

RATIFICATION OF THE CONSTITUTIONAL TREATY AND PROCEDURES FOR THE CASE OF VETO

by Stanislaw Biernat, Cracow*

I. Introduction

The reform of the European Union on the basis of the Constitutional Treaty¹ is the most important and most complicated in the history of the European Union and the Communities to date. This is due to several factors: the profoundness and variety of the changes introduced, concerning mainly institutional and procedural matters, the scale of the reform in the recently enlarged Union of 25 and the multi-phase procedure for the preparation of the Treaty.

In the process of development of the Constitutional Treaty there are three stages that can be distinguished:

Firstly, preparation of its draft at the Convention. It was for the first time that such a process was applied to the Treaty reform. The work of the Constitutional Convention went quickly and smoothly. It is worth noting, however, that the particular issues were not subjected to discussions at the Convention to equal degrees. For some problems, e.g. simplification of legal acts or the legal personality of the Union, working groups were established, and the reports of those groups were animatedly discussed. Conversely, other organisational or procedural matters, for instance the controversial, as it proved later, reform of the qualified majority voting at the Council, were agreed in the Praesidium of the Convention towards the end of the work, and the discussion over that reform was rather limited.²

Secondly, analysis, modification and acceptance of the draft by the IGC. Some Member States were in favour of the IGC restricting itself to the acceptance of the draft Constitution submitted by the Convention, and for the Treaty to be signed quickly. That intention did not work out though and in December 2003, the IGC ended in a failure. The reasons for that fiasco were various: the positions of the governments of Spain and Poland defending the Nice system of voting at the Council, the rigid attitudes of the governments of France and Germany, as well as the poor preparation of the IGC, and lack of serious attempts to work out a compromise on the part of the Italian Presidency.³ Conversely, the Irish Presidency in the first half of 2004, proved to be very effective and in June 2004 the text of the Constitutional Treaty was agreed by the IGC. This became possible because of a

* Professor of Law, Jagiellonian University, Cracow, Chair of European Law.

1 The terms "Constitutional Treaty" and "Constitution" will hereinafter be used interchangeably.

2 P. Norman, *The Accidental Constitution*, Brussels 2003, p. 281-299.

3 See a more detailed analysis by P. Ludlow, *The European Council and IGC of December, 2003*, EuroComment, Briefing Note, No. 2.8, January 9, 2004.

compromise in disputable matters, in particular concerning the manner of voting at the Council and the composition of the first European Commission appointed after the coming into force of the Constitutional Treaty.

On 29 October 2004, the Constitutional Treaty was signed in Rome and that date marked the third phase of the procedure: ratification of the Treaty. The issue of ratification is more and more frequently becoming the subject of discussions and concerns. Views are being voiced that successful completion of the ratification stage may prove to be even more difficult than the IGC stage.

The above division into three stages is rather simplified. In fact, the prospects of ratification had begun to be considered earlier, before the Constitutional Treaty was signed. Already at the IGC phase the positions of the States with regard to the contents of the Treaty were certainly affected by the fact that it would be subject to subsequent ratification and that the chances for ratification should be assessed in advance. Such an approach can be noted in the stances of the governments of some Member States.⁴ Lively discussions are now taking place on the course of the ratification process in particular States and in the European Union as a whole. One of the main features in that discussion relates to the possible problems with ratification or, more specifically, its refusal in one or more States.

II. Ratification and the Coming into Force of the Constitutional Treaty

1. Ratification referenda

a. Some introductory remarks

Two basic methods of ratification can be found in the Member States: by the parliament or based on a referendum. In November and December 2004, Lithuania and Hungary were the first Member States to ratify the Constitutional Treaty in their parliaments.

It is interesting to note that anxieties about the refusal to ratify concern exclusively or mainly the States where referenda are to be held. This is understandable; it could be stated that governments and parliaments are more predictable. If a given government has approved the results of the IGC it is also expected to support the ratification, unless the political situation has radically changed in the meantime, for example as a result of elections won by a party (parties) with a fundamentally different view on European issues.

⁴ J. Shaw, What happens if the Constitutional Treaty is not ratified? (paper in this volume), p. 3.

In the case of a referendum, on the other hand, one has to provide for surprises.⁵ Voters are noted to be prone to accept populist, nationalist and anti-European arguments, and certain groups of citizens are guided by ad-hoc considerations, such as the current economic situation in the state.⁶ In addition, the result of the referendum and sometimes its binding force may depend on the turnout.

Talking about referenda generally in this context is a simplification since the referendum can be used in a number of variants. The differences may concern e.g. whether: the referendum is obligatory or optional in a given State; its result is legally binding or is of consultative nature; the result determines the ratification (or its failure) directly or is required to be approved by the national parliament; its validity (binding force) depends on additional factors, such as turnout.⁷ The issues of internal ratification procedures will not be dealt with here in further detail, even though they are of great practical importance when chances for success of the Constitutional Treaty being ratified are considered. This is true in particular of the distinction between consultative referenda and those with legally binding results. However, it may be assumed that even where the result of the referendum in a given State is not legally binding, it may not be ignored in practice by the government or parliament.⁸ In a situation where the result of the consultative referendum in a State proved negative, the final decision on ratification will probably depend on other factors as well, such as for example the difference between “No” and “Yes”, and on how high the turnout was, of those eligible to participate in the referendum.⁹

According to the information available as at the beginning of 2005, referenda will be held in 11 Member States, even though formal decisions in that matter have not been made in all of them. These are: Belgium¹⁰, the Czech Republic, Denmark,

5 It is pointed out in discussions that referenda are unpredictable. See e.g. D. Keohane, A guide to the referenda on the EU Constitutional Treaty, http://www.cer.org.uk/pdf/briefing_referenda.pdf p. 2-3; A. Maurer, Austritt, Ausschluss oder institutionelle Anpassung: Optionen nach dem Scheitern des EU-Verfassungsvertrages (vorläufige Version), http://fesportal.fes.de/pls/portal30/docs/FOLDER/IPG/IPG1_2005/ARTMAURER.PDF, p. 1-5; A. Maurer, D. Devrim, K.-O. Lang, A. Crespy, A. Stengel, Ratifikationsverfahren zum EU-Verfassungsvertrag, Stiftung Wissenschaft und Politik, Januar 2005, http://www.swp-berlin.org/common/get_document.php?id=1135&PHPSESSID=0f1209c1b5b74c23f485a4b44ad7243; p. 3-5; B. de Witte, The Process of Ratification and the Crisis Options: A Legal Perspective, Asser Institute Colloquium on European Law, The Hague, 13-16 October 2004, *The EU Constitution: The Best Way Forward?* (forthcoming), p. 6-7.

6 Thus it is not surprising that referenda as a form of ratification are supported by the opponents of the Constitution. See e.g. a demand for fair referendums, The European NO Campaign, <http://www.europeannocampaign.com/219.99.html>.

7 A. Maurer, D. Devrim, K.-O. Lang, A. Crespy, A. Stengel, *op.cit.*, *passim*, esp. p. 4.

8 The government in The Netherlands has declared it will respect the outcome of (the consultative) referendum. See N. Hussain, G. Maitland Hudson, R. Whitman, *Referendums on the EU Constitutional Treaty: The State of Play*, Chatham House, October 2004, p. 7.

9 See generalisations on ratification by referendum, S. Shaw, *op.cit.*, p. 9-11.

10 Some sources suggest, however, that ratification of the Constitutional Treaty will take place in Belgium in the parliament in view of the negative opinion of the Council of State on the admissibility of the referendum.

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France, Ireland, Luxemburg, The Netherlands, Poland, Portugal, Spain and the United Kingdom.

b. Referenda in the new Member States

Those who have already decided to hold a referendum include two new Member States which joined the Union on 1st of May 2004 (Poland and the Czech Republic). As indicated by the discussions and statements made by politicians, the remaining new Member States consider that it is not necessary to announce referenda there. The reason is that the Constitution does not introduce any principal changes compared with the treaties on which the Union is founded at present and these treaties were approved in 2003 in the accession referenda. It was therefore concluded that organising new referenda after such a short period of time would be superfluous especially that most of the political forces and populations in those States are pro-European and “pro-Constitutional”.

The situation is different in Poland where, among political parties, there are differences of opinion about the support for European integration on the basis of the Constitutional Treaty. The Constitution of the Republic of Poland provides for a choice between the procedures of ratification of an international agreement like the Constitutional Treaty (and earlier the Accession Treaty), either in parliament or based on a referendum. If the first chamber of Parliament (the Sejm) decides to hold a referendum, which will undoubtedly be the case, its results will be binding but only if the turnout is higher than 50% of the eligible voters. If the turnout in the referendum is lower, the Sejm will again take a decision on the choice of the ratification procedure: either a new referendum or the ratification statute which requires the qualified majority of 2/3 of the deputies to the Sejm and 2/3 of the senators.¹¹

In the Czech Republic, there are controversies in political circles too as to the ratification of the Constitutional Treaty, and the view prevails that a referendum will be held on this matter. Its result is all the more difficult to foresee because even the

11 S. Biernat, Impact of EU Accession on the National Legal Orders of New Member States: Poland, in: A. E. Kellermann, J. Czuczai, S. Blockmans and A. Albi (eds.), Impact of EU Accession on the Legal Orders of New Member States and (Pre-) Candidate Countries. Hopes and Fears (forthcoming).

President of the Republic opposes the European Constitution.¹² The constitutional situation in that State is different from that in Poland, since the organisation of a referendum requires a separate constitutional act, which has not yet been passed.¹³

c. Referenda in the “Old” Member States

Referenda are to be conducted in 9 out of the 15 “old” Member States, including those where referenda on European matters have been organised frequently (Denmark and Ireland, five times each), or less often (twice in France and once in the United Kingdom). In the other States (Belgium, Luxemburg, The Netherlands, Portugal, Spain), referenda on the ratification of the Constitutional Treaty will be the first European ones.

It is believed that ratification should not be a problem in several States, and the referendum procedure is to emphasise the democratic legitimisation of the decision on a further stage of European integration (Belgium, Luxemburg, Portugal). In other States, smaller or greater concerns are being voiced about the referenda results. Sometimes those concerns stem from the experience of previous referenda (Denmark, Ireland) or eurosceptical attitudes which are stronger than elsewhere (United Kingdom).

At the beginning of 2005, it is hard to predict whether and in which States the ratification of the Constitutional Treaty may encounter difficulties.¹⁴ Public opinion polls and statements made by politicians do not provide a clear picture and indicate that the situation may still change by the referenda dates. In Denmark, mentioned as a State in which there may be difficulties with ratification, high support for the

12 See Václav Klaus, Speech at the 10th European Forum, Berlin, November 20, 2004: “As I said, our membership in the EU has no alternative but all other things do have alternatives. When I say that just now, two weeks after the signing and several weeks or months before ratifying the EU constitution I want to emphasize that I am convinced that this document has alternatives. I hope that the forthcoming ratification process all over Europe will give us a chance to look at it closely, to discuss it openly and seriously. I find it important for all of us to realize that the recently signed constitution is not just another EU treaty. It is much more. It repeals all the existing EU/EC treaties and establishes quite a new EU – legally, constitutionally and politically different from the existing one. The new EU – based on its Constitution – will in fact become a new European State with all essential features of a state, in which the existing member countries will be reduced to regions or provinces and in which the formal agreement to subordinate to the superior entity will lead us to the abandonment of our national democracy, sovereignty and political independence.”; <http://www.mzv.cz/wwwo/default.asp?id=29131&ido=11029&idj=36&amb=2>.

13 It is worth noting that the former President of the Czech Republic, Václav Havel, made a firm call recently for supporting the Constitution and its ratification by the Parliament, without organising a referendum. He argued, amongst other things, that the citizens had recently voted in favour of EU membership. See Havel says Czechs must ratify EU constitution, *Breaking News.ie*, 2.01.2005, <http://www.breakingnews.ie/2005/01/02/story182900.html>.

14 An extensive review of the situation in particular States is presented by A. Maurer, D. Devrim, K.-O. Lang, A. Crespy, A. Stengel, *op.cit.*

Constitution was noted in November 2004¹⁵ while in Spain, considered to be “pro-Constitutional”, in December 2004 almost 60 per cent of citizens did not know whether to vote in favour or against the Constitutional Treaty.¹⁶

In France too, concerns are being voiced as to the results of the ratification referendum.¹⁷ They intensified in autumn 2004, before the internal referendum in the socialist party concerning the support for the Constitution. However, the proponents of the European Constitution achieved a clear victory on 1 December 2004.¹⁸ One cannot be certain, though, as to the results of the ratification referendum; they may happen to be affected by some internal policy factors or other issues concerning the Union’s future, even if not connected directly with the constitutional reforms, e.g. the issue of Turkey’s membership.

Meanwhile, the results of public opinion polls conducted throughout the Union indicate strong support for the idea of the Constitution for Europe, which does not necessarily mean: for its content.¹⁹

An interesting situation has occurred in Germany where an announcement was made at the end of August 2004 to change the *Grundgesetz* in order to be able to hold a referendum.²⁰

However, there are practically no chances for holding a referendum in Germany in view of the lack of political will on that matter in the main parties.²¹ Still, social pressure to organise a referendum continues to exist there.²²

15 Poll: Strong Danish support for Constitution, EurActiv, 4.11.2004, http://www.euractiv.com/Article?tcaturi=tcm:29-131871-16&type=News&_lang=EN.

16 Spanish voters undecided over EU Constitution, EurActiv, 21.12.2004, http://www.euractiv.com/Article?tcaturi=tcm:29-13367616&type=News&_lang=EN&email=45948.

17 Chirac: if held today, the referendum would be lost, EurActiv, 23.11.2004, http://www.euractiv.com/Article?tcaturi=tcm:29-132541-16&type=News&_lang=EN; Decline in yes vote for Constitution in France, EUobserver, 12.01.2005, <http://euobserver.com/?aid=18113&rk=1>.

18 French Socialists say ‘oui’ to EU Constitution, EurActiv, 2.12.2004, http://www.euractiv.com/Article?tcaturi=tcm:29-132995-16&type=News&_lang=EN.

19 See the results of Eurobarometer 62 announced in December 2004. Throughout the Union, a total of 68% of those surveyed were for and 17% against the European Constitution. The citizens of Belgium proved to be the most euroenthusiastic (81%-13%), while the most eurosceptical were the citizens of Denmark (44% - 36 %). The results in other States where referenda are to be held were as follows (votes for and against, with the undecided omitted): Luxemburg – 77 % – 14 %; The Netherlands – 73 % – 20 %; Poland – 73 % – 11 %; Spain – 72 % – 13%; France – 70 % – 18 %; Czech Republic 63 % – 18 %; Ireland – 61 % – 13 %; Portugal – 61 % – 11 %; UK – 49 % – 29 %. However, the authors of the surveys make the reservation that most interviews were conducted before the adoption of the Constitutional Treaty. The result indicates the extent to which people support the concept of the Constitution and not an assessment of the content of the text proposed for ratification in the Member States, and even less an indication of voting intentions in referenda. http://europa.eu.int/comm/public_opinion/archives/eb/eb62/eb62first_en.pdf.

20 German ruling party wants to enable EU Constitution referendum, EUobserver, 30.08.2004, <http://euobserver.com/?aid=17157&rk=1>.

21 Likelihood of EU poll in Germany decreases, Euobserver, 10.11.2004, <http://euobserver.com/?aid=17728&rk=1>.

d. Referenda as a Factor of Legitimation of the Constitutional Treaty

In general terms, referenda will be a frequently used form of ratification.²³ This applies not only to the number of States but even more so the population sizes. It is worth noting that referenda will be held in several big States: the United Kingdom, France, Spain and Poland.

Ambivalent attitudes towards the ratification of the Constitutional Treaty in a referendum can be noted among the proponents of this Treaty. On the one hand, the abovementioned concerns about the results are voiced but, on the other, the importance of enhancing the legitimisation of the Union is emphasized.²⁴ It is worth recalling that Article I-1 CT refers to two sources for the legitimacy of the Union: the citizens and States of Europe. During the proceedings of the Convention or the IGC, politicians, publicists and NGO representatives put forward various proposals, including for instance a general European referendum,²⁵ or co-ordination in time of the ratification procedures.²⁶ However, those proposals have not been accepted. The application, to such a broad extent, of the form of referenda for the ratification of the Constitutional Treaty is a qualitative change compared with the previous procedures adopted to amend the treaties of the Union (Communities). Allowing the citizens of Member States to take direct decisions sets a certain standard of determining their future in a democratic manner, which will have to be followed in the future.²⁷

22 See the most recent information on the homepage of Mehr Demokratie, a grass-roots organisation which campaigns for the right to citizen-initiated referenda: <http://www.mehr-demokratie.de/>. See also A. Maurer, D. Devrim, K.-O. Lang, A. Crespy, A. Stengel, op.cit., p. 23-25.

23 For ratification referenda and the circumstances in particular Member States see D. Keohane, op.cit.; N. Hussain, G. Maitland Hudson, R. Whitman, op.cit.; A. Maurer, D. Devrim, K.-O. Lang, A. Crespy, A. Stengel, op.cit.

24 Arguments for and against referenda are presented in this context by A. Maurer, op.cit., p. 1-5; G. L. Tosato, E. Greco, *The EU Constitutional Treaty: how to deal with the ratification bottleneck*, <http://www.iai.it/pdf/DocIAI/iai0417e.pdf>, p. 3-4.

25 The resolution of the 97 members of the Convention, alternate members and observers: *Referendum on the European Constitution*, Brussels, 31 March 2003, CONV 658/03, <http://www.alainlamassoure.com/liens/161.doc>; P. Norman, op.cit., p. 131-132; N. Hussain, G. Maitland Hudson, R. Whitman, op. cit., p. 10, fn. 11; A. Maurer, S. Schunz, *Ratifikation durch Referendum* ?, Stiftung Wissenschaft und Politik, November 2003, http://www.swp-berlin.org/common/get_document.php?id=257.

26 Commission wants simultaneous ratification of the Constitution, EUobserver, 8.05.2004, <http://euobserver.com/?aid=15540&rk=1> ; MEPs call for co-ordinated referenda on EU Constitution, EUobserver, 15.10.2004, <http://euobserver.com/?aid=17528&rk=1>.

27 J. Shaw, op.cit., p. 23-24; N. Walker, *The EU as a Constitutional Project*, The Federal Trust for Education and Research, online paper 19/04, September 2004, p. 8, http://www.fedtrust.co.uk/uploads/constitution/19_04.pdf ; A. Maurer, D. Devrim, K.-O. Lang, A. Crespy, A. Stengel, op.cit., p. 26-28; D. Keohane, op.cit., p. 5 puts it as follows: "The genie cannot be put back into the bottle".

2. The coming into force of the Constitutional Treaty

a. Requirement of ratification in all Member States

It should be assumed that the replacement of the treaties on which the Union is founded by the new Treaty can be made only in compliance with the requirements of the TEU. In the current legal state, the rules for the Constitution coming into force are defined in Article 48 TEU. That provision has applied to the introduction of partial amendments to the treaties to date, but it also refers to the comprehensive reform of primary EU law. New rules on further reviews contained in the Constitution will be applied no earlier than after the Constitution comes into force. The final paragraph of Article 48 TEU is worth emphasising in this context in that the amendments (as well as the new Treaty) shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

The above view on the application of Article 48 TEU upon the ratification of the Constitutional Treaty is commonly accepted. The requirement of unanimity of the Member States also stems from Article III-447 para. 1 CT. Although attempts have been made to provide a certain interpretation of the special role of the Constitutional Treaty as different from ordinary treaty amendments, which would justify the departure from the requirement of unanimity, they are not convincing.²⁸ It is also worth recalling the unofficial draft of the European Constitution of 2002, prepared at the European Commission and known as the “Penelope” according to which the Member States were to agree (unanimously) to the adoption of the Constitutional Treaty if it is approved by five-sixths of the States.²⁹ That concept has not been taken up though, just like other numerous proposals put forward during the Convention and the IGC.³⁰ Their shared characteristic was the necessity to reach unanimity in principle for introducing subsequent changes in the Treaty by the qualified majority voting.³¹ The States did not want to agree to such a solution without knowing on which side they might find themselves in the event of a possible conflict in the future and not wishing to lose their influence on next Constitutional changes.

28 G. L. Tosato, E. Greco, *op.cit.*, p. 14-15.

29 B. de Witte, *op.cit.*, p. 5-6; F. Lamoureux, *Draft Constitution: why a “rear guard” should be established*, *Notre Europe*, <http://www.notre-europe.asso.fr/IMG/pdf/Lamoureux-en.pdf>.

30 See E. Philippart, *op.cit.*, p. 2. Stories of such projects dating back to the 1980s are presented by B. de Witte, *op.cit.*, p. 1-7.

31 This is referred to by L.S. Rossi, *What if the Constitutional Treaty is not ratified?*, *European Policy Centre*, p. 4, <http://www.theepc.net/en/default.asp?TYP=TEWN&LV=187&see=y&t=&PG=TEWN/EN/detail&l=&AI=372>; J. Shaw, *op.cit.*, p. 4-5.

b. Mutual Interactions in the Ratification Process

In light of Article IV-447 (2) CT, the planned closing date of the ratification process is going to be the end of October 2006, and the Treaty itself would come into force on 1 November 2006. Before that, the ratification procedures will be conducted within particular Member States. Intensive political contacts can be expected, however, between the Member States³² and between the States and institutions of the Union.³³ For instance, visits have been announced of leaders of the States which are considered to favour the Constitution to other States before the referenda to be held in the latter.³⁴ Engagement in the referendum campaign of politicians from other States or the Community institutions involves the risk of allegations of interference with the sensitive matters of national interest.³⁵ Undoubtedly, however, particular Member States will be watching closely the course of the procedure in the other States. The ratification of the Constitutional Treaty in other States, especially those where there was a threat of the Treaty being rejected, may induce a hesitating State to also support ratification. Conversely, the rejection of the Treaty in one State may encourage the Treaty's opponents in the States which have not completed the ratification procedure yet.³⁶ It is without doubt that no State will want to be the first, or even worse, the only one which has caused a ratification crisis. In this situation, the timings of the ratification decisions are of considerable importance, especially the referenda in particular States, and the indirect mutual influences the States exert upon one another³⁷ The contacts between Member States and with the involvement of the Union's institutions will probably be intensified in a situation where the Constitution were to be rejected in a given State and further ratification efforts were to be made.³⁸

The manner of phrasing the above comments constitutes anthropomorphisation of States. This, of course, is a considerable simplification. The settling of the issue of ratification in a given State is determined by various indefinable factors, such as for example, the composition of forces in the parliament or the positions of the parties and other political forces, as well as the attitudes of citizens participating in the

32 J. Shaw, *op.cit.*, p. 2.

33 Of substantial psychological importance may, for instance, be the support of the European Parliament for the Constitution expressed by a decided majority on 12.01.2005. See European Parliament strongly endorses Constitution, *EUobserver*, 13.01.2005, <http://euobserver.com/?aid=18117&rk=1>.

34 Chirac and Schröder to push for Constitution 'yes' in Spain, *EUobserver*, 09.12.2004, <http://www.euobserver.com/?sid=18&aid=17952>.

35 J. Shaw, *op.cit.*, p. 23.

36 For these circumstances see J. Shaw, *op.cit.*, p. 10-11. N. Hussain, G. Maitland Hudson, R. Whitman, *op. cit.*, p. 4 refer in this context to "a domino effect".

37 D. Keohane, *op.cit.*, p. 2. See also e.g. Denmark urged to hold referendum before UK, *EurActiv*, 13.01.2005, http://www.euractiv.com/Article?tcaturi=tcm:29-134044-16&type=News&_lang=EN&email=45948.

38 G. L. Tosato, E. Greco, *op.cit.*, p. 13.

referendum, with various motivations behind them. Added to that are the legal rules, especially of procedural nature, which “translate” individual preferences of members of parliaments or voters into the collective decision (act of parliament, result of the referendum). It is worth remembering these complicated circumstances when the “will” of a given State is talked about or the methods of persuasion are considered for application with respect to it by other States in a situation of a ratification crisis.

c. Declaration 30 to the Final Act of the IGC

The ratification procedure under Article 48 TEU may be supplemented. Such is the character, with regard to the Constitutional Treaty, of Declaration 30 annexed to the Final Act of the IGC on the ratification of the Treaty establishing a Constitution for Europe.³⁹ It is not clear who may refer the matter to the European Council. This seems to be the competence of the Presidency but a proposal may also be put forward by any Member State. Of course, the European Council will also be able to deal with the matter in the event that the Constitutional Treaty is ratified by fewer than 4/5 of the Member States, i.e. fewer than twenty States. It can only be presumed that in the opinion of the authors of the Constitution in the event a higher number of States refuse to ratify it, the Treaty cannot practically be saved. When the figure indicated above is reached, dealing with the issue of ratification becomes the obligation of the European Council. The Declaration does not say what the conclusion of the European Council’s proceeding on the matter should be. This is a forum for the leaders of Member States to discuss, clarify the situation, and consider methods of solving the crisis. Political decisions of the European Council require the consensus of the leaders of all States and have to comply with EU law.

III. Scenarios for the Case of a Ratification Crisis

1. General remarks

In the event of a veto of one or several Member States in the process of Constitutional Treaty ratification, various scenarios for action have been presented

³⁹ In accordance with that Declaration: *The Conference notes that if, two years after the signature of the Treaty establishing a Constitution of Europe, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter will be referred to the European Council.*

in the literature recently.⁴⁰ It seems that a full catalogue can already be made listing all the solutions that might potentially be applied.⁴¹ At the current stage of the discussions, the point is not therefore to design new ways of getting out of a crisis but to consider what conditions there are behind particular scenarios; chances for them being realised, and the consequences that follow. An issue to which due attention should be given in the assessment of the possible developments, is whether they are capable of happening (and how easily) in the current state of the law in force in the Union.⁴² This aspect of the issue deserves particular attention. Indeed, it is characteristic that in the considerations on the overcoming of a possible ratification crisis, certain, sometimes radical alternatives are proposed without taking account of whether they would be founded on the current law. As rightly noted, law is often treated, in this context, not as a significant factor that should determine the choice of the allowable solution, but as an impediment in the pursuance of political objectives.⁴³

The scenarios proposed in the discussion to date vary significantly. Particular procedures in the event of a veto of a State (States) will be characterised and commented upon below, account being taken of several factors:

- whether a given option has its basis in the law in force in the Union. Putting emphasis on this issue is understandable in juridical analyses, especially in view of the above-mentioned tendency to disregard the legal circumstances in some of the proposals made to date. The point is to examine whether subsequent proposals are in compliance with the primary law of the Union

40 The literature on the implications of the rejection of the Constitutional Treaty and scenarios in the event of a ratification crisis is extensive, even though available mainly in the Internet. See major elaborations, e.g. E. Philippart, *op.cit.*; L.S. Rossi, *op.cit.*; D. Kral, *And what if they do not buy it? - Reflections on how to win the constitutional referenda and consequences of (non) ratification*, EUROPEUM, http://www.europeum.org/en/Analyses/Constitution_ratification_commentary.pdf; B. de Witte, *op.cit.*; J. Shaw, *op.cit.*; D. Keohane, *op.cit.*; A. Wanlin, *What would be the implications of a 'No' vote for the European Constitution?*, http://www.cer.org.uk/articles/wanlin_integrace_1nov04_en.html; G. L. Tosato, E. Greco, *op.cit.*, A. Maurer, *op.cit.*; A. Maurer, D. Devrim, K.-O. Lang, A. Crespy, A. Stengel, *op.cit.*

41 The scenarios identified are organised in a number of ways. For example, G. L. Tosato, E. Greco, *op.cit.* distinguish “solutions agreed and not agreed upon by the member states”. In turn, B. de Witte, *op.cit.*, distinguishes “legally available and unavailable options” or “voice and exit options”. This reference to the famous Hirschmannian approach is common in the context discussed here.

42 E. Philippart, *op. cit.* p. 1, distinguishes options in line with the current treaties and “revolutionary” options.

43 See. B. de Witte, *op.cit.*, p. 19 on the tendency to treat the limitations under EU law or international law as only “legal technicalities”; cf. the characteristic phrase in the otherwise valuable elaboration of D. Keohane, *op.cit.*, p. 4: “Despite the lawyers and eurosceptics say, if a country votes No it will not necessarily mean that the EU governments will scrap the constitution”; cf. also the note: Schröder: Constitution even without ratification, EUobserver, 26.04.2004, <http://euobserver.com/?aid=15336&rk=1>.

- and with international law⁴⁴;
- what result would a given procedure produce, especially whether the particular scenario provides for the Constitutional Treaty coming into force and to what extent. Various possibilities appear here: adoption the Constitution in whole, the coming of the Treaty into effect but in a modified shape, the introduction of only certain legal constructions of the Treaty or, finally, abandonment of the Constitution coming into force;
 - what will the composition of the Union be after the choice is made and the given method of solving the ratification crisis is implemented. The point is in particular whether the Union will continue to exist in its current composition of 25 Member States, or whether that number will change (decrease).⁴⁵ In the case of a change in the Union's composition, various additional options may occur depending on how many States leave and how this will be done.

2. Extra time allowed for ratification

It can be expected that, attempting to solve the ratification crisis in accordance with Declaration 30, the European Council will decide first to allow extra time for Constitutional Treaty ratification in a given Member State (States) if there are any chances that this might happen.⁴⁶ The evaluation of those prospects will depend on the specific situation, e.g. on the size of the majority by which the ratification was rejected, how high the turnout was, as well as what the reasons for the negative result of the referendum were (if these can be precisely determined). Furthermore, the European Council may issue a political declaration intended to reassure the citizens of the State, as was the case before the second referendum in Ireland in 2002. If the next referendum yields a positive result, the Constitution will come into force in whole on the date set out in Article IV-447 para. 2 thereof and will apply in the Union in its current composition of Member States.

The solution discussed is the most advantageous and the "cheapest" method of getting out of a crisis situation. From the perspective of the States supporting the Constitutional Treaty, a drawback of that option is the postponement of the date that the Treaty comes into effect. This, in practice, may be more or less difficult to accept for the supporters of quick reforms. It is a matter for discussion whether the European Council could resolve to give an undecided State any concessions which would make the ratification easier. Such a solution was applied to Denmark in 1992,

44 The view prevails in the literature that the general considerations on the autonomy of EU law with respect to international law notwithstanding, there is a possibility and even the need to rely on the law of the treaties in matters concerning the conclusion of or amendments to the treaties on which the Union is founded to the extent not regulated in the TEU or the EC Treaty.

45 Omitted here are the changes resulting from the subsequent accession of Bulgaria and Romania, which may happen during the Constitutional Treaty ratification procedure if the procedure were to extend.

46 J. Shaw, *op.cit.*, p. 12-15.

before the Maastricht Treaty. However, its replication raises serious doubts if it were to consist of allowing, for a given State, the introduction of derogations from the rules of the Constitution, before it applies, in a simplified manner and without the required procedure.

3. Abandonment of the Constitutional Treaty

Another option, in the event of a ratification crisis, as opposed to the one discussed above, is resignation from the adoption of the Constitution and maintenance of the existing treaty framework.⁴⁷ In such a situation, the Union remains in its current composition of Member States, and the Constitutional Treaty does not come into force at all. This is of course legally permissible: if an amendment to the Treaty (imposition of a new treaty) requires the unanimity of the Member States, then in its absence, such amendment is not made and the existing treaties remain in effect.

It should be noted, however, that this solution raises serious objections on the part of the proponents of the Constitution.⁴⁸ They emphasize the importance of the Constitution for the performance of a profound reform of the enlarged (and still enlarging) Union, enabling its proper functioning and development over the coming years or even decades and the meeting of current and future challenges. The agreeing of the content of the Constitution at the Convention and its signature as a result of the IGC is regarded to be a success on the path of further integration. Abandoning the pursuit of this ambitious project as a consequence of the refusal to ratify the Constitutional Treaty would be seen as a failure which most Member States would probably not like to come to terms with.⁴⁹ A ratification crisis would rather inspire searches for other choices. The advocates of the European Constitutions object to leaving the rules of the existing treaties in place, because of their conviction that those rules are unable to ensure proper functioning of the Union. It is worth noting only, as a side comment, that such a conviction stems more from pessimistic forecasts rather than any negative practical experience, since some legal solutions adopted in Nice came into force only recently.⁵⁰

It can be anticipated that the scenario discussed here will be accepted in two situations. First, it will happen when the Constitution is rejected in a large number of States. This will mean no prospect of success in the further ratification procedure. In the current shape of the ratification debate throughout the Union, such a situation seems rather unlikely. Second, constitutional reforms will be abandoned if the Constitution is rejected in a State (States) considered to be particularly important and central to the process of European integration. This aspect of the issue is

47 J. Shaw, *op.cit.*, p. 15-16; G. L. Tosato, E. Greco, *op.cit.*, p. 12-13.

48 The Italians 12-13.

49 See Prodi: 'No' to the Constitution would be a 'tragedy', *Euobserver*, 24.09.2004, <http://euobserver.com/?aid=17367&rk=1>; A. Wanlin, *op.cit.*, p. 1 „rejection of the new treaty would be dramatic to the Union”.

50 This is referred to by J. Shaw, *op.cit.*, p. 15.

particularly interesting. In the light of the law, all Member States are equal and the lack of consent of any of them will result in the Constitution not coming into effect.⁵¹ In political terms, however, Member States are not equal and their problems with Constitutional Treaty ratification do not exert an equal impact on further steps taken in the Union in such a situation. It is pointed out in discussions on the subject, for instance, that the positions of big States will be of different importance in the area concerned than those of small ones.⁵² Moreover, some States are regarded as being central and others as fringe for European integration.⁵³ In this context, there are interesting considerations presented in the literature on the effect of the future of the Constitution in the case of the veto of France as compared with that of the United Kingdom. These are two big Member States having a significant impact on the Union's policy and economy. It is considered, however, that the consequences of the Constitution being rejected in one of the abovementioned States could differ. Refusal to ratify on the part of the United Kingdom could result in a change of its status and in the loosening of its ties with the other Member States, but it would not necessarily block the constitutional reform of the Union itself.⁵⁴ France's veto, on the other hand, it is believed, would cause abandonment of bringing the Constitutional Treaty into force throughout the Union.⁵⁵ Indeed, this is a State that has been in the centre of the integration processes ever since the Communities came into existence in the 1950's.⁵⁶

4. Renegotiation of the Constitutional Treaty

Bearing in mind the differences between the importance of particular countries, it may be expected that if one or more States veto the Constitutional Treaty, this would not, by definition, lead to the abandonment of its adoption. The effort put into the

51 It has already been mentioned with reference to Article 48 TEU and Article IV-447 para. 1 CT.

52 J. Shaw, *op.cit.*, p. 16: "It goes without saying that there is a difference between France and the UK, on the one hand, and – say – Malta or Estonia on the other".

53 D. Keohane, *op.cit.*, p. 4-5; A. Wanlin, *op.cit.*, p. 3.

54 Cf. e.g. D. Keohane, *op.cit.*, p. 4. cf. also numerous analyses of the situation of the United Kingdom in connection with the planned referendum and the forecasts of developments after a negative referendum result, e.g. V. Miller, IGC 2004: issues surrounding UK ratification of the European Constitution, May 2004, <http://www.parliament.uk/commons/lib/research/notes/snai-03040.pdf>; Ch. Grant, If Britain votes no..., Centre for European Reform, June /July 2004 - CER BULLETIN, Issue 36, http://www.cer.org.uk/articles/36_grant.html; R. Laming, What happens if Britain votes no?, Federal Union, Article Number 28, <http://www.federalunion.org.uk/europe/ifbritainvotesno.shtml>; J. Shaw, *op.cit.*, *passim*; UK no vote would raise questions, says Solana, EUobserver 04.01.2005, <http://euobserver.com/?aid=18072&rk=1>.

55 N. Hussain, G. Maitland Hudson, R. Whitman, *op. cit.*, p. 4; D. Keohane, *op.cit.*, p. 4; K. Kiljunen Referenda in France and UK will affect EU differently, EUobserver 13.10.2004, <http://www.euobserver.com/?sid=7&aid=17502>.

56 See K. Kiljunen, *op.cit.*: "So, voters in France, in contrast to voters in Britain or small member states will be answering different questions in the referenda: the former will be deciding the fate of the Constitution, the latter will be deciding their own fate in the Union".

preparation of the Constitution and its acceptance in most of the Member States would constitute the incentives, after some time, for undertaking further attempts to have it accepted. This expectation forms the starting point for yet another scenario which provides for the conduct of negotiations (renegotiations), as a result of which the content of the Constitution would change.⁵⁷ Such a solution will be in conformity with the current law in the Union if the prescribed procedure is observed. After its successful completion, the Treaty would come into force, even though in a changed form, throughout the Union with its present composition of Member States.

The option discussed here could be effected in a number of variants. What is important in particular is the extent of potential amendments to the Constitution's content. It is obvious that the smaller these amendments, the easier it will be to reach an agreement. Basically, they should be limited to a minimum necessary for averting a ratification crisis. It will not always be easy to determine that minimum though. That will depend, amongst other things, on whether it will be possible to identify, as precisely as possible, the reasons for which the Treaty was rejected in a given State. Changes in the Constitutional Treaty may consist, above all, of introducing safeguards for a given State in certain sensitive issues, e.g. introduction of opt-in or opt-out clauses⁵⁸ and ensuring a given State a special status in certain areas.⁵⁹ Theoretically, these could be also changes with a broader impact, e.g. concerning the procedures of taking decisions at the institutions or the composition of the European Commission.

The implementation of such a scenario may prove difficult. The States which have approved and ratified the Constitutional Treaty will probably be willing to express their consent to the amendments thereto to a small degree only, in order to satisfy the vetoing State(s). Such consent will be easier if the changes do not pertain to issues of key importance, and in particular the institutional and procedural reforms provided for in the Constitution. The point is that the Constitution introduces changes mainly of such nature while innovations in the field of substantive law concerning new policies are relatively small. This restricts, therefore, the possibilities of applying opt-out clauses or similar concessions for certain States.⁶⁰ The Member States which support the Constitution probably will not agree to renegotiations of the Treaty concerning amendments that would dilute the constitutional reforms or even reverse their direction. As mentioned above, it is not going to be without importance, in practice, which State proposes to renegotiate the content of the Constitution, when it comes to assessing the significance of that State for further European integration and the chances for subsequent ratification.

The implementation of the scenario for renegotiating the Constitutional Treaty discussed here will require the observance of the procedure set out in Article 48

57 B. de Witte, *op.cit.*, p. 13-15; J. Shaw, *op.cit.*, p. 19-20; G. L. Tosato, E. Greco, *op.cit.*, p. 11-12.

58 L.S. Rossi, *op.cit.*, p. 3.

59 G. L. Tosato, E. Greco, *op.cit.*, p. 12.

60 This is referred to by D. Keohane, *op.cit.*, p. 4; J. Shaw, *op.cit.*, p. 18-19.

TEU. With changes of a small extent, the IGC could be held quickly. A matter for debate in that particular case would be whether another Convention is to be called to prepare the changes in the Constitution. On the one hand, this would prolong and complicate the procedure. On the other hand, the Convention is already becoming a standard element of introducing treaty reforms in the Union.

A new treaty amending the Constitutional Treaty would require ratification in all Member States. It is a sensitive phase of the whole procedure. Particular attention will of course be paid to the State(s) which previously rejected the Constitution. The ratification procedure in the remaining States is not to be disregarded though. Depending on various factors, such as the profundity of changes, or the lapse of time from the previous ratification, that procedure can be more or less problem-free. In certain States which ratified the Constitutional Treaty before, referenda may prove to be necessary. A veto in a State (States) other than those which previously caused a ratification crisis may not therefore be precluded. With an unfavourable development, a spiral of ratification crises could ensue. Such a threat is one of the shortcomings of the scenario discussed and prudence is advised in its being undertaken and conducted.

5. Adoption of selected legal constructions

Another option is to bring into force selected legal constructions of the Constitutional Treaty and not the whole Treaty.⁶¹ Such a scenario could apply in two situations. First, partial introduction of the provisions of the Constitution may take place in the period when the ratification procedure is still continued, especially if the procedure were to be prolonged. Then, even before the date the entire Treaty is adopted, its selected elements could be put into effect. Such a solution has already had a certain tradition in the Union, and is also known in international law.⁶²

Second, certain provisions of the Constitution could be introduced if the coming into force of the Constitutional Treaty in whole proved impossible as a result of a ratification crisis. Such a development requires some comment. The idea of its authors is for the Constitution to form a consistent and comprehensive concept of the Union's reforms. It is possible, however, to distinguish certain elements from its entirety, which constitute separate legal constructions and are, in essence, independent. Those constructions can be made part of EU law individually and this does not depend on the future of the whole constitutional reform. In such a case, this would mean a kind of borrowing of selected concepts contained in the Constitutional Treaty.

The bringing into force of at least some elements of the Constitution which facilitate the functioning of the Union, is an advantageous undertaking. However, a

61 B. de Witte, *op.cit.*, p. 9 et seq. describes this solution as “‘Nice Plus’ Scenario”. See also J. Shaw, *op.cit.*, p. 16-19; A. Maurer, *op.cit.*, p. 10-13.

62 This is discussed broadly by G. L. Tosato, E. Greco, *op.cit.*, p. 4 et seq. See also B. de Witte, *op.cit.*, p. 15, with reference to Article 25 of the Vienna Convention on the Law of Treaties.

critical attitude to this idea can be feared as regards States which are emphatic supporters of the Constitutional Treaty being adopted in its entirety. Indeed, the Constitution is often deemed not only as a comprehensive set of legal solutions but also a symbol of the Union passing to a new stage of development. The limitation to the introduction of its selected elements only may be considered in many States as an insufficient step, and even a surrender to the States vetoing the Constitution. The States – proponents of the Constitution could be concerned that partial reforms would weaken the will to adopt, in not-too-distant future, the whole Constitution. It is hard to predict whether events will actually develop in such a way, since it is also possible that getting accustomed to partial reforms would in fact aid the subsequent acceptance of the whole Constitutional Treaty.⁶³

The particular constructions taken from the Constitution can be brought into effect in the scenario discussed, when they are in compliance with the treaties now in force in the Union. It would not therefore be a question of bringing into EU law solutions contained in the Constitutional Treaty of mainly organisational and procedural nature, which aim at amending the provisions of the EC Treaty or the TEU. It is not easy to conclude in advance what innovations it would be possible to introduce in the way discussed.⁶⁴ A lot would depend on the stances of the Member States and the Union's institutions, and in particular their preparedness to being bound or self-bound, to a narrower or broader extent.

There is a rich catalogue of instruments that could be used to introduce particular legal constructions borrowed from the Constitution into the legal order of the Union. Acts of secondary law⁶⁵ based also on Article 308 EC could apply. Besides, discussions to-date mention further measures such as institutional agreements⁶⁶, amended rules of procedure of individual institutions⁶⁷, informal application of the solutions contained in the Constitutional Treaty⁶⁸, improving EU governance⁶⁹ or even a “pro-Constitutional” interpretation of EU law currently in force.⁷⁰ The selection of particular instruments would have to depend on the contents of the innovations that are intended to be applied in the Union. The effects of the reforms will vary too, depending, e.g. on whether their basis will be regulations of binding nature or informal measures only.

Particular legal constructions taken from the Constitution and brought into force in the manner presented above would apply throughout the Union in its current composition of Member States.

63 G. L. Tosato, E. Greco, *op.cit.*, p. 4-5.

64 A catalogue of such permissible modifications of the current law and practice is discussed broadly by G. L. Tosato, E. Greco, *op.cit.*, p. 7 – 9.

65 J. Shaw, *op.cit.*, p. 17; G. L. Tosato, E. Greco, *op.cit.*, p. 5-6; A. Maurer, *op.cit.*, p. 13.

66 G. L. Tosato, E. Greco, *op.cit.*, p. 6; A. Maurer, *op.cit.*, p. 11-12; A. Maurer, D. Devrim, K.-O. Lang, A. Crespy, A. Stengel, *op.cit.*, p. 29-31.

67 A. Maurer, *op.cit.*, p. 11.

68 B. de Witte, *op.cit.*, p. 10-11; A. Maurer, *op.cit.*, p. 13.

69 J. Shaw, *op.cit.*, p. 18.

70 G. L. Tosato, E. Greco, *op.cit.*, p. 5.

6. Introduction of the Constitutional Treaty in respect of some Member States

The scenarios discussed above share a common characteristic: they provide for the Union remaining in its existing composition and with the equal positions of particular States, notwithstanding potential opt-outs in selected areas. It is possible, however, that the differing stances of Member States concerning the Constitution will result in the intention to differentiate between their legal positions within the Union. With this intention realised, a smaller group of States accepting integration under the Constitution terms would be formed within the UE. It is hard to conclude in advance about the size of that group; it would probably be composed of a majority, maybe even a considerable majority, of Member States. It would even be possible for several groups of advanced States to be formed within the EU. The scenario discussed would enable the attainment of two objectives: on the one hand, the enabling of the adoption of Constitutional Treaty provisions by the States which accept them, and, on the other hand, the remaining of the other States (State) in the Union upon the existing terms set out in the TEU and the EC Treaty.⁷¹ In such a way, the concepts of hard core or variable geometry of the Union could come true.

The projects contemplated herein could be implemented in a number of ways. When analyzing them, it is important to distinguish the following: the form of Constitutional Treaty adoption, and, moreover, whether it would apply to selected legal constructions only or the entire Constitution, and also whether a given option is founded on EU law.

a. Enhanced cooperation

The first method that comes into play is the procedure of enhanced cooperation, regulated under the TEU and the EC Treaty.⁷² That cooperation could be undertaken with the participation of the States supporting the Constitution. For that objective to be attained, all procedural and substantive requirements for enhanced cooperation set out in the existing treaties should be met. As is known, these requirements are numerous and not very precisely formulated. It is not easy to conclude *in abstracto* to what extent the procedure in question could be used to introduce selected legal constructions of the Constitutional Treaty, intended for a group of Member States.⁷³

b. International agreements outside EU law

In discussions on these subjects, views are being expressed that the procedure of enhanced cooperation does not preclude the search for other possibilities of bringing

71 States taking such a position are sometimes termed "rear guard". See F. Lamoureux, *op.cit.*

72 G. L. Tosato, E. Greco, *op.cit.*, p. 6; J. Shaw, *op.cit.*, p. 17-18; B. de Witte, *op.cit.*, p. 11.

73 G. L. Tosato, E. Greco, *op.cit.*, p. 6.

Constitution provisions into force with respect to some Member States.⁷⁴ In this context, the conclusion of international agreements between those Member States which support the Constitution, outside the framework of the EC Treaty and the TEU is considered. The subject of such agreements could also include the adoption of selected provisions of the Constitutional Treaty.

Views are being voiced that agreements between some Member States, made in order to develop more advanced forms of integration, are legally permissible.⁷⁵ Using them, it is possible to introduce certain new solutions which not all Member States are ready (for the time being at least) to accept. The Schengen agreements of 1985 and 1990, later included in EU law by the Amsterdam Treaty⁷⁶, are considered to be a prototype of such an option. It is emphasized in the discussions that the provisions of the TEU and the EC Treaty concerning enhanced co-operation do not stand in the way to conclude international agreements between Member States outside the framework of the Union. On the contrary, it is even believed that such agreements are a convenient method of cooperation between some States, if the treaty mechanism proves incapable of being launched.⁷⁷

However, doubts can be expressed concerning the abovementioned view. It is obvious that the membership of States in the Union does not deprive them of their capacity to conclude international agreements. But obligations relating to membership may prevent Member States from entering into certain agreements between them or with third countries. The reference to the example of the Schengen agreements cannot constitute a pre-determining argument with regard to the subsequent amendments to the treaties on which the Union is founded. At the time when those agreements were concluded, the TEU and the EC Treaty did not yet contain provisions on enhanced cooperation. It is worth noting that those provisions were established under the Amsterdam Treaty in parallel with the inclusion of the *acquis* Schengen to the *acquis communautaire*. This can be interpreted as the intention to comprehensively regulate more advanced cooperation between some Member States in the areas falling within the scope of the current EU law.

It is known that enhanced cooperation has not found any practical application to date. One of the reasons is the difficulty with meeting the strict legal requirements, even though these have been made more lenient in the Treaty of Nice. However, regulating enhanced cooperation in the treaties would be unclear and illogical if some Member States could, in the event of a fiasco of attempts to organise such

74 G. L. Tosato, E. Greco, op.cit., p. 7, 14; J. Shaw, op.cit., p. 17; B. de Witte, op.cit., p. 12-13.

75 See L.S. Rossi, op.cit., p. 2: "...there is nothing to prevent international agreements between sovereign states in order to establish more advanced forms of integration. However, these agreements cannot jeopardize the European Union's interests or infringe its basic treaties." B. de Witte, op.cit., p. 12, in turn, says: "Intergovernmental cooperation between a limited number of member states of the EU is thus perfectly possible, but membership of the EU imposes certain legal constraints on the scope and content of such cooperation."

76 J. Shaw, op.cit., p. 17; G. L. Tosato, E. Greco, op.cit., p. 7, 14.

77 B. de Witte, op.cit., p. 12.

cooperation, or without even taking the trouble to take steps in that direction, conclude international agreements between themselves, outside the Union, leading to a similar result, and thus introduce selected legal constructions of the Constitution.

The requirement to respect EU law formulated in this context for such agreements between selected States, would not change the above opinion a lot.⁷⁸ Such a requirement would be hard to meet anyway, if the subject of the agreements were to fall within the scope of EU law. Particularly realistic is the concern that agreements between some States would infringe the principle of prohibition of discrimination on grounds of nationality (Article 12 EC).⁷⁹ The proponents of the solution discussed here emphasise further that such agreements could not be concluded in areas which are within the exclusive competencies of the Union.⁸⁰ Similar limitation should also extend, however, to cover the area of the shared competencies due to the pre-emptive effect of Community acts.

c. 'Enhanced Europe'

In the discussions on overcoming a constitutional crisis, a radical concept has been put forward to bring into force the whole Constitution under an agreement concluded between some Member States which support it. This solution has been termed in the discussions to date as "enhanced Union" by analogy with "enhanced cooperation".⁸¹ This operation would consist of a new legal order based on the Constitutional Treaty and binding upon a narrower circle of Member States being superimposed on the existing Union and the current EU law.

Even a preliminary analysis of this idea demonstrates that its implementation would lead to hardly acceptable consequences or would even be unfeasible.⁸² Indeed, this concept provides for the parallel and simultaneous functioning of the whole Union founded on the existing treaties and, the existence within it, of a narrower group of Member States which has bound itself (additionally!) by an agreement introducing the Constitutional Treaty provisions. Inevitably, these two legal regimes would regulate the same issues, though not infrequently in a different manner. For instance, it is hard to imagine the parallel application of different organisational arrangements concerning e.g. different compositions of the Commission (after 2014), the office of the Union's Foreign Minister, or procedural

⁷⁸ Ibidem.

⁷⁹ Account should be taken at this point of the most recent case law of the Court of Justice concerning the rights of the Union's citizens based on Article 18 EC and the scope of application of Article 12 EC on the granting of various benefits by the state of residence. See C-184/99, *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, [2001] ECR I-6193; C-56/02, *Trojani v. Centre public d'aide sociale de Bruxelles (CPAS)*, n.y.r.

⁸⁰ B. de Witte, *op.cit.*, p. 12.

⁸¹ This proposal was put forward and discussed broadly by E. Philippart, *op.cit.*, p. 2 et seq.

⁸² L.S. Rossi, *op.cit.*, p. 2-3 quotes examples of such areas of unavoidable conflict and states that "this would lead to an unsustainable situation". See also B. de Witte, *op.cit.*, p. 8.

solutions (law-making procedures, the system of voting in the Council), different categories of acts of law, the internal structure of the Union (pillar-based structure or its abandonment), etc. The thesis that such an option would not be possible to reconcile with the current EU law does not need to be justified in any broader terms.

The conclusion of international agreements between some Member States in areas that fall within EU law raises doubts also in the light of Article 41 of the Vienna Convention on the Law of Treaties of 1969. Such agreements constitute “agreements to modify multilateral treaties between certain of the parties only”. However, they do not meet the requirement of their admissibility in the light of the provision of the Convention referred to above. The possibility of such a modification is not provided for by the TEU or the EC Treaty while international agreements of selected States within the area of EU law would, in principle, affect the enjoyment by the other parties of their rights under the Union’s treaties or the performance of their obligations.⁸³

It should be concluded that agreements between some Member States introducing more advanced forms of integration in areas regulated by EU law are permissible only when provided for under the TEU or the EC Treaty. Hence, selected legal constructions of the Constitution could be introduced with respect to certain States only under the procedure of enhanced cooperation and with the fulfilment of the treaty requirements.

7. Withdrawal from the Union

a. Admissibility and method of withdrawal

In discussions, proposals are put forward of further, firmer solutions in the event that the methods of overcoming a ratification crisis as presented above did not yield a satisfactory result. This concerns situations where the States which have ratified the Constitutional Treaty are not willing to abandon constitutional reforms or make concessions to the vetoing States. Numerous contributions on this subject discuss the method of resolving the problem of voluntary withdrawal from the Union of a State reluctant to adopt the Constitution. If such an option were to be implemented, the obstacles to the introduction of constitutional reforms in the EU would disappear. However, the Union itself would change its composition.

It should be recalled that both the EC Treaty and the TEU have been concluded for an unlimited period (Article 312 EC, Article 51 TEU). Neither of those treaties provides for any State withdrawing from the Union.⁸⁴ This possibility is commonly allowed though. It is important nevertheless to determine the form in which such an operation could be effected. The point is in particular whether withdrawal from the

⁸³ B. de Witte, *op.cit.*, p. 9.

⁸⁴ A new situation is created under Article I-60 CT. However, this provision will come into force together with the whole Constitution.

EU can be made via unilateral denunciation. In view of the absence of the applicable rules in the treaties on which the Union is founded, a solution to this issue is sought in international law, and, more specifically, in Article 56 of the Vienna Convention.⁸⁵ Considering the wording of the EU and EC Treaties, their history, as well as the principal aim – which is the creation of an ever closer Union (Article 1 TEU) – it would be impossible to conclude that Article 56 of the Vienna Convention or any other rule of international or Union law constitutes the basis for unilateral withdrawal of a Member State from the Union.⁸⁶

Yet, withdrawal of a given State from the Union could take place by consent of all Member States. Such a possibility is provided for under Article 54 of the Vienna Convention.⁸⁷ It seems that such a consent should then find its expression in a treaty forming an *actus contrarius* to the establishing treaties.

Withdrawal of a given State from the Union in relation to its reluctant attitude to the Constitution may be an option in that State which is considered as early as during the ratification procedure. There are political parties amongst those calling, in the referendum campaign, for rejection of the Constitutional Treaty, which are against EU membership in general.⁸⁸ It can be supposed nonetheless that basically the decision of a given State to withdraw from the Union would not result from a previously planned action. It would rather be the effect of a development which was not fully controlled, in a situation where the Constitutional Treaty was rejected in that State, and other scenarios for resolving the crisis could not be applied. The decision to withdraw would probably be taken as a consequence of surrendering to pressures on the part of the remaining Member States. The description of the withdrawal in this context as ‘voluntary’ should be understood in legal and not political terms.

If the scenario discussed were to be implemented, it can be expected that the withdrawal from the Union of a State rejecting the Constitution would not essentially be opposed by the remaining States: *volenti non fit iniuria*. Those States may be satisfied that an obstacle has been removed for the Constitutional Treaty coming into force and for constitutional reforms to be initiated. In certain situations, however, some States may be reluctant to have the Constitution adopted at such a high cost as a reduction in the number of Member States. A consequence of that would be the weakening of the whole Union, both in economic and political terms,

85 See L.S. Rossi, *op.cit.*, p. 2; M. Pechstein, Ch. Koenig, *Die Europäische Union*, Tübingen 2000, p. 233.

86 This issue is discussed broadly by A. Maurer, *op.cit.*, p. 5-9, who concludes (on p. 8-9) that: „Rechtlich ist ein Austritt aus der EU möglich, unter politischen und sozioökonomischen Gesichtspunkten allerdings zumindest fragwürdig und auf jeden Fall an bestimmte Voraussetzungen gebunden.“ B. de Witte, *op.cit.*, p. 16 does not take a firm position on this matter.

87 M. Pechstein, Ch. Koenig, *op.cit.*, p. 233; B. de Witte, *op.cit.*, p. 17; A. Maurer, *op.cit.*, p. 5; J. Shaw, *op.cit.*, p. 21.

88 N. Walker, *op.cit.*, p. 7-8; R. Helmer, MEP, *The EU Constitution - what if we vote NO*, Lincolnshire Echo - June 6 2003, <http://www.rogerhelmer.com/voteno.asp>.

as well as the worsening of the climate of opinion. It cannot be not excluded therefore that another State would deny its consent for the withdrawal of a given State from the Union.

b. Defining the relations between the withdrawing State and the European Union

When considering the chances for the implementation of the scenario discussed, of great importance is the determination of the position that could be attained by a given State after withdrawal. Having regard to the current advanced stage of EU integration, such a State can be assumed to be willing to continue its close ties with the Union and its Member States while enjoying a special status; the term “associate membership” is sometimes used in this context.⁸⁹ Such an option could be attractive for a State which is reluctant to accept a more advanced integration but does not want to lose the position already achieved. The discussions consider the possibility of following the model of the positions of the EEA States or Switzerland.⁹⁰ It is possible, however, that a former Member State would be guaranteed participation in the decision-making process in the Union to a certain extent.

A treaty constituting the basis for the withdrawal of a State from the Union would have complex content and structure. It would include a declaration by that State on voluntary withdrawal and the consent thereto of the remaining States. Furthermore, such a treaty would contain provisions on the special status of the State after it leaves the EU. The same or preferably a separate treaty would regulate the constitutional foundations of the „slimmed-down” Union. Basically, the provisions of the Constitution would apply here. It is not excluded, however, that those provisions would be modified to a certain extent in view of the new situation, i.e. the change in the composition of the Union. Such a treaty (treaties) would be subjected to the ratification process in the Member States. The prior ratification of the Constitutional Treaty in most States would probably not be considered sufficient, since the withdrawal of a given State would create a new legal situation.⁹¹

c. Problem of exclusion from the Union

It should be added that EU law does not provide for the exclusion of a given Member State from the Union.⁹² Hence, Article 60 of the Vienna Convention concerning, *inter alia*, termination of the treaty as a consequence of a material breach of it by one of the parties could not apply to the European Union. EU law has developed its own system of sanctions ensuring respect for the principle of loyalty

89 D. Keohane, op.cit., p. 4; R. Laming, op.cit. p. 2-3; G. L. Tosato, E. Greco, op.cit., p. 12.

90 R. Laming, op.cit., p. 2.

91 These issues are analysed by B. de Witte, op.cit., p. 17.

92 M. Pechstein, Ch. Koenig, op.cit., p. 235; L.S. Rossi, op.cit., p. 4; G. L. Tosato, E. Greco, op.cit., p. 11.

of Member States to the Community (Union) and between them (Article 10 EC). These sanctions follow in particular from Article 7 TEU and Articles 226-228 EC.

It is worth emphasising from the outset that refusal to ratify the Constitutional Treaty in a given State could not possibly be qualified as a breach of the TEU or EC.⁹³ The Member States which signed the Constitutional Treaty are obliged to conduct the ratification process in good faith. However, their legal obligation to ratify the Constitution cannot be formulated.⁹⁴ Even though in political terms, the attitude of a recalcitrant State can be deemed harmful to the future of the Union, no allegations can be made against such a State in legal terms. In particular, refusal to ratify the Constitutional Treaty does not violate the principle of loyalty under Article 10 EC. On the contrary, that principle would be breached by discrimination against a given State and application of sanctions in order to persuade it to ratify the Constitutional Treaty or leave the EU.⁹⁵ Aiming at an “even closer Union” does not mean a legal obligation to ratify a treaty introducing a specific integration programme.

Referring in this context to Article 18 of the Vienna Convention it should be said that every Member State is obliged to refrain from acts which would defeat the object and purpose of the Constitutional Treaty which it has signed. Moreover, the governments of Member States are obliged to take certain indispensable positive measures in the ratification process,⁹⁶ e.g. organise an informational campaign before the referendum. Similar obligations can be inferred from Article 10 EC.⁹⁷ However, where all the necessary steps have been taken by the government of a Member State in good faith and the ratification process brings a negative result nonetheless, an allegation of infringing either EU or international law cannot be made against that State.

8. ‘Refoundation’ of the European Union

A ratification crisis will become severe when a Member State which has vetoed the ratification of the Constitutional Treaty refuses to withdraw from the Union and the methods for the States reaching an accord, as discussed above, fail.

Proposals are being made to come out of such a difficult situation. Their essence is that the Member States approving the Constitution release themselves of the treaty relationships linking them to the State(s) which rejected that treaty, and then establish new connections between them but based now on the rules of the Constitution. In other words, if a State, reluctant to adopt the Constitution, does not want to leave the Union, this will be done by the States supporting the constitutional

93 B. de Witte, *op.cit.*, p. 17-18.

94 G. L. Tosato, E. Greco, *op.cit.*, p. 11.

95 M. Pechstein, Ch. Koenig, *op.cit.*, p. 235.

96 G. L. Tosato, E. Greco, *op.cit.*, p. 2-3, 10-11.

97 J. Shaw, *op.cit.*, p. 1-2.

reforms.⁹⁸ Having left the Union, those States will establish a new organisation (probably with the same or a similar name), but with a narrower composition. The basis of the new body of states would be a new treaty with its content corresponding to that of the Constitutional Treaty, with possible modifications,⁹⁹ while the remaining States would stay in the “old” Union; this does not hold, of course, for a situation when only one State is outside the new organization. Such a truncated Union would stand no chance of existence, though, and would probably be dissolved soon.

The option discussed is termed as the ‘refoundation of the Union’ (*Union refondée*)¹⁰⁰ and treated as a concept qualitatively different from transformations of the existing organization. Indeed, the new Union would not be a continuation of the existing one. Hence the States undertaking the refoundation would not feel to be bound by the treaty limitations, Article 48 TEU in particular.

The concept presented here is controversial from both the legal and political viewpoints.¹⁰¹ It has already been mentioned that withdrawal from the Union requires the consent of all Member States. This applies both to the case of one State which vetoes the Constitutional Treaty intending to leave and withdrawal being contemplated by a group of States wishing to arrange their future relations upon Constitution terms. In an extreme case, this may concern all States except one. It should be assumed that in the situation discussed here a Member State which refused to ratify the Constitutional Treaty would not be willing either to grant its consent to the withdrawal of the remaining States for them to set up a new Union. Otherwise, a simpler and less conflicting solution would be for just that State to withdraw. The requirement to obtain the consent of all States to changes in the composition of the EU therefore applies also what is referred to as the ‘refoundation’ of the Union. The use of that term, which is to point to the special nature of that operation, does not change its essence and the legal conditions for its admissibility.

Debates on solutions to a constitutional crisis in the excessively drastic manner discussed here, include considerations of the possibility of invoking a fundamental change of circumstances as a ground for terminating or withdrawing from the

98 See characteristic assessments of such a solution: L.S. Rossi, op.cit., p. 5 “extreme hypothesis”; A. Maurer, op.cit., p. 9 “eine sehr fragwürdige Alternative”. B. de Witte, op.cit., p. 18, states that compared with the exclusion of the recalcitrant state, this option is “legally more orthodox (though highly acrobatic) manner” whereas the alternative discussed here is approved by G. L. Tosato, E. Greco, op.cit., p. 15-16. Such an option was already considered, after all, after the failed referendum in Denmark in 1992 – M. Pechstein, Ch. Koenig, op.cit., p. 235.

99 It would be possible to adopt integration solutions reaching even further than those adopted in the Constitutional Treaty, if all States concerned agreed thereto.

100 See E. Philippart, op.cit., p. 6. B. de Witte, op.cit., p. 9 considers this option to be legally unavailable.

101 See E. Philippart, op.cit., p. 6 defines this solution as “the most dramatic of all” and “the solution of last resort”; G. L. Tosato, E. Greco, op.cit., p. 14 “extreme solution”.

treaties on which the Union is founded (the *rebus sic stantibus* clause).¹⁰² Such a possibility is provided for, to a limited extent, in Article 62 of the Vienna Convention. However, an analysis of the premises listed in that provision leads to the conclusion that they could not apply in the situation contemplated here. In particular, it would not be possible to assume that the situation the Union and its Member States are currently in, even taking account of the challenges they face, constitutes a fundamental change of circumstances, which is radically to transform the extent of obligations still to be performed under the treaty (Article 62 para. 1 (b)). Neither the conviction of most of the States on the necessity to make constitutional reforms in the Union – since in their opinion the current treaty status does not correspond to the aims pursued – nor a veto of one or more States which prevent such reforms could be considered as a “fundamental change of circumstances” in the meaning of Article 62 of the Vienna Convention.

In conclusion, neither EU nor international law offer Member States the possibility to withdraw in order to set up a new organization (new Union), without the consent of all States (a State).¹⁰³ Realistically, of course, if States decided to take such a step, they would be capable of doing so. Even though they would commit an international delict in such a way, it is hard to imagine that they would be subject to any substantial legal sanctions. Political damage would probably be considerable though. As a result of the ‘refoundation’ of the Union, made in breach of EU and international law, the reputation of the Member States would suffer, both on international arena and internally. The observance of the law by the Union (Community) and the Member States has always been regarded as one of the principal values.¹⁰⁴

Moreover, withdrawal from the Union and establishment of a new body of states would be a complicated venture, if contemplated in the context of the procedures required under the laws of particular Member States. Undoubtedly, the earlier ratification of the Constitutional Treaty in particular Member States did not comprise the consent for the withdrawal of those States from the Union, and establishment of a new organization. It would therefore be necessary to obtain repeated acceptance for such decisions in the States which intend to set up a new Union, under the procedure prescribed by their national constitutions. Ratification of a treaty constituting a new Union would perhaps require another referendum to be held in some States.

102 See L.S. Rossi, *op.cit.*, p. 5; G. L. Tosato, E. Greco, *op.cit.*, p. 15. Sceptical views of such a possibility are voiced by M. Pechstein, Ch. Koenig, *op.cit.*, p. 233; B. de Witte, *op.cit.*, p. 18.

103 Critical remarks on this in the context of the rule of law are made by J. Shaw, *op.cit.*, p. 22 while views to the contrary are expressed by G. L. Tosato, E. Greco, *op.cit.*, p. 15-16.

104 See Article 6 TUE and the jurisprudence of the Court of Justice, e.g. 294/83 Parti écologiste “Les Verts” v. European Parliament, [1986] ECR 1339; C-50/00P Unión de Pequeños Agricultores v. Council of the European Union, [2002] ECR I-6677. See the concept of the European Community as the “Rechtsgemeinschaft”, W. Hallstein, *Die Europäische Gemeinschaft*, Düsseldorf und Wien 1973, p. 31, et seq.

It is doubtful whether the new organization could be considered to be the successor to the European Union. It would not be a situation regulated under Article IV-438 CT which proclaims that the European Union established by the Constitutional Treaty, shall be the successor to the European Union established by the EU Treaty and to the European Community.

IV. Conclusions

The ratification of the Constitutional Treaty may go as planned and the Treaty will come into force at the date set out in Article III-447 para. 2. These considerations will then become pointless. The author would be very pleased to see such a development. Nonetheless, after the foregoing analysis of the individual scenarios, it is worthwhile to formulate some general and concluding remarks.

The question arises: which of the foregoing scenarios is the best? No clear answer to such a question can be offered. It depends on the hierarchy of values adopted and the objectives that are attributed to the European Union. More precisely, the point is, in particular, what place is taken in that hierarchy by a quick and full adoption of the Constitutional Treaty? Decisions in that regard are political in their nature.¹⁰⁵ The selection of each solution has its price. Worth considering is especially whether the Union would be prepared to allow a reduction in the composition of its Member States which is provided for in some of the radical proposals.

From the legal point of view, it is most important to establish which scenarios of resolving a ratification crisis are in compliance with the current EU law, and which disregard the legal circumstances, or even assume that these be overcome. Lawyers voice different views on that issue since the evaluations of some solutions are not consistent. In the light of foregoing analysis, the scenarios that comply with the law seem to be: extension of the time provided for ratification in the States which encounter problems, abandonment of the adoption of the Constitution, renegotiation of the Constitutional Treaty and bringing it into force in a modified shape, adoption of selected legal constructions of the Constitution using the methods provided for in EU law, introduction of certain legal constructions of the Constitution for some Member States using enhanced cooperation, as well as voluntary withdrawal from the European Union of a given Member State, upon the consent of the remaining States and awarding that State a special status. Other solutions should be regarded as non-compliant with EU law or in the least doubtful.

Ignoring the legal circumstances in the political considerations, as already mentioned, deserves to be referred to again since it is a phenomenon of great significance. The conviction can be observed in many statements that the end (adoption of the Constitution) justifies the means. Should this conviction win, it would be dangerous to the present day and the future of the Union. The application

105 B. de Witte, *op.cit.*, p. 19.

of radical solutions might considerably escalate a ratification crisis through raising additional controversies between Member States about whether, and which methods are allowed in resolving the crisis in conformity with the law. The prestige of the Union as an organization based on the *rule of law* is not to be overestimated.

A doubt can arise whether pondering on various options in the event of a veto of one or more Member States is not premature at the beginning of the ratification process and whether, unintentionally, it does not constitute “instructions” for the opponents of the Constitution or the opponents of the Union in general as to what strategies to follow for the rejection of the Constitution.¹⁰⁶

Discussions on this subject seem to be needed for at least two reasons.

First, it is for the solutions which might be applied in the event of a ratification crisis to be known and catalogued in advance, and for the choice between them, their conditions and consequences to be conscious. The knowledge of the various potential developments and consequences of the veto in the process of ratification is useful not only for the opponents of the Constitution but it should be made widely known in political circles and amongst voters.¹⁰⁷ Such knowledge may have an impact on the decisions concerning Constitutional Treaty ratification both generally (positions of parties) and individually (choices of particular voters). It is not excluded that the awareness of the existence of radical proposals allowing changes in the composition of the Union or its ‘refoundation’ may lead to a reflection that will result in a broader support to the Constitution among the citizens of Member States.¹⁰⁸ Thus some of the scenarios would perform the role of self-defeating prophecies.

Secondly, a discussion on methods of resolving a crisis (potential for the time being) will help clarify the positions on the issue of the hierarchy of values and objectives of the Union, as already mentioned, as well as the role of the law in shaping the Union’s future. In this context, it is worth making some comments.

The procedure for the adoption of the Constitutional Treaty is regulated in EU law. Respect for the law in this sensitive issue is justified by some principal reasons, the abovementioned rule of law in particular. Added to that are pragmatic considerations: it is not possible in fact to renounce the requirements set out in the law if one does not want to undermine the EU’s foundations and weaken its development prospects. The requirement of the consent of all Member States to the basis formed by the new treaty was adopted from the very outset of the existence of the European Communities and the Union and has been observed ever since. Such are the *rules of the game*.¹⁰⁹ Moreover, this requirement encompasses a more general

106 A. Maurer, *op.cit.*, p. 13-14.

107 For instance, there is a conviction prevailing in Poland that rejection of the Constitutional Treaty will mean remaining in the existing treaty framework and the awareness of other scenarios is not very common.

108 L.S. Rossi, *op.cit.*, p. 6.

109 B. de Witte, *op.cit.*, p. 17-19. The author warns against the temptations of breaking the law and calls for a persevering search for feasible solutions.

idea of European integration of equal and sovereign States. Even though there are States which do not have an equal importance in political and economic terms, they should not be treated differently in strategic matters concerning the Union's future. The ultimate consequences of a veto should not differ depending on which State is involved. What should be recommended when constructing scenarios in the event of a crisis and considering the options or opportunities for their use is – in line with the Rawlsian concept – a look from behind 'a veil of ignorance', without knowing which State rejected the Constitution.

Of great importance is the atmosphere in which the discussion is being conducted on the adoption of the Constitutional Treaty and the arguments put forward in support thereof.¹¹⁰ Those arguments should refer to the benefits of the adoption of the Constitution as the foundation for further functioning of the Union and its development. Yet, treatment of ratification as a condition for continued membership, and refusal to ratify as being sufficient for demanding withdrawal from the Union should be avoided.¹¹¹ An approach employing such an ultimatum would be devoid of a normative basis and not necessarily effective. It would mean, above all, an impoverishment of the discussion by disregarding the values carried by the Constitution over a longer perspective.¹¹² The success of the ratification process, conducted in the atmosphere of "everything or nothing", would be achieved at too high a price. This relates to the postulation of a balanced response to the possible failure of the process of ratification. It should be treated as a proof that the Union is not mature enough, for the time being, to introduce constitutional reforms; this does not preclude, after all, further efforts to be taken in that direction.¹¹³

More radical solutions introduced without the approval of all States are risky from the legal and political points of view. It would be an unexpected paradox if the reforms initiated in order to strengthen the enlarged Union were to result in its being weakened and the number of its Member States being reduced.

110 N. Walker, *op.cit.*, p. 7-8.

111 See U. di Fabio, *The European Constitutional Treaty: An Analysis*, 5 *German Law Journal*, No 8, p. 956 about the Constitutional Treaty: "We should regard its ratification with calm and should not create pressure, which would be wrong. The talk that a rejection of the Constitutional Treaty would lead to the respective state's exclusion from the Union is nonsense".

112 N. Walker, *op.cit.*, p. 7-8. The author develops a concept of the construction, by means of the Constitution, of a collective self-government at the supranational level.

113 N. Walker, *op.cit.*, p. 8.