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Robert Schuman Centre for Advanced Studies
Integrating Diversity in the European Union (InDivEU)

National Constitutional Obstacles to Differentiated Integration

Jan-Herman Reestman

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Integrating Diversity in the European Union (InDivEU) is a Horizon 2020 funded research project aimed at contributing concretely to the current debate on the 'Future of Europe' by assessing, developing and testing a range of models and scenarios for different levels of integration among EU member states. InDivEU begins from the assumption that managing heterogeneity and deep diversity is a continuous and growing challenge in the evolution of the EU and the dynamic of European integration.

The objective of InDivEU is to maximize the knowledge of Differentiated Integration (DI) on the basis of a theoretically robust conceptual foundations accompanied by an innovative and integrated analytical framework, and to provide Europe's policy makers with a knowledge hub on DI. InDivEU combines rigorous academic research with the capacity to translate research findings into policy design and advice.

InDivEU comprises a consortium of 14 partner institutions coordinated by the Robert Schuman Centre at the European University Institute, where the project is hosted by the European Governance and Politics Programme (EGPP). The scientific coordinators of InDivEU are Brigid Laffan (Robert Schuman Centre) and Frank Schimmelfennig (ETH Zürich).

For more information: <http://indiveu.eui.eu/>



**Integrating
Diversity in the
European Union**

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Abstract

It has become increasingly difficult to unite all member states behind policies that some of them consider desirable or necessary to further EU integration. Differentiated integration may be a solution for this, but also may complicate decision-making. This by raising national constitutional obstacles that have to be cleared in addition to those encountered in the 'ordinary' or at least the 'most obvious' decision-making procedure, which is, depending on the subject matter, decision-making by all member states inside the EU legal order, or the conclusion of an EU (Amendment) Treaty. There are only very few additional national constitutional obstacles to differentiated integration inside the EU legal order. As regards differentiated integration outside the EU legal order, via treaties, two categories should be distinguished. The first consists of treaties which regulate subject matter which could have been regulated in secondary EU law. If we compare the national process of treaty conclusion to the EU decision-making process, the additional national constitutional obstacles are manifold. They differ from one-member state to another and may range from approval by parliament or by referendum, via constitutional amendments, to ratification. The second subcategory consists of treaties which regulate subject matter for which no competence exists at the EU level. Instead of transferring the lacking competence to the EU by way of an EU (Amendment) Treaty, member states can opt for an ordinary treaty. If we compare the national constitutional obstacles faced by these to similar obstacles faced by EU (Amendment) Treaties, no additional national constitutional obstacles have been detected.

Keywords

EU internal differentiated integration; national rules conditioning EU enhanced cooperation; national phases of treaty conclusion; parliamentary approval of treaties; unicameralism, bicameralism and multi-cameralism; transfers of competences; treaty referendums; constitutional review of treaties; national constitutional amendment procedures; ratification of treaties; Schengen Treaties; Prüm Convention; Treaty on Stability Coordination and Governance in the Economic Monetary Union; Fiscal Compact; ESM Treaty; Agreement on a Unified Patent Court; Agreement on the Single Resolution Fund.

PART I: Introduction*

Differentiated EU integration of the variable geometry type would also perhaps have seen the light of day if the integration process had remained restricted to the founding member states, for it is noteworthy that Italy was originally not a party to the Schengen Agreements.¹ These Agreements are the first and most famous example of this type of differentiated integration, i.e. of ‘policies in which less than all of the member states participate in the decision-making, and where only the participating states are bound by those decisions’.² However, it goes without saying that enlargement has been an important catalyst for the development of this type of differentiated integration. With a growing number of member states of all sorts and conditions, with sometimes fundamentally different views on the EU’s development, it has become increasingly difficult to unite all member states behind policies that some of them consider desirable or necessary to further the integration process. In some instances, a coalition of the willing has decided to go ahead, to the detriment of regulatory unity, whether temporarily or more structurally; with or without the consent of the others; and sometimes within the framework of the EU Treaties and other times outside of it, by concluding ‘ordinary’ international agreements (hence ‘substitute EU treaties’). Also, other reasons than unbridgeable disagreements on the future of the EU integration have played a role in the establishment of differentiated integration. For instance, even if all member states had been willing to participate in it, at least some member states, for national democratic reasons, would still have preferred to establish a financial stability mechanism outside the EU framework in an ‘ordinary’ international agreement, as they did with the Treaty establishing the European Stability Mechanism (ESM Treaty).

This paper presents research on national constitutional obstacles to the various forms of internal differentiated integration, i.e. differentiated integration among member states. While differentiated integration may be a solution for a lack of consensus between member states, it also may complicate decision-making. This by imposing national constitutional obstacles that must be cleared in addition to those that have to be cleared in the ‘ordinary’ or at least the ‘most obvious’ decision-making procedure from which the establishment of differentiated integration deviates. That ‘ordinary’ or ‘most obvious’ decision-making procedure is, depending on the subject matter, decision-making by all member states inside the EU legal order, or the conclusion of an EU (Amendment) Treaty, outside that legal order.

Part two deals with differentiated integration inside the EU legal order, i.e. differentiated integration established by the Treaties themselves or established, on the basis of the Treaties, by secondary EU law. This is by far the simplest category, and it will only concern us briefly. The leading questions here are, first, whether there are national constitutional hurdles which governments have to clear before they can decide to participate in the establishment of a differentiated integration regime and, second, whether there are national constitutional rules or procedures which condition the voting behaviour of governments in established differentiation regimes.

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¹ Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany, and the French Republic on the gradual abolition of checks at their common borders (1985; Schengen Agreement); and the Convention Implementing the Schengen Agreement of 14 June 1985 (1990).

² Bruno de Witte, ‘The Law as Tool and Constraint of Differentiated Integration’, EUI Working Papers, RSCAS 2019/47, p. 3.

Part three deals with differentiated integration outside the EU legal order, via substitute EU treaties between member states. In fact, from an EU perspective, two categories of substitute EU treaties can be distinguished. The first consists of treaties which regulate subject matter which could have been regulated in secondary EU law, but which member states for one reason or another nevertheless have decided to regulate in a substitute EU treaty. Here, a plethora of additional national constitutional obstacles pops up, because although some member states have made some EU decision-making dependent on national (parliamentary) approval, this has actually happened relatively little, while treaties are *always* subject to national approval procedures, which may be more or less elaborate: treaties often have to be approved by parliaments, can be the subject of referendums, will have their constitutionality tested by courts and/or political institutions, can often only be accepted after prior constitutional amendment if they are considered incompatible with the constitution, and must be ratified or approved by national executive action. The second subcategory of treaties consists of treaties which regulate subject matter for which no competence exists at the EU level. Instead of transferring the lacking competence to the EU by way of an EU (Amendment) Treaty, member states can opt for a substitute EU treaty. The question here is whether the EU amendment treaties that confer competences on the EU are subject to the same national constitutional requirements as treaties which transfer competences to ordinary international organisations. Or are those requirements perhaps more stringent – for which there is something to be said, for example, because transfers of competences to the EU, whose acts may have direct effect in the national legal order and primacy even over national constitutional law, have a greater constitutional impact than transfers of competences to ordinary international organizations? Or are the national constitutional requirements perhaps less stringent than those for transfers to ordinary international organizations, for example, because those organisations lack the democratic and rule of law structure that characterizes the EU legal order? In short, the second part focuses on the usual constitutional suspects which one encounters in the national phases of treaty conclusion: parliaments, peoples, courts and, surprisingly perhaps, heads of state. The whole is concluded with a few concluding remarks.

A note on the terms used: according to some constitutions, at least in their English translations, parliaments are endowed with the competence to ‘ratify’ certain categories of treaties, for instance in Bulgaria, Croatia, Estonia, Lithuania, Romania, Slovakia and Slovenia.³ However, the actual filing of an instrument of ratification, i.e. the international act of a state by which it indicates on the international plane its consent to be bound by a treaty,⁴ is, in almost all of these states performed by the head of state, and sometimes by the government.⁵ What the parliaments actually do is approve the intention of the executive power to bind the state to the treaty and thereby, depending on national constitutional law, mandate, authorize or allow for the ratification of the treaty. In line with this, I therefore reserve the term ‘ratification’ for the acts of a state by which it expresses its consent to be bound by a treaty on the international plane, and the term ‘approval’ for the acts of parliament by which they approve treaties and mandate, approve or allow for their ratification.

³ Resp. Art. 85 (1) Bulgarian Const.; Art. 140 (1) Croatian Const.; Art. 121 Estonian Const.; Art. 75 (1) Romanian Const. Art. 153 (2) Slovenian Const.

⁴ Art. 2, sub b Vienna Convention on the Law of Treaties.

⁵ This seems to be different in Lithuania, where after the ‘ratification’ of treaties by act of parliament (Art. 67 (16) in conjunction with Art. 84 (2) and 138 Lithuanian Const.) on that basis ratification instruments must be drawn up; Art. 8 (3) Republic of Lithuania Law on Treaties.

Part II. National constitutional obstacles to differentiated integration inside the EU legal order

A. Varieties and manifestations

There are two varieties of differentiated integration inside the EU legal order: the first is established by the Treaties themselves and the second is established, on the basis of those Treaties, by secondary EU law.

Differentiated integration has been established by the EU Treaties themselves by integrating the Schengen acquis as a form of ‘closer cooperation’ between all member states except the United Kingdom,⁶ Denmark and Ireland,⁷ and by offering opt-outs from the euro to Denmark,⁸ to Denmark and Ireland in the AFSJ,⁹ and to Denmark as regards the elaboration and the implementation of Council measures with defence implications pursuant to Articles 26(1) and 42 to 46 TEU.¹⁰

The Treaties also offer frameworks for differentiated integration in other areas. They themselves have authorized the member states whose currency is the euro to practice differentiated integration to promote the proper functioning of the EMU (Article 136 TFEU). Several Regulations to combat the euro crisis issued in 2011 and 2013 are the fruits of this form of differentiated integration.¹¹

In addition, Articles 20 TEU and 326-334 TFEU offer a general framework for the establishment of differentiated integration (‘enhanced cooperation’), except for the area of exclusive competences, where differentiated integration is excluded, and for the common foreign and security policy (CFSP), for which a specific regime applies (*infra*). The establishment of differentiated integration on the basis of this general regime requires the approval of three EU institutions in the form of a decision of the Council, on the basis of a Commission proposal, and with the consent of the European Parliament.¹² In the areas of judicial cooperation in criminal matters, minimum rules on the definition of criminal offences and sanctions, police cooperation, and as regards the establishment of a Public Prosecutor’s Office, the authorization for the establishment of differentiated integration is deemed to be given if a Commission proposal does not obtain the required unanimity but a minimum of nine member states nevertheless wants to accept it.¹³ On the basis of the aforementioned provisions and their precursor, to date, several regimes of differentiated integration regimes have been established, relating to transnational divorces,¹⁴

⁶ For obvious reasons, I will leave out further references to the UK’s positions in differentiated integration regimes.

⁷ Protocol no. 19.

⁸ Protocol no. 16.

⁹ Protocols no. 21 and no. 22.

¹⁰ Protocol no 22.

¹¹ Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area; Regulation 1174/2011 on enforcement action to correct excessive macroeconomic imbalances in the euro area; Regulation 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member states in the euro area; Regulation 472/2013 on the strengthening of economic and budgetary surveillance of Member states in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

¹² Art. 20(2) TEU in conjunction with Article 329 (1) TFEU.

¹³ Respectively Art. 82 (3), 83 (3), 87 (3), 86 (1) TFEU.

¹⁴ Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, repealed by Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

EU patents,¹⁵ matrimonial & registered partnership property,¹⁶ and the establishment of the European Public Prosecutor's office.¹⁷

In the field of the CFSP, the Council may unanimously authorize differentiated integration after obtaining the opinion of the High Representative for Foreign Affairs and Security Policy and the Commission and informing the European Parliament.¹⁸ In addition, there is the 'Permanent Structured Cooperation' (PESCO),¹⁹ established by a unanimous Council decision, after consulting the aforementioned High Representative, on the basis of Articles 42(6) and 46 TFEU in combination with Protocol # 10.

B. Conditioning participation

It is common knowledge that member states have conditioned the voting behaviour of their government representatives in the Council via various scrutiny and mandating systems, which oblige them to take into 'due account' their national parliaments positions on draft-decisions.²⁰ In some member states, representatives' consent to specific draft decisions is even bound to prior approval of these drafts by their parliaments. All these various national conditions remain applicable when these member states participate in a differentiated integration regime inside the EU legal order. That implies, for instance,

¹⁵ Regulation (EU) no 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection.

¹⁶ Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes; and Regulation (EU) 2016/1104 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

¹⁷ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.

¹⁸ Article 329 (2) TEU.

¹⁹ Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member states.

²⁰ The obligations of governments vary in intensity. For instance, in Lithuania the government merely has to 'assess' these positions (Art. 3 Constitutional Act of the Republic of Lithuania on Membership of the Republic of Lithuania in the European Union), while in Slovakia they bind the government, unless deviation from them is 'unavoidable and necessary' and is done 'with due consideration for the interest of the Slovak Republic' (Art. 2 (4) and (5) Constitutional Act No. 397/2004 Coll.); it is more or less similar in Austria, where the government may not vote in favour of proposals if these have constitutional consequences and the houses are against it (Art. 23e, sub 3 and 4 Austrian Const.); in Denmark a mandating system exists, according to which representatives shall only vote for a proposal if the parliamentary European Affairs Committee is not against it, but it is not clear whether this is a merely political or an unwritten legal obligation (H. Krunke, 'Developments in National Parliaments – Involvement in Ordinary Foreign Policy and European Policy – Denmark', 13 EPL 2007, p. 335-348 (p. 340-1). See more generally on the national parliaments' positions, Claudia Heffler *et alia* (eds.), *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave 2015).

that draft decisions, which according to the Czech,²¹ German,²² Dutch²³ and Polish²⁴ acts of parliament, and according to the Irish Constitution,²⁵ require prior parliamentary approval, also require such approval if the relevant subject matter becomes part of a differentiated integration regime. Moreover, decisions taken under an established differentiating regime inside the EU legal order may be subject to *ultra vires* or constitutional identity review in those member states in which the constitutional or supreme courts claim the competence to do so.²⁶ The question is whether there are *additional* conditions that apply in the context of differentiated integration.²⁷ There are some, but not that many.

As regards differentiated integration established by the Treaties themselves, the participation of Ireland in the (development of) the Schengen acquis and the AFSJ requires prior approval of both houses of the *Oireachtas*.²⁸ In Denmark, the rescinding of the opt-outs on the basis of the various Protocols requires that the relevant parts of the Treaties be approved and ratified by Denmark.²⁹ As this implies a transfer of sovereign competences to an international organisation in the sense of Article 20 Danish Constitution, the required approval must be given by the *Folketing*, the Danish parliament, by a five-sixth majority of its members, or, if the bill is approved by a simple majority and the government maintains it, by referendum; in constitutional practice, a referendum is always held in the event of sovereignty transfers, even when the transfer has been approved by a five-sixth majority. History shows that Danish referendums are a formidable obstacle. In 2000, Danish voters rejected a proposal for Denmark's accession to the euro, and in 2015 the proposal to align Denmark's position in Justice and Home Affairs cooperation with that of the UK, i.e. to give it the possibility of 'opting-in' to specific policy decisions in that area. It should be noted that the consenting rights of the *Oireachtas*, the *Folketing*

²¹ Art. 109i Act on the Rules of procedure of Chamber of Deputies; it concerns *inter alia* the use of bridge clauses (Art. 31 (3) and 48 (7) TEU; Art. 81 (3); 153 (2), 192 (2), 312 (2) and 333 (1) and (2) TFEU); the simplified revision procedure (Art. 48 (6) TEU); the flexibility clause (Art. 352 TFEU). The list in Art. 119k of the Act on the rules of procedure of the Senate is shorter.

²² Art. 2-8 Integrationsverantwortungsgesetz; the list is long and concerns, *inter alia*, decisions on European defence (Art. 43 TEU); simplified treaty revisions under (Art. 48 (6) TEU); the use of bridge clauses (Art. 31 (3) and 48 (7) TEU; 81 (3) (2) TFEU), 153 (2) (4), 192 (2) (2), 312 (2) (2) and 333 (1) TFEU); international agreements which require unanimity (Art. 218 (8) (2) TFEU); decisions on the EU's own resources (Art. 311 (3) TFEU); the creation or strengthening of citizenship rights (Art. 25 (2) TFEU); uniform electoral rules for the EP (Art. 223 (1) TFEU); conferring jurisdiction on the ECJ on European intellectual property rights (Art. 262 TFEU); the extension of the competence to define minimum elements of criminal offences and sanctions (Art. 83 (1) TFEU); the introduction minimum requirements of criminal offences (Art. 83 (1) sub (2) TFEU); the powers of the EPPO under (Art. 86 (4) TFEU); the use of the flexibility clause (Art. 352 TFEU).

²³ Art. 3 *Rijkswet houdende goedkeuring Verdrag van Lissabon*; it concerns decisions on passports and identity cards etc. (Art. 77 (3)); on EU family law (Art. 81 (3)); on operational police cooperation (Art. 87 (3)); and on the conditions and limitations under which police and justice authorities may operate on the territory of other member states (Art. 89 TFEU).

²⁴ Art. 14 and 15 Cooperation Act; it concerns, *inter alia*, decisions on the introduction QMV in the CFSP (Art. 31(3) TEU); on a common defence (Art. 42 (2) TEU); simplified treaty revisions (Art. 48 (7)); the adoption of QMV for the adoption of the multiannual financial framework (Art. 312 (2) (2) TFEU); the bridge clauses in Art. 81 (3), 153 (2) (4), 192 (2), 333 (1) and (2),

²⁵ Art. 29.4.8 Irish Const.; it concerns the use of the bridge clauses; decisions identifying aspects of criminal procedure and areas of crime which may become the subject of common minimum rules (Art. 82 (2) sub d; Art. 83 (1) (3)); the establishment and extension of powers of the EPPO (Art. 86 (1) and (4) TFEU).

²⁶ Among them at least the Czech Constitutional Court, the Danish Supreme Court, the French Constitutional Council, the German Federal Constitutional Court, the Hungarian Constitutional Court, the Polish Constitutional Tribunal, and the Spanish Constitutional Court.

²⁷ I leave aside here those decisions of the (European) Council which must be approved by the member states in accordance with their respective constitutional requirements; as they may best be compared to treaties, they will be dealt with in Part III. Here I merely mention that some member states, such as Germany and Poland, have beforehand decided that such decisions must be approved by their national parliament. In Ireland, the decision to establish a common defence ex Art. 42 TEU requires a constitutional amendment (Art. 29.4.9 Irish Const.).

²⁸ Art. 29.4.7 Irish Const.

²⁹ H. Krunke, 'From Maastricht to Edinburgh: The Danish solution', 1 *EuConst* 2005, p. 348.

and the Danish electorate do not function as an obstacle to *establishing* differentiated integration, but to *abolishing* it.

As regards differentiated integration on the basis of the Treaties, Ireland is the odd man out. It is the only state that requires prior approval by the *Oireachtas* of the government's intention to participate in differentiated integration under Article 20 TEU, and in the areas relating to the definition of criminal offences and sanctions and the establishment of the EPPO.³⁰

While the member states thus have generally refrained from imposing conditions on participation in differentiated integration, the Czech Republic, Germany, Ireland and Poland have imposed conditions on the use of Article 333 (1) and (2) TFEU. These provisions offer the unanimous Council the competence to decide to switch to respectively qualified majority voting in the Council and the applicability of the ordinary legislative procedure in established differentiated integration regimes. The Irish Constitution does not specifically refer to Article 333 TFEU but states, in general, that all 'decisions, regulations or other acts' that apply a bridge clause require the prior approval of both houses of the *Oireachtas*,³¹ so also the application of Article 333 TFEU under a differentiated integration regime in which Ireland participates. The legislation in the Czech Republic, Germany and Poland specifically refers to Article 333. In the Czech Republic the use of this bridge clause requires the consent of both the *Poslanecká sněmovna* and the *Senát*,³² in Germany that of the *Bundestag*, and when legislative competences of the German *Länder* are at stake, also that of the *Bundesrat*.³³ The Polish arrangement seems even more demanding, because the Polish government representative may only consent to the use the bridge clause on the basis of a decision by the President of the Republic on a proposal of the Council of Ministers, with consent granted by statute. That implies, in principle, that three state institutions – the *Sejm*, the Polish lower house, the Polish *Senat*, and the President – have to approve the government's proposal to allow use of the bridge clause.³⁴ The German and the Polish legislations instruct the German and Polish representatives in the Council *expressis verbis* to vote against a proposal to use the bridge clause in case the required prior national parliamentary approval is refused. They thereby exclude the possibility that a proposal is adopted because government representatives abstain from voting.³⁵ We may assume that under similar circumstances the same is required of Irish representatives in the Council. National prior approval is, therefore, a *sine qua non* of the application of the bridge-clauses in Article 333 TFEU in case Germany, Ireland and Poland participate in a differentiated integration regime – and there is thus far no instance in which Germany has not participated.

To conclude this subsection: Ireland has conditioned participation in differentiated integration regimes inside the EU legal order, and four member states have conditioned the use of the bridge clauses in Article 333 TFEU. However, these member states conditioned the use of other bridge clauses in the Treaties in the same way. So, the provisions conditioning the use of Article 333 should be regarded as the expression of a general rule that the use of bridge clauses is subject to national parliamentary approval, rather than as a specific national obstacle to differentiated integration.

³⁰ Art. 29.4.7, under (i), and 29.4.8, under (iii), Irish Const.; Art. 83 (1) (3) and Art. 86 (1) TFEU.

³¹ Art. 29.4.8, under (i) and (ii), Irish Const.

³² Art. 109i of the Act on the Rules of procedure of Chamber of Deputies; Art. 119k of the Act on the Rules of Procedure of the Senate.

³³ Art. 6 in conjunction with Art. 5 Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union (Integrationsverantwortungsgesetz - IntVG).

³⁴ Art. 15 of the Act of 8 October 2010 on the cooperation of the Council of Ministers with the Sejm and the Senat in matters relating to the Republic of Poland's membership of the European Union; However, the Senat may be overruled in the legislative procedure; Bogusław Banaszak, 'The Republic of Poland' in L. Besselink *et al* (eds.), *Constitutional Law of the EU Member States* (Kluwer, 2014), p. 1279.

³⁵ See Art. 238 (4) TFEU.

Part III. National Constitutional Obstacles to Differentiated Integration Outside the EU Legal Order

A. Categories and examples

The national obstacles to differentiated integration outside the EU legal order will occupy us much longer than those on differentiated integration inside it. It goes without saying that substitute EU treaties may not tread on the exclusive competences of the EU or otherwise conflict with primary or secondary EU law. The Court of Justice of the European Union (ECJ) may be called upon to review that as evidenced, for instance, by its Opinion 1/09 on the Draft agreement on the creation of a unified patent litigation system of 8 March 2011³⁶ and the *Pringle* decision on the ESM Treaty of 27 November 2012.³⁷

From a Union perspective, the substitute EU treaties can be divided into two categories. The first consists of treaties that regulate subject matter which belongs to the non-exclusive competences of the EU. This concerns scenarios in which several member states - rather than opt for enhanced cooperation under the Treaties,³⁸ for which the required conditions may be lacking³⁹ - decide to conclude a substitute EU Treaty. Examples are the Schengen Treaties and the Prüm Convention (also incorporated in the meantime into the EU legal order);⁴⁰ the Treaty on Stability, Coordination and Governance in the Economic Monetary Union (TSCG; Fiscal Compact); the ESM Treaty; and the Agreement on a Unified Patent Court.⁴¹ The second category consists of treaties that regulate subject matter in areas where the EU has no competence. Instead of opting for an EU (Amendment) Treaty to transfer the lacking competence to the Union, the member states opt for regulating the subject matter in a substitute EU treaty, as they did with the Agreement on the Single Resolution Fund.⁴²

From a member states' perspective, other kinds of categorisation impose themselves. A treaty may be susceptible to all kinds of national procedural steps before a state is bound by it. In this respect, the institutional diversity of the member states is enormous, and whether a specific national procedure must be followed is often linked to the subject matter of the treaty. For instance, in most member states only certain categories of treaties need to be approved by the national parliament, while others may be made binding on the state by executive action alone. Also, many member states have subjected certain

³⁶ ECLI:EU:C:2011:123.

³⁷ ECLI:EU:C:2012:756.

³⁸ Bruno de Witte, 'The Law as Tool and Constraint of Differentiated Integration', EUI Working Papers, RSCAS 2019/47, p. 8

³⁹ On the question whether the member states may bypass the possibility of establishing enhanced cooperation under the Treaties by concluding a substitute EU treaty if the latter is not a means of last instance, see Alberto Miglio, 'Differentiated integration and the principle of loyalty', 14 *EuConst* 2018, p. 475-498.

⁴⁰ The Prüm Treaty, officially the Convention on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, is partially integrated in the EU framework by Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, and Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime. Cp. Bruno De Witte and Thibault Martinelli, 'Treaties between EU Member states as Quasi-Instruments of EU Law', in Marise Cremona and Claire Kilpatrick (eds.), *EU Legal Acts – Challenges and Transformations* (OUP 2018), p. 157-188 (167).

⁴¹ This is a special case because Art. 262 TFEU envisages that the competences conferred on a Unified Patent Court by the Agreement be conferred on the ECJ by a Council decision that must be approved by the member states in accordance with their respective constitutional requirements.

⁴² The Agreement is part of the EU's Banking Union, together with Regulation 806/2014 on a single resolution mechanism. The Agreement limits itself to imposing the obligation on the member states to transfer the nationally collected contributions to the Fund, an obligation which, according to recital 7 of the Agreement, 'does not derive from the law of the Union'.

categories of treaties to higher voting thresholds in parliament, for instance treaties that establish international organizations, or transfer competences to such organisations, or more specifically, to the EU. Moreover, the ratification of treaties that are repugnant to the national constitution, whether established by a court or by political bodies, usually, but not always, requires a prior constitutional amendment. In addition, in many member states treaties may, and in certain circumstances must be submitted to referendums. Finally, there is the requirement of the ratification, acceptance, and approval of treaties, i.e. of giving notice on the international plane of the state's consent to be bound by a treaty. Generally, this is a competence of the head of state; in some member states it is a bound competence and in others a discretionary one.

In the following subsections, we will discuss all these different national steps – thematically rather than member state by member state - in an attempt to bring some order to the overwhelming variety.⁴³

B. Parliamentary approval required?

That all treaties have to be approved by the national parliament before they can be made binding on the contracting state is not a constitutional principle common to the member states, at least not if the number of member states that adhere to it is decisive. The requirement of parliamentary approval is a constitutional rule only in Belgium,⁴⁴ the Netherlands,⁴⁵ and Luxembourg.⁴⁶ It is certainly not a coincidence that these three member states adhere to the monistic view on the relationship between international and national law and have given supra-constitutional status to treaty law in the national hierarchy of norms.

All other member states observe a distinction between categories of treaties that require parliamentary approval before the executive may make them binding upon the state, and those that can be made binding by executive action alone.⁴⁷ The distinction is almost always made by enumerating the categories of treaties that require parliamentary approval, with the implication being that the conclusion of all other categories of treaty is the prerogative of the executive.⁴⁸ Substantively, this division is somehow always linked to the division of powers between the legislative and executive authorities under the national constitution. This is clearly reflected in constitutional provisions requiring that treaties

⁴³ For member state by member state accounts, see L. Besselink *et al* (eds.), *National Constitutional Avenues for further EU Integration*, Report for the European Parliament's Committees on Legal Affairs and on Constitutional Affairs, 2014; Dermot Hodson and Imelda Maher, *The Transformation of EU Treaty Making* (CUP, 2018).

⁴⁴ Art. 167 (1) and (2) Belgian Const.; Art. 8 and 9 of the Samenwerkingsakkoord tussen de federale overheid, de Gemeenschappen en de Gewesten over de nadere regelen voor het sluiten van gemengde verdragen [Cooperation Agreement between the Federal Government, the Communities and the Regions on further rules for the conclusion of mixed treaties].

⁴⁵ Art. 91 (1) Dutch Const.

⁴⁶ Art. 37 (1) Luxembourg Const.

⁴⁷ See Art. 50 (1) Austrian Const.; Art. 85 (1) Bulgarian Const.; Art. 140 (1) and (2) Croatian Const.; Article 169, para. 1 and 2, Cypriot Const.; Art. 19 Danish Const.; Art. 121 Estonian Const.; Art. 94 (1) Finnish Const.; Art. 53 French Const.; Art. 23 (1), 24 (1) & 59 (2) German Const.; Art. 36 (2) Greek Constitution; Article 1 (2) sub d Hungarian Constitution in conjunction with & Act L of 2005 on the Procedure relating to International Treaties (Nóra Chronowski, Márton Varju, Petra Bárd and Gábor Sulyok, 'Hungary: Constitutional (R)evolution or Regression?' in Anneli Albi and Samo Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Asser Press, 2020), p. 1479); Art. 29.5.2 Irish Const.; Art. 80 Italian Const.; Art. 68 (1) and (2) Latvian Const.; Art. 67 (16) in conjunction with Art. 138 Lithuanian Const.; Art. 3 Maltese Ratification of Treaties Act 1983; Art. 89 (1) Polish Const.; Art. 161 sub i Portuguese Const.; Art. 91 (1) Rom. Const.; Art. 7 in conjunction with Art. 86 (b) and (d) Slovakian Const.; Art. 153 Slovenian Const. in conjunction with Art. 75 Slovenian Foreign Affairs Act.; Art. 94 (1) Spanish Const.; Chapter 10, Art. 3, 6 and 7 Swedish Instrument of Government.

⁴⁸ This is different in Cyprus, where Art. 169 (1) Cypriot Const. enumerates the treaties which may be concluded by the Council of Ministers, while Art. 169 (2) states that all other treaties require approval by the House of Representatives.

pertaining to matters falling within the (legislative) competences of parliament,⁴⁹ or requiring changes to existing legislation, or implementation by legislation, or imposing obligations on the treasury,⁵⁰ must be approved by the parliament. Also, for instance, treaties that transfer competences to international organizations are often specifically made subject to parliamentary approval.⁵¹ In addition, in member states that adhere to the dualistic view on the relationship between treaty law and national law, parliamentary approval is sometimes – but not always –⁵² a condition for the treaty's effect in the national legal order,⁵³ or decisive for the status of the treaty in the national hierarchy of norms.⁵⁴ In some member states, all treaties that need to be ratified are subject to approval⁵⁵ – undoubtedly on the basis of the assumption that the most important treaties require ratification – or even more simply: all treaties that are ‘of major importance’.⁵⁶ This indeed seems to be the greatest common denominator of all these different national arrangements: that, generally, the most important treaties have to be approved (even though, in some member states, peace treaties,⁵⁷ arguably the most important treaties of all, are an exception).

With the exception of Cyprus, where the Fiscal Compact was approved by the Council of Ministers,⁵⁸ the substitute EU treaties thus far concluded have always been approved by the national parliaments of the participating member states, and the aforementioned criteria all provide – partially overlapping – explanations as to why. For instance, some of these treaties require national legislation for their implementation, including budget legislation, in those member states where the budget is set by act of parliament (the Schengen Treaties, the Prüm Convention, the Fiscal Compact, the Agreement on a Unified Patent Court, the Agreement on the Single Resolution Fund);⁵⁹ impose financial obligations on the treasury (the ESM Treaty, the Agreement on the Single Resolution Fund); are meant to have effect in the national legal orders (the Schengen Treaties, the Prüm Convention, the Fiscal Compact, the Unified Patent Court Agreement) or establish, at least according to some member states, an international organization (the Schengen Treaties, the Prüm Convention, the ESM treaty, the Agreement on a Unified Patent Court; see also *infra*, Part III.D).

The conclusion of this subsection must therefore be that future substitute EU treaties will, in general, require parliamentary approval and thus face an *additional* national constitutional obstacle that must be cleared in those cases where their content could also have been laid down in secondary EU law (except in those rare cases in which member states have already made decision-making on the relevant subject

⁴⁹ See Art. 140 (1) Croatian Const.; Art. 53 French Const.; Art. 89 (1) (5) Polish Const.; Art. 161 sub I Portuguese Const.; Art. 75 Slovenian Foreign Affairs Act (a contrario); Art. 94 (1) sub e Spanish Const.

⁵⁰ See Art. 85 (1)(4) and 85 (1) (7) Bulgarian Const.; Art. 29 (5) (2) Irish Const.; Art. 89 (1) (4) Polish Const.; Art. 94 (1) sub d, Spanish Const.

⁵¹ See for instance Art. 85 (1) (2) Bulgarian Const.; Art. 140 (2) Croatian Const.; Art. 10a jo Art. 39 (4) Czech Const.; Art. 138 (5) Lithuanian Const.; Art. 89 (1) (3) Polish Const.; Art. 161 sub i Portuguese Const.; Art. 86 (d) Slovak Const.

⁵² In for instance Austria (Konrad Lachmayer, ‘The Constitution of Austria in International Constitutional Networks: Pluralism, Dialogues and Diversity’, in Albi and Bardutzky (eds.), *supra*, n. 47, p. 1312-3) and Finland (Article 94 (1) Finnish Const.) treaties that are not subjected to parliamentary approval may become part of the national legal order by government decree.

⁵³ Art. 29 (5) (6) Irish Const.; Art. 28 (1) Greek Const.; Art. 138 (3) Lithuanian Const.; see also the Lithuanian Constitutional Court’s ruling of 17 October 1995 in case No. 8/95 (<https://www.lrkt.lt/en/court-acts/search/170/ta983/content>); Art. 3 Maltese Ratification of Treaties Act 1983; Art. 86 (d) Slovak Const.

⁵⁴ See Art. 123 (2) Estonian Const.: only treaties approved by parliament have supra-legislative status.

⁵⁵ Art. 85 (1) (8) Bulgarian Const.; Art. 121 (5) Estonian Const.

⁵⁶ Art. 19 Danish Const.

⁵⁷ See art. 36 Greek Const.

⁵⁸ The Fiscal Compact was classified as treaty on economic cooperation in the sense of Art. 169 (1) Cypriot Const., see *supra* n. 48.

⁵⁹ Formally: Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund, of 21 May 2014.

matter dependent on parliamentary consent; *supra*, Part II.B). As regards substitute EU treaties that regulate subject matter for which the EU has no competence, there are no additional obstacles, for we may assume that these too will – in general, if not always – require parliamentary approval.

C. Unicameralism, bicameralism and multi-cameralism

More than half of the member states has a unicameral parliament: Croatia, Cyprus, Denmark, Estonia, Finland, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Portugal, Slovakia, and Sweden. For the purposes of this research paper, Ireland and Slovenia can be added to that list. Although those states have bicameral systems, only their lower houses are involved in the approval of treaties, in Ireland the *Dáil Éireann*,⁶⁰ and in Slovenia the *Državni zbor Republike Slovenije*.⁶¹ If any generalisations can be permitted in that regard, the odds are great that treaties co-authored by the government will be approved in states with unicameral parliaments and a parliamentary system of government⁶² (unless, perhaps, in situations with minority governments, which are customary in Denmark). Even if there is no enthusiasm for a specific treaty in parliamentary circles, governments in such states can usually persuade the parliamentary majority to approve it, if necessary by jeopardizing their very existence by threatening to resign in the event of non-approval. In Slovakia, a variation on this theme occurred in 2011 when the *Národná rada Slovenskej republiky* had to approve a bill on the European Financial Security Facility (EFSF), a private law precursor of the ESM Treaty; a deal was struck by which parliament would approve the Facility in exchange for the adoption of a motion of no-confidence, which led to the Radičová-government's resignation and new elections.⁶³

Approval can be less self-evident in states with a bicameral parliament. Upper houses (senates) are usually elected on the basis of different electoral systems than the lower houses, often have a different kind of democratic legitimacy, and are part of the national system of checks and balances, not only in relation to the governments but also in relation to the lower houses – actually, their *raison d'être* is the fact that they can hold views on a given issue that differ from those of the lower houses. Senates also often have a different relationship with governments than do lower houses: they are often not directly involved in the process of government formation and most often cannot send governments home with a vote of no confidence. The other side of the coin is that senates are less prone to pressure from governments. In short, it is not self-evident that senates will approve bills or treaties that have been approved by the lower house.

In some member states - for example, France and Poland - the consent of the upper house can be dispensed with if need be because treaties that require parliamentary approval need to be approved by act of parliament, and a potential veto by the upper house can, ultimately, be overcome in the legislative procedure. In contrast, in other member states (Italy, the Netherlands, and Romania), every treaty that requires parliamentary approval requires the approval of both houses of parliament. The consent of the senate can also not be dispensed with in the many member states that require qualified majorities in both houses for certain categories of treaty, for instance treaties that transfer competences to international organisations or to the EU. In all these member states, therefore, an additional national hurdle must be cleared, which can be especially difficult if the opposition holds a majority in the senate. In the Netherlands, for example, where the opposition currently has a majority in de *Eerste Kamer*, the Dutch

⁶⁰ Art. 29.5.2 Irish Const.

⁶¹ Art. 97 in conjunction with Art. 153 Slovenian Const.

⁶² The Cypriot system of government is according to Art. 1 Const. presidential, but in reality functions more or less as the French system, with very powerful president and a Council of Ministers accountable to parliament; cp. Alecos Markides, 'The Republic of Cyprus' in Besselink *et alia* (eds.), *supra* n. 34, p. 277 ff.

⁶³ Matúš Halás, 'The Eurozone crisis and fall of the Slovak government: A rationalistic explanation'.

senate, it is still unclear at the moment of writing whether that body will agree to the Comprehensive Economic and Trade Agreement between Canada and the EU and its member states (CETA).⁶⁴

Belgium, a federal state, is a special case. There, state competences are divided among three highest levels of government: the federation, the Communities, and the Regions, which each have their own governments and parliaments. As to treaty-making, the *foro interno-foro externo* principle applies: the subject matter of a treaty decides which of these parliaments must approve it. If a treaty touches on the competences of more than one level of government, thus making it a mixed treaty in Belgian constitutional law terms, the parliaments of all involved levels must approve it.⁶⁵ This means that not less than six parliaments have to approve a treaty which touches on the competences of all three levels of government: the House of Representatives (the Belgian lower house), the Flemish Parliament (into which the parliaments of the Flemish Community and the Flemish Region have merged), the Parliament of the French Community, the Parliament of the German-speaking Community, the Parliament of the Walloon Region and that of the Brussels-Capital Region. Therefore, in the event of mixed agreements under Belgian constitutional law, such as the EU (Amendment) Treaties and CETA (which is also a mixed treaty under EU law), the obstacles for treaty conclusion multiply. For instance, the Convention for the Protection of National Minorities and Protocol No 12 ECHR could not be ratified by Belgium due to a lack of consent from the Flemish parliament.⁶⁶ However, Belgium has thus far ratified all substitute EU treaties. Of these, only the Fiscal Compact required approval by all Belgian parliaments, the others only required the approval by the Belgian lower house.⁶⁷

D. Treaty-Approving Procedures; Ordinary and Qualified Majorities; Transfer Treaties

In a slew of member states, all treaties, or at least all treaties that require parliamentary approval, are put in the same box: there is only *one* procedure for approving treaties. This is the case in Belgium, Cyprus, France, Ireland, Italy, Malta, the Netherlands, and Portugal. In consequence, all treaties, at least those that are not repugnant to the constitution, can be approved by parliament by the majority required for ordinary parliamentary decision-making.⁶⁸ Estonia and Lithuania should also be placed on this list. In those member states, all treaties which require parliamentary approval may be approved by simple majority by, respectively, the *Riigikogu* and the *Seimas*, except for treaties that modify national borders. That category of treaties requires respectively a two-thirds and a four-fifths majority,⁶⁹ but is not relevant for the purposes of this research paper.

However, all other member states draw distinctions between categories of treaties that are highly relevant in the context of differentiated integration, by requiring qualified majorities for treaties that transfer competences (hence ‘transfer treaties’). Some of these states require qualified majorities for transfers to international organisations, without distinguishing between ordinary international organisations and the EU, while others distinguish between transfers to ordinary international organisations and transfers to the EU, but only require qualified majorities for the latter category of treaties.

⁶⁴ See *Kamerstukken* (Parliamentary Papers), 35155.

⁶⁵ Art. 167 (1) and (2) Belgian Const.

⁶⁶ Patricia Popelier and Catherine Van de Heyning, *The Belgian Constitution: The Efficacy Approach to European and Global Governance*, in Albi and Bardutzky (eds.), *supra* n. 47, p. 1264.

⁶⁷ Before the constitutional amendment of 2014, both houses of the national parliament had to approve treaties. Treaties approved before that date, among them the ESM Treaty and the Agreement on a Unified Patent Court, were consequently also approved by the *Senaat*.

⁶⁸ Art. 53 Belgian Const.; Art. 78 (1) Cypriot Const.; Art. 73 Estonian Const.; Art. 68 (1) *Règlement de l'Assemblée nationale* (France); Art. 15.11.1 Irish Const.; Art. 71 Maltese Const; Art. 67(2) Dutch Const; Art. 64 (2) Italian Const.; Art. 116 (3) Portuguese Const.

⁶⁹ See respectively Art. 73 and 122(2) Estonian Const.; Art. 10 and Art. 67 (16) in conjunction with 69 (2) Lithuanian Const.

Croatia, the Czech Republic, Denmark, Greece, Latvia,⁷⁰ Luxembourg, Poland, Slovenia, and Spain require qualified majorities for the approval of transfer treaties to international organisations, without distinguishing them from EU transfer treaties.⁷¹ Finland and Sweden may also be put in this league. They do make the distinction, but without attaching legal effects to it that are relevant in the current context. In Austria, Bulgaria, Germany, Hungary, Romania, and Slovakia, the voting requirements for EU transfer treaties are more strict than those for ordinary treaties, including treaties that transfer competences to ordinary international organisations.⁷² As to the majorities required, Spain requires that transfer treaties be approved by an absolute majority of members of the *Congreso de los Diputados*,⁷³ while ordinarily a simple majority suffices.⁷⁴ In the Czech Republic, Greece, Romania, and Slovakia, a three-fifths majority is required,⁷⁵ and in Austria, Bulgaria, Croatia, Germany, Finland, Luxembourg, Poland, Latvia, Romania, and Slovenia, a two-thirds majority,⁷⁶ while Sweden requires a three-fourths majority⁷⁷ and Denmark even a five-sixths majority.⁷⁸ In some member states, the qualified majorities required are the same as those required for a constitutional amendment, while in others the requirements for a constitutional amendment are more stringent (*infra*, subsection III.I).

It is evident that the national constitutional hurdle that must be cleared becomes higher if a transfer treaty must be approved by a qualified majority. This makes the question whether a treaty qualifies as such a treaty relevant in practical terms, especially of course if the relevant treaty is controversial and the parliamentary majority in favour thereof slim. In the rest of this subsection, we address the question of how those member states apply the relevant provisions on the basis of the history of the approval of EU substitute treaties, without making a distinction between states that require qualified majorities for all transfer treaties as opposed to only EU transfer treaties. In the next subsection, we will address the issue of which criteria are used to determine whether a substitute EU treaty should be equated with an EU transfer treaty or with an ‘ordinary’ transfer treaty.

All substitute EU treaties concluded thus far are prone to be qualified as transfer treaties: the Schengen Treaties and the Prüm Convention established Committees of Ministers empowered to take

⁷⁰ With the gloss that ‘(s)ubstantial changes in the terms regarding the membership of Latvia in the European Union shall be decided by a national referendum if such referendum is requested by at least one-half of the members of the Saeima’; Art. 68 (4) Latvian Const.

⁷¹ I leave aside accession treaties.

⁷² With the gloss that in Germany qualified majorities are only required for EU (Amendment) Treaties and ‘comparable regulations that amend or supplement this Basic Law’, see the next subsection.

⁷³ Art. 93 in conjunction with 81 (2) Spanish Const.

⁷⁴ Art. 74 (2) Spanish Const.

⁷⁵ Art. 10a in conjunction with Art 39 (4) Czech Const.; Art. 28 (2) Greek Const.; Art. 7 (2) in conjunction with Art. 84 (4) Slovakian Const. As regards Greece, it may be noted that in the dominant scholarly view Greece’s accession to the EU took place on the basis of the aforementioned provision in combination with Art. 28 (3), which allows for limitations on the exercise of national sovereignty on the basis of a law adopted by an absolute majority of the total number of MP’s, on the conditions that this is dictated by an important national interest, does not infringe upon the rights of man and the foundations of democratic government, and is effected on the basis of the principles of equality and reciprocity.

⁷⁶ Art. 50 (1) (2) in conjunction with Art. 50 (4) Austrian Const.; Art. 85 (1) sub 9 in conjunction with Art. 85(2) Bulgarian Const.; Art. 140 (2) Croatian Const.; Art. 23 (1) (3) in conjunction with Art, 79 (2) and (3) German Const.; Art. 94 (2), second sentence, Finnish Const.; Art. 49bis in conjunction with Art. 37 (2) and. 114 (2) Luxembourgish Const.; Art. 68 (2) Latvian Const.; Art. 90 (2) Polish Const.; Art. 148 (3) in conjunction with Art. 148 (1) Romanian Const.; Art. 3a Slovenian Const.

⁷⁷ In fact, the Swedish Instrument of Government distinguishes three kinds of transfers: transfers of ‘decision-making authority to the EU’, ‘transfers of decision-making authority which is directly based on the present Instrument of Government’ to an international organisation, and transfers of ‘(a)ny judicial or administrative function not directly based on this Instrument of Government’ to an international organisation, see Chapter 10, Article 6, 7 and 8. All require the same qualified majority.

⁷⁸ Art. 20 Danish Const.; see also *supra*, Part II.B.

certain executive decisions;⁷⁹ the ESM Treaty has a Board of Governors that takes decisions on dispensing financial aid;⁸⁰ and the Agreement on a Unified Patent Court establishes a supranational court with the exclusive competence to adjudicate disputes involving European patents.⁸¹ Even the Fiscal Compact and the Agreement on the Single Resolution Fund can be considered transfer treaties, at least if one accepts the notion that treaties that transfer competences to international entities qualify as such,⁸² given that those treaties attribute competences to EU institutions.⁸³

Before we go into the approval history of those treaties, three remarks are in order. The first is that I have limited my research to those treaties that have seen the light of day in the past decade: the ESM Treaty, the Fiscal Compact, the Agreement on a Unified Patent Court, and the Agreement on the Single Resolution Fund. The second remark concerns the research method. My points of departure for the first three treaties mentioned were the Wikipedia pages dedicated to them. Those websites also give information on parliamentary approval procedures and sometimes refer to official documents. Whenever I was unable to obtain independent confirmation of the information provided by the Wikipedia pages in official databases or literature, I contacted scholars in the respective member states. If I was unable to find any independent source of information, this is stated in a footnote. For the Agreement on the Single Resolution Fund, there is no Wikipedia page. As regards that treaty, I therefore had to rely on the other sources mentioned. The third remark is that, for the sake of readability, I have left out all the details of the qualified majorities required, for instance, whether a qualified majority is required of all statutory members or merely of those members present or voting, etc., although it may be clear that – in the example given – the threshold becomes higher if, for instance, the consent of a qualified majority of all statutory members is needed.

If we now look at the parliamentary approval history of the four most recent substitute EU treaties in the member states that have ratified them, the first thing one notices is that in all member states that have ratified the Agreement on the Single Resolution Fund and which demand qualified majorities for the approval of transfer treaties, ordinary majorities have so far sufficed, i.e. Austria, Finland,⁸⁴ Germany,⁸⁵ Greece,⁸⁶ Luxembourg,⁸⁷ Latvia, Romania,⁸⁸ Slovakia, Slovenia, and Spain.⁸⁹ In other words, in all these states the Agreement did not qualify as a transfer treaty.⁹⁰

⁷⁹ Art. 131 Convention implementing the Schengen Agreement of 14 June 1985 (1990); Art. 43 Prüm Convention.

⁸⁰ Art. 13 ff. ESM Treaty.

⁸¹ Art. 32 Agreement Unified Patent Court.

⁸² See for instance Art. 34 Belgian Const., Art. 49bis Luxembourg Const.

⁸³ See, among others, Art. 5 and 8 Fiscal Compact; Art. 14 Single Resolution Board Agreement.

⁸⁴ See for the required majority the opinion of the Constitutional Law Committee, PeVL 35/2014 vp. https://www.eduskunta.fi/FI/vaski/Lausunto/Documents/pevl_35+2014.pdf (visited 8 December 2020).

⁸⁵ See however the next subsection.

⁸⁶ Approved by Law no. 4350/2015.

⁸⁷ Approved by Loi du 18 décembre 2015 portant approbation de l'Accord concernant le transfert et la mutualisation des contributions au Fonds de résolution unique.

⁸⁸ Not confirmed.

⁸⁹ See https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-13769 (visited 8 December 2020).

⁹⁰ As regards Denmark, it is the Danish Government's position that if 'we end up recommending that Denmark should participate in the Banking Union, a referendum on the issue should be held'. Statement of the Danish minister for Industry, Business and Financial Affairs <https://eng.em.dk/news/2019/december/report-from-the-working-group-on-possible-danish-participation-in-the-banking-union/> (visited 8 December 2020).

As to the ESM Treaty, this was not considered a transfer treaty in Austria, Finland, Greece, Latvia, Slovenia, Slovakia,⁹¹ and Spain,⁹² but it did require qualified majorities in Germany⁹³ and Luxembourg. This means that in two of the 19 member states that are party to the ESM-Treaty, a higher parliamentary threshold had to be cleared than is necessary for an ordinary treaty.

Similarly, the Fiscal Compact was approved by ordinary majorities in Austria, Bulgaria,⁹⁴ Croatia,⁹⁵ Denmark, Finland,⁹⁶ Greece, Romania, Slovenia, Slovakia, Poland⁹⁷, and Sweden, but had to be approved by qualified majorities in the Czech Republic, Germany,⁹⁸ Hungary, Latvia, Luxembourg, and Spain.⁹⁹ I add, for the sake of completeness, that in Ireland a constitutional amendment was required. In consequence, in at least seven of the by now 27 member states that have bound themselves to the Fiscal Compact the approval of that treaty was more difficult than that of an ordinary treaty.

The approval of the Agreement on a Unified Patent Court paints a similar picture in terms of diverging qualifications. In Finland, the transfer of competences to the Court was considered to be so limited in scope and so insignificant to Finland's sovereignty that according to the Constitutional Law Committee of the Finnish Parliament, an ordinary majority sufficed to approve the Agreement,¹⁰⁰ as was also the case in Austria, Bulgaria,¹⁰¹ Slovenia and Spain, while in Latvia and Sweden¹⁰² the Agreement qualified as a transfer treaty (in Luxembourg, the situation is not clear).¹⁰³ For the same reason, in Denmark a referendum had to be held on the Agreement. On 24 May 2014, also the day of EP elections, the Danish electorate approved it. Again, for the sake of completeness, I add that in Hungary and Ireland a constitutional amendment is needed before it can be approved, and in Germany the adoption of the approval act by the same majorities as required for a constitutional amendment (see *infra*, subsection III

⁹¹ Contrary to what the Wikipedia site on the ESM Treaty states, the approval of that Treaty in Slovakia did not require a three-fifths majority. The Treaty was qualified as a treaty within the meaning of Art 7 (4) Slovak Const., and could therefore be approved by the *Národná rada Slovenskej republiky* by an (absolute) majority of all members (Art. 86 (d) in conjunction with Art. 84 Slovak Const.); see the explanatory memorandum (*Predkladacia správa*), <https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=366552> (visited 9 February 2021); Tomas Dumbrosky, *Constitutional Change Through Euro Crisis Law: Slovakia* (<https://eurocrisislaw.eu.eu/wp-content/uploads/sites/55/2019/05/Slovakia.pdf>; visited 9 February 2021), para. VIII.2.

⁹² See the Instrument of Ratification, *Boletín oficial del estado* of 4 October 2012, p. 70375.

⁹³ However, on the qualification of the ESM-Treaty in Germany, see also the next subsection.

⁹⁴ Mihail Vatsov, *Constitutional Change Through Euro Crisis Law: Bulgaria* (<https://eurocrisislaw.eu.eu/wp-content/uploads/sites/55/2019/05/Bulgaria.pdf>; visited 9 February 2021), para. IX.2 and IX.3.

⁹⁵ See the explanatory memorandum to the approval bill, <https://www.sabor.hr/sites/default/files/uploads/sabor/2019-01-18/081332/PZ_261.pdf>

⁹⁶ See the opinion of the Constitutional Law Committee, PeVL 37/2012 vp: <https://www.eduskunta.fi/FI/Vaski/sivut/trip.aspx?tritype=ValtiopaivaAsiakirjat&docid=pevl+37/2012> (visited 8 December 2020)

⁹⁷ Cp. Stanisław Biernat and Monika Kawczyńska, 'The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context', in Albi and Bardutzky (eds.), *supra* n. 47, p. 774.

⁹⁸ However, on the qualification of the Fiscal Compact in Germany, see also the next subsection.

⁹⁹ See the Instrument of Ratification, *Boletín oficial del estado* of 2 February 2013, p. 9078.

¹⁰⁰ See the report of the Constitutional Law Committee of the Finnish Parliament, PeVL 8/2015 vp, https://www.eduskunta.fi/FI/vaski/Lausunto/Sivut/PeVL_8+2015.aspx (visited 8 December 2020).

¹⁰¹ Not confirmed.

¹⁰² In Sweden the Treaty was classified as a treaty transferring a 'judicial or administrative function not directly based on this Instrument of Government' in the sense of Chapter 10, Art. 8 Instrument of Government. It therefore had to be approved with a three-fourths majority.

¹⁰³ In Luxembourg, the treaty was approved by *Loi du 12 avril 2015 portant approbation de l'Accord relatif à une juridiction unifiée du brevet*. The act was adopted with 58 out of 60 votes, but it is not clear a whether a qualified majority was necessary. The Luxembourg Council of State in opinion on the bill did not mention any majority requirements. <https://conseil-etat.public.lu/content/dam/conseil_etat/fr/avis/2014/12/50_642/50642.pdf (visited 8 December 2020).

E). If we translate all these words into numbers, this means the following. Twenty-five member states have signed the Agreement, and to date 16 have ratified it, for which in at least two member states qualified parliamentary majorities were needed. Moreover, in four other member states it has become a clear that approval by ordinary majorities is not enough to become bound by the Agreement. So, all in all in at least in seven out of 19 member states a higher than ordinary threshold had, or has, to be cleared.

To conclude this subsection: only in three member states that operate a distinction between ordinary treaties and transfer treaties and that have ratified all four researched substitute EU treaties so far, all these could be approved by ordinary majorities: Austria, Finland, and Slovenia. In all the others at least one of those treaties required approval by a qualified majority. To a certain degree, this patchwork is the result of diverging qualifications in the relevant constitutional provisions of the receiving international organization (EU or other, see the next subsection), and to another degree undoubtedly of the various adjectives, and differences in the interpretations thereof, used in those constitutional provisions to qualify the competences whose transfer requires a qualified majority ('sovereign' competences; 'competences of state institutions', etc.).¹⁰⁴ Those terms and interpretations in turn probably reflect varying sovereignty conceptions and approaches to European integration, although that is certainly not always the case; it is noteworthy that in Luxembourg, undoubtedly one of most pro-integration and least sovereignty-prone member states, at least two of the four substitute EU treaties required qualified majorities. More comparative research would be required to say anything more definitive about this.

E. EU Transfer treaty?

As mentioned before, several member states have specific rules for the conclusion of EU (Amendment) Treaties. In Sweden, for instance, transfers of competences to the EU may be more extensive than those to ordinary international organisations.¹⁰⁵ In Ireland, 'acts done or measures adopted' by the state 'that are necessitated by the obligations of membership of the European Union' are constitutionally immune, according to Article 29.4.6 Irish Constitution. Among those acts are also EU (Amendment) Treaties, on the condition that they 'do not alter the essential scope or objectives' of the EU. This follows from the Crotty judgment of the Irish Supreme Court on the Single European Act (SEA) of 1986, which not only amended the EEC Treaty but also introduced closer cooperation between the member states in foreign affairs, outside the EEC framework. The upshot of *Crotty* was that the provisions of the SEA, which amended the EEC Treaty, did not require a constitutional amendment, because, in the words of Judge Finlay, the constitutional amendment accepted at the occasion of Ireland's accession to the EU also authorised 'the State to participate in and agree to amendments of the Treaties which are within the original scope and objectives of the Treaties'.¹⁰⁶ However, the provisions of the SEA establishing closer foreign affairs cooperation did not 'purport to constitute amendments of or additions to any of the Treaties establishing the Communities. Adherence to these provisions of the SEA by the State could not be an act necessitated by any obligation of membership by the State of the Communities'.¹⁰⁷ In keeping with this, the substitute EU treaties are not considered to have been necessitated by EU membership. To the extent that they transfer sovereignty, they therefore require(d) a constitutional amendment, as had the Fiscal Compact and the Agreement on a Unified Patent Court – but not the ESM Treaty.¹⁰⁸

¹⁰⁴ Art. 85 (1) (2) Bulgarian Const.; Art. 140 (2) Croatian Const.; Art. 10a jo Art. 39 (4) Czech Const.; Art. 138 (5) Lithuanian Const.; Art. 89 (1) (5) Polish Const.; Art. 86 (d) Slovak Const.

¹⁰⁵ Cp. the Article 6, 7 and 8 of Chapter 10, Instrument of Government; Joakim Nergelius, 'The Constitution of Sweden and European Influences: The Changing Balance Between Democratic and Judicial Power' in: Albi & Bardutzki (eds.), *supra* n. 47, p. 352-4.

¹⁰⁶ *Crotty v. An Taoiseach*, [1987] IR 713; https://www.cvce.eu/content/publication/2013/5/6/187e7d4f-aa3e-43da-a1e2-bb3fc41d2fbd/publishable_en.pdf, p. 3 (visited 8 December 2020).

¹⁰⁷ *Ibidem*, p. 6 .

¹⁰⁸ Supreme Court, *Pringle v Government of Ireland & ors* [2012] IESC 47.

Malta has a somewhat similar arrangement to Ireland. In that member state, parliamentary approval of EU (Amendment) Treaties is procedurally easier than for treaties regarding ‘the relationship of Malta with any multinational organization, agency, association or similar body’. The latter treaties have to be approved by Act of Parliament if they are to have internal effect.¹⁰⁹ However, for EU (Amendment) Treaties and their internal effect, it suffices that the House of Representatives, by resolution, approves an order of the Prime Minister declaring that ‘a treaty entered into by Malta after the 16th April 2003 (...) is to be regarded as one with’ the Accession Treaty of Malta and the EU.¹¹⁰ The Treaty of Lisbon was thus approved by the House of Representatives,¹¹¹ although none of the substitute EU treaties has been approved this way.¹¹²

By contrast, as we have already seen, the voting requirements for parliamentary approval of EU transfer treaties in Austria, Bulgaria, Germany, Hungary, Romania, and Slovakia are more demanding than those for ordinary treaties, including transfers of competences to ordinary international organisations. In Austria, a qualified majority is required for ‘Treaties that amend the EU’s Treaty foundations’,¹¹³ in Bulgaria for treaties that ‘confer to the European Union powers ensuing from this Constitution’,¹¹⁴ in Romania for ‘acts revising the founding treaties of the European Union’,¹¹⁵ and in Slovakia for treaties that ‘transfer the exercise of part of its rights to the European Communities and the European Union’.¹¹⁶ In all these member states, the prevailing interpretation of these provisions is in line with their wording: only treaties that, by their form, amend primary EU law are subjected to higher voting thresholds. In Austria, this was decided by the Austrian Constitutional Court (*Verfassungsgerichtshof*) in decisions on the ESM Treaty and the Fiscal Compact. In the decision on the ESM Treaty, it found that that the Treaty did not amend Article 125 TFEU and therefore did not qualify as an EU treaty in the sense of the Austrian Constitution. In the decision on the Fiscal Compact, it explicitly stated that Article 50 (1) (2) Austrian Constitution pertains only to primary EU law – and not to treaties ‘außerhalb des Unionsrechts’ [treaties outside EU law]. For that, it relied also on the fact that, at that time, not all EU member states were party to it.¹¹⁷

The interpretation of the relevant provisions in Germany and Hungary is also in line with their wording but has as a consequence that more than only EU (Amendment) Treaties fall under their scope. We begin with Hungary,¹¹⁸ where treaties through which Hungary exercises ‘some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union’¹¹⁹ have to be approved by a two-thirds majority of all members of parliament.¹²⁰ The

¹⁰⁹ Art. 3(1) in conjunction with 3(2) Maltese Ratification of Treaties Act 1982.

¹¹⁰ Art. 2(2) Maltese European Union Act 2003.

¹¹¹ See the so-called Treaty of Lisbon Order, 2008S.L. 460.20, Legal Notice 42 of 2008.

¹¹² Not confirmed.

¹¹³ Art. 50 (1) (2) in conjunction with Art. 50 (4) Austrian Const.: ‘Staatsverträgen, durch die die vertraglichen Grundlagen der Europäischen Union geändert werden’.

¹¹⁴ Art. 85 (1) sub 9 in conjunction with Art. 85 (2) Bulgarian Const.: ‘предоставят на Европейския съюз правомощия, произтичащи от тази Конституция.’

¹¹⁵ Art. 148 (3) in conjunction with Art. 148 (1) Romanian Const.: ‘actele de revizuire a tratatelor constitutive ale Uniunii Europene’.

¹¹⁶ Art. 7 (2) in conjunction with Art. 84 (4) Slovakian Const.: ‘takej zmluvy preniesť výkon časti svojich práv na Európske spoločenstvá a Európsku úniu’.

¹¹⁷ Verfassungsgerichtshof, Decision SV 1/2013-15 of 3 October 2013, para. III. B.5.5.1, points 85-6.

¹¹⁸ This paragraph is partially based on J.H. Reestman, ‘Legitimacy Through Adjudication: the ESM Treaty and the Fiscal Compact before the National Courts’, in T. Beukers, B. de Witte and C. Kilpatrick (eds.) *Constitutional Change through Euro-Crisis Law* (CUP 2017), p. 243-278.

¹¹⁹ Art. E (2) Hungarian Const.: ‘alaptörvényből eredő egyes hatásköreit a többi tagállammal közösen, az Európai Unió intézményei útján gyakorolhatja’

¹²⁰ Art. E (2) in conjunction with (4) Hungarian Const.

Hungarian Constitutional Court (*Magyarország Alkotmánybírósága*) held that any treaty that transfers competences specified in the Constitution, however minor, is an EU Treaty in the sense of the Hungarian Constitution on two conditions: that Hungary adheres to it as an EU member state, along with other member states, and that it leads to the exercise of the transferred competence by the member states jointly or by EU institutions.¹²¹ The Fiscal Compact fulfilled the aforementioned conditions: it was concluded by the contracting parties as member states of the EU, it interfered with budgetary competences of the Hungarian parliament under the Hungarian Constitution, and it bestowed competences upon EU institutions.¹²² By contrast, the Agreement on a Unified Patent Court did not qualify. Although it transfers competences specified in the Hungarian Constitution, these are not bestowed on EU institutions, nor will the transferred competences be exercised by the member states jointly. Therefore, the Agreement was not an EU treaty in the sense of the Hungarian Constitution.¹²³ As we will discuss later, the Hungarian parliament could still not approve the Agreement by an ordinary majority, given that the Court found that the Agreement was repugnant to the Constitution and its approval therefore requires a prior constitutional amendment. It should be noted that the required parliamentary majorities for a constitutional amendment are the same as for an EU transfer treaty (*infra*, Part III.I)

Now let us turn to Germany. Article 23 (1), second sentence, German Constitution provides that Germany by act of parliament adopted by the *Bundestag* with the consent of the *Bundesrat*, may transfer competences to promote the objectives referred to in the first sentence, i.e. the development of the EU and, more generally, the realization of a united Europe. The third sentence of the same provision, in conjunction with Article 79 (2), requires that changes to the EU treaty foundations and ‘comparable regulations that amend or supplement this Basic Law’¹²⁴ be approved by two-thirds of the members of the *Bundestag* and two-thirds of the votes in the *Bundesrat*. In its decision of 13 February 2020,¹²⁵ the German Federal Constitutional Court (*Bundesverfassungsgericht*), not only recognized the right of German citizens to enforce compliance with these procedural requirements,¹²⁶ but also issued general guidelines for their application.

Transfers of competences to international organizations other than the EU fall under the scope of Article 23 (1) if they ‘complement the EU Treaties or otherwise stand in a close relationship to EU integration law’, in other words when they have *Primärrechtsäquivalenz* and function as *Erzatsunionsrecht*, i.e. *de facto* equal primary EU law and functionally change or complement the EU Treaties. This must be decided on a case by case basis and in view of the overall circumstances, regulatory objectives, contents, and effects of the treaty. Indications that a transfer treaty has

¹²¹ Magyarország Alkotmánybírósága, Decision 22/2012, para. 50-1.

¹²² *Ibidem*, para. 55-56.

¹²³ Magyarország Alkotmánybírósága, Decision 9/2018 of 26 June 2018.

¹²⁴ Art. 23(1) German Const.: ‘Zur Verwirklichung eines vereinten Europas wirkt die Bundesrepublik Deutschland bei der Entwicklung der Europäischen Union mit, die demokratischen, rechtsstaatlichen, sozialen und föderativen Grundsätzen und dem Grundsatz der Subsidiarität verpflichtet ist und einen diesem Grundgesetz im wesentlichen vergleichbaren Grundrechtsschutz gewährleistet. Der Bund kann hierzu durch Gesetz mit Zustimmung des Bundesrates Hoheitsrechte übertragen. Für die Begründung der Europäischen Union sowie für Änderungen ihrer vertraglichen Grundlagen und vergleichbare Regelungen, durch die dieses Grundgesetz seinem Inhalt nach geändert oder ergänzt wird oder solche Änderungen oder Ergänzungen ermöglicht werden, gilt Artikel 79 Abs. 2 und 3’; Art. 79 (2) German Const.: ‘Ein solches Gesetz bedarf der Zustimmung von zwei Dritteln der Mitglieder des Bundestages und zwei Dritteln der Stimmen des Bundesrates.’

¹²⁵ BVerfG 13 February 2020, ECLI:DE:BVerfG:2020:rs20200213.2bvr073917.

¹²⁶ *Ibidem*, para. 97 ff. It thereby added a *formelle Übertragungskontrolle* to the already existing and well-known constitutional identity and *ultra-vires* reviews; see on the judgment Mehrdad Payandeh, ‘Verfassungsrecht: Rechtsschutz gegen die Übertragung von Hoheitsrechten im Kontext der Europäischen Union. “Formelle Übertragungskontrolle” im Kontext der europäischen Integration, Anwendungsbereich und Reichweite von Art. 23 I 3 GG’, JuS 2020, 702; Markus Ogorek, ‘Übertragung von Hoheitsrechten, “Grundrecht auf Demokratie”’, JA 2020, 878.

Primärrechtsäquivalenz include, for instance, a strong substantive connection with the EU's integration program, the involvement of EU institutions in the exercise of the competences transferred, that only EU member states are party to the treaty, and, 'especially', that 'the path of international law coordination is chosen because attempts to anchor [the subject matter of the treaty] in EU law have not found the required majorities'.¹²⁷

In principle, transfers of competences to the EU or comparable institutions can be equated with substantive amendments to the Constitution and thus require approval by two-thirds majorities.¹²⁸ Additionally, such transfers also 'regularly' (*regelmäßig*) make such substantive amendments possible because (or: if?) the exercise of the competences transferred is not bound by German fundamental rights and their further development is unpredictable. This is especially the case if the treaty gives the EU or comparable institutions a competence that is exclusive or allows for the displacement of the federal legislature (i.e. concerns a shared competence), allows for infringements of the legislative competences of the *Länder*, affects the administrative and judicial competences of Federation and *Länder*, or allows inroads to the constitutional regulations regarding municipal self-government, the *Bundesbank* or the structure of the judiciary.¹²⁹ However, sometimes transfers to the EU or comparable institutions may be approved by ordinary majorities, especially if the transfer is 'sufficiently defined' and already previously approved by two-thirds majorities.¹³⁰

On the basis of these two sets of criteria, the Agreement on a Unified Patent Court falls within the scope of Article 23(1), and more specifically within that of its third sentence. The Agreement transfers competences and is intimately linked to the EU integration process,¹³¹ among other things because Article 262 TFEU provides that the competences now assigned to the Unified Patent Court would be assigned to the ECJ, only member states can be a party to it, the Court is bound by EU law¹³² and its functioning entirely intertwined with secondary Union law.¹³³ Moreover, the Agreement had to be approved by qualified majorities, for two reasons. First, it factually amends Article 262 TFEU and by that the EU's integration program, by conferring jurisdiction on the Unified Patent Court instead of on the Court of Justice. Second, it substantively amends the German Constitution, among other things by transferring competences of German courts to an international court that must respect the primacy of EU law¹³⁴ and that is competent to interpret and apply national law, for which reason it becomes part of the 'domestic jurisdiction' (*innerstaatlichen Gerichtsbarkeit*).¹³⁵ However, the act approving the treaty had not been adopted by the required two-thirds majority of the members of the *Bundestag* (only 38 members voted, all in favour). The act was therefore not effectively passed by the *Bundestag* and void.¹³⁶

¹²⁷ BVerfG 13 February 2020, ECLI:DE:BVerfG:2020:rs20200213.2bvr073917, para. 119-125; '[I]nsbesondere dann, wenn der Weg der völkerrechtlichen Koordination gewählt wird, weil gleichgerichtete Bemühungen um eine Verankerung im Unionsrecht nicht die notwendigen Mehrheiten gefunden haben' (para 125).

¹²⁸ Ibidem, para. 129.

¹²⁹ Ibidem, para. 130.

¹³⁰ 'Vor allem im Integrationsprogramm hinreichend bestimmt angelegte ("abgedeckte") und mit einer Zwei-Drittel-Mehrheit bereits gebilligte Übertragungen stellen keine (abermächtige) materielle Änderung des Grundgesetzes dar'; ibidem, para. 129.

¹³¹ Ibidem para. 142-151

¹³² See Art. 24 (1) sub a of the Agreement.

¹³³ Regulations 1247/2012 and 1260/2012.

¹³⁴ Art. 20 of the Agreement.

¹³⁵ BVerfG 13 February 2020, ECLI:DE:BVerfG:2020:rs20200213.2bvr073917, para. 157-161.

¹³⁶ Ibidem, para. 164-5. On 25 September 2020, the German government submitted a new bill for the approval of the Agreement; *Drucksache 19/22847 (Gesetzentwurf der Bundesregierung; Entwurf eines Gesetzes zu dem Übereinkommen vom 19. Februar 2013 über ein Einheitliches Patentgericht)*, which was adopted by the required qualified majorities in the *Bundestag* and the *Bundesrat* on respectively 26 November and 18 December 2020. However, ratification will take some time, because the German constitutional court will first have to deal with two new constitutional complaints against the

The guidelines offered by the German Court make it clear that substitute EU treaties fall very easily, if not always under the scope of the second sentence of Article 23 (1), and that they most often will have *Verfassungsrelevanz* and thus require qualified majorities in both houses under Article 23 (1), third sentence. Only in exceptional cases approval by ordinary majorities suffices. That is the case if a substitute treaty does not transfer competences, as the ESM Treaty according to the German Court,¹³⁷ and if it ‘copies’ a ‘sufficiently defined’ competence that has been previously transferred to the EU by two-thirds majorities. It will not always be easy to determine whether these exceptions apply. For instance, the Fiscal Compact and ESM Treaty were, to be on the safe side, approved in both houses by a two-thirds majority.¹³⁸ In the light of the judgment in question, it now appears that this was not necessary for the ESM Treaty, but was it perhaps a constitutional necessity for the Fiscal Compact? That is, at least to this observer, a question without a clear answer. A similar doubt arises as regards the Single Resolution Fund Agreement, which was approved by both houses, but not by qualified majorities.¹³⁹ Would that treaty have *Verfassungsrelevanz* because it confers jurisdiction to resolve disputes arising from the interpretation and application of the Agreement (Article 14) on the ECJ, while that Court is not bound by German fundamental rights? Or is it decisive that the competence attributed to the ECJ is not one bestowed on German courts by the German Constitution, and therefore *Verfassungsrelevanz* is lacking?

To conclude this subsection. In Ireland and Malta, substitute EU treaties cannot benefit from the more lenient rules for the adoption of EU Amendment Treaties because they do not formally amend the EU Treaties, while in Austria, Bulgaria, Romania and Slovakia, substitute EU treaties benefit from the fact that they are not formally amending the EU Treaties: they can be approved with ordinary majorities. In contrast, in Hungary and Germany, certain treaties that do not formally amend the EU treaties also fall within the scope of the constitutional provisions that are dedicated to transfers of competences to the EU. In Germany, the scope of the EU transfer-provision is the widest. There, in principle all substitute EU treaties fall under the scope of Article 23 (1) German Constitution, and they must be approved by the qualified majorities required for a constitutional change if they have *Verfassungsrelevanz*.

F. Treaty referendums

A study has found that, compared to EU membership referendums¹⁴⁰ and referendums on EU (Amendment) Treaties (*SEA, Maastricht, European Constitution, Lisbon*), so-called EU policy referendums often fare worse. They have the lowest success rate; around 55 % fail.¹⁴¹ However, this category of policy referendums also includes referendums in Sweden on accession to the EMU (2003), in Denmark on the (partial) termination of the opt-outs (2015), in Greece on the financial support package (2015), in Hungary on refugee quotas (2016), and in the Netherlands on the Association Agreement with Ukraine (2016).¹⁴² If we only look at substitute EU treaties, the picture is entirely different: the three referendums thereon have been successful, at least from an EU perspective: in Denmark on the Fiscal Compact and the Agreement on a Unified Patent Court, and in Ireland on the

Treaty; see ‘Verfassungsklage blockiert abermals Einheitspatent’, *Frankfurter Allgemeine* 9 February 2021, <https://www.faz.net/aktuell/wirtschaft/upc-in-karlsruhe-verfassungsklage-blockiert-aber-mals-einheitspatent-17144279.html> (visited 9 February 2021).

¹³⁷ Ibidem, para. 123.

¹³⁸ See C. Gröpl, ‘Schritte zur Europäisierung des Haushaltsrechts’, *Der Staat*, 52(1), 2013, 1-25, at 9-11 & 21.

¹³⁹ Gesetz zu dem Übereinkommen vom 21. Mai 2014 über die Übertragung von Beiträgen auf den einheitlichen Abwicklungsfonds und über die gemeinsame Nutzung dieser Beiträge vom 17. Dezember 2014 (BGBl II S. 1298).

¹⁴⁰ I leave out the referendums on constitutional amendments on EU accession held in Austria, Croatia, the Czech Republic, Denmark, Estonia, Finland, Hungary, Ireland, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, and Sweden.

¹⁴¹ Fernando Mendez and Mario Mendez, *Referendums on EU Matters* (Study European Parliament 2017), p. 39.

¹⁴² Ibidem, p. 54.

Fiscal Compact. And, if I can allow myself a prediction, the Agreement on a Unified Patent Court will also be approved once it has been presented to the Irish electorate (as required, given that this treaty, too, is considered repugnant to the Irish Constitution). From that perspective, referendums on substitute EU treaties have a 100% success rate.

In view of the enormous potential for treaty referendums under the member states' constitutions, the question is whether this will remain so. Only a limited number of member states explicitly exclude referendums on treaties, or on parliamentary acts approving them: Estonia,¹⁴³ Ireland,¹⁴⁴ Italy,¹⁴⁵ and Latvia.¹⁴⁶ Several other member states have no constitutional provisions on referendums – Belgium, Germany, Croatia, and Malta – but in at least in two of them – Malta and the Netherlands – consultative treaty referendums may be held on the basis of acts of parliament.¹⁴⁷ In Lithuania, referendums are mandatory if a treaty transfers competences of ‘Government bodies to the institutions of international organizations or the jurisdiction thereof’.¹⁴⁸ In all other member states, treaty referendums are possible, either in general or for certain categories of treaties, as in Slovenia.¹⁴⁹ These referendums may be legally binding or consultative, but here we will not take that distinction into account, because it needs to be put in perspective: the reality is that consultative referendums can be as equally binding as legally-binding referendums, especially if voter turn-out is high.

The conclusion of this stock-taking is that in most member states treaty referendums are possible. Why then are they so rare? A first element of an explanation is that in political practice in Lithuania the obligation to hold referendums on transfers of competences to international organisations is interpreted very restrictively: only one referendum has been organized, on EU accession.¹⁵⁰ A second element of an explanation could be that in quite a few member states the decision to hold a referendum is exclusively in the hands of political institutions: parliaments, if a majority is in favour, governments, and heads of

¹⁴³ See Art. 65 (2) and 106 Estonian Const.

¹⁴⁴ See Art. 27 Irish Const. makes possible referendums on bills passed by the two houses of the *Oireachtas*. But treaties only require approval by *Dáil Éireann*, the lower house (Art. 29.5.2), by way of a resolution, so Art. 27 does not allow for treaty referendums.

¹⁴⁵ See Art. 75 Italian Const.

¹⁴⁶ Art. 73 Latvian Const. (‘agreements with other states’ may not be put to referendum). However, substantial changes in the terms of EU membership must be decided by a referendum if such referendum is requested by at least one-half of the members of the *Saeima*; Art. 68 (4) Latvian Const.

¹⁴⁷ For Malta, see Art. 3 (1) of the Maltese Referenda Act 1973, which allows for referendums on the approval of proposals set out in a resolution passed for that purpose by the Maltese Parliament. In the Netherlands a consultative referendum was organized on the European Constitutional Treaty in 2005; see Arjen Nijeboer, ‘The Dutch Referendum’ 1 *EuConst* 2005, p. 393-405. In between 1 July 2015 and 10 July 2018, the Dutch Advisory Referendum Act made it possible for 300.000 citizens to request an advisory referendum on acts of parliament adopted but not yet entered into force, among those acts approving EU treaties. On this basis, a referendum on the mixed Association Agreement with the Ukraine took place on 6 April 2016. The Advisory Referendum Act is repealed by *Wet van 10 juli 2018 tot intrekking van de Wet raadgevend referendum* [Act van 10 July 2018 repealing the Advisory Referendum Act].

¹⁴⁸ Art. 5 (5) Referendum law of the Republic of Lithuania in conjunction with Art. 9 (1) Lithuanian Constitution.

¹⁴⁹ Where referendums ‘on laws on the ratification of treaties’ are generally prohibited, but referendums on transfer-treaties allowed; Art. 90 (2) and Art. 3a (2) Slovenian Const.

¹⁵⁰ Irmantas Jarukaitis and Gintaras Švedas, ‘The Constitutional Experience of Lithuania in the Context of European and Global Governance’, in Albi and Bardutzky (eds.), *supra* n. 47, p. 1041.

state.¹⁵¹ This is the case in Cyprus,¹⁵² the Czech Republic,¹⁵³ France,¹⁵⁴ Greece,¹⁵⁵ Luxembourg,¹⁵⁶ Malta,¹⁵⁷ the Netherlands,¹⁵⁸ Poland,¹⁵⁹ Portugal,¹⁶⁰ Romania,¹⁶¹ Slovenia,¹⁶² Spain,¹⁶³ and Sweden.¹⁶⁴ The outcome of referendums is often uncertain, in part because a vote for or against an act submitted to referendum can be used as a vote for, or more likely against, the incumbent government.¹⁶⁵ Therefore, political institutions dominated or occupied by representatives of the ruling majority will not be inclined or easily persuaded to organize referendums unless there is an urgent political or democratic reason to do so. One such good democratic reason might be that the ‘big’ EU (Amendment) Treaties, which structurally amend the Union’s constitution, may also be seen - from a substantive perspective and even if they are not formally repugnant to national constitutions - as national constitutional amendments. And given that constitutions have been adopted by referendum in many member states, while in others the voters – ‘the people’ – are, or may be, involved in the formal constitutional amendment procedure, via general elections or a referendum, there is a more or less compelling argument to be made that voters should also have a say on such ‘big’ EU (Amendment) Treaties. That explains, at least partially, the referendums on the Treaty of Maastricht and the European Constitution.¹⁶⁶ A similar argument for a referendum on the substitute EU treaties concluded to date cannot be made that easily, because their constitutional impact is far more limited (although, of course, not unknown: for instance, the German

¹⁵¹ I leave out Ireland and Denmark. In Denmark acts approving ‘major’ treaties in the sense of Art. 19 Danish Const. may be subjected to a referendum on demand of one-thirds of the MP’s; Art. 42(1) in conjunction with 42(6) Danish Const. However, this requires that parliament approves the treaty by act of parliament, and not by resolution, as is ordinarily the case.

¹⁵² Where parliament may call a referendum on request of the Council of Ministers; Constantinos Kombos and Stéphanie Lahlé Shaelou, ‘The Cypriot Constitution Under the Impact of EU Law: An Asymmetrical Formation’, in Albi and Bardutzky (eds.), *supra* n. 47, p. 1428.

¹⁵³ Which requires a constitutional act for a transfer treaty referendum; Art. 10 (A) Czech Const.

¹⁵⁴ Art. 11 (1) French Const. France also knows a *référéndum d’initiative partagée*. One fifth of the members of parliament supported by one tenth of the voters enrolled on the electoral lists may initiate a private member’s bill (Art. 11 (3)), which is only submitted to a referendum if is not ‘examined’ by each house of parliament within six months (Article 11(5) in conjunction with Art. 9 Loi organique n° 2013-1114 of 6 December 2013 ‘portant application de l’article 11 de la Constitution’). Therefore, the chances of a private member’s bill reaching the referendum stage seems to be very small; Francis Hamon, ‘Le référendum d’initiative partagée’, *Revue française de droit constitutionnel* (2014) p. 253-268; Marine Haulbert, ‘Le référendum d’initiative “partagée”: représentants versus représentés?’, *Revue de droit public* (2014) p. 1637-1655.

¹⁵⁵ Art. 44 (2) and 35 (3) Greek Const.: by the president ‘following a resolution voted by an absolute majority of the total number of Members of Parliament, taken upon proposal of the Cabinet’.

¹⁵⁶ Art. 51(7) Luxembourg Const.

¹⁵⁷ Art 3(1) Maltese Referenda Act 1973 (by parliament).

¹⁵⁸ *Supra*, n. 147.

¹⁵⁹ Art. 90(3) in conjunction with Art. 125 Polish Const. (by the *Sejm*, with an absolute majority, or by the President, with the consent of the *Senat*).

¹⁶⁰ Art. 115(1), (4) and (5) in conjunction with 161(i) Portuguese Const. (by the president, on request of the government or the *Assembleia*).

¹⁶¹ Art. 90 Romanian Const. (by the president, after consultation of parliament).

¹⁶² Art. 3a (2) Slovenian Const. (by parliament).

¹⁶³ Art. 92(2) Spanish Const. (by the King on proposal of the President of the Government after previous authorization by the Congress).

¹⁶⁴ Art. 6, 7, 8 in conjunction with Art. 16 Instrument of Government.

¹⁶⁵ That, at least in theory, may be different for presidents who do not belong to the ruling majority and who play a substantial political role on the national political scene (*infra*, Part III.J).

¹⁶⁶ That *Lisbon* was nowhere subjected to a referendum, except in Ireland, is because the government leaders were fed up with referendums after the European Constitution failed to pass in the Netherlands and France. They did not want to run the risk that its successor would suffer the same fate. The Brexit referendum will not have rekindled their appetite for referendums.

Federal Constitutional Court qualified the ESM Treaty as ‘a fundamental reshuffling of the EMU’,¹⁶⁷ the Fiscal Compact required that the balanced budget rule should be written into national law ‘through provisions of binding force and permanent character, preferably constitutional’ (Article (3 (2)), and the Agreement on a Unified Patent requires, or has to be adopted with the majorities required for, a constitutional amendment in three member states: Hungary, Ireland and Germany).

However, it is striking that also in member states where (also) parliamentary minorities or citizens can demand a referendum, as in Austria,¹⁶⁸ Bulgaria,¹⁶⁹ Croatia,¹⁷⁰ Finland,¹⁷¹ Lithuania,¹⁷² and Slovakia,¹⁷³ no referendums have been held on substitute EU treaties. The parliamentary or societal opposition to those treaties, if any, was probably not big enough to cross the thresholds. (In Lithuania, a citizens' initiative seeking a referendum on joining the euro that had been prompted, in part, by the financial risks that Lithuania, as a eurozone state, would run under the ESM, was declared inadmissible.)¹⁷⁴ Be that as it may, the conclusion of this subsection could be that referendums do not currently seem to pose a serious obstacle for substitute EU treaties.

G. Constitutional Review I; the Actors

Contrary to what is sometimes thought, constitutional review of treaties is not only carried out by courts, but also by political bodies, including legislatures. Constitutional review by such bodies is the only option in member states where constitutional review by the courts is excluded, whether in general or specifically of treaties: Croatia,¹⁷⁵ Luxembourg,¹⁷⁶ Malta,¹⁷⁷ and the Netherlands.¹⁷⁸ And although treaties have been considered repugnant to the constitution in at least some of these member states – notably Luxembourg and Belgium(*infra*, Part III.I) – this has not happened so far with substitute EU treaties. However, it is worth noting that in Ireland, where judicial review of treaties is allowed, two substitute EU treaties were deemed incompatible with the Constitution without prior court judgment: the Fiscal Compact and the Agreement on a Unified Patent Court. But that is also due to the fact that after the Crotty case (*supra*, Part III.E), the Irish government has grown extremely cautious, requiring that any treaty that seems to imply a new transfer of sovereignty be approved by referendum, in order to avoid further lawsuits *à la* Crotty.¹⁷⁹ Finland is a special case. Although the courts in that member state may review acts of parliament, which they may not apply if these are manifestly unconstitutional,¹⁸⁰

¹⁶⁷ BVerfG 18 March 2014, ECLI:DE:BVerfG:2014:rs20140318.2bvr139012, para. 180 ‘Art. 136 Abs. 3 AEUV bedeutet (...) eine grundlegende Umgestaltung der bisherigen Wirtschafts- und Währungsunion’; BVerfG 13 February 2020, ECLI:DE:BVerfG:2020:rs20200213.2bvr073917, para. 123.

¹⁶⁸ Art. 44 (3) Austrian Const.

¹⁶⁹ Art. 3 Direct Citizen Participation in Government Act of Bulgaria.

¹⁷⁰ Art. 87(3) Croatian Const.

¹⁷¹ Art. 53 Finnish Const.

¹⁷² Art. 9 Lithuanian Const.

¹⁷³ Article 93(2) in conjunction with 95 (1) Slovakian Const.

¹⁷⁴ Irmantas Jarukaitis and Gintaras Švedas, ‘The Constitutional Experience of Lithuania in the Context of European and Global Governance’, in Albi and Bardutzky (eds.), *supra* n. 47, p. 1032.

¹⁷⁵ Iris Goldner Lang, Zlata Đurđević and Mislav Mataija, ‘The Constitution of Croatia in the Perspective of European and Global Governance’, in Albi and Bardutzky (eds.), *supra* n. 47, p. 1176.

¹⁷⁶ Art. 95ter (2) Luxembourg Const.

¹⁷⁷ Peter G. Xuereb, ‘The Constitution of Malta: Reflections on New Mechanisms for Synchrony of Values in Different Levels of Governance’, in Albi and Bardutzky (eds.), *supra* n. 47, p. 175.

¹⁷⁸ Art. 120 Dutch Const.

¹⁷⁹ Gavin Barrett, ‘Building a Swiss Chalet in an Irish Legal Landscape? Referendums on European Union Treaties in Ireland & the Impact of Supreme Court Jurisprudence.’, 5 *EuConst* 2009, p. 44.

¹⁸⁰ Art. 106 Finnish Const.

the bulk of constitutional review is performed by the parliament's standing Constitutional Law Committee, whose role is consecrated in the Constitution (Article 74), and whose opinions are extremely authoritative and *de facto* binding.¹⁸¹

Judicial review of treaties is possible in the vast majority of the member states, in one way or another.¹⁸² As regards substitute EU treaties: the ESM Treaty¹⁸³ has been tested in Austria,¹⁸⁴ Estonia,¹⁸⁵ Germany,¹⁸⁶ and Ireland,¹⁸⁷ while complaints against it were declared inadmissible in Belgium,¹⁸⁸ the Fiscal Compact was reviewed by courts in Austria,¹⁸⁹ France,¹⁹⁰ Germany,¹⁹¹ and Hungary,¹⁹² while complaints against it were declared inadmissible in Belgium¹⁹³ and withdrawn in Poland;¹⁹⁴ and the Agreement on a Unified Patent Court was tested in Germany¹⁹⁵ and Hungary.¹⁹⁶ This means that three of the four substitute EU treaties that have been negotiated in the past decade, have been submitted at least 13 times to courts in 8 member states, with the ESM Treaty and the Fiscal Compact accounting for 11 of the cases. In comparison: the European Constitutional Treaty and its successor, the Lisbon Treaty, were submitted 18 times to courts in 11 member states.¹⁹⁷

So quantitatively, the number of lawsuits on substitute EU treaties is lower than that on EU Amendment Treaties. That is not surprising, because one would indeed expect that EU (Amendment) Treaties, which structurally change the EU's constitution and, as mentioned above, can also be equated with (substantive) constitutional amendments at the national level, are more explosive constitutionally than the more policy-oriented substitute EU treaties, which, all in all, have a relatively limited constitutional impact. In that perspective, the number of substitute treaties submitted to courts may seem surprisingly high. The explanation is undoubtedly related to the pointed political sensitivity of the

¹⁸¹ See *supra* Part III.D for its opinion on the Unified Patent Court Agreement.

¹⁸² For the various possibilities, see Maartje de Visser, *Constitutional Review in Europe. A Comparative Analysis* (Hart, 2014), p. 99 ff.

¹⁸³ I leave aside the Slovenian Constitutional Court (*Ustavno sodišče Republike Slovenije*) on the precursor of the ESM, the European Financial Stability Facility (EFSF), a private law construction under Luxembourg law. *Ustavno Sodišče Republike Slovenije*, Judgment of 3 February 2011, Case U-I-178/10-18. See on that judgment, Reestman, *supra* n. 118, p. 254-5.

¹⁸⁴ *Verfassungsgerichtshof*, Decision SV 2/12-19 of 16 March 2013.

¹⁸⁵ *Riigikohus*, Constitutional Judgment 3-4-1-6-1212 of July 2012.

¹⁸⁶ *BVerfG*, 2 BvR 1390/12 of 12 September 2012.

¹⁸⁷ Supreme Court, *Pringle v Government of Ireland & ors* [2012] IESC 47.

¹⁸⁸ Belgian Constitutional Court, judgment nr. 156/2012 of 20 December 2012.

¹⁸⁹ *Verfassungsgerichtshof*, SV 1/2013-15.

¹⁹⁰ Conseil Constitutionnel, Decision 2012-653 DC of 9 August 2012.

¹⁹¹ *BVerfG*, 2 BvR 1390/12.

¹⁹² *Magyarország Alkotmánybírósága*, Decision 22/2012 (V.11.) AB of 11 May 2012.

¹⁹³ Belgian Constitutional Court, judgment nr. 62/2016 of 28 April 2016.

¹⁹⁴ The Fiscal Compact was challenged before the Polish Constitutional Tribunal by MP's with the argument that the Treaty conferred competences upon an international organisation and thus required approval by qualified majorities; however, after the parliamentary elections in 2015, the procedure was ended; Stanisław Biernat and Monika Kawczyńska, 'The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context', in Albi and Bardutzky (eds.), *supra* n. 47, p. 774.

¹⁹⁵ *BVerfG* 13 February 2020, ECLI:DE:BVerfG:2020:rs20200213.2bvr073917.

¹⁹⁶ *Magyarország Alkotmánybírósága*, Decision 9/2018 of 26 June 2018.

¹⁹⁷ The European Constitutional Treaty was submitted to courts in Austria (inadmissible), France, Slovakia, Spain, the Lisbon Treaty in Austria (three times; all inadmissible), Belgium (three times; one inadmissible), the Czech Republic (two times), Denmark, France, Germany, Hungary, Latvia, and Poland; Carlos Closa, 'National Higher Courts and the Ratification of EU Treaties', 36 *West European Politics* 2013, p. 97-121.

matters regulated by the ESM Treaty and the Fiscal Compact, which directly affect national budgetary, fiscal, and economic sovereignty.

At the same time, the number of EU substitute treaties submitted to courts seems rather modest given the potential of such review in the member states. The possibility cannot be excluded that some of the until now unused potential will be tapped for future substitute EU treaties, and that the observed tendency of an increased involvement of courts in treaty review will endure,¹⁹⁸ especially because it may be expected that future integration steps will tread on even more politically and constitutionally sensitive ground. Treaty review is not only possible in member states in which substitute EU treaties so far have been challenged (Austria, Belgium, the Czech Republic, Estonia, France, Germany, Hungary, Ireland, Poland), but at least also in Bulgaria,¹⁹⁹ Latvia,²⁰⁰ Lithuania,²⁰¹ Romania,²⁰² Slovakia,²⁰³ Slovenia,²⁰⁴ Spain,²⁰⁵ and Portugal,²⁰⁶ and to a certain extent in Greece.²⁰⁷

Although political authorities belonging to the ruling majority will sometimes submit treaties to the courts – as the French president did with the Fiscal Compact and the Hungarian government with the same treaty and the Agreement on a Unified Patent Court – we may nevertheless assume that any increase in the number of submitted treaties will mainly be the result of actions by parliamentary minorities and/or individuals. They are already responsible for most of the cases against EU substitute treaties, and it seems no coincidence that Austria, where both possibilities exist, is probably the member state with the most cases of treaty review.²⁰⁸

¹⁹⁸ Hodson and Maher, *supra* n. 43, p. 193; for an argument in favour of more treaty review Mario Mendez, ‘Constitutional review of treaties: Lessons for comparative constitutional design and practice’, 15 *ICon* 2017, 84-109.

¹⁹⁹ Art. 149 (1) (4) in conjunction with Art. 150 (1) Bulgarian Const.

²⁰⁰ Art. 16 (2) Latvian Constitutional Court Law.

²⁰¹ Art. 105 (3) (3) Lithuanian Const.

²⁰² Art. 146 (b) Romanian Const.

²⁰³ Art. 125a Slovakian Const.

²⁰⁴ Art. 160 (2) Slovenian Const.

²⁰⁵ Art. 95 (2) Spanish Const.

²⁰⁶ Art. 278 and Art. 280 Portuguese Const. Portugal is a special case, because a treaty declared incompatible with the constitution can nevertheless be ratified, *infra* Part III.I).

²⁰⁷ Greece does not have abstract review of treaties; however, the Greek Council of State (CoS) reviews whether acts approving treaties that transfer competences that under the Greek Const. are exercised by the government, the legislature, or the executive, have been adopted by a majority of three-fifths of the deputies, as is required by Art. 28 (2) Greek Const. (CoS decision 668/2012). Recently, the CoS added that only an act of parliament that is adopted by the same majority may give international institutions (*in casu* the Commission en the ESM) certain public competences (CoS decisions 1223,1224/2020; thanks to Christos Papastylanos for bringing this to my attention); Xenophon Contiades, Charalambos Papacharalambos, and Christos Papastylanos, ‘The Constitution of Greece: EU Membership Perspectives’, in Albi and Bardutzky (eds.), *supra* n. 47, p. 678-9; Xenophon Contiades, Alkeme Fotiadou, ‘The Hellenic Republic’, in Besselink *et alia*, *supra* n. 34, p. 747-749; Hodson and Maher, *supra* n. 43, p. 183

²⁰⁸ Art. 140a Austrian Const. in conjunction with Art. 139 and 140; Konrad Lachmayer, ‘The Constitution of Austria in International Constitutional Networks: Pluralism, Dialogues and Diversity’, in Albi and Bardutzky (eds.), *supra* n. 47, p. 1315-16.

The possibility for parliamentary minorities exists in most member states that allow for *ex ante* judicial review of treaties – but not in Estonia,²⁰⁹ Hungary,²¹⁰ Ireland,²¹¹ Lithuania,²¹² Slovakia,²¹³ and Portugal²¹⁴ – yet the opposition to the treaty may not always be able to muster the required minimum number of members of parliament to file a complaint.²¹⁵ As regards individuals, even if they have the theoretical possibility to refer a treaty for scrutiny to a (constitutional) court, in practice much depends on how the courts operationalize their standing. It is common knowledge that the German Federal Constitutional Court has adopted a very liberal position in this respect – if a German citizen can make a *prima facie* plausible and underpinned claim that his democratic rights under the German Constitution have been ignored, the complaint is admissible. Similar liberal positions seem to be taken by the Danish Supreme Court and the Irish Supreme Court,²¹⁶ while the Austrian and Belgian Constitutional Courts have adopted a restrictive admissibility policy, and the Latvian Constitutional Court a position somewhere in-between.²¹⁷ But more research on the ability of individual treaty complaints to gain court access will be needed before anything more specific can be said in this regard. To complete the picture: in some member states, independent institutions can submit acts for review to the constitutional court, e.g. in Estonia, the Chancellor of Justice, the authority that submitted the ESM Treaty to the Estonian Constitutional Court.²¹⁸

Before drawing interim-conclusions, let us first have a look at substantive constitutional review issues in the next subsection.

H. Constitutional Review II: The Substance

Almost all member states must amend their constitutions before they can be bound by a treaty that is incompatible with their constitutions. In some member states, this requirement is explicitly expressed in their constitutions,²¹⁹ in others it is implied.²²⁰ The grounds for declaring a treaty, among which EU Treaties, incompatible with the constitution can be categorised as follows: incompatibility with specific

²⁰⁹ Art. 2 (1), and 4 (1) and (2) Estonian Constitutional Review Court Procedure Act.

²¹⁰ Cp. Art. 23 (1) and 23 (3) Hungarian Act CLI of 2011 on the Constitutional Court in conjunction with Art. 6(2) and 6 (4) Hungarian Const.

²¹¹ But in Ireland MP's can start such lawsuits as individuals, as Mr. Pringle did against the ESM Treaty.

²¹² Cp. Art. 106(6): 'The conclusions of the Constitutional Court may be requested by the Seimas or, in cases concerning elections to the Seimas or international treaties, by the President of the Republic.'

²¹³ Cp. Art. 125a Slovakian Const.

²¹⁴ Art. 278 (1) Portuguese Const.

²¹⁵ For instance, in the Czech Republic 41 deputies or 17 Senators (Art. 71a of the Constitutional Court Act 16 June 1993 jo, Art. 87 (2) Czech Const.); in France 60 deputies of 60 senators (Art. 54 Const.); in Latvia 20 deputies (Art. 16 (2) in conjunction with Art. 17 (1) Latvian Constitutional Court Law); in Poland 50 Deputies and 30 Senators (Art. 191 Polish Const.); in Romania 50 deputies or 25 senators (Art. 146 (b) Romanian Const.); in Slovenia a third of the deputies (Art. 160(2) Slovenian Const.). In the last-mentioned member state five treaties have been reviewed, three on request of the government, two on request of the parliamentary minorities; Samo Bardutzky, 'The Future Mandate of the Constitution of Slovenia: A Potent Tradition Under Strain' in: Albi and Bardutzky, *supra*. n. 47, p. 736.

²¹⁶ See the Crotty case of the Irish Supreme Court, https://www.cvce.eu/en/obj/judgment_of_the_supreme_court_of_ireland_crotty_v_an_taoiseach_9_april_1987-en-187e7d4f-aa3e-43da-a1e2-bb3fc41d2fbd.html, p. 2 (visited 8 December 2020); Hjalte Rasmussen, 'Denmark's Maastricht-Ratification Case: The Constitutional Dimension', 32 *Irish Jurist* 1997, p. 77-101 (p. 83 ff).

²¹⁷ Mattias Wendel, 'Lisbon Before the Courts: Comparative Perspectives', 7 *EuConst* 2011, p. 96-127 (108-113); for Belgium, see Constitutional Court judgment nr. 62/2016 of 28 April 2016 (Fiscal Compact).

²¹⁸ Art. 6 (1) (4) Estonian Constitutional Review Court Procedure Act; on the judgment Carri Ginter, 'Constitutionality of the European Stability Mechanism in Estonia: Applying Proportionality to Sovereignty', 9 *EuConst* 2013, p. 335-354.

²¹⁹ See, for instance, Art. 85 (4) Bulgarian Const., Art. 54 French Const., Art. 11 (3) Romanian Const.

²²⁰ Cp. Art. 125a Slovakian Const.

constitutional provisions;²²¹ incompatibility with national fundamental rights;²²² incompatibility with the permitted degree of transfers of competences to an international organisation;²²³ and incompatibility with fundamental constitutional principles such as statehood, sovereignty, democracy, the rule of law and human dignity/fundamental rights.²²⁴ Most member states use more than one of these categories, as opposed to the Netherlands,²²⁵ where it is not considered unconstitutional as such if competences that are bestowed by the Constitution on national institutions are transferred to international organisations, and where a treaty is deemed incompatible with the Constitution only if its provisions are incompatible with (the contents of) particular constitutional provisions, also in view of the underlying fundamental assumptions and intentions.²²⁶

It should be clear that the categories overlap considerably and sometimes even more or less coincide. This can be illustrated with a reference to the Netherlands, again, where the examples given *in vitro* of treaty obligations that are incompatible with specific constitutional provisions usually concern violations of fundamental rights provisions that have no derogation clause, or international obligations that lead to very profound infringements of fundamental rights.²²⁷ It should also be clear that there may be a thin line between, for instance, constitutional limitations on transfers of competences to international organisations on the one hand, and the obligation to abide by fundamental constitutional principles in those states that make such distinctions on the other. The Czech Republic is one of them. According to its Constitution, only ‘certain powers’ may be transferred to an international organization, while ‘changes in the essential requirements for a democratic state governed by the rule of law are impermissible’.²²⁸ In its first judgement on the Lisbon Treaty, the Czech Constitutional Court ruled that these obligations were two sides of the same coin: the transfer of powers ‘cannot go so far as to violate the very essence of the republic as a democratic state governed by the rule of law, founded on respect for the rights and freedoms of human beings and of citizens and to establish a change of the essential requirements of a democratic state governed by the rule of law’.²²⁹

Because of the limited scope of substitute EU treaties, one might intuitively expect that they would not easily affect such fundamental constitutional principles as statehood, sovereignty, democracy, and

²²¹ Belgium, France, Germany, Luxembourg, and Spain had to amend their constitutions to allow for the participation of EU citizens in local elections, Poland to allow for the surrender of nationals in the context of the European Arrest Warrant.

²²² As in Denmark (Helle Krunke and Trine Baumbach, ‘The Role of the Danish Constitution in European and Transnational Governance’ in Albi & Bardutzky (eds.), *supra* n. 47, p. 273).

²²³ For instance, in Austria only ‘single sovereign powers’ may be transferred to ‘ordinary’ international organisations; Art. 9 (2) Austrian Const.; see the decision of the Austrian Constitutional Court on the ESM-Treaty, *Verfassungsgerichtshof*, Decision SV 2/12-19.

²²⁴ See for instance the German Federal Constitutional Court, decision of 30 June 2009, ECLI:DE:BVerfG:2009:es20090630.2bve000208 (all criteria mentioned); the Hungarian Constitutional Court, decision 22/2016. (XII. 5.) AB of 30 November 2016 (human dignity and the essential content of any other fundamental right; the sovereignty and constitutional self-identity of Hungary); the Polish Constitutional Tribunal, decision K 32/09 of 24 November 2010 (the protection of human dignity and the constitutional rights and freedoms; the respect of sovereign statehood and the principles of democracy, the rule of law, social justice and the bases of the economic system); the Latvian Constitutional Court, decision in case 2008-35-01 of 7 April 2009 (sovereignty).

²²⁵ The French *Conseil constitutionnel* for instance reviews whether a treaty conflicts with ‘clauses of the Constitution, constitutionally protected rights and liberties and the essential conditions for the exercise of national sovereignty’; Decision 2007-560 DC of 20 December 2007 (Treaty of Lisbon), para. 9.

²²⁶ Opinions of the Dutch *Raad van State* [Council of State] of 23 December 1983 (cruise missiles), *Kamerstukken* (Parliamentary Papers) 17980, A-B, p. 1-3; and of 19 November 1999 (foreign jurisdictions), *Kamerstukken* (Parliamentary Papers) 26800 VI, A, p. 3.

²²⁷ Opinion of the Dutch *Raad van State* [Council of State] of 19 November 1999 (foreign jurisdictions), *Kamerstukken* (Parliamentary Papers) 26800 VI, A, p. 5-6.

²²⁸ Resp. Art. 10 a (1) and 9 (2) Czech Const.

²²⁹ Czech Constitutional Court, decision 2008/11/26 - Pl. ÚS 19/08: Treaty of Lisbon I.

the rule of law, which these days often sail together under the flag of national constitutional identity.²³⁰ And to a certain extent, practice proves that intuition correct. So far, two substitute EU treaties have been held or deemed to be incompatible with national constitutions, i.e. the Fiscal Compact, by Ireland, and the Agreement on a Unified Patent Court, by Germany, Hungary, and Ireland. The Hungarian Constitutional Court declared the latter treaty incompatible with the Constitution, on the hand because it authorises the Patent Court to apply Hungarian law and makes it part of the Hungarian legal system, on the other because it deprives Hungarian courts of constitutionally protected competences.²³¹ As we have already seen, the German Federal Constitutional Court applied similar reasoning: the Patent Court Agreement substantively amends the German Constitution because it transfers competences of German courts to an international court which then becomes part of the domestic jurisdiction, is competent to interpret national law, and is not bound by German fundamental right (*supra*, Part III.E). In short, although both courts found the Agreement incompatible with specific constitutional provisions and that it amounted to a limitation of national sovereignty, the idea of a potential infringement of the ‘constitutional identity of Hungary’²³² or of German constitutional identity²³³ was far beyond the horizon in both judgments.²³⁴

However, fundamental constitutional principles were actually in plain sight in the assessments by the Estonian, German, French and Irish Courts of the ESM-Treaty and the Fiscal Compact.²³⁵ Their judgments seem to indicate that a treaty that gives EU or other international institutions a direct hold on the national budget, or that introduces unlimited and unpredictable financial liabilities for the state, will run up against a declaration of unconstitutionality for infringing national parliamentary democracy.²³⁶ Thus, in principle, the entire range of grounds that can underpin a declaration of incompatibility in respect of a treaty is also relevant for substitute EU treaties. And as the integration process advances, the subject matter regulated by substitute EU treaties is likely to become more sensitive, politically, and constitutionally.

Is it perhaps possible to say something more specific about constitutional limits to EU treaties, whether substitute or amendment treaties? That is very difficult, for various interconnected reasons. Judicial review is never a mechanical, black and white subsumption exercise. A declaration of incompatibility is always the result of the confrontation of two texts that are, most often if not always, multi-interpretable. Treaty drafters approximately know where the cliffs lie and will try to steer away from them, while courts do not set out to issue declarations of incompatibility and will try to avoid them. If, for instance, treaty provisions are open to different interpretations of which only one is compatible

²³⁰ Be it more often so in literature than in judgements. Only a very small number of courts use the term constitutional identity.

²³¹ Magyarország Alkotmánybírósága, Decision 9/2018 of 26 June 2018, para 44-53.

²³² Article R (4) Hungarian Const.

²³³ On German constitutional identity see for instance Christian Calliess, ‘Constitutional Identity in Germany. One For Three Or Three In One’, in Christian Calliess and Gerhard van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (CUP 2020) p. 153-181; the volume also contains chapters on Austrian, Belgium, Czech, Danish, French, Irish, Italian, Dutch, Polish, Spanish and British constitutional identity. For a comparison of German constitutional identity in the case law of the Bundesverfassungsgericht and the constitutional identity of other member states in the case law of their constitutional and highest courts, see Monica Claes and Jan-Herman Reestman, ‘The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case’, *German Law Journal* 2015, p. 917-970

²³⁴ Although the German Court in the last paragraph of its ruling stated that it left unanswered the question whether the Agreement is contrary to German constitutional identity because of the unconditional primacy it gives to EU law, ‘because the invalidity of the act of approval has already been established on other grounds’; BVerfG 13 February 2020, ECLI:DE:BVerfG:2020:rs20200213.2bvr073917, para. 166.

²³⁵ Resp. *Riigikohus*, Constitutional Judgment 3-4-1-6-1212 of July 2012; *Conseil Constitutionnel*, Decision 2012-653 DC of 9 August 2012; *Bundesverfassungsgericht*, 2 BvR 1390/12 of 12 September 2012.; Supreme Court, *Pringle v Government of Ireland & ors* [2012] IESC 47.

²³⁶ Reestman, *supra* n. 118, p.275.

with the constitution and the other(s) not, courts can and will impose that interpretation as the only legitimate one, rather than declaring the treaty incompatible with the constitution.²³⁷ Moreover, constitutional interpretations change over time, due to changing legal perspectives and insights, due to the changing composition of the courts, and also due to changing political, economic, and societal circumstances.

For all these reasons, it is most often not entirely predictable where the constitutional limits to EU integration will lie in a particular case, not even if courts have given the political institutions guidance as to where they lie in general. This is something that the Czech Constitutional Court famously refused to do in its decisions on the Treaty of Lisbon as regards substantive limits to the transfer of competences – “(t)hese limits should be left primarily to the legislature to specify, because this is a priori a political question, which provides the legislature wide discretion.” Responsibility for these political decisions cannot be transferred to the Constitutional Court; it can review them only at the point when they have actually been made on the political level.²³⁸ However, not only the Czech Constitutional Court, but in fact all courts do, to a greater or lesser extent, give the political institutions, *and themselves*, room for manoeuvre, even the German Federal Constitutional Court. The *Bundesverfassungsgericht*, the court with the most elaborate case law on constitutional limits to the European integration of all member states’ courts, does not shy away from giving guidelines to political institutions. It did so, for instance, in its judgment on the Lisbon Treaty, in which it identified five areas of competences prone to constitutional identity violations, which, if they materialise, can only be overcome by the adoption of a new constitution. These areas concern *inter alia* substantive and formal criminal law, the use of force within Germany and the deployment of German military forces abroad, the budget, and social policy.²³⁹ This case law is more nuanced than many make it out to be, for instance because even competences that are at the nucleus of state competence can in principle be transferred, and the German Court moreover suggests that if the EU actually becomes more democratic, more competences could be transferred.²⁴⁰ In short, even German constitutional identity is, at least to a certain extent, a movable limit.

Let us now draw some interim conclusions on this and the previous subsections. Two substitute EU treaties have been found or deemed incompatible with the constitution in three member states, i.e. the Fiscal Compact, by Ireland, and the Agreement on a Unified Patent, by Germany, Hungary, and Ireland. As regards the Agreement: would it have made any difference if the competences now conferred on the Unified Patent Court had been assigned by the Council of the European Union to the Court of Justice under Article 262 TFEU? No. That Council decision needs to be approved by the member states in accordance with their respective constitutional requirements, which makes it in the national constitutional perspective a treaty; approving the Council decision therefore would also have required a constitutional amendment.

As regards the Fiscal Compact and the ESM Treaty: from a strictly legal EU perspective, their provisions could probably have been enacted in secondary Union law. In that situation, it would not have been necessary to hold the Irish referendum on the Compact, and the number of lawsuits in the other member states would perhaps not have risen so high. However, such EU acts would certainly have been subjected to judicial review in Germany, and perhaps also in other member states in which the highest or constitutional courts claim competence to conduct *ultra vires* reviews and/or constitutional identity reviews of secondary EU law. But such EU acts would have undoubtedly also caused a fervent political backlash in many member states, because, as I have argued elsewhere, it is doubtful whether the EU has the required political and constitutional authority to impose on the member states, by secondary law, the obligation to amend their constitutions to allow the inclusion of a balanced budget

²³⁷ See on this De Visser, *supra* n. 182, p. 291-301.

²³⁸ *Ústavní soud České republiky*, Decision 2009/11/03 - Pl. ÚS 29/09 (Treaty of Lisbon II), para. 111; see also Decision 2008/11/26 - Pl. ÚS 19/08 (Treaty of Lisbon I), para. 109.

²³⁹ BVerfG, decision of 30 June 2009, ECLI:DE:BVerfG:2009:es20090630.2bve000208, para 252.

²⁴⁰ *Ibidem*, para. 248-266

rule, as a draft version of the Fiscal Compact did, or to impose enormous financial liabilities on national budget authorities, as the ESM Treaty does. This arguably requires the national parliaments' (or the peoples') consent, and thus a treaty, an EU (Amendment) Treaty or a substitute treaty.²⁴¹

There is also another advantage to differentiated integration outside the EU legal order as opposed to differentiated integration inside it, and more generally secondary EU-decision making:²⁴² *ultra vires* review is of no avail in respect of EU Amendment Treaties or substitute EU treaties.

I. Constitutional amendment procedures

All member states have a rigid constitution. That means that their constitution is more difficult to amend than the highest ordinary act in the national hierarchy of norms, that is to say, more difficult to amend than acts of parliament. The degree of rigidity varies enormously. At one end of the spectrum, we have member states whose constitutions can be amended by a qualified parliamentary majority,²⁴³ although they sometimes ordain that the amendment must be adopted twice, with an interval of several months, or provide for the possibility of an additional referendum,²⁴⁴ or both.²⁴⁵ At the other end of the spectrum, we have member states in which parliament must pass a constitutional amendment twice by a qualified majority with a general election in between,²⁴⁶ and those member states in which a constitutional amendment accepted by parliament needs to be ratified by referendum.²⁴⁷ The member states with several constitutional amendment procedures are difficult to situate on this spectrum of less to more rigid constitutions. In France, for example, a constitutional amendment, if initiated by parliament, must be ratified by referendum after parliament accepts it. However, if it is initiated by the executive, ratification by a three-fifths majority of *Congrès*, the united assembly of both houses of the parliament, will suffice.²⁴⁸

Other member states have different procedures for different categories of amendments which, depending on the content, can be lighter or heavier. In for instance Austria, ordinary constitutional amendments may be submitted to a referendum after parliamentary acceptance, but a referendum is mandatory if it concerns a total revision of the Constitution, as was required for Austria's accession to the EU.²⁴⁹ In Bulgaria, a special 400-member Grand National Assembly must be elected for the adoption of, among other things, a new constitution, a change of government system, or a repeal of fundamental rights.²⁵⁰ In Spain, there is a heavy procedure involving general elections and a mandatory referendum for amendments relating to fundamental constitutional principles, basic fundamental rights, the crown, or a total constitutional revision.²⁵¹ Lithuania even has three different constitutional amendment

²⁴¹ Reestman, *supra* n. 118, p. 273-4.

²⁴² The Czech Constitutional Court, the Danish Supreme Court, the German Federal Constitutional Court, and the Polish Constitutional Court.

²⁴³ As in Slovakia (art. 84 (4) Slovakian Const.)

²⁴⁴ As in Poland (Art. 235 Polish Constitution) and Slovenia (Art. 169 in conjunction with Art. 170 Slovenian Const.)

²⁴⁵ As in Italy (where a referendum may be requested by one-fifth of the members of either house of parliament, 5000.000 voters, or five regional councils, unless the amendment is adopted in the second reading by a two-thirds majority; Art. 138 Italian Const.) and Luxembourg (where a referendum requested by 25.000 voters may replace the second reading (Art. 114 Luxembourg Const.).

²⁴⁶ Such as in Belgium (Art. 195 Const.), Greece (Ar. 110 Const.); the Netherlands (Art. 137 Const.).

²⁴⁷ Denmark (Art. 88 Const.); Ireland (Art. 46 in conjunction with 47 Const.).

²⁴⁸ Art. 89 French Const.

²⁴⁹ Art. 44 Austrian Const. It is more or less similar in Latvia, where amendments to *inter alia* Art. 1 Latvian. Const., according to which Latvia is an independent democratic republic, must be confirmed in a referendum (Art. 77 in conjunction with Art. 76 Latvian Const.).

²⁵⁰ Art. 157 in conjunction with Art. 158 Bulgarian Const.

²⁵¹ Art. 168 Spanish Const.

procedures, the heaviest one prescribing that an amendment to Article 1 Lithuanian Constitution, which proclaims that the State of Lithuania is an independent democratic republic, may only be altered by a referendum approved by not less than three-quarters of the Lithuanian electorate.²⁵²

In fact, the last-mentioned category of member states forms a link to yet another category, consisting of member states as Cyprus, the Czech Republic, France, Germany, Greece, Italy, and Portugal. Besides constitutional provisions that can be amended according to a more or less rigid amendment procedure, these states also have constitutional principles or provisions that *cannot* be amended.²⁵³ These unamendable constitutional provisions generally concern the fundamentals of the national constitution, its basic structure. The link between the two categories is that while the constitutions of the member states in the former category (explicitly) allow the possibility of establishing a fundamentally different, novel constitution while staying *within* the existing constitutional order, according to the constitutions of the member states in the latter category such a fundamentally different, novel constitution can only be established by going *outside* the existing constitutional order – unless, of course, if it is accepted that the provision designating the unamendable provisions or principles may itself be constitutionally amended. That is the case in France, at least *de facto*, and in Portugal, at least to a certain extent.²⁵⁴

If we now look at the rules on acceptance by the member states of treaties that are incompatible with their constitutions, it should be noted, first of all, that in three member states approving such a treaty is procedurally easier than amending the constitution itself. In Finland, a treaty that ‘concerns the Constitution’, among other things, must be approved by a two-thirds majority of the *Eduskunta*, while a constitutional amendment has to be adopted by it twice, the second time after general elections and by a two-thirds majority (unless a majority of least five-sixths declares, during the first reading, that the proposal is urgent, in which case the amendment can be adopted in one reading by a two-thirds majority).²⁵⁵ In the Netherlands, only one reading and a two-thirds majority in both houses of parliament is required, while a constitutional amendment requires two readings, with general elections in between, and a two-thirds majority in both houses in the second reading.²⁵⁶ In Portugal, a treaty declared repugnant to the Constitution by the Constitutional Court may nevertheless be ratified if the *Assembleia da República* approves it by a majority that is at least equal to two-thirds of all members present, and greater than an absolute majority of all the members in the full exercise of their office.²⁵⁷ By contrast, an ‘ordinary’ constitutional amendment, which may only take place five years after the date of publication of the previous constitutional amendment, requires a two-thirds majority of the members in full exercise of their office. The contrast is even sharper in comparison with the ‘extraordinary’ constitutional amendment procedure, which may take place any time, on the condition that the amendment is carried by a four-fifths majority.²⁵⁸ However, treaties incompatible with the Portuguese Constitution that have been approved without prior constitutional amendment may only be applied in the internal Portuguese legal order if they are also applied by the other contracting parties (reciprocity) and no fundamental constitutional principle is at stake.²⁵⁹ Substitute EU treaties will usually, if not always, meet those conditions.

²⁵² Art. 148 Lithuanian Const.

²⁵³ Resp. Art. 182 (1) Cypriot Const.; Art. 9 (2) Czech Const.; Art. 89 (5) French Const.; Art. 79 (3) German Const.; Art. 110 (1) Greek Const.; Art. 139 Italian Const.; Art. 288 Portuguese Const.

²⁵⁴ *De facto* in France because the French Constitutional Council is not competent to review constitutional amendments; *Conseil Constitutionnel* decision 2003-469 of 26 March 2003 (Decentralisation), para. 2. For Portugal, see Teresa Violante, Vera Euró, ‘The Portuguese Republic’ in Besselink *et alia* (eds.), *supra* n. 34, p. 1307.

²⁵⁵ Resp. Art. 94 and 95, and Art. 73 Finnish Const.

²⁵⁶ Art. 91 (3) and Art. 137 Dutch Const.

²⁵⁷ Art. 279 (4) Portuguese Const.

²⁵⁸ Art. 286 (1) and Art. 284 Portuguese Const.

²⁵⁹ Art. 277(2) Portuguese Const.

In all other member states, the constitution has to be amended before the state can be bound by a treaty that is incompatible with its constitution (with the proviso that in Germany no formal constitutional amendment is required for EU (Amendment Treaties) and substitute EU treaties, which merely need the approval of the majorities required for a constitutional amendment). With regard to these states, we can again make a distinction between member states that have only one procedure for approving treaties and member states that require qualified majorities for transfer treaties (*supra*, Part III.D). For the former category of member states, with the exception, of course, of the Netherlands and Portugal, the requirements for a constitutional amendment are always stricter than those required for treaty approval.

The situation is often different in those member states that demand a qualified parliamentary majority for transfers of competences to international organizations, in general, or the EU, in particular. In one member state, Poland, it is actually more difficult to adopt a transfer treaty than a constitutional amendment, although the difference is modest. A transfer treaty requires a two-thirds majority vote in both houses with at least half of the statutory number of members present. A constitutional amendment must be adopted by the same majority in the *Sejm*, the Polish lower house, whereas in the *Senat*, an absolute majority of votes with at least half of its statutory numbers present will suffice.²⁶⁰

In the other states that fall into this category, the majorities required for parliamentary approval of transfer treaties are often the same as those required for constitutional amendments: this applies to EU transfer treaties in Austria, Germany, and Hungary, and to ‘ordinary’ transfer treaties in Croatia, the Czech Republic, Finland, Latvia, Slovakia, and Slovenia. Sweden may be added to this list. In that member state, a constitutional amendment must be adopted twice by the *Riksdag*, by simple majority and with elections in between, while a transfer treaty must be approved either by a majority of three-fourths of the votes cast representing at least half of the members of the *Riksdag*, or in accordance with the procedure prescribed for the adoption of a constitutional amendment.²⁶¹ In all these member states, the acceptance of a transfer treaty can thus more or less be equated with a (substantive) constitutional amendment (although in some of these states, additional referendums are possible²⁶² or even required for certain categories of constitutional amendments).²⁶³ This implies that the consequences of a declaration of incompatibility in these member states are, or could be, very modest. This can be illustrated with a reference to Hungary, where the Agreement on a Unified Patent Court did not qualify as an EU treaty, and therefore did not have to be approved by a qualified majority. It was, however, declared incompatible with the Constitution, in consequence of which it can only be approved after a constitutional amendment, which requires an identical parliamentary majority to be adopted.²⁶⁴

However, in Denmark,²⁶⁵ Greece,²⁶⁶ Finland,²⁶⁷ Romania,²⁶⁸ Spain,²⁶⁹ which require qualified majorities for transfer treaties, the adoption of a constitutional amendment is subject to more stringent requirements.

²⁶⁰ Art. 90 (2) and Art. 235 (4) Polish Const. However, in case of constitutional amendment a confirmatory referendum may be demanded by one-fifth of the statutory members of *Sejm*, the *Senat*, or the president of the republic (Art. 235 (6) in conjunction with (1))

²⁶¹ Cp. Chapter 7, Art. 14 and 16, and Chapter 10, Art. 6, 7, and 8, Swedish Instrument of Government.

²⁶² Such as in Luxembourg (Art. 114 Luxembourg Const.); Slovenia (Art. 170 Slovenian Const.); Sweden (Chapter 7, Art. 16 Swedish Instrument of Government).

²⁶³ Such as in Latvia (Art. 77 Latvian Const.)

²⁶⁴ Art. S Hungarian Const.

²⁶⁵ Cp. Art. 20 and 88 Danish Constitution.

²⁶⁶ Cp. Art. 28 (2) and 110 Greek Const.

²⁶⁷ Cp. Art. 73 and 94 (2) Finnish Const.

²⁶⁸ Cp. Art. 148 (1) and (3), and 151 (2) and (3) Romanian Const.

²⁶⁹ Cp. Art. 93 jo 81 (2), and 167 and 168 Spanish Const.

A constitutional amendment can take a long time, especially if, as in Luxembourg, until 2003, and Belgium, an amendment must be accepted twice by parliament, with general elections in between. In these member states, it has been known to happen that their constitutions were amended only *after* the approval, ratification, and entry into force of treaties inconsistent with their constitutions. In Luxembourg (European Coal and Steel Community) and Belgium (the three founding EC Treaties), constitutional authorizations to join the mentioned international organizations were only created after the ratification of the mentioned accession treaties; and in both member states, provisions that reserved voting rights in municipal elections to their respective nationals were amended only after the entry into force of the Treaty of Maastricht.²⁷⁰ Something similar happened in Lithuania, where the constitutional act authorising accession to the EU was adopted several months after accession.²⁷¹ It should be clear that this is not the recommended course of action in rule of law based states.

To conclude this subsection: treaties that are incompatible with the constitution must clear the highest of national constitutional hurdles. That is even the case in the Netherlands and Portugal. Although it is easier to approve an unconstitutional treaty than a constitutional amendment in these member states, the approval of such treaty is still more difficult than the approval of treaties that are *not* unconstitutional, including transfer treaties (*supra*, Part III.D). It is also noteworthy that in two member states, the adoption of substitute EU treaties formally required a constitutional amendment – in Hungary, the Agreement on a Unified Patent Court and in Ireland, the same treaty and the Fiscal Compact – while in four member states at least one of the substitute EU treaties had to be approved by the same parliamentary majorities as required for a constitutional amendment: the Fiscal Compact in the Czech Republic and Hungary, and the Agreement on a Unified Patent Court in Germany and Latvia (*supra*, Part III.D). Non-amendable constitutional provisions or principles are national constitutional hurdles *hors catégorie*. Clearing them would somehow require the enactment of a new constitution. But that has not proved necessary thus far as regards EU Amendment Treaties and substitute EU treaties, and it seems reasonable to assume that, at least for substitute EU treaties, it will remain that way.

J. Ratification

The Schengen Implementation Agreement of 1990 (Article 139 (1)), the Prüm Convention (Article 48), and the ESM Treaty (Article 47 (1)) were subject to ‘ratification, acceptance or approval’ by the signatories, and the Fiscal Compact and the Agreement on a Unified Patent Court were subject to ‘ratification in accordance with the respective constitutional requirements’.²⁷² Generally, ratification is a competence of the head of state, but it should be noted that in member states where parliamentary approval is not required for all treaties - and these are, as we have seen (*supra*, Part III.B), by far in the majority – it is sometimes the government that executes the required act of approval or acceptance for those treaties that do not require parliamentary approval.²⁷³

²⁷⁰ For Belgium, see Patricia Popelier and Catherine Van de Heyning, ‘The Belgian Constitution: The Efficacy Approach to European and Global Governance’, in: Albi & Bardutzky (eds.), *supra* n. 47, p. 1235-6; For Luxembourg, Jörg Gerkrath, ‘The Constitution of Luxembourg in the Context of EU and International Law as ‘Higher Law’’, in Albi & Bardutzky (eds.), *supra* n. 47, p. 224-5.

²⁷¹ Irmantas Jarukaitis and Gintaras Švedas. ‘The Constitutional Experience of Lithuania in the Context of European and Global Governance’, in Albi & Bardutzky (eds.), *supra* n. 47, p. 1003.

²⁷² As to the Schengen Agreement of 1985, art. 33 states that ‘This Agreement shall be signed without being subject to ratification or approval, or subject to ratification or approval, followed by ratification or approval (or, in one of the original language versions: ‘Le présent Accord est signé sans réserve de ratification ou d’approbation, ou sous réserve de ratification ou d’approbation, suivie de ratification ou d’approbation’). This seems to indicate that the Agreement was not subject to parliamentary approval in least one of the original signatory member states; however, to my knowledge the Agreement received parliamentary approval in all of them.

²⁷³ As for instance in Estonia, where instruments of ratification for treaties ‘ratified’ by the Estonian Parliament are signed by the president (Art. 78(6) Estonian Const.), while other treaties are ratified by the Prime Minister or the Minister of Foreign

All member states have a dual or bicephalic executive consisting of the head of state, on the one hand, and the government, on the other. Also, in all member states, the government is accountable to, and can be dismissed by, parliament or one of its houses. This is even the case in Cyprus, which, although nominally a presidential republic (Article 1, Constitution), has a Council of Ministers whose existence is dependent on the confidence of the House of Representatives.²⁷⁴ Disagreements between the president, on the one hand, and the government and parliament, on the other, are possible, especially in times of *cohabitation*, in which the political affiliation of the president differs from that of the government and parliamentary majority. Such disagreement sometimes concerns treaties, which begs the question of whether a head of state may refuse to ratify a treaty if its ratification is desired by government and parliament.

That is impossible in Ireland, given that the Irish president has no original constitutional competences in the field of treaty conclusion, not even for issuing of instruments of ratification, although that competence can be 'delegated' to him or her by the government on the basis of the Republic of Ireland Act 1948 (Article 3). In practical terms, such refusal can also be ruled out in the monarchies that are member states of the European Union (Belgium, Denmark, Luxembourg, the Netherlands, Spain, and Sweden), as the democratic legitimacy of their monarchs is simply too weak to allow them to refuse to sign instruments of ratification proposed by their ministers. In most of the remaining member states, the issue just does not seem to have been settled; however, in some of them, it has been, in one way or another. In the following, we will leave aside those member states in which it is not entirely clear whether the president may refuse to ratify for, let us say, his or her 'personal' constitutional reasons, but in which (s)he may refuse to ratify as long as a treaty is subject to judicial constitutional review.

In Bulgaria, the Czech Republic,²⁷⁵ and Hungary,²⁷⁶ it is prohibited to presidents to refuse issuing an act of ratification. It is striking to see the Czech Republic on this list, given that the president of that member state refused to ratify the Lisbon Treaty for quite some time;²⁷⁷ it indicates that constitutional theory and practice do not always go hand in hand. Finland and Lithuania are somewhere in between: although the Finnish and Lithuanian presidents may refuse to issue an act of ratification, their vetoes can be overcome by parliament - on a proposal by the government and by a simple majority in Finland, and by a majority of all members of parliament in Lithuania.²⁷⁸ In Cyprus,²⁷⁹ France, Poland, Portugal,²⁸⁰ and, probably, Romania, however, the presidents are constitutionally empowered to refuse to ratify, their decisions being moreover final. It is no coincidence that all the last-mentioned member states have a system of government that is or can be classified as presidential or semi-presidential, or at least as a system that is somewhere in between a presidential and a parliamentary system of government.²⁸¹ In constitutional practice, these member states cannot be categorised together; everyone knows that the French president, who is in ordinary times not only the head of state but also the head of government who determines French policy, falls in another league than, for example, the Portuguese president. But

Affairs; Madis Ernits *et alia*, 'The Constitution of Estonia: The Unexpected Challenges of Unlimited Primacy of EU Law', in Albi & Bardutzky (eds.), *supra* n. 47, p. 944.

²⁷⁴ Alecos Markides, 'The Republic of Cyprus' in Besselink *et al* (eds.), *supra* n. 34, p. 284.

²⁷⁵ Václav Pavlíč, Miluše Kindlová, 'Czech Republic', in Besselink *et alia* (eds.), *supra* n. 34, p. 367-8.

²⁷⁶ The president must issue the instrument of ratification on proposal of the minister of foreign affairs within five days; section 8(2) Act L of 2005 on the Procedure Relating to International Treaties (unless he/she refers the treaty for review to the constitutional court ex section 23 of Act CLI of 2011 on the Constitutional Court).

²⁷⁷ Honor Mahony, 'Klaus keeps EU guessing on future of Lisbon Treaty', *EUobserver* 13 October 2009, <https://euobserver.com/news/28819> (visited 8 December 2020); Václav Pavlíč, Miluše Kindlová, 'Czech Republic', in Besselink *et alia* (eds.), *supra* n. 34, p. 368.

²⁷⁸ Art 58 (2) Finnish Const.; Art. 72 (2) Lithuanian Const.

²⁷⁹ Art. 50 (1) (a) sub ii, Cypriot Const.

²⁸⁰ Art. 13b(b) Portuguese Const.

²⁸¹ As Poland, Bogusław Banaszak, 'The Republic of Poland', in Besselink *et al* (eds.), *supra* n. 34, p. 1264.

it may perhaps be said that a general characteristic of these states is that the constitutional capacity of heads of state to make independent political decisions is greater than that of heads of state in purely parliamentary systems. That capacity, in combination with their direct election, makes it conceivable, especially in times of *cohabitation*, that a president could refuse to ratify a treaty, not only temporarily, but also more structurally. However, to my knowledge, this has not happened thus far in the EU context. The closest it has come, besides the aforementioned case of the Czech president, was the case of the Polish president, who also refused to ratify the Lisbon Treaty between April 2008 and October 2009.²⁸²

The conclusion of this subsection is therefore that the ratification phase for the moment seems to pose no real national constitutional obstacles for differentiated EU integration.

Part IV: Concluding Remarks

The additional constitutional obstacles to differentiated integration inside the EU legal order are small in number compared to the obstacles encountered in EU decision-making in general. Only Ireland has made participation in a differentiated integration regime dependent on parliamentary consent. In addition, the Czech Republic, Germany, Ireland, and Poland have tied the application of the so-called bridge clauses in the framework of an established integration regime to national parliamentary (and in Poland also presidential) assent. However, they have conditioned the use of other bridge clauses in the same way. Therefore, the relevant provisions should be regarded as the expression of a general rule that the use of bridge clauses is subject to national parliamentary approval, rather than as a specific national obstacle to differentiated integration. Furthermore, the national rules that oblige the government representatives in EU Councils to take, in one way or another, their national parliaments' positions into due account in their voting behaviour, and those rules that bind the representatives' consent to specific draft decisions to prior parliamentary approval, are also applicable under internal differentiated integration regimes. But they constitute no additional national constitutional obstacles. Something similar applies to the possibility that decisions taken under differentiated integration regimes inside the EU legal order can be subjected to *ultra vires* or constitutional identity review in those member states in which constitutional or supreme courts claim competence to do so.

With regard to differentiated integration outside the EU legal order, the following can be concluded. Substitute EU treaties always must clear a host of national constitutional obstacles ranging from parliamentary approval to ratification. However, if we look for additional national constitutional obstacles, we must distinguish between substitute EU treaties that regulate subject matter that could also have been regulated in secondary EU law and substitute treaties that regulate subject matter for which the EU lacks competence.

If we compare the substitute EU treaty conclusion process to the EU decision-making process, the additional national constitutional obstacles are manifold. As we have seen, substitute EU treaties thus far have been subjected to parliamentary approval in the largest possible majority of member states that ratified them, and it seems reasonable to assume that it will remain exceptional that a substitute EU treaty does not require parliamentary approval in one or several member states. We have also seen that several substitute EU treaties have been subjected to higher parliamentary approval requirements in several member states, and to referendums in Denmark and Ireland, either because they were considered transfer treaties, or because they were considered, by courts or by political institutions, incompatible with the national constitution. At the same time, we have been able to observe that none of the member states whose legislation allow for treaty referendums has organised a referendum on an EU substitute treaty - except for Denmark and Ireland, where they were necessary for constitutional reasons. However, it cannot be ruled out that this will be otherwise for future substitute EU treaties, all the more so because we may presume that as the integration process progresses the subject matter regulated by them is likely

²⁸² Phillipa Runner, 'Polish President declines to sign EU Treaty', *EUobserver* 1 July 2008, <https://euobserver.com/institutional/26424v> (visited 8 December 2020).

to become more politically and constitutionally sensitive. For the same reason, it cannot be ruled out that the number of lawsuits in which national courts are asked to review treaties, and the frequency of findings of incompatibility with the constitution, will rise.

If we compare the national constitutional obstacles faced by substitute EU treaties to similar obstacles faced by EU (Amendment) Treaties, no additional national constitutional obstacles have been detected. On the contrary, in a few member states (Austria, Bulgaria, Romania, and Slovakia) some substitute EU treaties have benefitted from the fact that they were not equated with formal EU (Amendment) Treaties, even if they did qualify as transfer treaties. The national hurdles they had to clear were less high, given that they could be approved by a simple parliamentary majority, whereas the same subject matter wrapped in an EU (Amendment) Treaty would have required a qualified majority. But it should be clear that this minor advantage will never be decisive for the choice between a substitute EU treaty and an EU (Amendment) treaty.

Substitute EU treaties have yet another advantage over EU (Amendment) Treaties: they do not require unanimous ratification. That means that a hitch somewhere along the line during the national treaty-conclusion phase will not necessarily frustrate the entire project. However, not all member states are equal in this respect, as evidenced by the four substitute treaties that have seen the light of day over the past decade. The Fiscal Compact was able to enter into force after ratification by 12 eurozone states, without any distinction between them (Article 14 (2)). The other three treaties do, however, make a distinction between states. The Agreement on a Unified Patent Court can only enter into force once 13 signatory states have ratified it, provided that ‘the three States in which the highest number of European patents was in force in the year preceding the year in which the signature of the Agreement takes place’ are among them (Article 89 (1)), i.e. France, Germany, and, since the United Kingdom’s withdrawal from the Agreement, Italy. The ESM Treaty required ratification by signatories representing at least 90% of the subscribed capital stock (Article 48 (1)), which means that it could not have entered into force if it had not been ratified by France, Germany, and Italy. And, if I have counted well and we add Spain to the list of indispensable member states, the same applies to the Single Resolution Fund Agreement, which required ratification by member states ‘that represent no less than 90 % of the aggregate of the weighted votes of all Member States participating in the Single Supervisory Mechanism and in the Single Resolution Mechanism’ (Article 11 (2)).

The participation of a core of large member states is, or was, therefore indispensable for the entry into force of these three treaties. It should be added that, although this was not necessary from a strictly legal perspective, it is questionable whether the Fiscal Compact would have entered into force if France and Germany, and perhaps Italy, had not accepted to be bound by it. If it is indeed the case that the participation of these two or three member states is, from a political point of view, a *conditio sine qua non* of differentiated integration outside the EU legal order, it is interesting, finally, to take a look at national constitutional obstacles in their legal systems to EU treaties, whether substitute or amendment treaty.

Italy is a no-brainer: it does not demand qualified parliamentary majorities for transfer treaties; does not allow for treaty referendums; has a constitutional court that does not intervene in the process of treaty-conclusion; and has never needed to amend its Constitution to be able to ratify EU substitute or amendment treaties.

France and Germany are harder and perhaps even impossible to classify. But let us try, by juxtaposing various possible national constitutional obstacles point by point. France does not require qualified majorities for transfer treaties, Germany does. France allows for treaty referendums, Germany does not. France has a constitutional council to which political authorities, among them parliamentary minorities (but not individuals), may submit treaties for review; Germany has a constitutional court that is accessible to both parliamentary minorities and individuals. The French constitutional council reviews whether a treaty is compatible with the ‘essential conditions for the exercise of sovereignty’, but not whether it affects the unamendable provision in the French Constitution; the German constitutional court

also reviews whether a treaty affects the unamendable constitutional principles, i.e. German constitutional identity, made up of, among other principles, sovereignty, statehood and (national) democracy. France had to amend its Constitution to be able to ratify the Treaties of Maastricht, Amsterdam, and Lisbon, because the constitutional council declared them incompatible with the 'essential conditions for the exercise of national sovereignty'. In Germany, the constitutional court never found a treaty incompatible with German constitutional identity. It seems that in France even the most fundamental constitutional amendments can be carried through via entirely parliamentary means; in Germany an infringement of German constitutional identity can only be overcome by the adoption of a new constitution.

Which of the two has the highest national constitutional obstacles? It is hard to tell, although one may be inclined to say that the scale tilts towards Germany, for the following reason. While in France constitutional amendments to overcome encroachments on 'essential conditions for the exercise of national sovereignty' are a more or less calculated in and run of the mill aspect of the French process of EU treaty-conclusion, an encroachment on German constitutional identity would require Germany to venture in unchartered constitutional territory.

Author contacts:

Jan-Herman Reestman

Roeterseilandcampus,

Gebouw A, Kamer 9.03 Nieuwe Achtergracht 166

1018 WV Amsterdam

Email: J.H.Reestman@uva.nl



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