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Constitutional Amendment Index: the procedural requirements of an EMU-induced constitutional change in EU member states

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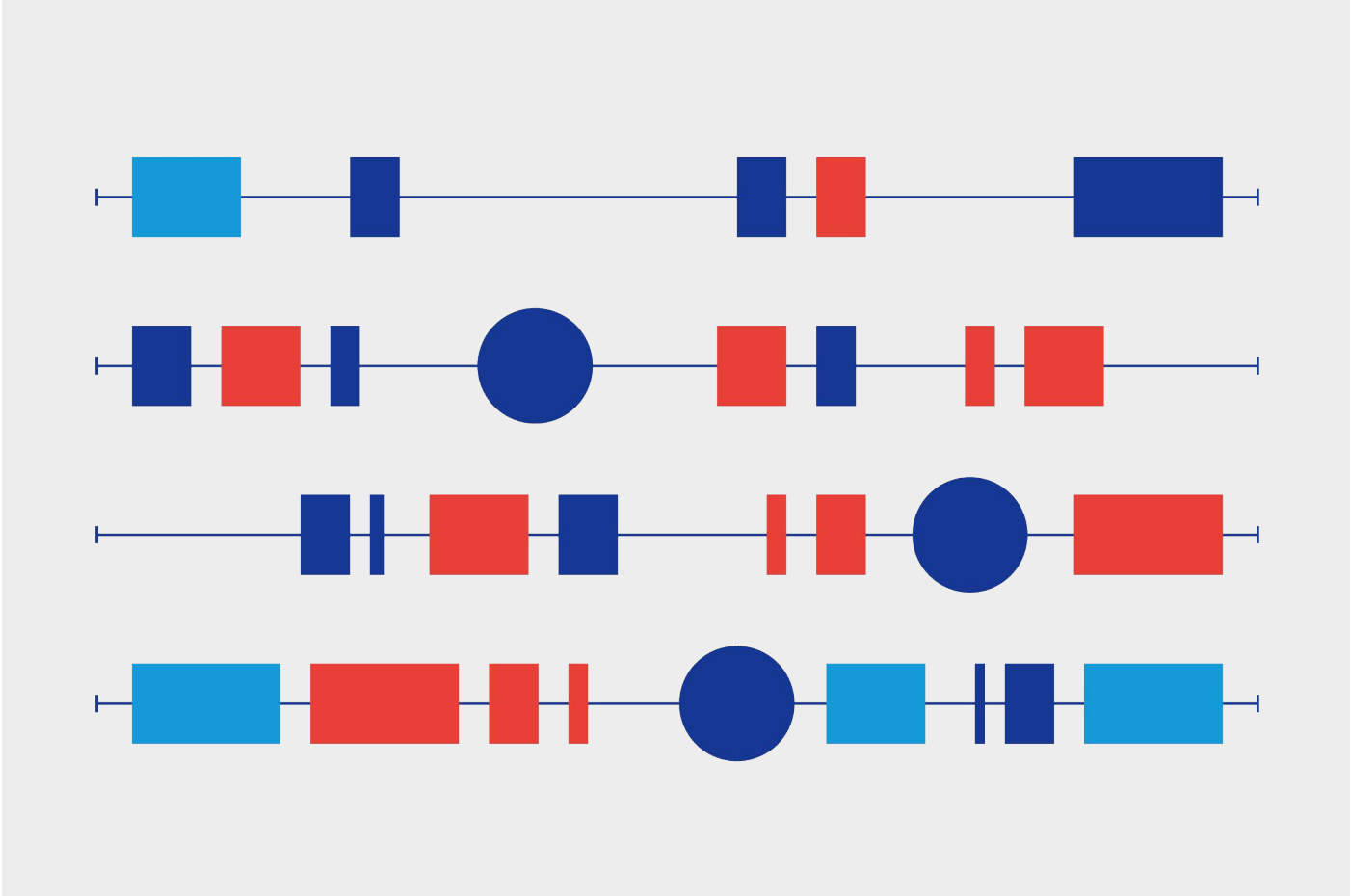

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Constitutional Amendment Index: the procedural requirements of an EMU-induced constitutional change in EU member states[1]

Zdenek Kudrna and Elisabeth Lentsch[*]

Zusammenfassung
Die Umsetzung der Reformen der Wirtschafts- und Währungsunion (WWU) hängt von einem komplexen Zusammenspiel zwischen nationalem und EU-Recht ab. Dieser Artikel umfasst einen einfachen zusammengesetzten Indikator über jene verfassungsrechtlich vorgegebenen Verfahrensbeschränkungen in den EU Mitgliedstaaten, welche durch weitere Integrationsmaßnahmen im Bereich der WWU relevant würden. Der Verfassungsänderungsindex (CAI) basiert auf der Reihenfolge der Vetopunkte - parlamentarische Formationen, Referenden, Staatsoberhäupter und Verfassungsprüfungsorgane - und den Verfahrensanforderungen, die die durch die WWU hervorgerufenen Verfassungsänderungen erfüllen müssen. Die Kodierung der gesetzlichen Anforderungen kombiniert die Analyse der förmlichen Verfahren in 28 EU Mitgliedstaaten mit einem Expertenurteil über die mögliche Verwendung dieser Anforderungen im Lichte der geltenden Rechtskultur und der bisherigen Erfahrungen. Während die Relevanz dieser Einschränkungen von den spezifischen wirtschaftlichen und politischen Umständen abhängt, bietet dieser Index einen Vergleich der Verfahrensanforderungen in den EU-Mitgliedstaaten sowie eine potenzielle Kontrollvariable für die quantitative Forschung.

Abstract
The implementation of reforms of Economic and Monetary Union (EMU) is constrained by a complex interaction between national and EU laws. This paper presents a composite indicator of procedural constraints that national constitutional laws impose on the EMU-induced constitutional amendments. The Constitutional Amendment Index (CAI) is based on the sequence of veto points - parliamentary formations, referenda, heads of states and constitutional review bodies - and procedural requirements that the EMU-induced constitutional amendments need to comply with at each point. The coding of legal requirements combines the analysis of formal procedures in 28 EU member states with expert judgement on the potential use of these requirements in the light of the prevailing legal culture and past experience. While the relevance of these constraints depends on the specific economic and political circumstances, the legal index provides a comparison of procedural requirements across EU member states as well as a potential control variable for quantitative research.

Key words
constitutional amendment, EMU reforms, legal index

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I. Introduction

The Economic and Monetary Union (EMU) needs further reform to address challenges exposed during the economic and financial crisis after 2008. The competence to conduct monetary policy was centralized at EU level since the Treaty of Maastricht. However, the corresponding economic and fiscal union was not adopted at that time. Several EU documents outline further fiscal and economic integration steps that are being discussed, albeit inconclusively as no major reform was adopted after the completion of the banking union in 2014.[2]

EMU reforms tend to delegate new competences to the EU level so that the supranationalized decision-making on monetary policy can be matched by the coordinated response of financial and fiscal policies. Shifting competences to the EU or Eurozone level creates not only questions about the political oversight, but also about the legal perspective of the compatibility with EU and national legal frameworks.[3] Any EMU reform needs to be either embedded within the existing treaty framework or include a treaty change or amendment.[4] This involves the fact that EU Treaty amendments may only enter into force after being ratified by all member states in accordance with their respective constitutional requirements.[5] Treaty reforms in the field of economic and fiscal policies may involve delegation, transfer or limitation of respective national sovereign rights and powers which exceed existing limits set by constitutions of EU member states.[6] Consequently, the adoption of EMU reforms may require some changes in national constitutional framework. Such EMU-induced constitutional amendment can be adopted only if it meets the required political support and is found compatible with the existing constitutional order (see Chart 1)

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[2] *European Commission,* A blueprint for a deep and genuine economic and monetary union: Launching a European Debate, Communication from the Commission 28.11.2012, online under https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0777:FIN:EN:PDF (29.05.2019), *van Rompuy Herman*, Towards a Genuine Economic and Monetary Union, Report by President of the European Council 26.062012, online under https://www.consilium.europa.eu/media/33785/131201.pdf (29.05.2019). *Juncker Jean-Claude, Tusk Donald, Dijsselbloem Jeroen, Draghi Mario* und *Schulz Martin* (2015). Completing Europe's Economic and Monetary Union. European Commission, European Commission 22.06.2015, online under https://ec.europa.eu/commission/sites/beta-political/files/5-presidents-report_en.pdf (29.05.2019).

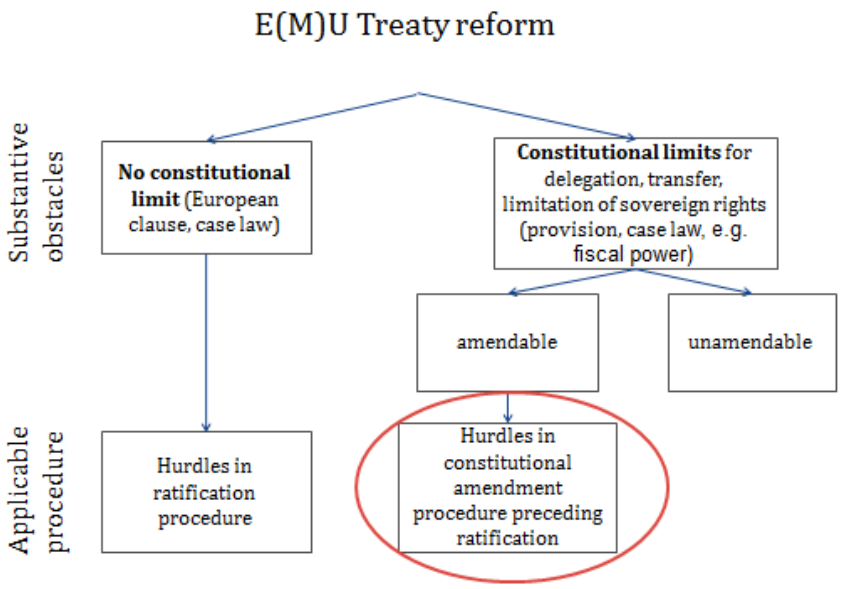
[3] *Lentsch Elisabeth*, Report on the Compatibility of EMU Reform Scenarios with the EU Treaties, EMU Choices 31.08.2018, online under https://emuchoices.eu/2018/08/31/legal-feasibility-report-on-the-compatibility-of-reform-scenarios-with-the-eu-treaties/ (28.05.2019).

[4] This can be partially sidestepped by relying on intergovernmental treaties as was the case with the Schengen framework or more recently with the Fiscal Compact, the European Stability Mechanism or some aspects of the Single Resolution Fund. However, most such treaties are meant to be integrated into EU law to benefit fully from the EU enforcement and dispute resolution mechanisms.

[5] Article 48 Treaty of the European Union.

[6] *Griller Stefan* and *Lentsch Elisabeth*, EMU integration and National Constitutions, Forthcoming 2019.

Chart 1: EMU related Treaty change and national constitutional hurdles



Recent reforms in the field of EMU – such as the ECB's unconventional monetary policy measures, the Treaty on Stability, Coordination and Governance (TSCG) or the European Stability Mechanism (ESM) – were legally challenged before the EU as well as national courts. These cases brought attention to the EU and national legal constraints, which are discussed widely in legal literature. By contrast, the existing literature on the political economy of EMU reforms pays much less attention to legal constraints, often on the assumption that economic necessity is sufficient to generate political momentum for legal and constitutional changes. While this assumption might seem to have been justified under the pressure of the escalating financial crisis, the lack of reform progress in the last five years suggests that political and legal constraints have hardened.

Further EMU reforms require ever more extensive coordination of economic policies, impose more and more restrictions on the core powers of states and intrude more into national sovereignty in the field of fiscal policies. Such reforms are increasingly likely to impinge on legal principles and provisions defined in national constitutions. In turn, they are more likely to induce the modification of national constitutions.

Formal procedural requirements for the EMU-induced constitutional amendment differ across member states and these differences can shape the political and economic design of reform proposals. Indeed, national constraints on constitutional change can create a legal equivalent of the political 'paradox of weakness', when a weak national government - based on fragile coalition or narrow parliamentary majority - gains disproportional influence in EU-level

bargaining as other member governments try to shape the EU compromise to ensure domestic acceptability.[7]

Similarly, higher procedural demands on the EMU-induced constitutional amendment can strengthen the bargaining position of some states as others recognize the domestic difficulty of adopting the reform. Comparative understanding of these legal constraints can thus provide potentially important insights into the bargaining process of member states and EU institutions about reforms that may impinge on national constitutional limits.

While the relevance of national constitutions is indisputable, their inclusion into the analysis of EMU reforms is hampered by the complexity of the 28 legal systems in the EU. The comparative work of constitutional lawyers remains complex and limited to single case analyses or comparison of a few cases. This prevents integration of legal insights into the broader comparative political economy research on EMU reforms, which tends to include preferences of all member states.[8] The missing systematic comparison creates an unfortunate interdisciplinary mismatch, whereby national constitutional constraints are either ignored altogether or at best included through binary proxies based on the national referendum requirements.[9]

To bridge this gap, we propose a legal index that captures procedural constraints on EMU-induced constitutional amendments. Its origins lie in debates between lawyers and political economists working in the EMU Choices research consortium. While the index remains a crude summary of the national situation - especially from the point of view of constitutional lawyers - it provides structured information that political economists as well as non-legal scholars, but also lawyers can work with in quantitative as well as qualitative research. The index builds on previous studies,[10] but customizes them to the specific context of the EU member states. It also includes some information on the potential impact of legal review,

[7] *Schelling Thomas*, The Strategy of Conflict (1960)., *Bailer Stefanie* and *Schneider Gerald*, Nash versus Schelling? The importance of constraints in legislative bargaining, in Thomson, Robert et al. (Hg). The European Union decides 2006 in Cambridge (in print).

[8] *Lehner Thomas* and *Wasserfallen Fabio*, Political conflict in the reform of the Eurozone, European Union Politics 20 (2019)., *Armingeon Klaus* and *Cranmer Skyler*, Position-taking in the Euro crisis, Journal of European Public Policy 25 (2018)., *Târlea Silvana, Bailer Stefanie, Degner Hanno, Dellmuth Lisa, Leuffen Dirk, Lundgren Magnus, Tallberg Jonas* and *Wasserfallen Fabio*, Explaining governmental preferences on Economic and Monetary Union Reform, European Union Politics 20 (2019).

[9] *Grande Edgar* and *Hutter Swen*, Beyond authority transfer: explaining the politicisation of Europe, West European Politics 39 (2016).

[10] See for review of indicators for amendment difficulty: *Ginsburg Tom* and *Melton James,* Does the constitutional amendment rule matter at all? Amendment cultures and the challenges of measuring amendment difficulty, International Journal of Constitutional Law 13 (2015).

which was not addressed in the existing literature on legal indices. Constitutional courts and review bodies as special legal institutions are provided with essential influence on changes.[11]

The paper is structured as follows. We start by reviewing existing literature and provide a stylized model of requirements for constitutional amendment that guides the empirical analysis underpinning the Constitutional Amendment Index (CAI). The following section deals with an illustration of the design of the CAI and the respective variety of veto-points and other procedural requirements imposed on the adoption of an EMU-induced constitutional amendment by the constitutions of the current EU member states. Subsequently, we introduce the legal index data as well as commentary on the key differences among EU countries across the determined dimensions of the index. In conclusion, we outline possible uses of the legal index and further research.

II. Existing literature and varieties of EMU-induced amendments

In the empirical literature the typical proxy for the national legal constraints on any major EU reform is the presence or absence of the constitutional requirement to hold a referendum, whenever EU treaties are amended.[12] However, this proxy provides no guidance in the reverse scenario, when the national constitution needs to be amended in order to accommodate a reform introduced by the EU. The actual cases for necessary amendments of the EU member states' constitutions strongly depend on the substantive obstacles determined by the constitutional framework, including the concomitant interpretation by constitutional review bodies.[13]

In addition, existing comparative studies of constitutional amendment procedures[14] lack the full coverage of all EU countries. They also tend to focus on constitutional change in general and do not necessarily focus on the constitutional aspects relevant for EU and in particular

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[11] *Engst Benjamin, Wittig Caroline, Hönnige Christoph* and *Gschwend Thomas*, Courts as Veto players, A Game-theoretic Model, ECPR Joint Session 16.03.2013, online under http://methods.sowi.uni-mannheim.de/working_papers/ECPR_JS%20Engst,Wittig,H%C3%B6nnige,Gschwend.pdf (28.05.2019)., *Hönnige Christoph, Gschwend Thomas, Engst Benjamin* and *Wittig Caroline*, Constitutional Courts as Veto players: Composition, Absorption and Decisions at the German Court, ECPR General Conference 29.08.2015, online under https://ecpr.eu/Filestore/PaperProposal/27bc1dce-4f72-436d-8be4-603be58e8a44.pdf (28.05.2019)., *Brouard Sylvain* and *Hönnige Christoph*, Constitutional courts as veto players: Lessons from the United States, France and Germany, European Journal of Political Research 56 (2017).

[12] *Grande* and *Hutter*, (Fn 8).
Prosser Christopher, Calling European Union Treaty Referendums: Electoral and Institutional Politics, Political Studies 64(2016)., *Closa Carlos*, Why Convene Referendums? Explaining Choices in EU Constitutional Politics, Journal of European Public Policy 14 (2007).

[13] See *Griller* and *Lentsch* (Fn 6)

[14] *Lane Jan-Erik*, Constitutions and Political Theory (1996), *Lutz Donald,* Toward a Theory of Constitutional Amendment, American Political Science Review 88 (1994)., *Lijphart Arend*, Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries (1999), *Elster Jon*, Ulysses Unbound. Studies in Rationality, Pre-commitment, and Constraints (2000), *Rasch Björn Erik*, Foundations of constitutional stability: Veto Points, Qualified Majorities, and Agenda-Setting Rules in Amendment Procedures, ECPR Joint Sessions 16.04.2008, online under https://verfassungswandel.files.wordpress.com/2008/10/bjc3b8rn-erik-rasch-constitutional-rigidity-and-formal-amendment-procedures1.pdf (28.05.2019).

EMU-induced amendments. Furthermore, they do not include the potential role of constitutional courts and other review bodies, which was clearly demonstrated by their involvement in the review of recent EMU reforms.

The legal literature provides detailed analysis of constitutional frameworks and EU integration in general[15] but these studies are often too complex to inform comparative research on EMU reforms in political science or economics. Hence, there is a need for a composite indicator that is complete for all EU members, covers aspects relevant for EMU reforms and includes constitutional courts, while sufficiently reducing the complexity.

Constitutions are fundamentally laws for making laws[16] and as such their integrity is usually protected by more complex procedural requirements than ordinary legislation.[17] The existing literature refers to these requirements as amendment difficulty[18] and provides three distinct approaches to their empirical operationalization. The first is a qualitative analysis of the legal procedures and broad comparison of several cases.[19] These studies provide rich details but the comparison is often limited to a few cases. Furthermore, they are not expressed in a form suitable for quantitative analysis.

The second approach combines description of actors involved in the constitutional amendment procedure with vote threshold imposed for the amendment to pass. This approach tends to be rooted in the veto player framework, whereby relevant actors are selected because their agreement is necessary for a change in status quo. [20] The amendment difficulty is coded on the basis of actors involved as some studies focus only on the role of parliaments[21], while others also include referenda and the heads of state.[22] Some articles also consider the role of sub-national units in federal states.[23] In this approach, the list of actors is variously combined

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[15] *Griller Stefan, Keiler Stefan, Kröll Thomas, Lienbacher Georg* and *Vranes Erich* (2011). National Constitutional Law and European Integration, European Parliament: DG for Internal Policies 15.03.2011, online under http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/432750/IPOL-AFCO_ET(2011)432750_EN.pdf (28.05.2019)., *Besselink Leonard, Imamovic Šejla, Claes Monica* and *Reestman Jan Herman*, National Constitutional Avenues for Further EU Integration, European Parliament: DG for Internal Policies 14.02.2014, online under http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493046/IPOL-JURI_ET(2014)493046_EN.pdf (28.05.2019)., *Beukers Thomas, de Witte Bruno* and *Kilpatrick Clair*, Constitutional change through euro-crisis law (2017).

[16] *Congleton Roger*, Improving Democracy through Constitutional Reform: Some Swedish Lessons (2003)

[17] *Ferejohn John*, The Politics of Imperfection: The Amendment of Constitutions, Law and Social Inquiry 22 (1997).

[18] *Ginsburg* and *Melton* (Fn 10).

[19] *Griller et al.* (Fn 15)., *Besselink et al.* (Fn 15)., *Beukers et al.* (Fn 15)., *Griller and Lentsch* (Fn 5).

[20] *Tsebelis George*, Veto Players and Law Production in Parliamentary Democracies: An Empirical Analysis, The American Political Science Review, 93 (1999)., *George Tsebelis*, Veto Players: How Political Institutions Work (2002).

[21] *Lijphart* (Fn 14).

[22] *La Porta Rafael, Lopez-de-Silanes Florencio, Pop-Eleches Cristian,* and *Shleifer Andrei*, Judicial Checks and Balances, Journal of Political Economy 112 (2004).

[23] *Lutz* (Fn 14), *Elster* (Fn 14) 101.

with voting thresholds such as simple or qualified majorities that also add to the amendment difficulty.[24] *Elster* also codes delays such as repeated votes by the same legislature or requirement for a vote by two subsequent legislatures.[25] Interestingly, none of these operationalisations includes constitutional courts on the basis of the implicit assumption that the court involvement is arbitrary, depending on anyone challenging the amendment.

The third approach to the construction of amendment difficulty index is driven by statistics. *Lutz* compiles observed rates of constitutional changes from US states to calculate weights that indicate which procedures increase amendment difficulty by reducing the frequency of change. Subsequently, he matches these weights with amendment procedures in 32 countries to calculate index of amendment difficulty.[26] *Ginsburg* and *Melton* combine the information on the observed amendment rate with several variables describing number of actors who can propose amendment, number of veto players, vote quora in parliaments and the time required for an amendment to pass. They also develop a separate measure of amendment culture, based on the amendment rates over many decades.[27]

From these three approaches, the second one is the most suitable for the construction of the Constitutional Amendment Index. While it sacrifices the detailed qualitative analysis, it facilitates a systematic comparison across many different countries. Moreover, given the regional focus on the EU, we can contribute to the existing literature by including more actors and vote thresholds than was feasible for larger global comparisons.[28] In contrast with the third quantitative approach, the descriptive comparison has the advantage of being simple and transparent, which is not necessarily the case of indices based on complex weights or historical data. This matches the intention to provide simple control variable for quantitative research.

The inevitable consequence of the descriptive approach is that the coding of empirical information relies on the combination of the detailed study of the law on the books and expert judgement. We have engaged a network of constitutional lawyers who are experts in their national systems and knowledgeable about other European countries.[29] Consequently, the coding of individual countries was done by national experts, whose description was challenged by experts from other member states. This limits the idiosyncrasies of individual legal opinion and makes data more comparable across countries, although it cannot remove

[24] Lane (Fn 14) 114., *Elster* (Fn 14) 101., *La Porta et al.* (Fn 22).
[25] *Elster* (Fn 14) 101.
[26] *Lutz* (Fn 14)
[27] *Ginsburg* and *Melton* (Fn 10) 708.
[28] such as *La Porta et al.* (Fn 22) or *Ginsburg* and *Melton* (Fn 10).
[29] EMU Choices Legal Network – presented online under https://emuchoices.eu/people/.

the subjective judgements entirely. The added advantage of the expert network is that we are able to provide a complete dataset for all 28 member states, while existing indices cover between 26[30] and 16 member states.[31] In particular, many of the member states from Central and Eastern Europe were heretofore not covered.

III. The design of the Constitutional Amendment Index

The Constitutional Amendment Index can be formally defined as a composite indicator of the cumulative procedural requirements imposed by the national legal system on constitutional amendment induced by the EMU reform. It serves as a proxy for legal constraints that have effective power to influence the adoption of EMU-induced constitutional amendment. The CAI is specifically focused on the EMU reforms of fiscal and economic governance and some of the underlying assumptions - such as the most likely legal pathways or likelihood of certain actions - might not be met in the context of other policies (see section 4 for discussion of the full complexity).

The construction of CAI relies on the sequence of four veto-points that have the potential to block constitutional amendments in most member states. Specifically, we focus on the role of parliaments, referenda, constitutional review bodies and the heads of state. In case of parliaments, we emphasise the number of parliamentary formations involved, the number of ballots required and required majorities, while in case of constitutional review on both the ex post and ex ante constitutional scrutiny in each country. Altogether, the CAI covers seven different components (see Table 1).

Table 1: The components of the Constitutional Amendment Index (CAI)

Code	The definition of the CAI component
PRF	***Parliamentary formations:*** How many parliamentary formations must decide on the adoption of EMU-induced constitutional amendment?
BAL	***Ballots:*** How many ballots are the relevant parliamentary formations required to cast for the adoption of EMU-induced constitutional amendment?
MAJ	***Majorities:*** What are the majorities required for the adoption of EMU-induced constitutional amendment?
REF	***Referendum:*** Is any referendum possible or mandatory for the adoption of EMU-induced constitutional amendment?
SIG	***Head of State:*** Is the signature of the head of state required for the EMU-induced constitutional amendment?
EAR	***Ex-ante constitutional review***: Is ex-ante constitutional review required for the EMU-induced constitutional amendment?
EPR	***Ex-post constitutional review***: Is ex-post constitutional review required for the EMU-induced constitutional amendment?

[30] *Ginsburg* and *Melton* (Fn 10)
[31] *La Porta et al.* (Fn 22).

The CAI structure is derived from the literature review in the previous section as well as iterative debate among a team of constitutional lawyers and political scientists. It includes all veto-points included in any of existing indices of amendment difficulty, while also adding constitutional courts and review bodies. Much of the iterative discussion focused on the balancing the trade-off between simplicity and comprehensiveness of standardized options for each component (see Table 2). While a detailed list of options provides for more precise description, it also tends to render the indicator too complex to be useful for quantitative research.

The final list for all 7 CAI components includes 31 different options, which is more than any other index of amendment difficulty, yet it remains reasonably simple and transparent. Table 2 lists these options, which cover the most consequential variations in procedural requirements and therefore can distinguish the degrees of amendment difficulty across EU member states. They also include all options used in other descriptive indices, with partial exception of required delays and the involvement of subnational units.[32] These two options are not explicitly defined, but subsumed in the PRF 3 option (Table 2, Parliamentary formations) that covers the requirement for two successive legislatures voting on the amendment as well as the potential involvement of sub-national chambers. The numerical coding as zero indicated that the given component is absent in the given member state, while the codes from 1 to 4 indicate increasingly demanding requirements. These codes essentially provide ordinal ranking of the procedural demands on each component.

Table 2: The standardized options of the CAI

Code	CAI component	Options
PRF	***Parliamentary formations***	1 one parliamentary chamber 2 two or joint parliamentary chamber(s) 3 more than two/joint parliamentary formations, including newly elected parliament
BAL	***Ballots***	1 one vote in any of the relevant parliamentary formations 2 two votes in any of the relevant parliamentary formations 3 more than two votes in any of the relevant parliamentary formations
MAJ	***Majorities***	1 only simple majorities required 2 both simple and constitutional majorities required 3 only constitutional majorities required
SIG	***Head of State***	0 no signature required or legal obligation to sign 1 signature required, but its absence can be surmounted by other constitutional actor(s) 2 signature required and can veto ratification

[32] see *Lutz* (Fn 14), *Elster* (Fn 14)

REF	***Referendum***	0 no referendum foreseen 1 consultative (legally non-binding) referendum possible 2 consultative (legally non-binding) referendum mandatory 3 legally binding referendum possible 4 legally binding referendum mandatory
EAR	***Ex-ante constitutional review***	0 no ex-ante review possible 1 procedurally difficult to invoke, outcome legally non-binding 2 procedurally difficult to invoke, outcome legally binding 3 procedurally easy to invoke, outcome legally non-binding 4 procedurally easy to invoke, outcome legally binding 5 mandatory review, outcome legally non-binding 6 mandatory review, outcome legally binding
EPR	***Ex-post constitutional review***	0 no ex-post review possible 1 procedurally difficult to invoke, outcome legally non-binding 2 procedurally difficult to invoke, outcome legally binding 3 procedurally easy to invoke, outcome legally non-binding 4 procedurally easy to invoke, outcome legally binding 5 mandatory review, outcome legally non-binding 6 mandatory review, outcome legally binding

The options for coding CAI components cover only the most important subset of formal requirements, but constitutional amendments are also guided by informal conventions relying on the established political practices. This is particularly pertinent for the four CAI components covering referenda, constitutional review and head of state signatures. In these cases, even legally non-binding procedures tend to be respected as political binding. Since these reflect the voice of the people, constitutional guardians or the head of state, they are rarely side-lined or overruled, even if such option formally exists. To cover these specific issues, we have asked our country experts to indicate, whether – given the past experience and established political conventions – the non-binding outcome would be respected as binding.[33] While this discussion was conceptually important for the construction of CAI, empirically it is a rare phenomenon judged relevant only in the case of Finland by our expert respondents.

Our approach to CAI construction corresponds to the best practices in this field formulated by the OECD.[34] The OECD handbook on constructing composite indicators recommends grounding them in a clear theoretical framework, which is provided by the veto-point

[33] Formally, this option was offered on options (see Table 2) Referendum 1 and 2, Head of state signature 1, Ex-ante constitutional review 1, 3, 5 and Ex-post constitutional review 1, 3, 5. When respondent indicated that the outcome in question would be most likely treated as binding, we coded the answer as binding (e.g. while the referendum on EMU-induced constitutional amendment in Finland is intended as consultative and non-binding (Referendum 1 option in Table 2), it has been coded as Referendum 3 option: legally binding referendum possible because according to the past experience, the outcome was treated as de facto binding on the only two occasions, even though it is also emphasized in constitutional doctrine that referendum is consultative and, accordingly, not legally binding.)

[34] *OECD*, Handbook on Constructing Composite Indicators: methodology and user guide (2008).

framework.[35] At the same time, the handbook also admits that there are no optimal rules for structuring and grouping individual components of the indicator and these choices can be guided only by the clarity of information conveyed.[36]

To achieve such clarity, we have relied on the iterative debate among teams of lawyers and political scientists. The coding of CAI components for each member state was done by country experts from the EMU Choices research consortium. The central team performed the descriptive analysis and engaged country experts in discussion about which standardized option from Table 2 matches existing rules and practices the closest. The descriptive analysis was based on the 28 factsheets covering the legal foundations for fiscal, economic, and monetary integration for all EU member states[37] as well as the analysis of the literature on comparative constitutionalism within the EU.[38]

The descriptive analysis is the primary source of the coding of three parliamentary components, referendum and the role of the head of state (see Table 1). In contrast, the expert judgement is a primary determinant of the two components on constitutional review. It adds to the descriptive analysis the estimation for the potential that the ex-ante or ex-post review would be triggered in the case of constitutional amendment due to EMU reform. Such estimation involves the consideration of past cases and the broader legal culture prevailing in the given country. The expert judgement is also needed for the choice of the most likely 'legal pathway' for the EMU-induced constitutional amendment in countries with multiple option of constitutional amendment and other discretionary elements such as calling a non-mandatory referendum in the given country.

While the primary contribution of the CAI is to provide comparative information on the key veto-points, its potential use in quantitative research requires some aggregation. There is no single optimal method for such purpose as each relevant alternative involves trade-offs.[39] Consequently, the choice of the aggregation method depends on the goals of the user of the data and we can only facilitate methodological choices by providing data in a transparent and structured form.

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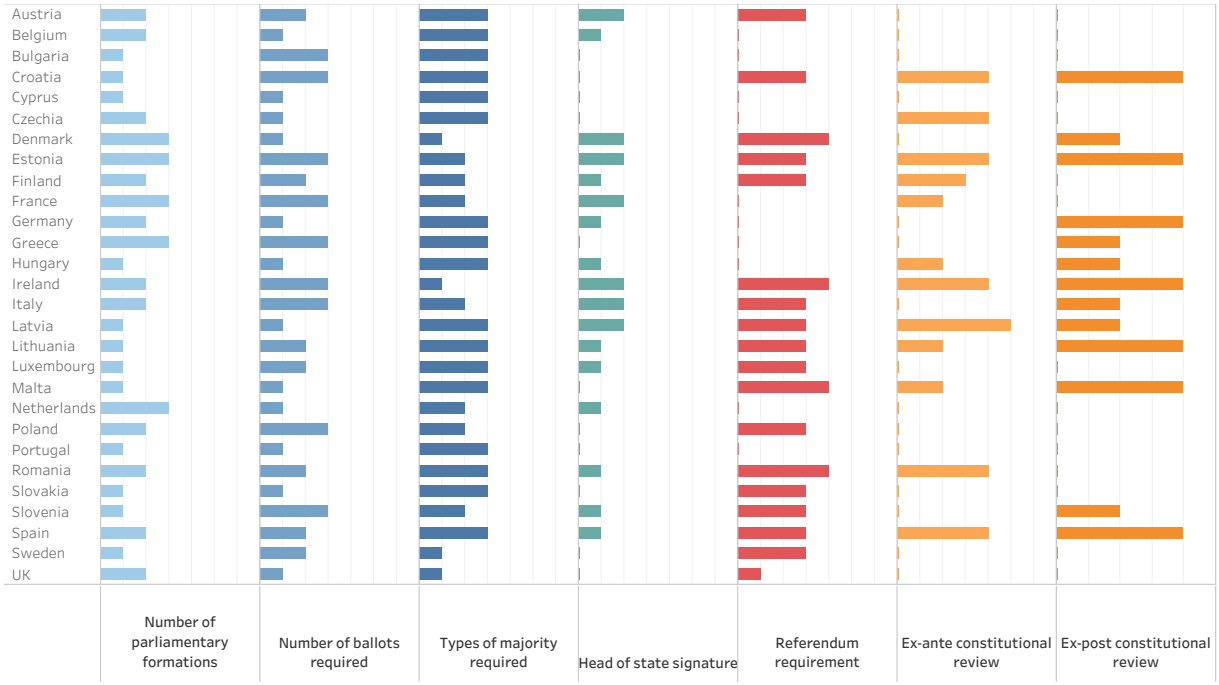
[35] *Tsebelis* (Fn 20).; *Rasch* (Fn 14).
[36] *OECD* (Fn 35) 25.
[37] See *EMU Choices*, Factsheets, EMU Choices 20.06.2016, online under www.EMUchoices.eu/data (29.05.2019).
[38] *Besselink et al.* (Fn 15)., *Beukers et al.* (Fn 15)
[39] see *OECD* (Fn 35), *Leuffen Dirk, Shikano Susumu and Walter Stefanie*, Measurement and Data Aggregation in Small-n Social Scientific Research. European Political Science, 12 (2013) for overview of methods.

IV. Comparisons across member states

Figure 1 provides an overview of the Constitutional Amendment Index for all EU countries. It indicates considerable variation in procedural requirements that the EMU-induced constitutional amendment provide before fully and constitutionally being adopted. While in all member states parliaments are involved, head of state signature, referendum or constitutional reviews do not apply in all EU countries. The next sections address the differences and similarities among EU countries on each CAI component, while also highlighting some legal, political and procedural complexities that are not fully captured by this index.

Figure 1: Constitutional Amendment Index: seven components



Note: See Tables 1 and 2 for definitions and coding rules.

A. Number of parliamentary formations

The organization of parliaments differs considerably across member states and impacts on the number of involved actors. The elementary differences stem from unicameral or bicameral systems and intervening elections. The constitutional amendment requires the approval of all houses of the parliament, and while it depends on the composition of individual chambers, it is likely to be more difficult in countries with more than a single parliamentary chamber. Consequently, the CAI indicates higher level of amendment difficulty for countries involving the second chamber or a joint parliamentary chamber or even more so in case of the necessity of intervening elections between the necessary readings or votes.

Almost half of the EU countries require the vote on EMU-induced constitutional amendment in a single parliamentary chamber (see Figure 1). The larger countries and countries with a federal system[40] tend to have bicameral political systems, requiring both chambers to vote, either sequentially or jointly. Remarkably are Denmark, Greece, the Netherlands, and Finland, which require two successive parliaments with intervening election for constitutional amendments. A special case is Estonia providing for various pathways. (see subchapter G.)

B. Number of ballots

Similar variation in procedural requirements is observable with the number of ballots that the relevant parliamentary formations need to cast in order to pass the constitutional amendment (see Figure 1). Although the actual political demands for passing the amendment depend on the compositions of relevant parliamentary formations, the simple fact that the proposal needs to be subjected to public debate and voted multiple times increases the potential for politicization. While nearly half of the EU countries require only one ballot per chamber, the other half integrates multiple ballots into the system of checks and balances in numerous EU countries.

For example, in Lithuania the amendment of chapters of the Constitution must be considered and voted at the Seimas twice, while in France, generally the first vote has to be adopted by identical terms in both chambers, and in a second vote approved by the Congress, which is a joint parliamentary formation. In many other Member States, such as in Poland, even more votes are required in the chambers.[41]

C. Required majorities

The required majorities for specified parliamentary formations and individual ballots also differ across the EU (see Figure1). A few member states like Sweden or Denmark do not differentiate between an ordinary and constitutional act and require only simple majority in parliament. However, most member states foresee higher voting threshold than for usual legislative adoption. This ensures that the constitutional amendment is based on a broad base of political representation, which at the same time implies a higher procedural requirement for change. In a majority of EU countries each ballot requires a constitutional majority, which is variously defined mostly between three-fifths and two-thirds of the total available votes.[42] However, several countries including Estonia, the Netherlands and Slovenia require some

[40] E.g. Austria's second chamber must decide on matters concerning the competences of the regions.
[41] In Poland, it is one vote in the upper chamber and three to four votes in the lower chamber.
[42] In Malta, Article 66(1) of the Constitution provides the instances where a two-thirds majority is required. It mainly relates to the fundamental principles of the republic, such as democracy, fundamental human rights and freedoms as well as finances under Articles 102 to 110, which includes the consolidated fund and the authorisation of expenditure, the authorisation of expenditure before appropriation, contingencies fund and public debt.

combination of simple and qualified majorities for the constitutional change pathway most likely used for EMU-induced amendment.[43]

D. Approval of the head of state

After the parliamentary approval some countries require an approval of the head of state to complete the adoption process (see Figure 1). In principle, such requirement could provide the head of state with a veto power over the amendment. However, while the majority of EU countries require the signature, the refusal is not able to finally block the amendment. In some Member States a signature is not foreseen or the head of state is not empowered to refuse such[44] or its refusal is according to the past experience is highly theoretical[45].

In many EU systems, either the possibility of a refusal of providing the foreseen signature may be overruled by another constitutional actor. For example, in Germany the signature of the President is required, but can be forced by the Constitutional Court, if the amendment followed the foreseen procedure and does not exceed constitutional constraints. In Finland, the President shall decide on the confirmation of the Act, however, it may be readopted and thereby enter into force without his/her confirmation.

E. Referendum

Referendum can add an element of direct democracy into the process of constitutional amendment. Over a third of EU member states do not presume any referendum, while in the rest there is either an obligation or a possibility of calling such (Figure 1).

Figure 1 summarizes the requirements with regard to the referendum. There is a group of 10 member states that either do not allow or do not foresee referenda on EMU-induced constitutional change. However, most countries allow for the initiation of legally binding referenda.[46] Denmark and Ireland[47] impose mandatorily a referendum to facilitate EMU-

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[43] In the Netherlands, in the first reading a simple majority of the votes cast in both houses suffices, while in the second reading a two-thirds majority of the votes cast in both houses is required. (Article 137 Dutch Constitution)

[44] In Ireland for example, the President is not entitled to refuse his/her signature (Article 46(5)) Irish Constitution. In Portugal Article 286 (3) of the Constitution states that the President of the Republic may not refuse to enact the revision law.

[45] In Belgium there is a highly theoretical possibility and thus highly improbable that the King refuses to sign an act consenting to a treaty (amendment), or refuses to fulfil his role in the context of a constitutional amendment. In that case recourse could be taken to "the -moral- impossibility of the King to rule/reign", a technique which was used when the King refused to sign the act legalizing abortion in 1991.
The royal signature of the Dutch King is purely a formality and is under ministerial responsibility. (Articles 47, 138 and 42, paragraph 2, Dutch Constitution)

[46] In Italy a referendum is an option, if a bill passes the required simple majority, but remains below the qualified majority. In Luxembourg 25% of members of parliament or 25000 voters may initiate a referendum, in Slovenia and Sweden 33% of members of parliament. § 164 Estonian Constitution; The Croatian Constitution can also be amended by a referendum, which may be called by the Croatian Parliament; the Croatian President, on a proposal of the Croatian Government and with the countersignature of the Prime Minister or; it has to be called by the Croatian Parliament, when so requested by ten percent of the total Croatian electorate.

induced change. Such mandatory referendum must be called in Austria, Lithuania, Malta and Spain in case of specific circumstances, such as for a total revision of the Constitution, or specific parts of the Constitution.[48] However, it is assumed that this case is not likely in regard to changes in the field of EMU. In contrast, Finish constitution allows only a consultative referendum with no legally binding effect, but the results are likely to be treated as binding.[49]

F. Ex-ante constitutional review

Finally, constitutional amendments are or may be subject to legal review to ensure the constitutionality of amending acts. This may be achieved by constitutional courts being able to stop legislation in abstract or concrete review procedures.[50] In some member states other constitutional bodies, may have or may be attributed on a case-to-case basis a competence to review a legislative act or proposal. The most prominent example is the Finnish ex-ante Constitutional Law Committee providing an advisory opinion on the amendment draft. In this light, the index covers the institution of ex-ante review ('preventive norm control'). Thereby, the legislation in question is tested in an 'abstract' manner on its constitutionality and usually invoked by public authorities. Most countries do not provide for any ex-ante constitutional review for an amendment act.

In Hungary, Lithuania, and Malta it is rather difficult to activate a legally binding ex-ante review and thereby to prevent the amendment due to unconstitutionality. In Hungary, the Constitutional Court's powers are restricted to review of the formal requirements of a constitutional amendment only.[51]

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[47] Referendums in Ireland are held ensure the Constitution poses no obstacle to a particular policy choice, which is then either inserted in the Constitution or made by the Government or legislature.

[48] In Austria, EU Treaty approvals with impact on the Constitution were adopted as partial constitutional revision setting out the hold of an optional referendum. Since 2008 with the introduction of Art 50(4) B-VG, no referendum is required for State treaties by which the contractual bases of the European Union are modified.
In Spain for a total revision, or a partial revision which affects the Preliminary Title, Section I of Chapter II of Title I which is about fundamental rights , and Title II, about the Crown.
In Lithuania a referendum is mandatorily required for the amendment of Article 1 of the Constitution providing "The State of Lithuania shall be an independent democratic republic", the First Chapter "The State of Lithuania" and the Fourteenth Chapter "The Alteration of the Constitution". These may be altered only by referendum if not less than 3/4 of the citizens of Lithuania with the electoral right vote in favour thereof;" may be altered only by referendum. (Art 148 paras 1 and 2 of the Constitution)
In Malta, in the case of alteration of Article 66(3),(4) and Article 76(2) Maltese Constitution.

[49] See Section 53.1 of the Constitution. Up until now, only 2 referendums have taken place in Finland. Although the outcome was treated as de facto binding on both occasions, it is also emphasized in constitutional doctrine that referendum is consultative and, accordingly, not legally binding.

[50] A concrete review is based on an actual individual case due to an infringement of rights. In contrast, an abstract review occurs without a concrete case.

[51] *Vincze Attila*, Wrestling with Constitutionalism: The Supermajority and the Hungarian Constitutional Court, in ICL Journal 8 (2014) 91f.

In contrast, the involvement of the Finnish Constitutional Law Committee is most likely deriving from its easy mode of activation. In addition its, even though legally non-binding, opinions are in practice generally followed.[52]

In the Czech Republic, Spain, Ireland and Croatia the ex-ante review may formally become a more likely and stronger veto point because it is rather easy to activate and the outcome has binding effect. However, in fact, even though the Czech constitutional procedural rules offer such option, according to the past experience, the actual application of such is most unlikely in practice as it would only apply for serious procedural[53] or substantive reasons[54]. Even though, only a limited number of public authorities are entitled to launch constitutional review, in Estonia the ex-ante review on the constitutionality is very likely and most probable to be invoked by public authorities and provides legally-binding effect. In Latvia, the review is mandatorily invoked, but no legal obligation exists to follow the opinion.

G. Ex- post constitutional review

More common are the ex post review mechanisms, which relate to the compatibility of enacted legal provisions with the constitution by an advisory body, court, or parliamentary committee, which can de facto revert to the status quo after the law has been enacted.[55] The access to and thus the potential veto capacity of this review differs across member states. Most member states do not provide for a procedural ex-post scrutiny of constitutional amendment. In Austria and Sweden a review of a constitutional amendment is on a theoretical basis possible, but has never happened or is discussed and thus is hardly imaginable in practice.

Procedurally difficult to invoke are legally binding reviews in Denmark, Greece, Italy and Slovenia. Also in Hungary and Latvia such options are highly theoretical and thus unlikely and is limited to the competence to review on procedural check.[56] Thus, the potential of such obstacle remains rather low. On the other hand, several countries have established ex-post

[52] Finland's ex-ante Constitutional Law Committee as part of the parliament provides opinions, which are generally followed. (Section 74 Finish Constitution) *Lavapuro Juha*, *Ojanen Tuomas, and Scheinin Martin*, Rights-based constitutionalism in Finland and the development of pluralist constitutional review, International Journal of Constitutional Law, 9 (2011) 505.

[53] Exemplary is one single case Melcak, where the Constitutional Court struck down a constitutional bill shortening the term of office of the sitting parliament for the lack of generality to be considered law.

[54] Such as the constitutional core.

[55] *Ginsberg Thomas*, Judicial Review in New Democracies (2003), *Stone Sweet Alec*, Governing with judges. Constitutional politics in Europe (2000), *Hönnige Christoph, Gschwend Thomas, Engst Benjamin and Wittig Caroline,* Constitutional courts as veto players: Composition, Absorption and Decisions at the German Court, ECPR General Conference 29.08.2015.

[56] In Hungary, the powers of the Constitutional Court were expressly narrowed by the introduction of a new provision according to which it has only power to review the formal technicalities of a constitutional amendment but not its substance.

review instruments, which may easily be initiated and are commonly used as a review tool, such as in Croatia, where the Constitutional Court signalled the option beyond procedural constitutional review to allow substantive review based on the premise of core Constitution and a holistic approach towards the Constitution.

In the Czech Republic for the ex-ante constitutional review option, the same applies for the ex-post review. According to the past experience, the actual application of such is rather unlikely and never happened in practice as a constitutional amendment would need to radically undermining for instance democracy.

H. Other factor affecting constitutional amendments

The constitutions of many EU countries provide for several alternative pathways for EMU-induced constitutional amendment. Some constitutions include the EU clause providing a dedicated procedure for all EU-related changes, while others impose a standard amendment procedure (see Figure 1), which may also include several alternatives. Estonia allows the amendment either by a three-fifths majority in parliament and a referendum, or two successive decision of a three-fifth majority with an intervening general election, or in urgent cases by a four-fifth majority in one session. Bulgaria for example foresees an alternative amendment procedure if the required qualified majority of three-fourths is not reached. A lower threshold of majority of two thirds may be reached and repeated after a two to five months period. In Finland the Constitution may be amended at once by a five-sixth majority or by a repeated two-thirds-majority with an intervening election. France may amend its constitution by the vote of both parliamentary houses and either by a three-fifths majority in a joint parliament, the Congress, or a referendum, if the president decides so.

The Romanian Constitution provides for the failure to reach an agreement in the general procedure the option that the Chamber of Deputies and the Senate shall decide thereupon, in joint session, by the vote of at least three quarters of the number of Deputies and Senators.[57]

In some Member States, differentiation exists depending on the scope of constitutional amendment. In Spain in case of a total revision, or a partial revision, which affects the Preliminary Title, Section I of Chapter II of Title I about fundamental rights and Title II of the Spanish Constitution, about the Crown, or in Austria a total revision requires the approval by a referendum. Bulgaria's Constitution requires a special covenant – the Grand National Assembly for the change of specific subjects listed under Art 158, such as to adopt a new Constitution, changes in relation to the territory and the form of State structure or form of

[57] Article 147 Romanian Constitution.

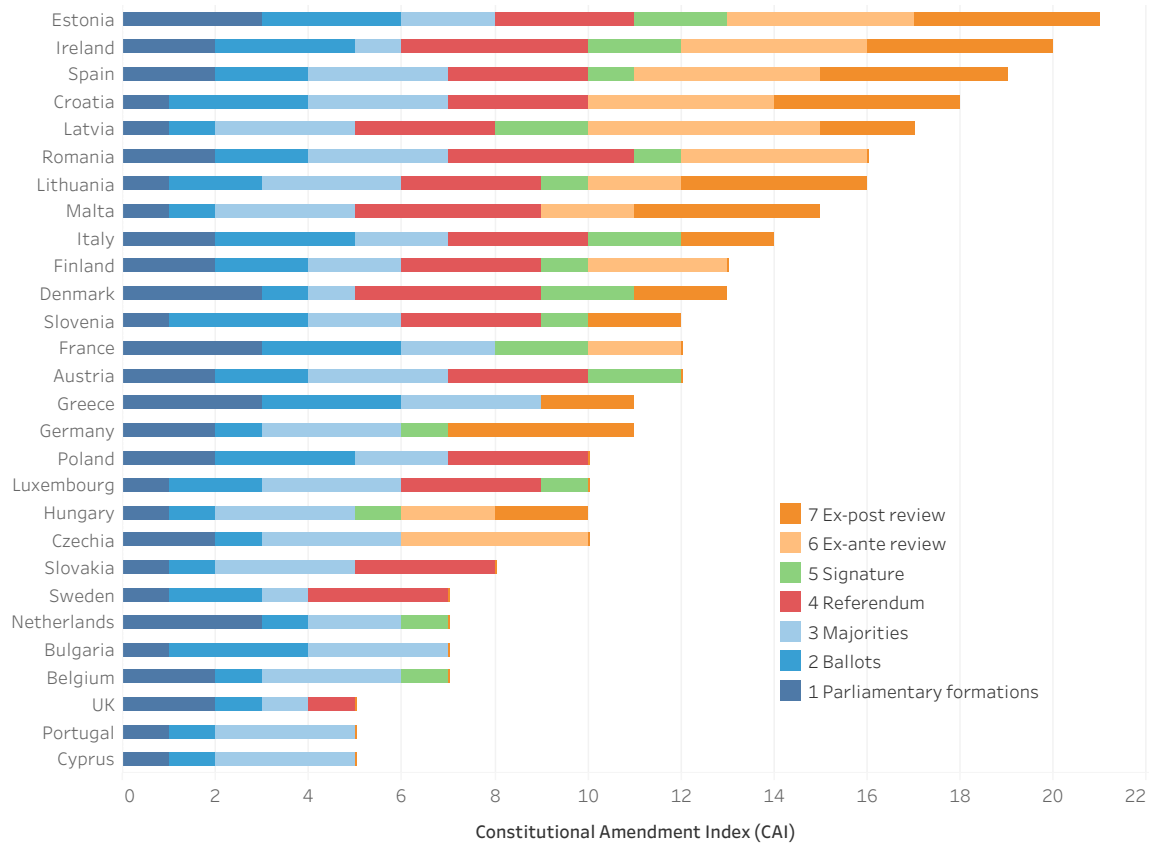
government, constitutional amendment procedure and constitutional principles and fundamental civil rights.

I. Aggregating the components of the Constitutional Amendment index

The components of the Constitutional Amendment Index provide a description of procedural requirements for EMU-induced constitutional change in 28 EU member states. While the coding options for each component abstract from many specific features of national legal systems, they capture the variety of procedures that can impact EU negotiations under various circumstances. If the CAI is to be used as empirical proxy for legal constraints in models of the decision-making in the EU, then it would be helpful to aggregate all CAI components into a single number.

The CAI components are coded as ordinal variables, despite being represented numerically (see Table 2). They cannot be aggregated without accepting some strong assumptions that allow for treating numerical indices as continuous variables. If we use a simple mean for aggregation, we have to accept that the differences between numerical indices are in some substantive sense comparable (equidistant) and that each CAI component has an equal impact (equal weight) on the overall demands that national procedures impose on the EMU-induced constitutional change. Such assumptions are hardly acceptable for legal scholars or political scientists focused on qualitative comparisons. However, they may be acceptable in some quantitative research designs, where the legal constraints on constitutional change are one of the many control variables.

Figure 2: Constitutional Amendment Index: aggregated for comparison



Note: See Tables 1 and 2 for definitions and coding options.

The advantage of providing data on all CAI components is that their users can opt for an aggregation procedure most suited for their purposes, such as including only some components or using different weights for individual components. Figure 2 provides the simplest aggregation by an unweighted average and illustrates the variation in procedural requirements across EU countries. While it suggests that in some countries like in Estonia, Ireland and Spain, procedural requirements are more demanding than in Portugal or Cyprus, the empirical relevance of these hurdles depends on the circumstances of each case, which we discuss in the conclusion.

V. Conclusion

This paper had introduced a Constitutional Amendment Index (CAI) as an indicator of procedural demands imposed by the EU member states on constitutional amendments originating from EMU reforms. While the CAI simplifies the amendment process, it is more granular and informative than similar proxies elaborated so far for national legal constraints. It provides information on seven characteristics related to the role of four key veto-players involved in the constitutional change - parliaments, referenda, heads of states and

constitutional review bodies. The CAI advances the literature in this field by providing the most comprehensive - in terms of EU states as well as veto-points - and the most up to date index of amendment difficulty. It is simple, yet most granular proxy for national legal constraints that can be adopted for quantitatively oriented research strategies.

The relevance of procedural constraints captured by CAI for actual constitutional amendment is inevitably contextual. When all national political stakeholders agree more or less unanimously on the desirability of constitutional amendment, then they will be able to pass it, even if the constitution imposes the most rigid procedural requirements.[58] In such cases, only constitutional court can block the amendment, if it concludes that the amendment breaches the underlying constitutional principles. However, to date all EMU reforms that were adopted during the post-crisis decade and challenged at courts, have passed the muster.

When there is a political disagreement about any EMU-induced constitutional amendment, then procedural rules captured by the CAI matter much more. The more demanding these requirements, the less likely is the reform to pass. Yet, even for politically contested cases the relevance of legal constraints depends on the context. In acute crisis circumstances political disagreements can be subdued by immediate economic pressures. Arguably, such pressures allowed the EU member states to agree and remain committed to many contested reforms such as three stabilization programs for Greece, the creation of the European Stability Mechanism or the development of the banking union. More generally, legal constraints are likely to be more relevant in cases when: (i) the economic views of the EMU reform that triggers the amendment are divided; (ii) the consequences of the EMU reform or of the enabling amendment constitution are politically contested and (iii) the compatibility of the EMU reform or of the enabling amendment with the established constitutional framework is widely questioned.

The dependency of the procedural constraints on specific context of reforms also implies that different scholars are going to view and use the CAI differently. Economists who tend to expect that EMU reforms will be adopted when they present the best alternative course of action may still use it as a control variable for legal and political constraints. Political scientist and legal scholars may be attracted to the systematic comparison underpinning the CAI, which can provide good starting point for more detailed case studies.

Note

[58] Tsebelis (Fn 20) 26ff.

Data are provided in the interactive data portal at www.EMUchoices.eu/cai

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EMU CHOICES

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