably wish to keep on influencing the development of that part of the Community acquis which would continue to apply to itself (as did, for example, Norway and Iceland with respect to the Schengen zone, of which they are a part). One way to allow this would be to grant the right for the State concerned to rejoin the European Economic Area. The formation of a "rear guard" which would more or less preserve the acquired rights of States withdrawing from the Union could draw

¹⁶ See this proposal's legal formulation in the Annex.

¹⁷ Article 50 TEU.

inspiration from the “Penelope Project” of the European Commission,¹⁸ which developed this idea.

Another possible guarantee for the marginalised States would be to allow them to take advantage of a so-called “opt-out” clause, which would provide that a section of the new Treaty would not apply to them (partial differentiation). This option could be activated either prior to the Treaty’s entry into force,¹⁹ or thereafter.²⁰ Such a solution would not be possible in all areas, however. Differentiation is conceivable when implementing a policy, as demonstrated by the EMU, in which only certain Member States participate, but it is possible during the various stages of the legislative co-decision procedure, which cannot be but the same for all.²¹

A similar technique would be to provide for a differentiated entry into force of a revision treaty which would only bind Member States that have approved it. Contemplated several times before, notably in the 1984 Spinelli Project, this formulation was challenged on grounds that it was technically impossible to ensure the co-existence of two different treaties within a single organisation. Within the European Union, the Treaty of Nice could not have co-existed with either the Constitutional Treaty or the Lisbon Treaty.

If it is used when revision treaties are being negotiated, this technique would open up new opportunities, not in institutional matters but with regard to the transfer of competencies or implementation of policies.

¹⁸ Namely, the Draft Constitution formulated by the European Commission during the work of the Convention (European Commission, *Feasibility Study: Contribution to a Preliminary Draft Constitution of the European Union*, Working Document, 4 December 2002, p. XI, and Article 4 of the Agreement on the Entry into Force of the Treaty on the Constitution of the European Union).

¹⁹ To be compared with the “constructive abstention” system currently provided for within the CFSP implementation framework, which allows States placed in a minority to accept decisions without being individually bound by the latter, while retaining the option of blocking the decisions’ adoption (Article 23 TEU).

²⁰ It would then be necessary to provide for an “opt-in” clause which would allow the situation, where appropriate, to be “regularised” without the necessity of formally revising the Treaties.

²¹ Defining the topics which could be subjected to a differentiated approach should, *a priori*, be done either abstractly within the mechanism of the general revision procedure, or concretely, in the revision treaties themselves.

For example, a revision treaty could be modelled after the Agreement on Social Policy signed by eleven member States and annexed to the Treaty of Maastricht which notably provided for “the suspension of any voting rights in the Council for non-participating States.” Thus the co-existence between the Group of Eleven and Great Britain (which did not wish to be a member), was properly maintained.

Lastly, the rights of minority States could be preserved by providing for neutral bodies to intervene in the procedure as arbitrators. The European Commission and European Parliament as guarantors of a certain common interest, could be afforded a right of scrutiny (approval for the former, assent for the latter), in order to avoid any hegemonic drift. The Court of Justice might also be induced to intervene, in a manner similar to what was provided for under the former ECSC Treaty. It would mainly ensure compliance with the procedures and guarantees offered to minority members. The measures, aimed at further legitimising the revision process beforehand; such as resorting to a Convention, would also make a majority decision more acceptable in most people’s opinion.

3.4 Recommended way to reform the revision procedure

Theoretically, even under the Lisbon Treaty, any change in the revision procedure requires the double unanimity mentioned earlier.²² The proposed reform may have better chances of succeeding if it is implemented calmly, without being associated with any other sensitive issue. It nonetheless remains a major change, as it is predicated upon *unanimous* States abandoning their veto right.

Is this an insurmountable problem? In other words, shouldn’t the Union’s Member States be entitled to depart from the revision procedure set out

²² Article 48 of the TEU.

in Article 48 of the TEU, e.g. by making a revision treaty's entry into force contingent upon ratification by four-fifths of them, or by coupling this provision with the aforementioned right of withdrawal and guarantees for minority members? It should first be stressed that, in 2002, the Convention method was added to the procedure referred to in Article 48 of the TEU without having been explicitly provided for. Next, from the vantage point of international law, it is not unorthodox to anticipate that a change of procedure may directly apply to the revision treaty being drafted, even if it would mean challenging certain case law of the Court of Justice (which, in principle, requires strict compliance with the terms of Article 48 of the TEU). The revision treaty would thus be viewed as a "successive" treaty which replaces the former treaties,²³ or as a "complementary" treaty, within the meaning of the Vienna Convention. It should, however, ensure that the "acquired rights" of the States which do not adhere to it are maintained in accordance with the precepts of the latter Convention.²⁴

A similar approach was proposed by the European Commission's "Penelope Project" mentioned above, the originality of which was that it made the entry into force of the Draft Constitution contingent upon the entry into force of a separate agreement, which could have *in fine* been ratified by only five-sixths of the Member States. The departure from Article 48 of the TEU was compensated by safeguards for the vested rights of the minority States which, in this instance, would have nonetheless been forced to withdraw from the Union.²⁵

On the national level, the situation could turn out to be more delicate. For example, Parliamentary approval could be viewed as "an internal rule of law of fundamental importance." likely to challenge the validity of the revision treaty concerned.²⁶ Consequently, the loss of a veto right at the

²³ Article 30 of the Vienna Convention, paragraph 3 in particular.

²⁴ Regardless of whether the revision treaty is considered as a new successive treaty (Article 30, § 4 of the Convention) or as an amending Treaty (Article 40, § 4(b) of the Convention), only "the treaty to which both States are parties governs their mutual rights and obligations."

²⁵ "Penelope Project," p. XII, and Article 6 of the Entry into Force Agreement in question.

²⁶ Article 46 of the Vienna Convention.

time of the Treaties' revision could have the same effect.

Although our approach may be deemed "revolutionary," it appears more legitimate, especially if carried out in plain view, than other aforementioned "abuses" of procedure discreetly done in the past

Moreover, the persistent blocking tactics which are preventing any remotely ambitious reform from being realised – even when desired by a large majority of Member States – might ultimately lead to a much more radical break. The "reformist" Member States could be tempted to create a new structure alongside that of the Union's, which is bound to be weakened as a result. To elude the pressure being placed upon the new structure²⁷ by Community law, they could ultimately decide to withdraw en masse from the Union. In many respects, a smooth transition to a principle of reform based upon a "superqualified" majority is preferable to a scenario of this type.

²⁷ Indeed, a group of Member States is entitled to establish co-operations outside of the Union, provided that they do not adversely affect its existing rules and policies, in accordance with primacy and *pre-emption* principles.

IV - Other Proposals to facilitate the ratification procedure

4.1 Making the ratification procedure more “Europeanised” and flexible

Although our priority recommendation is that veto rights be abandoned, other methods would also enable the ratification procedure to be made more flexible, or even help to Europeanise it.

Under the current procedure, parliamentary assemblies (or populations, in the case of a referendum) are typically presented with the *fait accompli* of a Treaty already negotiated by their respective governments, without having been involved in this process. Their only option is to either accept or reject the entire agreement. In view of the complexity of such agreements, the multiplicity of issues and actors already involved in the negotiation, this binary constraint seems inappropriate. The gap between these two stages is all the more prejudicial in that the national debates over ratification are decided more by national political issues, or even by ad hoc coalitions. Hence the many hurdles which have impeded the most recent reforms of European Treaties.

The need has therefore arisen to promote a freer dialogue between the national and the European levels.²⁸ For example, it would be possible to provide that, once a political agreement has been concluded between the governments, the definitive signing of the revision treaty should be preceded by a concertation with the national parliaments, in order to be able to fine-tune the text, where necessary, and take into account any point which one of them may deem important. That would avoid the necessity of having to start over the entire ratification process from scratch each time such adjustments have to be made. As R. Dehousse so rightly concluded, the mere fact that this dialogue can occur and that citizens can have a say – either directly or through their representatives – in the reform process to the point of interfering with the negotiations between the States would in itself be a positive factor, likely to establish the legitimacy of the system as a whole.²⁹

To avoid polarising the debate over exclusively national issues, it would also be advisable to “Europeanise” the ratification procedure. Contemplating a centralised ratification procedure at the European level would no doubt be tantamount to a federalisation of the European Union, which many would consider unacceptable, as recently reiterated by the German Federal Constitutional Court. Without venturing as far as that, the procedure’s European dimension could still be strengthened. For example, on the occasion of the Draft Constitutional Treaty, it had been proposed that a referendum could be held in all of the Member States that would have allowed it, possibly in tandem with European elections.

Failing that, the Treaty ratification procedures could at least be coordinated at the European level, for example, by calling for a relatively short deadline in order for the States which have signed the Treaty to announce their position on its ratification, which would also strengthen the focus on

28 R. Dehousse, “Au-delà du plan B,” 2007, p. 952.

29 *Idem*, p. 953.

common issues. However, it seems less realistic to challenge the principle of procedural autonomy by interfering with the various national ratification practices, notably the choice between a referendum or parliamentary vote process.

4.2 Strengthen the democratic legitimacy of the revision process preceding the ratification procedure

The “double unanimity” issue also should, be considered within the context of the overall revision procedure, from the initial preparation stage. Generally speaking, strengthening of the process’s democratic legitimacy would help to lessen the risks associated with ratification.

As for the Treaties’ preparation, negotiation and signing, the Convention model undeniably affords some progress in terms of transparency, deliberation and thus of legitimacy. The experiences of the first two Conventions showed that the exercise could make it possible to overcome obstacles that have been stumbling blocks for “traditional” intergovernmental conferences. Nonetheless, numerous aspects of this model could be improved.³⁰ For example, the direct election of at least part of the Convention’s representatives would have the effect of enhancing the Convention’s political representativeness, reinforcing its legitimacy in relation to governments and also increasing media coverage of its debates and deliberations.

One particular problem lies in the sequence between the Convention – in which representatives of national governments are brought together with members of Parliament – and the IGC, in which such governments once again exercise their full prerogatives. Such sequence may have given rise to some “two-level games.”³¹ For example, some governments adopted

30 See Notre Europe’s first study by G. Ricard-Nihoul, *Réviser les traités européens européens : le moment Convention – Six arguments pour la sauvegarder, six propositions pour la réformer*, Policy Paper 31, December 2007.

31 On this topic, see R. Dehousse, R. Dehousse, “Au-delà du plan B,” 2007, p. 945.

a low profile at the Convention in order to devote most of their efforts to the IGC, while other members downgraded their ambitions to avoid total rejection during the IGC. The most radical solution, other than to eliminate the IGC, would be to merge the latter with the Convention in order to harness the governments' influence during the open discussion and deliberation phase. A specific agreement governments representatives would be necessary if possible avoiding the straitjacket of unanimity, as previously suggested.

4.3 Extend simplified revision procedures

Over and above the general revision procedure, existing Treaties are being subjected to special procedures which consist of dropping the unanimity requirement, easing the ratification procedure (subject to approval by Member States according to their respective rules), or even abandoning ratification in its entirety. Following the Lisbon Treaty, the use of two “simplified revision procedures” has, to some extent, become widespread.³²

The first concerns the revision of that part of the Treaty on the Functioning of the European Union which deals with EU internal policies and action. Instead of a Convention and an IGC, these matters are now be considered by the European Council, whose decision must be approved by the Member States in accordance with their respective constitutional requirements. Although the aim of this model is to leave a greater margin of discretion to the Member States in order to simplify their internal procedures, this is not actually a simplification. Moreover, it disregards the progress constituted by the holding of a Convention. Most importantly, inasmuch as this procedure should not impact the division of competencies, it appears useless and might as well be eliminated.

³² Article 48, paragraphs 6 and 7.

The second simplified procedure is more promising. It involves the so-called “passerelle” clauses which can be used to amend decision-making procedures, where applicable, in favour of a majority decision or of legislative co-decision. Here too, the European Council, ruling unanimously, is substituted for the Convention and the IGC. As for the ratification procedure, it is replaced by an implicit ratification technique. In other words, if no national parliament voices its opposition to the contemplated amendment within a maximum of six months, the European Council can adopt it.

The advantage of this procedure in that it constitutes a first step towards a certain Europeanisation of the national parliaments' role in the revision procedure (which also implicitly dissuades the Member States from resorting to national referendums). For the above-mentioned reasons, it would be preferable to require a minimum threshold of one-fifth of the Member States' national parliaments to block the amendment under consideration, which would correspond to an implicit approval by four-fifths of the Member States. Furthermore, the national parliaments should be consulted ahead of time to ensure that the procedure would have a favourable outcome. Lastly, this negative ratification technique could be extended to other situations.

This could be taken one step further by abandoning any ratification procedure for treaty amendments dealing with minor institutional matters, such as changes in the functioning or internal organisation of institutions. Such issues are more numerous and less sensitive than is supposed, such as the European Commission's composition, which is already subject to just such a simplified revision procedure.³³ In this respect, too, unanimity should be abandoned so as to opt for a dual “superqualified” majority consisting of four-fifths of the Member States, representing four-fifths of the populations.

³³ Article 213 of the ECT.

The use of this type of simplified procedure will ultimately depend upon the progress made in reforming the general revision procedure. If the latter were to evolve in the direction which we advocate, the simplified revision procedures would lose some of their significance.

Conclusion

This study constitutes the second component of *Notre Europe*'s research on the reform of the European Treaties' revision procedure. Although the first presented various ways of improving the Convention's method – the revision procedure's preparatory stage – the second component mainly deals with the subsequent phases; i.e., the negotiation and signing of the Treaties within the Intergovernmental Conference, as well as their ratification.

Our primary recommendation is to abandon unanimity, and therefore the EU Member States' individual veto rights, at these two key moments of the reform process. Our aim was to demonstrate that the status quo is unsustainable. A majority of four-fifths of the States, or a dual majority also requiring four-fifths of the Union's population (if only to persuade the "large" States, which would thereby increase their relative power) seem more appropriate the rights they have. Certain guarantees could be

afforded to minority States, such as the option to withdraw, not to alter “acquired under the existing treaties.

A second recommendation concerns the need for greater integration of the various phases of the revision procedure: first by merging the IGC with the Convention, and secondly by permitting interaction between this Convention/IGC and the national parliamentary assemblies called upon to ratify the Draft Treaty (or still other groups, allowing a dialogue to take place with citizens in the event of a referendum). Other factors may also promote a certain “Europeanisation” of the ratification procedure, such as a common agenda, which would further legitimise, or even facilitate, the revision procedure.

Another governing idea which emerges from this study is to limit the scope of future revision treaties by making them more targeted. Focusing them on relatively delimited issues would undoubtedly facilitate the process of reaching an agreement (while not excluding the option of working out package deals). Should the ratification procedure fail it would also make it to rework a treaty. That would allow the maximum benefit to be derived from simplified revision procedures while also making it easier to pinpoint, where applicable, issues that may require a referendum in certain countries. Moreover, more targeted revision treaties would more easily integrate the special arrangements required to meet the most reticent Member States’ specific needs. In a way, this would be a return to Jean Monnet’s “small steps” approach, applied to the reform of European Treaties.

ANNEX

Article 48 of the TEU

Ordinary revision procedure

2. ...

3. ...

A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties. **Such amendments shall be adopted by a four-fifths majority of the Member States (representing the Member States comprising at least four-fifths of the population of said States).**

The amendments shall enter into force after being ratified by **four-fifths** of the Member States (**representing the Member States comprising at least four-fifths of the population of such States**) in accordance with their respective constitutional requirements.

A blocking minority must include at least (two or three) Member States, failing which a four-fifths majority shall be deemed attained.

5. If, **eighteen months** after the signature of the treaty amending the Treaties, **in accordance with paragraph 4, subsection 1, less than** 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. **Acting by a four-fifths majority of the Member States representing the Member States comprising at least four-fifths of the population of said States, the European Council may determine that the ratification process has been interrupted, or set a new time limit.**

6. Those Member States which will have not ratified the treaty amending the Treaties may withdraw from the European Union, in accordance with Article 50.

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