

THE NEW TREATY REVISION PROCEDURE AND THE ENTRY INTO FORCE OF THE CONSTITUTIONAL TREATY*

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I. THE STARTING POINT: THE END OF THE ROAD FOR THE REVISION PROCEDURE CONTAINED IN THE TREATY ON EUROPEAN UNION

Community law academics¹ and the Community institutions themselves have repeatedly pointed out that the present method of reforming the Treaties is no longer viable and that an alternative to the procedure contained in Article 48 of the Treaty on European Union (TEU) must be found.² According to De Witte, there are two main areas where the traditional revision procedure is itself in need of reform.³ Firstly, Article 48 of the TEU gives an Intergovernmental Conference the task of negotiating the revision process in accordance with the rules that typify the diplomatic method and

* This paper is part of a wider monographic work. Some of the reflections that it contains, especially those concerning the process by which the Treaty establishing a Constitution for Europe will come into force, are still at an embryonic stage. The work carried out by the German presidency - in particular the report which it will submit in June 2007 - will undoubtedly have a bearing on certain conclusions which could not be properly reached at this stage.

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¹ MANGAS MARTÍN, A.: “La reforma institucional en el Tratado de Ámsterdam”, *Revista de Derecho Comunitario Europeo*, no. 3, 1998, pp. 7-40, particularly p. 39 (“the revision procedure has run its course and is increasingly unviable as a means of moving the Union forward and preparing it for the twenty-first century”). See also DE WITTE, B.: “The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process”, in BEAUMONT, P. *et. al.* (eds.), *Convergence and Divergence in European Public Law*, Hart Publishing, Oxford, 2002, pp. 39-57; LIÑÁN NOGUERAS, D.J.: “La difícil reconducción del discurso de la simplificación”, in GARCÍA DE ENTERRÍA, E. (dir.): *La encrucijada constitucional de la Unión Europea*, Civitas, Madrid, 2002, pp. 287-298, at p. 297.

² DEHOUSSE, R.: “Can the European institutions still be reformed”, in *Challenge Europe. Europe@50: back to the future*, European Policy Centre, February 2007, pp. 63-70, at p. 63.

³ DE WITTE, B.: “Entrée en vigueur et révision du Traité constitutionnel”, in SERRA ROSSI, L.: *Vers une nouvelle architecture de l'Union européenne. Le projet de Traité-Constitution*, Bruylant, Brussels, 2004, pp. 77-98, at p. 88.

which it would appear necessary to overcome in a Union in which “the need to improve and monitor [...] democratic legitimacy and transparency” is recognized.⁴

The second aspect which critics have highlighted is the fact that reforms only come into force once they have been ratified in all Member States,⁵ something which is now very difficult to achieve in a Union of twenty-seven States.⁶ The need for change was accepted in practice after the first referendum in Denmark rejecting the Maastricht Treaty,⁷ as well as the negative outcome of the referendum in Ireland which threatened to block the entry into force of the Treaty of Nice.⁸

These two aspects have been present in the academic and political debates of the European Union in recent years - some of which have been encouraged by the Community institutions themselves⁹ - and were expressly stated during the preparation of the Treaty establishing a Constitution for Europe in at least two ways. In the first

⁴ *Declaration 23 on the future of the Union* annexed to the Treaty of Nice, point 6. The Convention’s impact on the democratic system of the Union has been analyzed by PETERS, A.: “European democracy after the 2003 Convention”, *Common Market Law Review*, no. 1, 2004, pp. 37-85.

⁵ This was also noted in the VON WEIZSACKER, DEHAENE and SIMON Report to the European Commission entitled *the Institutional Implications of Enlargement* published on 18 October 1999 which stated that “[i]t cannot be right to pursue this course in an enlarged Union, when each treaty change will have to go through 25 or more parliamentary systems with the foreseeable delays, frustrations and risks of complete paralysis” (p.12) and therefore proposed to “introduce a procedure for changes based, at least partly, on a form of majority voting, with intervention of the European Parliament” (p. 13). Online at http://europa.eu.int/ing2000/repoct99_en.pdf.

⁶ DE WITTE B.: “Entry into Force and Revision”, in *Ib.* (ed.): *Ten reflections on the Constitutional Treaty for Europe*, European University Institute, Florence, 2003, pp. 210-219, at p. 214.

⁷ See CURTIN V./VAN OOIK, R.: “Denmark and the Edinburgh Summit: Maastricht without Tears”, in O’KEEFE, D./TWOMEY, P.M. (eds.), *Legal Issues of the Maastricht Treaty*, London, 1994, pp. 349-365.

⁸ An analysis of the two referenda caused by the ratification of the Treaty of Nice can be found in LAFFAN, B.: *Irlanda et Europe: continuité et changement. La présidence 2004*, Groupment d’études et de recherches, Notre Europe, no. 30, December, 2003, pp. 20-27.

⁹ In 2000 the European Commission entrusted the Robert Schuman Centre of the European University Institute of Florence with producing a report on the reorganization of the Treaties. The report is divided into two parts. The second part sets out the results of a study made of possible alternatives to the revision procedures of the Treaties. The authors’ theoretical approach is stated in two well-defined perspectives. First, substituting the need for unanimity in the process whereby the reform is approved and enters into force; and secondly, diversifying the future revision procedures of the Treaty, offering an array of mechanisms whose rigidity would vary according to the substantive scope of the matter to be reformed. See EHLERMANN, C.I.D./MÉNY, Y. (Coord.): *Réformer les procédures de révision des Traités. Deuxième rapport sur la réorganisation des traités de l’Union européenne remis le 31 juillet à la Comisión européenne*, Robert Schuman Centre for Advanced Studies /Academy of European Law, Florence, 2003. Both documents are available online at http://ec.europa.eu/archives/igc2000/offdoc/discussiondocs/index_es.htm.

place, the procedure used to prepare the Constitutional Treaty, namely the creation of a Convention entrusted with preparing the draft text which would subsequently be negotiated by the Intergovernmental Conference, amounts to a *de facto* ‘mutation’ of the normal revision process contained in Article 48 of the TEU. A mutation which, whatever the Constitutional Treaty’s fate, will probably be very hard to ignore in future revisions.

Secondly, the need to tackle in a definitive manner the reform of the Treaty revision procedure was an issue incorporated into the work of the Convention¹⁰ and later into the Intergovernmental Conference of 2004.¹¹ For this reason the final version of the Constitutional Treaty included a *de jure* reform of the Treaty revision system which, in addition to establishing the ordinary revision procedure (Article IV-443), established two simplified revision procedures applicable to Part III (Article IV-444) and the internal Union policies contained in Title III of Part III of the Constitutional Treaty (Article IV-445).

¹⁰ During the work of the European Convention, the question of amending the Treaty revision procedures was not the subject of much debate. In fact, it could be said that it was initially avoided and then later displaced by the need to overcome the problems caused by the debate concerning institutional reform in the final stages of the Convention’s preparatory work. As a result, the approach of the European Convention to the ratification of the Constitutional Treaty and the inclusion of reform procedures was merely one of continuity. The first amendments focused on the inclusion of the Convention as the working method for the *travaux préparatoires* of the Intergovernmental Conference. In addition, the Convention rejected the idea of diversifying the revision procedures depending on the part of the Constitutional Treaty in question (more complicated for Parts I, II and IV; simpler for Part III): see CONV 728/03 of 26 May. Finally, Article IV-7 of the draft Constitutional Treaty which the Convention submitted to the European Council meeting in Thessaloniki included a single procedure for revising the Treaty which nevertheless contained marked changes from the current Article 48 of the TEU. These changes affected the participation of the Community institutions, the formal inclusion of the Convention as the method for dealing with future reforms, and, to a lesser extent, the procedure that determined whether such reforms actually came into force. The amendments agreed by the Convention became part of the final wording of Article IV-443 of the Constitutional Treaty (CONV 850/03, of 18 June).

¹¹ The solution opted for by the European Convention in its draft Constitutional Treaty – a single ordinary revision procedure – did not satisfy the European Commission. In fact, the Commission took advantage of the Opinion prepared for the Intergovernmental Conference of 2004 to state the need to find a way of making future revisions of the Constitutional Treaty more flexible ((Document COM(2003) 548 final, of 17 September 2003). Following this Commission recommendation, the initial work of the Italian presidency revealed a preference for an expedited system for amending certain parts of the Treaty, and this gave rise to the two simplified revision procedures applicable to Part III of the Constitutional Treaty and internal Union policies contained in Title III of Part III of the Constitutional Treaty. Formal shape was given to the proposals in the following documents: CIG 46/03 of 11 November; CIG 52/03, ADD1, of 25 November, Annexes 30 and 31; CIG 60/03 ADD1, of 9 December. The proposals were modified under the Irish Presidency, as reflected in the following documents: CIG 73/04 of 29 April; CIG 76/04 of 13 May and CIG 79/04 of 10 June, until their approval in the final document that the Heads of State and Government signed on 29 October 2004.

The legal efficacy of this reform obviously depends on the Constitutional Treaty coming into force. As things currently stand, this is highly unlikely, at least not in the form adopted on 29 October 2004. In any event, it seems evident that the Constitutional Treaty has made Member States aware of the difficulties inherent in the enlargement of the Union and has led them to look for solutions concerning the revision system. As Jacqu  has noted, “Certes, celles-ci peuvent para tre modeste, mais, au sein de l’Union, il s’ coule un temps de latence entre la prise de conscience d’un probl me et l’adoption d’une solution satisfaisante”.¹²

This, then, is the background to this paper, which is divided into four sections that analyse the study of the provisions finally adopted by the Constitutional Treaty in this area. We will examine in detail both the ordinary revision procedure (II) and the new simplified revision procedures (III). Having described the changes to the revision procedure of the Constitutional Treaty, we shall provide some initial thoughts on the main legal problem currently facing the Constitutional Treaty, namely the question of its entry into force. In particular, we will refer to the proposals which are currently being worked on with a view to finding a solution to this problem before the next European Parliament elections in 2009 (IV).

II. THE ORDINARY REVISION PROCEDURE: CONTINUITY WITH THE PAST

The new ordinary revision procedure contained in the Constitutional Treaty is, like the original amendment procedure established in the founding Treaties, divided into three phases, within each of which different bodies or institutions intervene.¹³ Thus, the first phase of the revision procedure is of a Community nature, consisting in the commencement and preparation of the revision process, to be dealt with by a Convention created for this purpose by the European Council. The second phase, of a

¹² JACQU , J.-P.: Les dispositions g n rales et finales du Trait   tablissant une Constitution pour l’Europe”, *Revue Trimestrielle du Droit Europ en*, no. 2, 2005, pp. 549-556, at p. 556.

¹³ For DE WITTE the new procedure involves five stages. The first stage is the commencement of the revision, the second stage is where it is agreed to proceed with the reform, the third stage is where the body entrusted with preparing the reform is convened, the fourth stage is the one in which the amendments are made, and the fifth stage is ratification in each Member State. See DE WITTE, B.: *loc. cit.* (“La proc dure de r vision: continuit  dans le ...”), at p. 4.

purely international nature, takes place in a Conference of Representatives of the Governments of each Member State which is entrusted with adopting an agreement, where possible.¹⁴ Finally, the third phase is the ratification procedure to be followed by the Member States in accordance with their constitutional requirements.¹⁵ If ratification is successfully concluded in all Member States the reform will come into force. If not, a new feature introduced by the Constitutional Treaty provides that the matter will be referred to the European Council, although it does not state the terms on which the Council will intervene, nor the legal consequences of this.¹⁶

1. Starting the revision procedure: the residual function of the Council and a new role for the European Parliament

According to the wording of Article IV-443, the ordinary revision procedure may be started by any Member State, the European Parliament or the Commission by submitting proposals for the amendment of the Treaty to the Council.¹⁷ Unlike the current Article 48 of the TEU, for the first time the Constitutional Treaty gives the European Parliament¹⁸ legal standing to submit reform proposals. This new feature -

¹⁴ A point which has been criticized by DE WITTE B.: “Entry into Force and Revision”, in *Ib.* (ed.): *Ten reflections on the Constitutional Treaty for Europe*, European University Institute, Florence, 2003, pp. 210-219, at p. 214 (“The first *criticism* is the fact that the revision is entrusted to an intergovernmental conference which, in practice, has meant diplomatic negotiations happening behind semi-closed doors, with little public debate, and culminating in ugly and ineffectual horse-trading at the final European Council summit. The Nice IGC highlighted all these negative aspects, to the extent that even the governments themselves, the prime players in this process, became convinced of the need for change”).

¹⁵ For DE WITTE, “In a future European Union with an ever larger membership, this mechanism may become altogether untenable”; DE WITTE B.: “Entry into Force and Revision”, in *Ib.* (ed.): *op. cit.* (*Ten reflections on the Constitutional ...*), at p. 214.

¹⁶ See Section III.4 below.

¹⁷ The proposed amendment submitted by Messrs. Duhamel, Einem, Van Lancker, Marinho, Berès, Bergeer, Carrero and Paciotti that “una proposta di revisione della Costituzione può essere presentata dal Consiglio a una maggioranza dei suoi membri che rappresenti una maggioranza della popolazione dell’Unione, o dal Parlamento europeo alla maggioranza assoluta dei membri che lo compongono” (CONV 673/03, of 14 April, p. 11) was not accepted on the grounds that it is the expression of the dual legitimacy principle on which the Union is based.

¹⁸ Recognizing the European Parliament’s power to submit reform proposals was one of the amendments submitted by Lamassoure and Severin (CONV 673/03, dated 14 April, p. 12) for whom “[u]n droit de pétition est même envisagé. De telles dispositions de démocratie directe aideront

one that academics pressed for¹⁹ - resolves the longstanding demands of the European Parliament,²⁰ based not only on the democratic nature of its representation but also on the fact that it is the legislative power in the European Union.²¹

The Constitutional Treaty does not allow Treaty reform to be proposed by popular initiative along the lines suggested during the work of the Convention by some of its members.²² Nor does it permit – in our opinion correctly – the Treaty revision to be initiated by two institutions whose competences are merely consultative in nature, namely the Economic and Social Committee and the Committee of the Regions.²³ Nor can the procedure be started by national parliaments,²⁴ although they continue to have a fundamental role in the ratification of any reform.

puissamment à faire maître un espace public européen”. Lequiller, Zieleniec and Kirkhope Mep also proposed such amendments.

¹⁹ See the report prepared by the European University Institute of Florence, which after noting that “l’on ne voit pas pourquoi le Parlement européen ne pourrait pas être davantage impliqué dans le processus de révision des traités en général” stated “Il devrait, à tout le moins, être mis sur le même pied que la Comisión européenne pour ‘soumettre au Conseil des projets tendant à la révision’ des traités européens”, in EHLERMANN, C.I.D./MÉNY, Y. (Coord.): *op. cit. (Réformer les procédures de révision des Traités. Deuxième rapport sur la réorganisation des traités ...)*, p. 19.

²⁰ The European Parliament has expressly requested this on at least two occasions, firstly in the Resolution on the Treaty of Amsterdam of 19 November 1997, (OJ C 371 of 8.12.1997) and secondly in the Resolution on the Constitutionalization of the Treaties of 12 October 2002 (OJ C 197 of 12.07.2001, p. 106).

²¹ An analysis of the new competences of the European Parliament can be found in MAURER, A.: “The Evolution of the Legislative Powers of the European Parliament: An Impact assessment”, in AA.VV., *Mélanges en hommage de Jean Victor Louis*, Université Libre de Bruxelles, Brussels, 2003, pp. 309-336.

²² In the amendment submitted by Lamassoure and Severin, it was proposed, for example, that the popular initiative be signed by 5% of voters representing four fifths of the Member States of the Union (CONV 673/03, 14 April, p. 12). For the authors of the said amendment, “Un droit de pétition est même envisagé. De telles dispositions de démocratie directe aideront puissamment à faire naître un espace public européen”. The popular initiative right is referred to in general terms in the Constitutional Treaty. For an analysis thereof, see LAURENT, S.: “Le droit d’initiative citoyenne — En attendant l’entrée en vigueur de la Constitution européenne”, *Revue du Marché Commun et de l’Union Européenne*, no. 497, 2006, pp. 221-225.

²³ This was proposed by Lequiller (CONV 673/03, of 14 April, p. 12) who considered that both this consultative body and the Committee of the Regions are “susceptibles de relayer les préoccupations des citoyens de l’Union”.

²⁴ For example, this was proposed by Povilas Andriukaitis (CONV 673/03, of 14 April, p. 12) on the grounds that “[i]t is one of the ways of bringing Europe closer to the people”.

Once proposed revisions have been submitted to the Council, the latter will refer them to the European Council and notify them to the national parliaments.²⁵ With respect to the Council's function of referring reform proposals to the European Council, the Secretariat of the Intergovernmental Conference suggested amending Article IV-443 so that Treaty revision proposals were submitted directly to the European Council, on the grounds that this latter body was the one with the competence to convene a Convention and establish its mandate.²⁶ The final wording adopted, although more complicated, gives legal effect to a common practice in Treaty revision procedures, whereby although the Council is the institution which receives the reform proposals, the European Council is the body entrusted with taking the political decision to authorize the reform.²⁷

According to the wording of the Constitutional Treaty, the Council is also responsible for notifying revision procedures to the national parliaments.²⁸ In this regard, it should be noted that such notification is merely for information purposes, and national parliaments are not competent²⁹ to make substantive declarations thereon. This new feature of the Constitutional Treaty must be seen simply as a step taken towards improving the participation of national legislatures in the process of European

²⁵ See *the Protocol on the Role of National Parliaments in the European Union*.

²⁶ Document CIG 4/03, of 6 October prepared by the IGC Secretariat containing the editorial and legal comments on the draft Treaty establishing a Constitution for Europe (p. 503).

²⁷ In fact, although Article 48 of the TEU attributes to the Council the power to deliver an opinion in favor of convening a Conference of Representatives of the governments of the Member States, and to the President of the Council the power to convene the said Conference, the decision to initiate each of the previous revision procedures of the founding Treaties was adopted by a simple majority in the European Council.

²⁸ The final wording adopted did not take into account the amendment submitted by Heathcoat-Amory (CONV 673/03, 14 April, p. 12) in which it was proposed that the notification of the revision procedure to national parliaments should be substituted by a provision giving them the opportunity to debate the proposed revision. For the authors of the amendment, debate in national parliaments was necessary, in order to "increase the input of national parliaments, which shall be called upon at an early stage to give their governments a broad negotiating outline, and voice their opinions on the need for modifications and reforms".

²⁹ The amendment submitted by Heathcoat-Amory and Bonde which proposed substituting the notification of national parliaments with the expression "shall have the right to debate" was not taken into consideration. For the authors of this amendment, the reason for their proposal was to "increase the input of national parliament, which shall be called upon at an early stage to give their Governments a broad negotiation outline, and voice their opinions on the need for modifications and reforms" and, they add, "Nor should a member state effective be forced into negotiating a treaty change which its parliament does not want. This method allows for full debate and participation by citizens", (CONV 673/03, of 14 April, at p. 11).

integration, by associating them with the revision procedure of the Treaties.³⁰ In fact, the national parliaments are under no obligation to issue any report in this regard, nor would it be a breach of the revision procedure if the European Council adopted the decision to convene the Conference of Permanent Representatives without waiting to receive the opinions of the national parliaments.

In short, the participation of the national parliaments in this phase of the revision procedure for the purpose merely of maintaining them informed is not only appropriate from a strictly legal standpoint, but it also fits perfectly the international logic of the revision procedure of the Treaties which governs the system laid down in the founding Treaties and, by extension, the revision procedure of the Constitutional Treaty.³¹ Within this international logic, the role of national parliaments only becomes of real importance in the ratification phase of the international text, when each Member State gives its consent to be bound by the said Treaty.

As already noted above, the Council must refer reform proposals to the European Council. This latter body is entrusted with adopting by a simple majority a decision in favor of examining the modifications.³² To adopt such a decision, the European Council must consult with the European Parliament, the Commission and, where appropriate, the Central European Bank. This is the same as the present system contained in Article 48 of the TEU.

Once the European Council has adopted a decision in favor of examining the proposed Treaty amendments, Article IV-443 gives the President of the European Council the power to determine the method to be used to prepare the reforms. Thus, the ordinary revision procedure may establish a Convention or, where appropriate, it may

³⁰ This opinion is shared by JACQUÉ, J.P.: *loc. cit.* (“Les dispositions générales et finales du Traité établissant ...”), p. 555; OBERDORFF, H. : “La ratification et la révision du traité établissant une Constitution pour l’Europe”, *Notre Europe*, no. 38, 11.04.2005, (<http://www.notre-europe.asso-fr>), p. 16.

³¹ The national parliaments have a particularly important role in the simplified revision procedure contained in Article IV-444. See Section III.2 below.

³² To date, only the reform which led to the Single European Act has been approved by the European Council of Milan of 29 and 30 June 1985, with the opposition of the UK, Denmark and Greece. This initial opposition did not prevent these Member States from actively participating in the revision process.

use the diplomatic method.³³ In short, the Constitutional Treaty's new feature is that it provides two different methods of revising the Treaties in a single ordinary revision procedure, making the revision procedure one of 'variable rigidity'.³⁴

In our opinion, from the wording of this provision in the Constitutional Treaty it may nevertheless be deduced that the two possible methods to be used in any future reform of the Treaties are not of equal importance. It is submitted that Article IV-443 firstly states a *preferred option* (Convention + IGC) by virtue of which the *travaux préparatoires* of the ordinary Treaty revision procedure require a Convention to be convened³⁵ and, secondly, a *residual option* (IGC), in which the use of a Convention for the *travaux préparatoires* is dispensed with in favor of the traditional diplomatic method.

The inclusion of these two different methods in the ordinary revision procedure is, however, somewhat strange if we consider the scope of the simplified revision procedures applicable to certain specific parts of the Treaty, the details of which are

³³ During the work of the Convention, different amendments were submitted which focused on diversifying the method of preparation and the institutions involved in developing the proposed single revision procedure, on the basis that using either the Convention or the intergovernmental method would depend on which part of the Constitutional Treaty was affected by the reform. These proposed amendments can be divided into four main groups according to the different options formulated. The first group proposed a reform of Part I through an IGC, preceded, where appropriate, by a Convention and a reform of Part II of the Treaty unanimously approved by the Council, subject to prior consultation of the European Parliament (submitted by Mr. Kuneva); or by a superqualified majority of the Council with the approval of the European Parliament and two thirds of the national parliaments (submitted by Van der Linden). The second group proposed the revision of Parts I and III by a Convention that would present to the European Council the amendments adopted by consensus. The European Council was to adopt a unanimous decision following receipt of a favorable opinion from the European Parliament. Part II of the Treaty would be revised by the European Council, which would adopt an unanimous decision (submitted by Mr. Zielenic). The third group proposed a reform prepared by a Convention, after which an IGC would adopt the amendments concerning Parts I and III of the Treaty and the Council, after consulting the European Parliament, would approve the amendments concerning Part II of the Treaty. Finally, the fourth group of amendments differentiated the revision procedure through an IGC for Parts I and III whereas the European Council would be used for changes to Part II (submitted by De Vries and De Bruijn). See CONV 673/03, of 14 April, p. 13.

³⁴ GROPPI, T. "La revisione della Costituzione", in BOU FRANCH, V./CERVERA VALLTERRA, M. (coords.): *Estudios sobre la Constitución europea*, Tirant lo Blanch, Valencia, 2006, pp. 221-246, at p. 229.

³⁵ The incorporation of the Convention into the ordinary revision procedure of the Constitutional Treaty and its preferential use has been a constant feature of the debates in the Convention. An example is the statement contained in the Summary Report on the Plenary Session held on 5 June 2003 (CONV 798/03, of 17 June), in which, amongst other matters, the general and final provisions were discussed. The said Report stated that "Convention members were in favour of the *Praesidium's* proposal that the Intergovernmental Conference to approve any future amendments to the Constitution should *as a general rule* be prepared by a Convention." (CONV 798/03 p. 4). Italics added.

analyzed below. In fact, it seems reasonable to suggest that future reforms to be dealt with under the Article IV-443 procedure will always be important enough to justify convening a Convention, and it is therefore unlikely that they can be prepared exclusively through the diplomatic method of the Intergovernmental Conference.

2. The ordinary revision of the Treaty: a single procedure with two methods of preparation

2.1. The Convention and diplomatic (IGC) method: the preferred option

Under Article IV-443, the European Council may adopt a favorable decision to examine a proposal to reform the Treaty. For this purpose, a simple majority vote in favor is sufficient, after consulting the European Parliament and the Commission. If the amendment affects institutional changes in the monetary area, the Central European Bank must also be consulted. The terms on which consultation of the Parliament, the Commission and, where appropriate, the European Central Bank are to be made reveal that this is merely for the purposes of obtaining these institutions' opinions, and cannot prevent the revision procedure from being convened.

Once the decision in favor of examining the proposed reform has been taken, "the President of Parliaments shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission".³⁶ During the work of the Convention that prepared the Constitutional Treaty, numerous amendments were proposed not only with respect to the body entrusted with convening the Convention,³⁷ but also as regards the latter's composition.³⁸ There were even those that proposed giving the Convention a

³⁶ The provision granting the President of the European Council the power to convene a Convention was supported in the submissions made by De Villepin, Costa and D'Oliveira Martins; Oleksy; Van der Linden, Timmermans, Van Eekelen and Van Dijk; Azevedo, Nazaré Pereira; Figel; Kuneva (CONV 673/03, p. 12).

³⁷ The amendment presented by Messrs. Brok, Santer, Szajer, Tajan and others proposed that it be convened by the Council (CONV 673/03, p. 12).

³⁸ Thus, the amendment presented by Messrs. Borrell, Carnero and López Garrido requested the inclusion of members of the Economic and Social Committee on the grounds that within the Convention they would help "à garantir une ouverture aussi large que possible des débats au sein de la société civile et

constitutional nature.³⁹ At the same time, the objective of some proposed amendments was to abolish the express inclusion of the Convention method.⁴⁰

With the wording finally adopted by the Constitutional Treaty, the Convention will probably be the body responsible for examining future revision projects and adopting a recommendation to a Conference of Representatives of the Governments of the Member States convened for this purpose by the President of the Council.⁴¹ The Convention will reach its decision by consensus,⁴² and in this regard will adopt the same voting system used by both the Convention entrusted with preparing the draft Charter of Fundamental Rights of the European Union⁴³ and the European Convention itself.⁴⁴

à la transparence indispensable pour qu'elle puisse effectivement y contribuer". Bonde's proposed amendment – the inclusion of “distinguished persons with different views on the Union integration, representatives from civil society organisations” (CONV 673/03, of 14 April, p. 12) – was also rejected.

³⁹ Such amendments were split into three broad groups. The first group was made up of those amendments which proposed a constitutional Convention convened by the European Council, after obtaining the opinion of the Council and the Parliament (amendment of Messrs. Borrell and others; Voggenhuber and others). The second group was composed of the amendments in favor of a constitutional Convention convened by the President of the European Council or, alternatively, by the Council following a proposal of a Member State or the Commission (Severin). The third group favored a constitutional Convention convened by the Council after consulting the European Parliament and, where appropriate, the Commission (Meyer, Floch, Einem); CONV 673/03, of 14 April, p. 12.

⁴⁰ Opposed to the express provision regarding the Convention method were those amendments presented on 11 April 2004 by the representatives of the Finnish government in the Convention, Messrs. Tiilikainen, Peltomaki, Kiljunen, Vanhanen, Korhonen and Helle. They rejected the proposal made by the *Praesidium* for the express inclusion of a Convention-based approach (CONV 647/03, of 2 April, p. 13) on the grounds that « it would not be appropriate to lay down in the Constitution one particular method that might be used for preparing for an Intergovernmental Conference. The system should rather be kept as flexible as possible, which of course in no way rules out the possibility that in future recourse is also had to a preparatory Convention. In that case, however, the Convention should be convened by the European Council and not by its 'President' ».

⁴¹ It is therefore similar to the work done by the European Convention in preparing the Constitutional Treaty. Although the Constitutional Treaty does not mention either the composition nor the working method to be used, it seems reasonable to think that with respect to those amendments which, where appropriate, could be proposed in accordance with the procedure laid down in the Constitutional Treaty, the *acquis* existing after the work carried out by the previous Conventions will be taken into account. This would also include the Convention entrusted with preparing the Charter of Fundamental Rights of the European Union.

⁴² In this regard, there was an amendment proposed by alternate members of the European Convention, Messrs. Duhamel, Einem, Van Lancker, Marinho, Berès, Berger, Carnero and Paciotti, whereby the Convention would need the approval of two-thirds of its members in order to adopt the text (CONV 673/03, of 14 April, p. 11).

⁴³ The Laeken Declaration had already decided on consensus as the Convention's method for adopting decisions. In the Note on the Convention's Working Methods, consensus was also mentioned in Article 6.2; CONV 9/02, of 14 March. Even the General Secretariat of the European Convention opted

Using such a mechanism (or method) to revise the Treaties does not affect the legal nature of the final text.⁴⁵ In fact, although the intervention of a Convention body helps to ‘democratize’ or, even better, legitimate future reform projects, it does not in itself ensure the approval or the entering into force of the resulting text, as would seem obvious given the international legal nature of the founding Treaties.⁴⁶

2.2. The diplomatic method (ICG): a residual option

As has already been pointed out, the ordinary revision procedure contained in the Constitutional Treaty does not impose the Convention method as the sole way of preparing reforms in the future. In fact, future revisions of the Constitutional Treaty may also continue to be prepared using the diplomatic method of intergovernmental conferences. This is established in Article IV-443(2) paragraph two, which gives the European Council the power to decide, by a simple majority and after obtaining the consent of the European Parliament, *not* to convene a Convention. In this case, the President of the European Council will establish a mandate – as occurs in the revision procedure currently in force – to call a Conference of Representatives of the Governments of Member States.

The provision whereby the European Council does not convene a Convention on the basis of a simple majority vote was subject to numerous amendments. Some were aimed at removing this method of voting,⁴⁷ while others preferred qualified majority

for this approach, as is noted by DELOCHE-GAUDEZ, F.: “Le secrétariat de la Convention européenne: un acteur influent”, *Politique européenne*, no. 13, 2004, pp. 43-67, at p. 55.

⁴⁴ This was agreed in the document *Composition, method of work and practical arrangement for the body to elaborate a draft EU Charter of Fundamental Rights* incorporated into the conclusions of the Tampere European Council of 15 and 16 October 1999, Annex I.

⁴⁵ In this regard, OBERDORFF warns that “Rien n’empêche d’imaginer que’une nouvelle Convention, forte de l’expérience des précédentes, soit plus encline à s’aventurer, un jour, sur la voie de la rupture constitutionnelle, justement à l’occasion d’une révision, si les conditions politiques ont évolué dans ce sens”; in OBERDORFF, H.: *loc. cit.* (“La ratification et la révision du traité établissant ...”), p. 16.

⁴⁶ MONJAL, P.-Y.: “Le projet de traité établissant une Constitution pour l’Europe: quels fondements théoriques pour le droit constitutionnel de l’Union européenne ?”, *Revue Trimestrielle du Droit Européenne*, no. 3, 2004, pp. 443-475, at p. 466.

⁴⁷ Thus, Michel, Elio di Rupo, Anne Van Lancker, Chevalier and Nagy proposed removing the simple majority as the voting method in the European Council (CONV 673/03, 14 April, p. 11).

voting.⁴⁸ In our opinion, the provision finally adopted reinforces the preeminence of the Convention method as the paramount Treaty revision procedure, without aggravating the decision-taking system corresponding to the European Council. To achieve this end, the Constitutional Treaty has imposed two conditions. First, dispensing with the Convention method is only possible where the latter is “not [...] justified by the extent of the proposed amendments.” Secondly, the European Council can only decide not to convene the Convention when it has obtained the approval of the European Parliament.⁴⁹

From a careful examination the second paragraph of Article IV-443(2) of the Constitutional Treaty, one may conclude that the participation of the European Parliament offers a double guarantee. In the first place, it is a guarantee in favor of the use of the Convention⁵⁰ as a practically ‘irreplaceable’ method in the ordinary revision procedure of the Constitutional Treaty.⁵¹ But in the second place, the European Parliament is entrusted with exercising political control of the interpretation reached by the European Council – within the admissible margins of political expediency – of this indeterminate legal concept (“should this not be justified by the extent of the proposed amendments”) contained in Article IV-443.⁵² A legal concept which is not, however,

⁴⁸ BROK, Szajer, Akcam, Azevedo, Van Der Linden, Lamassoure, Brejc, Demetriou, Figel, Liepina, Piks, Santer, Kelam, Kroupa, Tajan, Almeida Garrett, Altmaier, Lennmarker, Maig-weggen, Rack and Vilen (CONV 673/03, of 14 April, p. 11) who proposed a qualified majority voting.

⁴⁹ The wording reflects the content of the amendment proposed by Messrs. Pervenche Verès, Duff, Duhamel, Fayot and Einem (CONV 673/03, of 14 April, p. 11).

⁵⁰ For DE WITTE, the European Parliament has become the “protecteur de la Convention —un protecteur tout à fait naturel, puisque c’est bien le Parlement européen qui a bénéficié le plus de cette innovation de la procédure de révision”, in DE WITTE, B.: *loc. cit.* (“La procédure de révision : continuité dans ...”), p. 3.

⁵¹ In fact, in the opinion of JACQUÉ, making giving up the Convention method subject to the European Parliament’s authorization would logically suggest that the Parliament “sera généralement favorable à la réunion d’une Convention”, JACQUÉ, J.P.: *loc. cit.* (“Les dispositions générales et finales du Traité établissant...”), at p. 555.

⁵² Some authors have seen in this form of words the lack of definition and subjectivity of the Luxembourg Compromise of 1966. However, in our view, the wording of Art IV-443 cannot be compared with a formula such as the one adopted at that time by the said Compromise. In fact, the objective of the provision contained in the Constitutional Treaty is neither to defend national interests, nor is it exempt from control, as is clear from the fact that the European Council requires the approval of the European Parliament. By contrast, there is a consensus of opinion among academics that the legal form of the Luxembourg Compromise can be seen in the conditions that determined the Treaty of Amsterdam in relation to the voting system of the Council to initiate an enhanced cooperation

subject to the control of the Court of Justice. In this regard, if the European Parliament considers that the proposed amendments justify convening the Convention, this is sufficient to stop the European Council from taking the opposite course of action. For this reason, we conclude that the wording of the Constitutional Treaty with respect to the Article IV-443 ordinary revision procedure effectively contains a preference for the Convention as the method for preparing the reform and the diplomatic method for its approval.

3. The negotiation of the reform: the continuation of the diplomatic method through the Intergovernmental Conferences

The work carried out by the Convention will be continued in a Conference of the Representatives of the Governments of the Member States, which is convened “for the purpose of determining by common accord the amendments to be made to this Treaty” (Article IV-443(3)). Thus, the potential generalization of the Convention method as a tool for preparing Treaty reforms adopted in accordance with the ordinary procedure does not imply giving up the diplomatic method but quite the reverse, since it consolidates it. This is for two reasons. First, as Article IV-443(3) states, the Conference of Representatives of the Governments of Member States will ultimately be responsible for the approval by *common accord* of any amendments proposed by the Convention body. But the second reason is that where the European Council decides not to convene a Convention, the Conference of Representatives of the Governments of Member States has the task of carrying out, on the terms actually contained in Article 48 of the TEU, the preparatory work related to the revision and its subsequent negotiation and approval.

In any event, accepting that most future reforms will be dealt with through the convening of a Convention,⁵³ the question arises as to the extent to which the Conference of Representatives of the Governments of Member States entrusted with

mechanism. In this regard, see our work *La cooperación reforzada en la Unión Europea*, Colex, Madrid, 2002.

⁵³ OBERDORFF has described the Convention method as having a “caractère quasi-incontournable”; OBERDORFF, H.: *loc. cit.* (“La ratification et la révision du traité établissant ...”), p. 16.

definitively adopting the reform will be bound by the proposed reform put forward by the said Convention. From a legal point of view, it is submitted that it cannot be bound. In fact, the Treaty itself defines the Convention as a body entrusted with examining proposed amendments “and adopt[ing] by consensus a recommendation” (Article IV-443(2)). However, in the light of the experience of the two Conventions which have already existed – the first to prepare the Charter of Fundamental Rights of the European Union and the second to prepare the Constitutional Treaty – it can be expected that the task of the Intergovernmental Conference may be reduced to one of mere technical⁵⁴ and political⁵⁵ fine tuning of those reforms proposed by the Convention.

In short, the Constitutional Treaty retains the essentially intergovernmental nature of the current ordinary revision procedure contained in Article 48 of the TEU, although it is an improvement on the latter. Combining the Convention method (for preparing the reform) with the diplomatic method (for its approval) not only improves the efficacy of the revision procedure, but also indirectly strengthens the legitimacy of the reforms made, since the use of both the Convention and the Intergovernmental Conference reproduces the two legitimacies on which the Union is based: that flowing from its citizens and that of the Member States.

4. The ratification of the resulting text: the responsibility of the Member States and the reserved role of the European Council

4.1. The entry into force of a future reform: the prerequisite of ratification by all Member States

The second paragraph of Article IV-443 of the Constitutional Treaty leaves no room for any doubt. The Constitutional Treaty is an international treaty and the entry into force of any reform thereof is dependent upon the ratification *by all* Member States

⁵⁴ For the technical refinement function of IGCs based on the experience of the IGC 2004, see MANGAS MARTÍN, A.: “La Conferencia Intergubernamental de 2004: balance de un trabajo bien hecho”, *Revista General de Derecho Europeo*, no. 5, 2004, www.iustel.com.

⁵⁵ For the limitations of IGCs in defining the political model in the light of the experience of the work undertaken by the European Convention, see ALDECOA LUZARRAGA, F.: “La CIG confirma el Tratado Constitucional de la Convención”, DT no. 44, 2004, *Real Instituto Elcano de Estudios Internacionales y Estratégicos* (www.realinstitutoelcano.org), p. 24, *in fine*.

in accordance with their respective constitutional requirements. By retaining the international law nature of the ordinary revision procedure, the Constitutional Treaty requires that any future revisions are approached, at least as a starting point, from the perspective of needing to achieve a consensus within the framework of a Conference of Representatives of Governments of the Member States and, subsequently, a successful ratification process in all the Member States of the European Union.

In the context of an enlarged European Union of twenty-seven Member States, the unanimous ratification requirement contained in Article IV-443 of the Constitutional Treaty makes the Treaty extremely inflexible.⁵⁶ This inflexibility not only converts the European Treaty into a text that is likely to last in time as the constitutional framework of the European Union,⁵⁷ it also makes it extremely difficult to reform.⁵⁸ In fact, the clear will of the Member States to maintain their individual right to authorize or veto the extent to which the European Union develops in the future paralyzes the process of integration of the EU. Not only is this undesirable,⁵⁹ it is perhaps even incompatible with the future development of the Union. In our opinion, while this requirement can be understood from the perspective of defending the power of Member States, it is increasingly hard to accept in the current context of developing the integration process.⁶⁰

⁵⁶ As JACQUÉ strikingly put it, “Il paraît donc exagéré de dire que la Constitution est gravée dans le marbre”, en JACQUÉ, J.P.: *loc. cit.* (“Les dispositions générales et finales du Traité...”), p. 555.

⁵⁷ OBERDORFF argues that the “Traité deviendrait une sorte de carcan intouchable”, in OBERDORFF, H.: “La ratification et la révision du traité établissant une Constitution pour l’Europe”, *Notre Europe*, no. 38, 11.04.2005, (<http://www.notre-europe.asso-fr>), p. 14.

⁵⁸ In order to reduce the rigidity of the ordinary revision process contained in the Constitutional Treaty and make it possible for certain sections of the Treaty to be regularly revised, a number of simplified revision mechanisms were introduced in Articles IV-444 and IV-445. A different question, as we will try to show throughout this paper, is whether the Treaty has achieved its aim, since these simplified revision procedures are also protected by unanimity voting.

⁵⁹ QUERMONE, J.L.: “L’Union européenne est objet ou acteur de sa constitution”, *RFSP*, no. 2, 2004.

⁶⁰ There are a number of international organizations that make the entry into force of amendments subject to majority approval. The International Labor Organization was the first international organization to use this system. For a more in-depth analysis of the different legal mechanisms governing the reforms of international organizations, see GUERRA MARTÍN, A.: *A natureza jurídica da revisao do Tratado da Uniao Europeia*, Lex, Madrid, 2000, at pp. 404-423.

4.2. The legal formalization of recourse to the European Council as a subsidiary mechanism

In regulating the system for the entry into force of future revisions of the Constitutional Treaty, apart from the requirement of unanimous ratification by Member States, Article IV-443 contains a subsidiary option which reproduces the content of Declaration 30 on the ratification of the Treaty establishing a Constitution for Europe, and whose use could prove to be the first symptom of the erosion of the inflexible nature of the future Treaty revision system.⁶¹ In this way, the Constitutional Treaty gives legal form to the political solution that has been provided for as a secondary choice to the traditional ratification system used for the Constitutional Treaty itself to come into force.⁶² It is a solution that is not defined in the Declaration annexed to the Constitutional Treaty and whose aim is simply to address the possible difficulties that may be encountered in the ratification of the Constitutional Treaty itself, as in fact has occurred with the success of the “no” vote in the referenda held in France and the Netherlands.⁶³

In this regard, although the entry into force of future reforms of the Constitutional Treaty is also subject to ratification by all Member States, the Treaty expressly authorizes the European Council to examine the situation in the event that the procedure fails, thus providing a type of *clause de secours*.⁶⁴

Article IV-443 thus provides legal support to the political power of the European Council to *examine the issue* when the ratification procedure has failed, provided that

⁶¹ The text delivered by the European Convention to the European Council does not include this possibility (CONV 850/03, of 18 June).

⁶² For JACQUÉ “[l]a formule applicable à la ratification de la Constitution est donc pérennisée pour les amendements à celle-ci”; JACQUÉ, J.-P.: “Les dispositions générales et finales du Traité établissant une Constitution pour l’Europe”, *Revue Trimestrielle du Droit Européenne*, no. 2, 2005, pp. 549-556.

⁶³ The *Praesidium* of the Convention justified this legislative change on the grounds that “the European Council would probably have to examine the situation which would arise if a large number of Member States had ratified amendments to the Treaty establishing the Constitution, but one or more Member States had not done so.” (CONV 728/03, of 26 May, p. 12).

⁶⁴ AUER, A.: “E pour *si muore*. La caractère constitutionnel de la Constitution pour l’Europe”, *Revue du Droit de l’Union européenne*, no. 1, 2005, pp. 65-90, at p. 70.

two circumstances exist.⁶⁵ The first, of a *temporal nature*, is that at least two years must have elapsed from the date of signature of the Treaty which intends to amend the present Constitutional Treaty. The second, of a *quantitative nature*, only allows the European Council to act if the amended text has been ratified by four fifths – in other words, a critical mass - of Member States.⁶⁶

Despite the enigma surrounding Article IV-443(4),⁶⁷ it seems reasonable to suggest that the European Council would not just limit itself to examining the situation, but in addition it could adopt a possible solution aimed at facilitating the entry into force of the reform.⁶⁸ Whatever the situation, it appears reasonable to think that, as OBERDORFF put it, “l’efficacité de cette mise à l’ordre du jour du conseil européen dépendra largement du climat politique du moment sur cette question”.⁶⁹

In any event, in our view the need to adopt a mechanism that facilitates the coming into force of future reforms in accordance with the ordinary revision procedure established in the Constitutional Treaty cannot be affected by the mechanism that the European Council may adopt as a ‘solution’ to the failure of the process for bringing into force the said Treaty. Nevertheless, there is always the possibility of citing the precedent if it is confirmed that some sort of mechanism to rescue the Constitutional Treaty has been devised, for example under the current German Presidency of the Council.⁷⁰

⁶⁵ Mr. Duff in contribution no. 341 to the Convention, entitled *Cómo poner en vigor la Constitución*, proposed the convening of a new international conference (CONV 764/03, of 28 May, Annex).

⁶⁶ The wording of Art IV-443 has not made the intervention of the European Council conditional upon the success of the ratification process in a number of Member States (four fifths) that represent a given percentage of the EU’s population. Although it might contradict the very basis of the European Union established in Article I-1 of the Constitutional Treaty, this solution may be reasonable under the principle of formal equality of Member States, which is also contained in the Treaty (Article I-5).

⁶⁷ LENAERTS and GERARD have described Declaration 30 on the ratification of the Constitutional Treaty as “enigmatic”; see LENAERTS, K./GERARD, D: “The structure of the Union according to the Constitution for Europe”, *European Law Review*, no. 3, 2004, pp. 289-322, at p. 304.

⁶⁸ Hence, we do not agree at all with GROPPÌ’s description of Article IV-443(4) as “une previsione alquanto anodina”, in GROPPÌ, T.: *loc. cit.* (“La revisione della costituzione...”), p. 231.

⁶⁹ OBERDORFF, H.: *loc. cit.* (“La ratification et la révision du traité établissant ...”), p. 17.

⁷⁰ In this regard, see Angela Merkel’s speech before the European Parliament of 17 January 2007, as well as the Berlin Declaration itself, adopted on the fiftieth anniversary of the creation of the European

III. THE NEW SIMPLIFIED REVISION PROCEDURES: INSUFFICIENT FLEXIBILIZATION

1. The legal nature of the simplified revision procedures: self-reform mechanisms

In addition to the ordinary revision procedure contained in Article IV-443, the Constitutional Treaty contains two new simplified revision procedures, defined in Articles IV-444 and IV-445.⁷¹ Through these less complicated procedures, the aim is to make possible those amendments of the Treaties that are inextricably linked to the effective working of the European Union.⁷² Such amendments would not, therefore, be related to what could be called the ‘constitutional framework’ of the Union.⁷³

Before analyzing these two procedures in detail, it is necessary to make one point regarding the legal nature of such revision procedures, namely that the terminology used in the Treaty, referring to them as “simplified revision procedures”, plus their position in the Treaty - immediately after the ordinary revision procedure of Article IV-443 - could create some confusion. However, in our opinion neither of the simplified revision procedures is, strictly speaking, a system to amend the Treaty, despite the fact that they

Communities. The said Declaration stresses the need for a “renewed common basis before the European Parliament elections in 2009”.

⁷¹ Of those authors who have studied these new mechanisms, the following are of note: DE WITTE, B.: “La procédure de révision : continuité dans le mode de changement”, multicopied text of a conference given in Geneva on 3 March 2005; DEHOUSSE, F./COUSSENS, W.: “Rethinking the revision and entry into force clauses of the European Constitution”, in *Ib.*, *The Convention’s Constitutional Treaty: old wine in a new bottle?*, Studia Diplomatica, no. 1-2, 2003; MOULIN, E.: “Révision d’un Traité ou émergence d’un pouvoir constituant ? La procédure d’adoption et de révision de la Constitution européenne”, in BEAUD O./LECHEVALIER, A./PERNICE, I./STRUDEL, S.: *L’Europe en voie de Constitution. Pur un bilan critique des travaux de la Convention*, Brussels, Bruylant, 2004, pp. 289-303.

⁷² This was the conclusion of the Commission’s Opinion given pursuant to Article 48 of the TEU, document COM (2003) 548 final, of 17 September 2003, where it stated that “it is crucial for the IGC to open the way towards procedures for revising the Constitution which are more flexible, albeit subject to clearly defined definitions.” (point III. 10, para 5). In addition, in its Resolution of 14 January 2004 concerning its *progress report of the Intergovernmental Conference* (P5_TA-PROV(2003)0549), the European Parliament insisted “on the importance of incorporating a light and flexible procedure to revise Part III of the Constitution”, point 12. This Resolution forms part of the document CIG 64/04, of 14 January.

⁷³ An aspect which we could identify clearly with Parts I and II of the Constitutional Treaty. This was the position taken by JACQUÉ, J.P.: *loc. cit.* (“Les dispositions générales et finales du Traité établissant une ...”), at p. 553.

are referred to as such in the text. In fact, both the system contained in Article IV-444 and that of Article IV-445 could be called mixed or quasi-autonomous revision procedures, since they give the Community institutions a significant reform capacity, albeit some intervention is required from Member States (different in the two procedures) in order for reforms to take effect.⁷⁴

On this basis, the difference between the ordinary revision procedure of Article IV-443 of the Constitutional Treaty and the simplified revision procedures of Articles IV-444 and IV-445 is clear. Less clear, however, is the difference between the simplified revision procedure of Article IV-444 and the Article IV-445 procedure concerning internal Union policies and actions. The terminology used by the Constitutional Treaty suggests that the Article IV-445 revision mechanism could be a version of the Article IV-444 procedure when, in principle, this is not the case. The fact that both simplified revision procedures belong to this general category of mixed reform mechanisms does not make them identical. Thus, the Article IV-444 procedure could be seen as a version of the traditional *passerelles* or ‘bridging clauses’⁷⁵ which already exist in the current Community Treaties.⁷⁶ It shares the same objective⁷⁷ as the

⁷⁴ Unlike mixed systems of self-reform, autonomous mechanisms are those in which the competence to revise the Treaties falls solely on the Community institutions. This is the case, for example, of Article 44A TEU which authorizes the Council to amend the system of financing for enhanced cooperation; Article 67(2) of the EC Treaty whereby five years after the adoption of the Treaty of Amsterdam the Council shall take a decision with a view to providing for all or parts of the areas covered by this title in accordance with the co-decision procedure. This provision also authorizes the Council to give the European Court of Justice jurisdiction over the said areas. There are many other examples of such mechanisms in the EC Treaty: Article 104(14) gives the Council authority to authorize the Protocol on the excessive deficit procedure; Article 107(5) allows the Council to amend a series of Articles of the Statute of the European System of Central Banks; Article 133(7) widens the application of the rules on the common commercial policy to the field of intellectual property; Article 213(1) allows the Council to increase the number of members of the Commission; Article 222(1) allows the Council to increase the number of Advocates-General of the Court of Justice; Article 225A(1) authorizes the creation of judicial panels and Article 245(2) gives the Council competence to amend the Statute of the Court of Justice. The Constitutional Treaty has included similar mechanisms: see Article III-269(3); Article III-271(1) *in fine* or Article-III 274.

⁷⁵ This is the view taken, inter alia, by DE WITTE, B.: *loc. cit.* (“La procédure de révision : continuité dans le ...”); OBERDORFF, H.: *loc. cit.* (“La ratification et la révision du traité établissant une ...”), p. 18 ; PFERSMANN, O.: “The New Revision of the Old Constitution”, in AA.VV., *Altneuland: The EU Constitution in a Contextual Perspective*, *Jean Monnet Working Paper*, no. 5, 2004 (www.jeanmonnetprogram.org), at p. 11.

⁷⁶ Article 42 of the TEU establishes the ‘main’ *passerelle*, a self-reform system that has not been used to date. For its part, the Treaty of Amsterdam created the ‘mini’ *passerelle*, found in Article 67 of the EC Treaty. This latter system has been used by the Council in its Decision of 22 December 2004 (OJ L 396, 31 December, p. 45). Similarly, the Constitutional Treaty contains a ‘mini’ *passerelle* in Article IV-422 by virtue of which the Council – composed, for this purpose, of those Member States involved in

passerelles, although it differs from them in two ways: first, as regards the criteria for its use⁷⁸ and secondly with respect to its substantive scope.⁷⁹ Under Article IV-444, the Constitutional Treaty grants to the Community institutions self-reform competences to be used exclusively with respect to certain fields of the Treaty.

For its part, Article IV-445 effectively establishes a genuine simplified revision procedure of the Treaties whose legal nature, while similar to self-reform procedures of a mixed nature which already exist in the Treaties,⁸⁰ differs from the latter not only in the general scope of the proposed reform put forward but also as regards the group of institutions which are competent to initiate the reform.⁸¹

2. The (new) main general *passerelle* of Article IV-444: the reserved role of the national parliaments

the enhanced cooperation mechanism – has competence to amend the voting system or, where appropriate, the legislative procedure laid down for this purpose by the Constitutional Treaty. This is clear from the general provisions governing the system of enhanced cooperation contained in Article I-44(3).

⁷⁷ A *passerelle* is “une disposition qui permet, dans un domaine déterminé, d’étendre le champ d’action de l’Union ou de modifier les procédures de décision sans pour autant avoir recours à la procédure de révision.”. The definition is from JACQUÉ, J.P.: *loc. cit.* (“Les dispositions générales et finales du Traité ...”), at p. 554.

⁷⁸ In the ‘main’ *passerelle* - Article 42 TEU - the Council is given the power to decide, by unanimity and after having consulted the European Parliament, that certain actions referred to in Article 29 of the TEU come within Title IV of the EC Treaty. This decision will only be adopted if it is approved by the Member States in accordance with their constitutional requirements. For its part, Article 67 of the EC Treaty gives the Council competence to allow it to reach a decision on an unanimous basis with a view to all or part of the areas covered by Title IV of the EC Treaty being governed by the co-decision procedure, as well as adapting the provisions concerning the competences of the Court of Justice.

⁷⁹ The aim of Article 42 of the TEU is to provide a conduit from the scope of the EU to that of the European Community. For its part, the aim of Article 67 of the EC Treaty is to modify the legislative procedure for the adoption of certain acts, as well as being widened to cover those acts that are the competence of the Court of Justice.

⁸⁰ It is, for example, similar to the one currently contained in Article 190(4) of the EC Treaty regarding the adoption of principles common to the uniform electoral procedure, as well as that established in Article 269 relating to the system of own resources. This has been noted by, among others, OBERDORFF, H.: *loc. cit.* (“La ratification et la révision du traité établissant ... »), p. 17. Nevertheless, it should be pointed out that the Article 269 mechanism only refers to the need to consult the European Parliament but not the need to obtain the latter’s consent, unlike the wording of Article IV-444 of the Constitutional Treaty.

⁸¹ Thus, as under the ordinary procedure, the system established under Article IV-445 may be initiated by the governments of Member States, the Commission or the European Parliament.

Article IV-444 provides that the European Council is competent to amend the Council's voting system with respect to Part III of the Constitutional Treaty (from unanimity to qualified majority), as well as the type of legislative procedure (from special to ordinary) to adopt European laws or framework laws without having to have recourse to the ordinary revision mechanism in Article IV-443. The European Council, which has the exclusive right to initiate this mechanism, can adopt a European decision authorizing the reform by unanimity and having obtained the consent of the European Parliament which for these purposes shall be given by the majority of its members.⁸²

The main *passerelle* provided for in the Treaty as a revision system is designed to make it possible to widen the application of qualified majority voting and the ordinary legislative procedure to cover the whole or part III of the Constitutional Treaty. However, Article IV-444 contains a limitation on this. Thus, Article IV-444(1) paragraph 2 states that the capacity of the European Council to allow the Council to vote on a qualified majority basis rather than unanimity "shall not apply to decisions with military implications or those in the area of defence".

However, the main new feature of the Constitutional Treaty in relation to the establishment of this simplified revision procedure is the fundamental role for national parliaments in its functioning. In fact, all of the reforms made using this mechanism must be transmitted to the national parliaments so that, if they consider it appropriate, they can oppose the European Council's decision.⁸³ To impede the use of the main *passerelle* it is sufficient for a *single* national parliament to express its opposition within a period of six months.⁸⁴ By contrast, if the six-month period passes without any

⁸² The European Parliament's association with the decision-making process of the general clause of current Article IV-444 is a constant feature of all of the drafts proposed during the Intergovernmental Conference. See the wording of Art IV-7 in the IGC proposal 52/03 ADD1, of 25 November; CIG 60/03 ADD1, of 9 December 2003, Annex 35; CIG 73/04, of 29 April, Annex 38; CIG 76/04, of 13 May, Annex 40 and, finally, CIG 79/04, of 10 June, Annex 46.

⁸³ In its Decision 2004-505 of 19 November 2004, the French *Conseil constitutionnel* held this provision of the Constitutional Treaty to be incompatible with the French Constitution. On this point see, inter alia, CHALTIEL, F.: "Une première pour le Conseil constitutionnel – Juger un Traité établissant une Constitution", *Revue du Marché Commun et de l'Union Européenne* no. 484, 2005, pp. 5-10; LEVADE, A.: "Le cadre constitutionnel du débat de révision de la Constitution. Commentaire de la décision n° 2004-505 DC du 19 novembre 2004", in *Le supplément de la Lettre* no. 191, 6.XII.2004 (www.robert-schumann.org).

⁸⁴ This option was included in the document submitted by the Italian Presidency on 9 December 2003 (CIG 60/03 ADD1, Annex 35, p. 49). It would appear that this condition was imposed by the United

parliament expressing its opposition, the European Council may adopt the decision in question.⁸⁵

It can be concluded that even when it is not subjected to the ratification procedure in the Member States, the review mechanism contained in Article IV-444 is extremely rigid, to such an extent that the right of veto granted to the national parliaments is effectively a double veto in favor of Member States.⁸⁶ Thus, the veto that any national parliament can expressly impose (the new feature) is added to that enjoyed by Member States in the European Council, since the voting system governing the main *passerelle* contained in Article IV-444 is one of unanimity.

In short, the simplified revision procedure of Article IV-444 of the Constitutional Treaty facilitates the revision proposals relating to Part III of the Constitutional Treaty solely as regards the method of dealing with the reform. In fact, recourse to the Convention and the Intergovernmental Conference is removed in favor of the competence of the European Council, but it is very difficult to claim that this process is more flexible or makes it simpler for amendments to be made, since they must be approved on at least three different levels in order to enter into force. First, the unanimous approval of Member States in the European Council is needed. Secondly, the majority consent of the European Parliament is binding, and thirdly, the express non-opposition of all national parliaments is also required.⁸⁷ The existence of so many

Kingdom, as can be concluded from a reading of the report entitled *The Convention on the Future of Europe and the Role of National Parliaments*, prepared by the House of Commons European Scrutiny Committee. This report warned that “the idea that parts of the Treaty would be amendable without national ratification was unacceptable”, p. 19.

⁸⁵ As JACQUÉ put it, “un procédure de non-objection”; JACQUÉ, J.P.: *loc. cit.* (“Les dispositions generales et finales du Traité établissant...”), at p. 554 *in fine*.

⁸⁶ This point was highlighted by DE WITTE, B. in “European Treaty Revision: a Case of Multilevel Constitutionalism”, multicopied version of the conference given by the author at a meeting in Prague.

⁸⁷ In this regard, DUFF proposes an amendment to Article IV-444 whereby national parliaments have the right to veto any revision proposed under this procedure. Such a reform would consist in requiring the opposition of at least one third of the national parliaments for a reform project to be blocked. See DUFF, A.: “Plan B: How to Rescue the European Constitution”, *Notre Europe. Etudes et recherches*, no. 52, 2006, at p. 17.

hidden vetoes calls into question the true scope of the effectiveness of the reform in a European Union of twenty-seven or more Member States.⁸⁸

3. The mixed self-reform procedure of Article IV-445: a simplified revision procedure

Article IV-445 sets out a simplified procedure to be used in those cases involving a partial and substantively limited revision of the Constitutional Treaty concerning internal Union policies and actions. Article IV-445 gives any Member State, the European Parliament and the Commission the right to submit proposals to the European Council for the revision of all or part of the provisions of Title III of Part III of the Treaty. Compared with the ordinary revision procedure, it is worth noting that under Article IV-445 the governments of Member States, the Commission and even the European Parliament must address their revision proposals to the European Council rather than the Council. Unlike the situation under the ordinary procedure, such proposals are not notified to the national parliaments.

Having received the revision proposal, the European Council is the body entrusted with adopting a European decision that modifies all or part of the said provisions of Title III of Part III concerning internal Union policies and actions, provided that the proposed reform does not involve the conferring of new competences. The decision of the European Council must be adopted by unanimity⁸⁹ and requires the prior consultation of the Commission, the European Parliament and the European Central Bank (the latter where the revision concerns institutional changes in the monetary area). As is clear from the above, there are three essential points that can be made about the nature of Article IV-445 from the perspective of simplification.

⁸⁸ For OBERDORFF, “cette procédure doit surmonter successivement plusieurs exigences qui sont autant de risques d’échec ou de blocage”, in OBERDORFF, H.: *loc. cit.* (“La ratification et la révision du traité établissant ...”), p. 18.

⁸⁹ According to the proposal submitted by the Italian Presidency to the Naples Ministerial Conclave, the European Council would adopt the reform by qualified majority: CIG 52/03 ADD1, of 25 November, Annex 31. The substitution of the qualified majority in favor of unanimity already appeared in the document CIG 60/03 ADD1, of 9 December, Annex 36. And it was retained in the wording of the following documents: CIG 73/04, of 29 April; CIG 76/04, of 13 May and, finally, CIG 79/04, of 10 June.

First, it is a revision procedure that is wholly resolved within the framework of the Community institutions, giving the European Council a *quasi-constitutional* competence that allows it to adopt a decision revising all or part of the provisions of Title III of Part III. Under the simplified revision procedure there is no Convention to prepare the reform, nor is any Conference of the Representatives of the Governments of Member States convened to negotiate and approve the final proposal.⁹⁰ It is the European Council that has the sole competence to prepare, negotiate and approve the reform.

Secondly, the decision adopted by the European Council will be given legal form in a legal instrument of a mixed nature, namely the European decision. The decision will be adopted by unanimity after consulting the European Parliament, the Commission and the European Central Bank (the latter where the revision involves institutional changes in the monetary area).⁹¹ Such consultations are not binding, which is reasonable with respect to the Commission and, where appropriate, the European Central Bank,⁹² but perhaps less so in relation to the European Parliament, given its marked legislative power.⁹³

Third, the entry into force of the European decision adopted by the European Council requires the approval of the Member States in accordance with their constitutional requirements and with the obvious risk of it being blocked.⁹⁴

⁹⁰ For all of these reasons GROPPi considers that it is possible to refer to the mechanism contained in Article IV-445 as a simplified revision procedure. See GROPPi, T.: "La revisione della Costituzione", in BOU FRANCH, V./CERVERA VALLTERRA, M. (Coords.): *op. cit. (Estudios sobre la Constitución ...)*, at p. 230.

⁹¹ Consulting the European Central Bank was a late amendment that was introduced into the wording of Article IV-7b (now Article IV-445) in the proposal contained in document CIG 79/04, of 10 June, Annex 46.

⁹² The reference to the Central European Bank was incorporated into the text after the ministerial meeting of 24 May 2004. See CIG 79/04 of 10 June, Annex 46. Until then, the proposed wording only referred to the European Parliament and the Commission being consulted. See particularly CIG 52/03 ADD1, of 25 November, Annex 31; CIG 60/03 ADD1, of 9 December, Annex 36; CIG 73/04, of 29 April, Annex 39; CIG 76/04, of 13 May, Annex 41.

⁹³ Although the current wording already appeared in the same form in the document submitted by the Italian Presidency to the Naples Ministerial Conclave (CIG 52/03 ADD1, of 25 November, Annex 31); in April 2004, the Irish Presidency stated "that further consideration might be given to the possibility of requiring the consent of the European Parliament to the Council decision on amending all or part of the provisions of Title III of Part III", (CIG 73/04, of 28 April 2004, p. 99).

⁹⁴ This determining factor is not a new feature that was introduced into the Treaties via the new simplified revision procedure established by the Constitutional Treaty. For example, it can be found in Articles 17(1) and 42 of the TEU, as well as in Articles 22(2), 190(4), 229A and 269(2) of the EC Treaty.

In short, the simplified revision procedure has not lost the typical features of the traditional revision system for the European Union, apart from removing the holding of an intergovernmental conference as the method of preparing the reform. In fact, in these simplified mechanisms Member States retain the right to reject the content of the proposed amendment on at least two occasions: first, when the amendment is put to the vote in the European Council, unanimity being required, and secondly, during the compulsory approval process in the Member States, in accordance with the latter's constitutional rules. All of this leads DE WITTE to claim that "les chefs de gouvernement réunis dans le Conseil européen décideront seuls comme au bon vieux temps de Nice!"⁹⁵

In our view, it would perhaps have been better to have considered the possibility of substituting the requirement of unanimity in the European Council with a qualified majority voting system,⁹⁶ to the extent that such a system guarantees a more effective procedure without clashing with the principle of democratic legitimacy in decision-taking, the latter being guaranteed in any event by the requirement that the proposed amendments be approved in each Member State.⁹⁷

In addition, without wishing to debilitate the competence of Member States as sovereign entities to decide on an amendment to the Treaty to which they are a party, or eliminate the democratic controls that must guarantee the legitimacy of Treaty revision

⁹⁵ DE WITTE, B.: "La procédure de révision: continuité dans le mode de changement", multicopied text of a conference given in Geneva on 3 March 2005., at p. 6.

⁹⁶ This was the proposal of the Italian Presidency to the national delegations in a document on the Treaty revision. The said document set out the possibility of establishing a more expedited revision mechanism for the internal policies of the Union. The Italian Presidency proposed two options. The first was the adoption of a European Council decision by qualified majority and the approval of all the Member States in accordance with their respective constitutional rules, while the second was the substitution of the requirement of full national ratification for one based on approval through the non-opposition of national parliaments. In this latter situation, the agreement would continue to be common and the national parliaments would, in reality, have the right of veto over any proposed amendments (CIG 46/03, of 11 November, p. 4, point 7).

⁹⁷ We are aware, however, that voting on a qualified majority basis in the European Council while maintaining the necessary approval of all Member States may ultimately leave the reform approved by the majority in the European Council at the mercy of the minority who opposed it. In fact, the negative vote in the European Council could simply be repeated in the national process for approval of the revision. In our view, however, since a single Member State does not have the capacity to block the adoption of a reform proposal in the European Council, the political cost of its non-approval in accordance with its constitutional requirements may be higher than that of blocking the proposal in the Community institutions, where it is clear that political responsibility is easily diluted among all Member States.

procedures, it does seem appropriate to put forward a possible proposal to be considered for the future. This proposal would consist in making the entry into force of the European decision contained in the simplified revision of the Constitutional Treaty conditional upon the absence of express rejection formulated by each of the national parliaments adopting, in this regard, the same formula as laid down in Article IV-444 of the Constitutional Treaty.⁹⁸ In our opinion, this would combine both the necessary simplification of the reform procedures in a Community context with the Member States' requirement to make reforms conditional upon their approval in accordance with their constitutional rules.⁹⁹ A requirement that Member States do not appear ready to give up.

IV. THE FINISHING POINT: THE ENTRY INTO FORCE OF THE CONSTITUTIONAL TREATY

1. The debate during the preparation process of the Constitutional Treaty: the break with the past proposed by the Penelope Project

During the preparation of the Treaty establishing a Constitution for Europe, it was agreed to deal separately with potential proposals concerning the entry into force of the Treaty and those others focused on the amendment of the future revision system of the Constitutional Treaty.

As far as the entry into force of the Constitutional Treaty was concerned, only two approaches were possible: either maintaining the conditions established in Article 48 of the TEU, that is, making the reform subject to the necessary ratification of the Member States in accordance with their constitutional requirements,¹⁰⁰ or alternatively modifying

⁹⁸ In this case the agreement would continue to be common and in reality the national parliaments would have the right to veto any revisions that were proposed (CIG 46/03, 11 November, p. 4, point 7).

⁹⁹ For his part, Andrew DUFF proposes that the reform should come into force when it has been approved by “four fifths of the states, representing two thirds of the population”, in DUFF, A.: *loc. cit.* (“Plan B: How to Rescue the...”), p. 17.

¹⁰⁰ This was stated in the document CONV. 250/02, of 10 September 2002, p. 21. (“even if the basic treaty is envisaged as a “renewed founding pact”, it follows on from the current Treaties and should therefore in principle be adopted under the procedure laid down in Article 48 of the TEU”). This same approach is contained in the Summary Report of the Plenary Session of the Convention held on 24-25

these conditions.¹⁰¹ As regards the latter option, the most interesting contribution was, in our opinion, the one contained in the document prepared by the working party headed by François Lamoureux and incorporated into the proposed Constitution presented by the European Commission, which was given the name Penelope.¹⁰² This *Feasibility Study* approached the ratification and entry into force of the Constitutional Treaty in an ambitious and imaginative manner. It proposed an alternative approach to the traditional way in which treaties come into force in an attempt to satisfy both those Member States who accepted the new legal system and those that did not but who were nevertheless prepared to allow others to do so, provided always that their particular *status quo* remained unaltered.

To square this circle,¹⁰³ Penelope proposed laying down a *Protocol* for the entry into force of the Treaty, which had to be signed and ratified by all Member States. In this way, the need for any modification of the Treaty revision procedure necessarily to obtain unanimous ratification under Article 48 of the TEU would be respected. When ratifying the said Protocol, each Member State could either make a Declaration confirming its wish to continue with the integration process of the Union or not make such a Declaration. In the latter case it would cease to belong to the Union (Article 3) and if it chose this option, negotiations between the Member State and the European Union would begin with a view to reaching an agreement regulating their future relationship (Article 4). The Treaty would come into force when the Protocol had been

April 2003, which stated that “ratification by all the Member States would be necessary for the Constitution to enter into force” (CONV 696/03, 30 April 2003).

¹⁰¹ Such reflections could be broken down into two groups: first, the holding of a referendum in all Member States (see CONV 658/03 of 31 March 2003) and secondly, the possibility of eliminating the requirement of unanimous ratification by Member States. Among the observations made, we would highlight the content of the Bourlanges Report of 3 December 2002 *on the typology of acts and the hierarchy of legislation in the European Union* (A-50425/2002, p. 8). This report proposed a modification of the Treaty ratification procedure to prevent a small minority from blocking the whole ratification process. It specifically suggests substituting unanimity “by a dual qualified majority comprising at least three-quarters of the Member States representing at least three-quarters of the Union population”. The proposal basically reproduces the procedure for entry into force contained in Article 77 of the Draft European Constitution prepared by the *European Policy Center*. The document may be consulted online at <http://www.theepc.be/Word/ECconst.doc>.

¹⁰² *Feasibility Study. Contribution to a Preliminary Draft Constitution of the European Union. Working Document*, 4 December 2002, at pp. XI-XII. Online at http://europa.eu.int/futurum/documents/offtext/const051202_3n.pdf. A detailed analysis of this document may be found in MATTERA, A. (Dir.): “*Penélope*”, *Projet de Constitution de l’Union européenne*, Clément Juglar, Brussels, 2003.

¹⁰³ In the words of JACQUÉ, J.P.: *loc. cit.* (“Les dispositions générales et finales du Traité établissant une ...”), p. 551.

ratified by all Member States, provided that a minimum of three quarters of them had made the said Declaration (Article 5).

As is noted in the explanations that accompany the said working document, the problem with this proposal would arise if a Member State did not wish to ratify the Protocol which introduces a degree of flexibility into the procedure for the entry into force of the resulting Treaty. To resolve this issue, which, in the words of CONSTANTINESCO, places us “à l’hypothèse précédente”,¹⁰⁴ Penelope incorporated the possibility of the Protocol coming into force on a given date, provided that by that time ratification by five-sixths of the Member States had taken place. Once this majority had been reached, the Protocol would enter into force only for those Member States who had ratified it.¹⁰⁵ Non-ratification would be considered for these purposes as manifesting the desire to leave the Union.¹⁰⁶ This innovative solution contained in Penelope, although attractive, involves breaking with the traditional procedure contained in Article 48 of the TEU¹⁰⁷ and, as DE WITTE has rightly pointed out, a manifest infringement of that Treaty which finds no support in international law.¹⁰⁸

¹⁰⁴ CONSTANTINESCO, V.: “La coopération renforcée: désintégration ou pré-intégration?”, in *Institut Suisse de Droit Comparée*, Lausanne, 7-8 November 2001, pp. 109-125, at p. 120.

¹⁰⁵ Articles 82 and 84 of the draft Treaty on the European Union submitted by the European Parliament in 1984 made the entry into force of the Treaty conditional upon ratification by a majority of Member States representing at least two thirds of the Community population (OJ C 77, 19.03.1984, p. 52). An analysis of this document can be found in CAPOTORTI, F./HILF, M./JACOBS, F./JACQUÉ, J-P.: *Le Traité de l’Union européenne. Commentaire du projet adopté par le Parlement européen le 14 février 1984*, ULB, Brussels, 1985; FERRI, M.: “Le projet de Traité d’Union européenne”, *Annales de Droit de Liège*, 1984, pp. 275-291; NICKEL, D.: “Le projet de Traité instituant l’Union européenne élaboré par le Parlement Européen”, *Cahiers du Droit Européen*, no. 5-6, 1984, pp. 511-542; SAINT-MIHIEL, P.: “Le Projet de Traité instituant l’Union européenne”, *Revue du Marché Commun*, no. 276, April, 1984, pp. 149-152.

¹⁰⁶ This formula is also contained in Article 94 of the International Civil Aviation Organization Treaty.

¹⁰⁷ The documents’ authors take the view that Article 48 of the TEU is compatible with international law “since the Agreement offers the Member State concerned every guarantee that it will retain its established rights (...). The proposed solution requires the agreement, at the time of signature, of all the Member States”. *Feasibility Study. Contribution to a Preliminary Draft Constitution.*, at p. XII *in fine*.

¹⁰⁸ DE WITTE, B.: “Entry into Force and Revision”, in *Ib.* (ed.): *Ten reflections on the Constitutional Treaty for Europe*, European University Institute, Florence, 2003, especially pp. 210-212, footnote 9. Similarly, see JACQUÉ, J.P. *loc. cit.* (“Les dispositions générales et finales du Traité établissant ...”), at p. 551.

However, neither the proposal that accompanied the European Commission document nor any other alternative was finally incorporated into the definitive wording of the Constitutional Treaty.¹⁰⁹ In fact, Article IV-447, the provision entrusted with determining the entry into force of the Constitutional Treaty, is not innovative at all, remaining faithful to the traditional revision system that has been in existence since the founding Treaties came into force, which means requiring – with the problems that this involves – the ratification of all Member States.

2. The solution finally adopted: Article IV-447 and Declaration 30 on the ratification of the Treaty

According to the wording of Article IV-447 of the Constitutional Treaty, the Treaty will come into force on 1 November 2006 if by that date all of the instruments of ratification have been deposited or, failing that, on the first day of the second month after the deposit of the instrument of ratification of the last signatory State to take this formal step.

Of the provisions established in the Constitutional Treaty to determine its entry into force, special attention needs to be paid to the *Declaration on the ratification of the Treaty establishing a Constitution for Europe*, which provides that “if, two years after the signature of the Treaty establishing a Constitution for Europe, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, *the matter will be referred to the European Council.*”¹¹⁰ The wording of the Declaration evidently does not include the possibility of modifying the entry into force mechanism contained in Article IV-447. Nor does it

¹⁰⁹ Moreover, the summary report of the plenary session held on 22 and 25 April 2003, stated that “some members of the Convention observed that, while some degree of flexibility was desirable for the entry into force of future amendments to the Constitution, such flexibility could not be applied for the entry into force of the Constitution itself, given that the current Treaties did not contain provisions to that effect. As a result, ratification by all the Member States would be necessary for the Constitution to enter into force.” (CONV 696/03, 30 April p. 12, last paragraph).

¹¹⁰ Italics added.

provide either a precise political or legal response to the problem that would be caused by the non-ratification of the Treaty by one or more Member States.¹¹¹

Given its legal nature, the Declaration adopted by the Intergovernmental Conference is simply an interpretative declaration that states the power of the Member States, expressed through the European Council, to examine the situation that the failure of some of the ratification procedures could cause. This would involve a political commitment to find, if possible, a legal formula that would allow the Constitutional Treaty to enter into force once the vast majority of the Member States had consented to the new Treaty.¹¹²

As is clear from its wording, the Declaration of the Intergovernmental Conference covers a purely *subsidiary* solution; in other words, it is a “last resort”¹¹³ to which recourse may be had when the failure of unanimous ratification of the Treaty becomes clear - as has finally occurred - yet at least four fifths of the Member States have given their consent.

In short, the said Declaration does not include anything like a revolutionary formula with respect to the entry into force of the Treaty, since the legal limits imposed by Article IV-447 must be complied with. However, it would appear necessary to recognize that there is some political potential offered by the inclusion of this formula in the Declaration. In our opinion, the scope of Declaration 30 annexed to the Constitutional Treaty must be qualified by the following three aspects which affect the future development of the European Union. First, the Declaration must be interpreted as preventing Member States from continuing to enjoy a veto right through their refusal to ratify the Treaty, thus stopping increased integration for the majority of Member States

¹¹¹ In this regard, contribution no. 341, which was submitted to the Convention by Mr. Duff and entitled “*How to bring the Constitution into force*”, suggested the convening of an intergovernmental conference entrusted with renegotiating “only the provisions of this Article in order to enable the Constitution to enter into force”. The agreement reached in the said intergovernmental conference would then be ratified by all Member States (CONV 764/03, 28 May, Annex).

¹¹² This opinion is shared by DE WITTE, B.: “Entrée en vigueur et révision du traité constitutionnel”, in ROSSI, L.S.: *Vers une nouvelle architecture de l’Union Européenne. Le Projet de Traité-Constitution*, Bruylant, Brussels, 2004, pp. 77-98, at p. 85.

¹¹³ As Auer strikingly put it, it is a type of ‘emergency window’ which should only be opened in the event of necessity. See AUER, A.: “Adoption, ratification and entry into force”, *European Constitutional Law Review*, no. 1, 2005, pp. 131-135, at p. 134.

who do desire to move further in the European construction process. This is particularly so when the Constitutional Treaty itself contains a provision giving Member States the right to request their withdrawal from the Union on the terms contained for this purpose in Article I-60.¹¹⁴

Secondly, the Declaration should not allow the requirement of unanimous ratification by the Member States to be taken advantage of in order to (re)open bilateral negotiation processes between the Union and the Member States¹¹⁵ which, through the subsequent adoption of mechanisms that authorize the flexibilization of the obligations for certain Member States, effectively undermine the agreement reached in the Constitutional Treaty. In our opinion, the wording of the Declaration should not be seen as providing support for opting-out clauses, despite the fact that such mechanisms have been used at other times during the development of the European construction process, as can be seen in the Maastricht Treaty¹¹⁶ and later in the Treaty of Amsterdam.¹¹⁷

Thirdly, it is submitted that the Declaration on the ratification of the Constitutional Treaty may be interpreted as meaning not ruling out the possibility of differentiated

¹¹⁴ This same idea appears to be implied after the Lamassoure and Severin amendments, which proposed substituting unanimity voting under former Article F with a super-qualified majority of the Council ratified by four fifths of the Member States representing four fifths of the population (CONV 673/03, of 14 April, p. 14). In fact the following justification of the amendment is given: “A 25 membres ou plus, sur tout projet significatif, l’unanimité est impossible à obtenir. La contrepartie doit être l’ouverture d’un droit de retrait de l’Union pour un ou des Etats qui seraient radicalement opposés à la réforme ainsi décidée”.

¹¹⁵ The Prime Minister of the British Government referred to this possibility when appearing before the House of Commons in the event that the outcome of the United Kingdom referendum was a negative one; *Agencia Europe* of 23.4.2004, no. 8691 p. 4.

¹¹⁶ CURTIN, D.: “The Constitutional Structure of the Union: A Europe of Bits and Pieces”, *Common Market Law Review*, 1993, pp. 17-69; USHER, J.A.: “Flexibility and Enhanced Cooperation”, in HEUKELS, T./BLOKKER, N./BRUS, M. (eds.): *The European Union after Amsterdam. A Legal Analysis*, Kluwer Law International, La Haya, 1998, pp. 253-271.

¹¹⁷ EHLERMAN, C.D.: “Différenciation, flexibilité, coopération renforcée: les nouvelles disposition du traité d’Amsterdam”, *Revue du Marché Unique Européen*, no. 3, 1997, pp. 53-90; GAJA, G.: How Flexible is flexibility under the Amsterdam Treaty?”, *Common Market Law Review*, no. 35, 1998, pp. 855-870; HEDEMANN-ROBINSON, M.: “The area of Freedom, Security and Justice with regard to the UK, Ireland and Denmark: The «opt-in opt-out» under the Treaty of Amsterdam”, in O’KEEFFE, D./TWOMEY, P. (eds.): *Legal Issues of the Amsterdam Treaty*, Hart Publishing, Oxford, 1999, pp. 289-302; LYONS, C.: “Flexibility and the European Court of Justice”, in DE BÚRCA, G./SCOTT, J. (eds.): *Constitutional change in the EU. From uniformity to flexibility?* Hart Publishing, Oxford, 2000, pp. 95-112, at pp. 97-102; GSTÖHL, S.: “The European Union after Amsterdam: Towards a Theoretical Approach to (Differentiated) Integration”, in GREEN COWLES, M./SMITH, M. (eds.): *The State of the European Union. Risks, Reform, Resistance, and Revival*, Oxford University Press, vol. 5, 2000, pp. 42-62.

integration mechanisms with a constitutional scope.¹¹⁸ Although such mechanisms are legally and politically difficult to establish in the European Union, they are perfectly compatible with Article 30(4) of the Vienna Convention. In any event, whether we are dealing with constitutional or non-constitutional differentiated integration formulae, the legal consequence of failure to ratify the Constitutional Treaty cannot be loss of membership of the European Union.¹¹⁹

3. The ratification problems of the Constitutional Treaty: from opening the period of reflection to the search for a formula for the entry into force of the Constitutional Treaty

Not unexpectedly, the Constitutional Treaty adopted on 29 October 2004 has also been the victim of the rigidity of the revision procedure contained in Article 48 of the TEU. In fact, as soon as the ratification process was started in each Member State, given the risks that the requirement of unanimous ratification entailed¹²⁰ an interesting — although legally somewhat unorthodox¹²¹ — academic debate began about possible alternatives in the event that problems arose in ratifying the Treaty in the Member

¹¹⁸ Although the possibility of establishing a system that would allow different levels of integration according to each Member State's desire would appear politically reasonable, the problem is more of a technical nature, since it is very complicated to give legal form to a system such as the one proposed for the scope of the primary law in question. With respect to the need to adopt such measures, see LAMOUREUX, F.: "Projet de Constitution: de la nécessité d'organiser une 'arrière-garde'", *Revue du Droit de l'Union européenne*, no. 4, 2003, pp. 8007-811. Another in favor of this option is the Belgian Prime Minister Guy Verhofstadt, for whom "Europe would comprise two concentric circles: a political core that is a 'United States of Europe' and surrounding it a confederation of countries or an 'Organization of European States'", in VERHOFSTADT, G.: "Crisis-busting I: Only a new 'political core' can drive Europe forward again", *Europe's World, Summer*, 2006.

¹¹⁹ LOUIS, J.-V. : "L'Etat de l'Union", *Cahiers de Droit Européen*, no. 3-4, 2004, pp. 291-296, at p. 293.

¹²⁰ ALDECOA LUZARRAGA, F.: "El proceso constituyente ¿'víctima' del proceso de ratificación?", *Revista General de Derecho Europeo*, no. 7, May 2005 (www.iustel.com); CLOSA, C.: "La ratificación de la Constitución de la UE: un campo de minas", *Real Instituto Elcano de Estudios Internacionales y Estratégicos* (<http://www.realinstitutoelcano.org>); VEDRINE, M.H.: "La Constitution et sa ratification", *RMCUE*, no. 482, 2004, pp. 557-558.

¹²¹ DE WITTE, B.: "Entrée en vigueur et révision du Traité constitutionnel", in SERRA ROSSI, L.: *Vers une nouvelle architecture de l'Union européenne. Le projet de Traité Constitution*, Bruylant, Brussels, 2004, pp. 77-98, at p. 80.

States.¹²² The debate, which was initiated by Ferdinando Riccardi in the editorial of the *Bulletin Quotidien Europe*,¹²³ has continued after the negative results of the two referenda held in the Netherlands and France.¹²⁴ The debate, which initially focused on analyzing the causes of this serious crisis,¹²⁵ has evolved more recently towards focusing on the presentation of studies¹²⁶ and political proposals aimed at finding solutions to rescue the Constitutional Treaty.¹²⁷ In this regard, there are essentially two options to be considered if we recognize that the entry into force of the Constitutional

¹²² See AREILZA CARVAJAL, J.M.: “Qué hacer si gana el ‘No’?. Tres escenarios para dos ‘Noes’”, *Real Instituto Elcano*, ARI, no. 69, 2005, (www.realinstitutoelcano.org); DE WITTE, B.: “The Process of Ratification of the Constitutional Treaty and the Crisis Options: A Legal Perspective”, *EUI Working Paper Law*, no. 16, 2004 (www.IUE.it); LAMOUREUX, F.: “Projet de Constitution: de la nécessité d’organiser une ‘arrière-garde’”, *Revue du Droit de l’Union européenne*, no. 4, 2003, pp. 8007-811; ROSSI, L.S.: “En Case de Non-Ratification... (le destin périlleux du ‘Traité-Constitution’)”, *Revue Trimestrielle de Droit Européen*, no. 4, 2004, pp. 621-637; by the same author “What if the Constitutional Treaty is not ratified?”, *European Policy Centre*, 30.06.2004 (www.theepc.net); SHAW, J.: “What Happens if The Constitutional Treaty is not ratified?”, in *The Treaty on a Constitution for Europe: perspectives after the IGC*, Symposium of the European Constitutional Law Network at Charles University in Prague, 23-24 September 2004, (www.ecln.net/elements/cionferences/prague).

¹²³ No. 8329, of 28-29 October 2002, pp. 3-4, at p. 4.

¹²⁴ The European Council meeting in Brussels in June 2005 in order to assess the results of the said referenda decided to start a period of reflection (See European Council *Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe*, Brussels, 18 June 2005 (SN 117/05, 2005)). The European Commission’s response to this was published on 13 October 2005 and entitled Plan D. *Democracy, Dialogue and Debate*. The Plan of action to improve communication concerning Europe was based on three principles: *listen* to citizens in order to take into account their opinions, *communicate* to citizens the way in which the policies adopted by the Union improve their lives, and *connect* with citizens, through whatever channels for transferring information that citizens prefer, as well as the language that they understand. The European Commission presented its conclusions on the process in Spring 2006 in the document entitled *The Period of reflection and Plan D*, COM (2006), 212 final of 10 May 2006.

¹²⁵ See, inter alia, ANDRÉS SAÉNZ DE SANTAMARÍA, P.: “El largo camino hacia la Constitución Europea: el mejor Plan B es cumplir los compromisos adquiridos”, *Revista General de Derecho Europeo*, no. 10, May 2006 (www.iustel.com); GARCÍA-VALDECASAS, I.: “El rechazo al proyecto de Constitución Europea: un análisis retrospectivo”, *Real Instituto Elcano*, ARI, no. 104, 2005 (www.realinstitutoelcano.org); RICHARD-NIHOUL, G.: “El ‘no’ francés del 29 de mayo de 2005: comprender, actuar”, *Real Instituto Elcano*, ARI no. 150/2005 (www.realinstitutoelcano.org); RUBIO PLO, A.: “Crisis en la UE: ¿la ‘pequeña Europa’ frente a la ‘gran Europa’?”, *Real Instituto Elcano*, ARI, no. 104, 2005 (www.realinstitutoelcano.org).

¹²⁶ DUFF, A.: “Plan B: How to Rescue the European Constitution”, *Notre Europe. Etudes et Recherches*, no. 52, October 2006; KURPAS, S.: “¿Qué aspectos de la Constitución Europea podrían salvarse si fracasa la ratificación?. Los problemas del ‘Plan B’”, *Real Instituto Elcano*, ARI, no. 26, 2005 (www.realinstitutoelcano.org).

¹²⁷ This covers the political proposal presented by Nicolas Sarkozy, as well as the proposal on which we imagine that the German Presidency is working, whose route map will be presented to the European Council in June 2007.

Treaty is currently unviable both from a political and legal point of view.¹²⁸ The first option consists in rescuing the new features of the current Constitutional Treaty which make it possible to address successfully the changes that are necessary to enable the European Union to function correctly. The second option effectively involves doing the reverse, namely eliminating from the Constitutional Treaty those aspects that obstruct the achievement of the unanimous agreement of the Member States. As can be seen, the first option is politically less ambitious, although perhaps for this reason more realistic. The second option, more in tune with the Constitutional Treaty, is more difficult to put into practice, not only as regards the process of identifying those parts of the Treaty that should be eliminated, but also determining the basis on which the Treaty would have to be ratified once again in each Member State.

Within the scope of the first option noted above comes the proposal submitted by Nicolas Sarkozy on 8 September 2006.¹²⁹ The essence of the Sarkozy proposal is to rescue a mini-Treaty “to carry out the most urgent institutional reforms”.¹³⁰ This mini-Treaty “could be negotiated quickly, because essentially, it would involve re-using the provisions that required so much work within the European Convention and the IGC, without re-opening the political debates on which a compromise was found” and it would be subjected to parliamentary ratification by Member States so that it could come into force in 2009.

¹²⁸ This point was made by MANGAS MARTÍN, A. in “El rescate Constitucional: ¿qué y cómo se puede salvar?”, *Real Instituto Elcano*, ARI no. 17, 2007 (www.realinstitutoelcano.org).

¹²⁹ The proposal was made public in the speech given by Nicolas Sarkozy on 8 September 2006 to *the Friends of Europe Foundation and the Robert Schuman Foundation*.

¹³⁰ According to the Sarkozy proposal, “The mini-treaty should:

- include the stipulations about the extension of qualified majority voting and co-decision, particularly in judicial and penal matters (...)
- include the stipulations about the rules for qualified majority voting, particularly the double majority
- include the stipulations about sharing legislative power between the Parliament and the Council and about the election of the Commission President by the Parliament
- We need to verify compliance with the subsidiary principle (...)
- The question of a stable presidency of the European Council (...)
- Then there is the setting up of a role of European Union Foreign Minister (...)
- Two other series of measure achieved a genuine consensus: firstly, all the measures concerning participatory democracy within the Union, and in particular the citizens’ right of initiative (...). Then there are the measures to enshrine enhanced cooperation.
- Finally, the idea of giving the Union its own legal personality (...)

In our opinion, the Sarkozy proposal substantially lowers the expectations of the Constitutional Treaty; it is not an ambitious solution from the point of view of European politics and even goes as far as to accept the failure of the Constitutional Treaty, to the point that in the short term it is considered to be beyond repair. However, it is a pragmatic proposal that could provide the transitional phase needed to resolve the current crisis and offer, in the medium term, a viable political and legal proposal that makes it possible to readdress the preparation of a single framework Treaty for Europe.¹³¹ We reach this conclusion on the basis of the points set out in the following paragraphs.

First, it seems reasonable to think that the Constitutional Treaty cannot enter into force in the same form as the text approved on 29 October 2004. Calling a new referendum on the same Treaty in France and the Netherlands would be very complicated, both legally and politically. Moreover, the difficulties that the current Treaty is likely to encounter during ratification in Member States like Poland, the Czech Republic and the United Kingdom are well known.

Secondly, while admitting the impossibility of ‘rescuing’ the Constitutional Treaty, there is, however, a general consensus of opinion among the Member States of the European Union that there is a need to make the necessary institutional changes to allow the Union of twenty-seven Member States to continue functioning in an effective manner. In this regard, it is appropriate to bear in mind that the institutional reform of the Treaty of Nice expires in November 2009.

Thirdly, in the current climate of crisis in the European integration process, it may be appropriate to offer a solution to the problems of the Constitutional Treaty which is introduced over time. Thus, the first phase - which could run between the European Council of June 2007 and the European Parliamentary elections of 2009 – would involve defining the terms of a reform which rescued those parts of the Constitutional Treaty that were vital for the functioning of the European Union and even those others which, without being essential, may be important to recover the confidence of citizens

¹³¹By contrast, opposition to this proposal has been voiced by Andrew DUFF, for whom “the mini-treaty idea represents dubious law, poor politics and bad tactics”, in DUFF, A.: “Operation Pandora”, in *Challenge Europe. Europe@50: back to the future*, European Policy Centre, February 2007, pp. 55-62, at p. 56.

in the European project. Thus, as well as changes to the institutions, it may be politically worthwhile assessing the convenience of giving legal force to the Charter of Fundamental Rights of the European Union as the legal expression of the European Union's commitment to its citizens¹³² and even consider incorporating the clause that allows the accession of the European Union to the Council of Europe. This reform, which would require the convening of an Intergovernmental Conference, could be established in a Protocol which would need to be ratified by all Member States in accordance with their constitutional requirements in order to enter into force.

Fourthly, having carried out the reform needed to guarantee the correct functioning of the European Union, in the second phase (after the European Parliament elections in 2009) an attempt could be made to carry out a wider reform that involved simplifying the legal instruments of the current European Union on similar terms to those contained in the Constitutional Treaty.¹³³ It is in this phase that it would be necessary to adopt a (new) framework Treaty with the majority of the reforms currently contained in the Constitutional Treaty. This would also be the moment to tackle definitively the reform of the system for the entry into force of the Treaties, so that some of the present provisions' defects became consigned to history. In fact, the difficulties that are being experienced by some Member States in their ratification processes merely confirms a constant trend in the recent reforms of the Treaties, a structural problem of the European Union.¹³⁴ If, in addition to the above, we take into account the maturity of the integration process, the number of States that make up the European Union and the different conceptions that the Member States themselves have of the European construction process, it seems reasonable to consider tackling the thorny issue of the entry into force of the future Treaty through a reinforced integration formula with a

¹³² About the significance of the European Citizen see WEILER, J.: *The Constitution of Europe*, pp. 329-332 and pp. 344-348.

¹³³ For Jean Luc DEHAENE, "the Union really needs a new basic treaty. The question is how to ensure that the contents of the treaty (the form is of secondary importance) preserve the essence of the draft Constitutional Treaty (there are some less essential points in it, particularly in the third part) in a way which will allow the newly-elected leaders in France and the Netherlands to ratify the new proposal (preferably without a referendum). It is to be hoped that the German Presidency will find a way out" DEHAENE, J.-L.: "Was the European Convention's work in vain?" in *Challenge Europe. Europe@50: back to the future*, European Policy Centre, February 2007, pp. 34-39, at p. 38.

¹³⁴ This was noted by DEHOUSSE, for whom "[t]he failure of the Constitution must be seen as a confirmation that we face a structural problem", in DEHOUSSE, R. "Can the European institutions still be reformed" in *op. cit. (Challenge Europe. ...)*, p. 65.

constitutional scope. This would enable those who wish to move more quickly in the integration process to do so.