

**European University Institute**

---



**Robert  
Schuman  
Centre  
for  
Advanced  
Studies**



# **Reforming the Treaties' Amendment Procedures**

**Second report on the reorganisation of  
the European Union Treaties**

**submitted to the European Commission  
on 31 July 2000**

---



EUROPEAN UNIVERSITY INSTITUTE

Robert Schuman Centre for Advanced Studies

---

## **Reforming the Treaties' Amendment Procedures**

### **Second report on the reorganisation of the European Union Treaties**

**submitted to the European Commission on 31 July 2000**

---

#### Coordinators

Claus-Dieter Ehlermann

Yves Mény

#### Rapporteur

Hervé Bribosia

#### Members of the Working Group

Armin von Bogdandy

Gráinne De Búrca

Renaud Dehousse

Bruno De Witte

Luis Díez-Picazo

Jean-Victor Louis

Francis Snyder

Antonio Tizzano

Jacques Ziller

#### with the participation of

H. E. the Ambassador Philippe de Schoutheete,  
Special Adviser to Mr Michel Barnier, Member of the European Commission

© 2000 European Communities

All rights reserved.  
No part may be reproduced in any form without permission

Printed in Italy, in November 2000

## ***REFORMING THE TREATIES' AMENDMENT PROCEDURES***

### **Second report of the European University Institute, Florence, on the reorganisation of the European Union Treaties**

On 15 May 2000, the Robert Schuman Centre at the European University Institute of Florence<sup>1</sup> submitted to the President of the European Commission a report on the reorganisation of the Treaties relating to the European Union.<sup>2</sup> That report advocates the elaboration of a “Basic Treaty of the European Union” to replace the Treaty on European Union (TEU), while keeping the law as it stands. This Basic Treaty would consolidate and incorporate the essential provisions of that treaty and the Treaty establishing the European Community (TEC). Two special protocols containing the bulk of the provisions on common foreign and security policy and on police and judicial cooperation in criminal matters would be annexed to the Basic Treaty. The consolidated version of the TEC which was annexed “by way of illustration” to the final act of the Amsterdam Treaty, would receive official status as the only authentic text on the European Community, but in a reduced version due to the transfer of some of its provisions to the Basic Treaty.

The Commission’s mandate to the Schuman Centre also included, along the lines of the report by the three Wise Men, the examination of whether a reorganisation of the treaties should lead to differentiation in the procedure for their amendment. The Schuman Centre group felt it preferable to consider the two questions relatively

---

<sup>1</sup> The group meeting at the Robert Schuman Centre was co-ordinated by Yves Mény and Claus-Dieter Ehlermann. The other members of the group were Gráinne de Búrca, Renaud Dehousse, Bruno de Witte, Luis Díez-Picazo, Jean-Victor Louis, Francis Snyder, Antonio Tizzano, Armin von Bogdandy, Jacques Ziller. The group met several times in Florence and in Brussels, with the participation of Ambassador Philippe de Schoutheete, Special Adviser to Michel Barnier, member of the European Commission. Hervé Bribosia acted as *rapporteur* for the group.

<sup>2</sup> “A Basic Treaty for the European Union. A Study of the Reorganisation of the Treaties”, European University Institute, Robert Schuman Centre for Advanced Studies, Italy, May 2000. The report is also accessible on the Commission web-site in English, French and German ([http://www.europa.eu.int/comm/igc2000/offdoc/index\\_fr.htm# docreflex](http://www.europa.eu.int/comm/igc2000/offdoc/index_fr.htm# docreflex)).

separately, even though, as we shall see at the end of this report, there is a certain connection between the two operations.

In the first report, the main aim was to highlight, for present and future citizens of the Union, the Treaty rules which directly concern their rights, as well as the principles, objectives and values of the Union. The aim was also to clarify and rearrange the basic texts relating to the Union's institutional architecture and its functioning. The result would be a document which, when supplemented by the Charter of Fundamental Rights which was being drafted at the same time, would have considerable symbolic and identity-creating value.

While the reorganisation of the treaties is intended to consolidate the present state of primary law, this second report reconsiders the process of evolution of the treaties in a Union enlarged to comprise thirty or more Member States. We shall start by recalling the essential features that characterise the general amendment procedure, as well as the numerous special procedures derogating from the general procedure (I). In the light of the problems these procedures present in terms of efficiency and legitimacy (II), we shall then seek to identify guidelines for further reflection (III). We shall end with some specific proposals for reforming the amendment procedures (IV).

Though the Union is neither a classical international organisation nor a State, we felt it useful to consider the amendment procedures used in the former, as well as the constitutional revision procedures of certain States, especially those with a federal structure. This kind of comparison can sometimes have explanatory value. It also allows for the elucidation of mechanisms which are already present in the Community context but deserve to be further developed.

\*        \*  
\*  
\*  
\*

## I. — THE CURRENT AMENDMENT PROCEDURES

### 1. — The general amendment procedure

The general procedure of Article 48 TEU for amending the treaties fits into the classical tradition of international law and is marked by a certain rigidity and a certain solemnity: amendments must be adopted by common accord of the representatives of Member State governments meeting in a diplomatic conference, and come into force only once they have been ratified by all Member States “in accordance with their respective constitutional requirements”. These requirements in practice involve approval by national parliaments, or the holding of a referendum.

It is true that the Community institutions are called on to play a relevant part in the opening stage of the procedure. Thus, the Commission may, like each government, submit draft treaty amendments to the Council. In practice, this power of initiative also gives it the right to sit at the negotiating table, by contrast with the European Parliament. Next, the Council may decide—by simple majority—to call an Intergovernmental Conference, but only after consulting Parliament and, where appropriate, the Commission, on the advisability of amending the treaties. In the case of an institutional modification in the monetary area, the Central Bank is also consulted. The Court of Justice, for its part, has repeatedly insisted on strict respect for these formal and procedural requirements for amending the treaties, whether to alter existing treaty provisions or to add new ones.<sup>3</sup> But these requirements essentially concern the role of the institutions in the pre-negotiation stage, so that in reality the Member States remain the primary actors in the process, as far as both its initiation and its results are concerned.

---

<sup>3</sup> By contrast, general international law allows contracting parties unanimously to depart from a specific clause relating to the amendment procedure by adopting an *actus contrarius*, and more generally by invoking the principle of freedom as to the form of amendments (Articles 11 and 39 of the Vienna Convention of 23 May 1969 on the Law of Treaties).

## **2. — The special “autonomous” and “quasi-autonomous” amendment procedures**

The treaties already currently contain a number of special amendment procedures derogating from the general procedure. These procedures can be called “autonomous” where they are in the hands of the Community institutions, without going through an act of ratification and the associated national approval procedures, and “quasi-autonomous” where, though not omitting national approval procedures, they nonetheless incorporate some Community features.

What the “**quasi-autonomous” amendment procedures** have in common is that the Council, acting unanimously, is empowered to adopt provisions “which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements”. The involvement of other Community institutions varies according to the particular case.

Thus, on a proposal from the Commission and after consulting the European Parliament, the Council may add to the rights of Union citizens,<sup>4</sup> and, by the same procedure, it has adopted and amended the system of own resources.<sup>5</sup> Similarly, the Council adopted the Act concerning elections to the European Parliament by direct universal suffrage on the basis of a European Parliament initiative and with its assent,<sup>6</sup> and is empowered to establish the common electoral procedure for these elections according to the same procedure.<sup>7</sup>

Following the Amsterdam Treaty, the Council may, on the initiative of the Commission or a Member State, decide that action in areas covered by Title VI of the TEU shall fall under Title IV of the TEC, and at the same time determine the relevant voting rules.<sup>8</sup> Along the same line, the Amsterdam Treaty empowers the European Council to convert the progressive framing of a common defence policy into a true

---

<sup>4</sup> Article 22 TEC.

<sup>5</sup> Article 269 TEC. See most recently the Council Decision of 31 October 1994.

<sup>6</sup> The act is annexed to the Council Decision of 20 September 1976, amended on the occasion of German re-unification by the Council Decision of 1 February 1993.

<sup>7</sup> Article 190(4) TEC.

<sup>8</sup> Article 42 TEU (system known as the “grande passerelle”).

common defence, and to integrate the WEU into the Union.<sup>9</sup> In the latter case, the European Council shall “recommend to the Member States the adoption of such a decision in accordance with their constitutional requirements”. It may be noted that no such decisions have yet been taken.

In all these examples, the aim is to supplement primary law, or to give effect to prior decisions of principle. The procedure is marked by certain Community features. The intergovernmental conference is replaced by the Council, which is a Union institution of a less solemn nature. Additionally, in most cases, the Commission and/or the European Parliament have a power of initiative, or are at least consulted. By contrast, the national approval procedures are retained. This is why this amendment procedure is called “quasi-autonomous”. It nonetheless appears that the national procedures associated with ratification might thus be somewhat simplified for certain Member States.

**The “autonomous” special procedures** are characterised by the fact that only the Union institutions are involved in the amendment procedure: the national procedures associated with ratification are discarded. The best-known example of an “autonomous” procedure is the so-called “small revision” in the ECSC Treaty, in which the European Parliament must give its approval by special majority.<sup>10</sup>

Similar examples can be found in the EC Treaty, whereby the amendment power rests in the hands of the Council alone, which decides unanimously, with the other Union institutions playing only an initiating or consultative role.<sup>11</sup> The most significant

---

<sup>9</sup> Article 17 TEU.

<sup>10</sup> Article 95, paragraph 4, of the TECSC provides that amendments covered by the previous subparagraph “shall be proposed jointly by the Commission and the Council, acting by a twelve-fifteenths majority of its members, and shall be submitted to the Court for its opinion. In considering them, the Court shall have full power to assess all points of fact and of law. If, as a result of such consideration, it finds the proposals compatible with the provisions of the preceding paragraph, they shall be forwarded to the European Parliament and shall enter into force if approved by a majority of three-quarters of the votes cast and two-thirds of the Members of the European Parliament”.

<sup>11</sup> Former TEC provisions supply other examples of autonomous amendment procedures where the Council sometimes had to decide by qualified majority. Thus, the old TEC Articles 14(7) and 33(8) allowed the Council to change the rhythm of evolution of customs duties and quotas, while Article 38(3) provided for amendment by the Council of the list of agricultural products covered by the Common Agricultural Policy. See also old TEC Article 126, empowering the Council to review the tasks of the European Social Fund, and Article 4(1) of the protocol on the statutes of the European Investment Bank, empowering the Board of Governors to modify the definition of the unit of account.

examples concern the number of Commissioners, which can be changed by the Council deciding alone, and unanimously,<sup>12</sup> and much more broadly, the organisation and functioning of the Court of Justice. Thus, the Council may, at the request of the Court of Justice, increase the number of judges and advocates-general, and adapt the provisions relating to sessions of the Court (plenary or in chambers) and the mechanism of partial replacement of judges and advocates-general.<sup>13</sup> Additionally, at the request of the Court of Justice and after consulting the European Parliament and Commission, the Council may amend Title III of the Statute of the Court, which concerns the procedure before the Court.<sup>14</sup> In the same way, the Council may adapt or supplement the Statute of the Court of Justice following modifications of the role of the Court of First Instance.<sup>15</sup>

Other examples of autonomous amendment procedures relate to Economic and Monetary Union. Thus, on a proposal of the Commission and after consulting the Parliament and the European Central Bank (ECB), the Council may adopt provisions replacing the protocol on the excessive deficit procedure.<sup>16</sup> Furthermore, the Council may amend some provisions of limited importance in the Statute of the European System of Central Banks. Such amendments are made by the Council acting either by a qualified majority on a recommendation from the ECB and after consulting the Commission, or unanimously on a proposal from the Commission and after consulting the ECB. In either case, the assent of the European Parliament is required.<sup>17</sup> This example shows that even in the present context, it is conceivable to amend primary law by qualified majority.

The Amsterdam Treaty introduced two new cases of autonomous revision by an act of the Council deciding unanimously, on a proposal from the Commission and after consulting the European Parliament. This procedure applies to extending the scope of application of commercial policy to services and to intellectual property,<sup>18</sup> and to

---

<sup>12</sup> Article 213, paragraph 2, TEC.

<sup>13</sup> Article 221, paragraph 4, and Article 222, paragraph 3, TEC.

<sup>14</sup> Article 245, paragraph 2, TEC.

<sup>15</sup> Article 225(2) TEC.

<sup>16</sup> Article 104(14) TEC.

<sup>17</sup> Article 107(5) TEC.

<sup>18</sup> Article 133 TEC.

activate the “*mini-passerelle*” system aimed at communitarising further the decision-making and judicial procedure in the new Title IV TEC after a period of five years.<sup>19</sup>

## II — THE ISSUES

In the light of comparative constitutional law and the practice of international organisations, the general procedure for amending the treaties is particularly rigid. In the case of the European Union, this rigidity is not meant to stabilise the political and institutional system, as is the case in many national constitutions. On the contrary, the European Treaties have practically never ceased to be amended throughout the last fifteen years, and both the Union’s borders and its definitive constitutional form are far from being permanently fixed. Recourse to unanimity in the procedure for amending the constituent texts resulted, at the outset, from the small number of founding States. Later, the emergence of a law-making and judicial system which were unprecedented in the history of international organisations was thought to justify the preservation of a veto right for each Member State, and of national ratification procedures for approving amendments.

In other words, the rigidity of the general amendment procedure certainly contributed to legitimising the integration process. However, from the viewpoint of efficiency, the experience of recent years shows the limits of such a procedure in a Union with twelve or fifteen members. The compromises emerging from the Intergovernmental Conferences often come down to the lowest common denominator and suffer from inconsistencies; they are also the object of ever more detail, sometimes reducing the room for manoeuvre for the institutions in applying the treaty. The result is that the need formally to amend the treaties is permanent: an ICG is often scheduled even before the previous one is over. And given the length of the ratification procedures it can happen that a new ICG begins while an amending treaty has barely entered into force.

In addition, negotiations can be concluded only at the cost of increasingly numerous improvised exemptions for individual Member States, formulated in an extremely

---

<sup>19</sup> Article 67 TEC.

complex and non-transparent fashion. There are many such examples in the Maastricht and Amsterdam treaties.

It should finally be noted that the rigidity and solemnity of the general amendment procedure have been able to contribute to the emergence of parallel practices, sometimes regarded as procedural deviations. One might consider here the increasingly frequent recourse to the technique of inter-institutional agreements, which supplement the treaties on certain points in more detailed fashion without always being neutral as regards the institutional equilibrium.<sup>20</sup> This technique is certainly useful for making the institutional gears run smoothly, but suffers from uncertainty as to the value and legal nature of the agreements. Along the same lines, one may consider the practice of agreements in simplified form which are concluded as a “Decision of the Representatives of the Member States meeting in Council”. One might also consider the extensive use of Article 308 (ex 235) TEC to legitimize Community competence where the powers of action required to realize one of the objects have not been explicitly provided for in the treaty.

In the light of these considerations, there is reason to fear that in a European Union enlarged to 21, 27 or 30 Member States, the unanimity principle and national approval procedures risk constituting a source of total paralysis, preventing even the slightest adjustment of the treaties at least if the present general amendment procedure is to be followed.

Alongside this problem of efficacy in the context of an expanding European Union, there is also the inherent problem of the legitimacy of the amendment procedures. Given the subject matter of treaty revisions, which affect the lives of citizens ever more closely, recourse to a diplomatic conference seems an increasingly inappropriate way to reform the European treaties.

In this regard, the agreement reached on the Amsterdam Treaty on the night of 17 June 1997 constitutes a precedent from which lessons should be drawn. After a year and a half's negotiations the Heads of State and of Government were forced to decide

---

<sup>20</sup> For instance, several inter-institutional agreements have had the effect of improving the position of the European Parliament.

on the spot, sometimes in the absence of their advisers, on texts that had never been discussed before. Because of this lack of preparation, the Intergovernmental Conference had to be extended informally for nearly four months at Coreper level, in order to resolve issues that had been forgotten or misunderstood at Amsterdam.

In addition, despite efforts to make the negotiation documents accessible on the Internet, civil society (non-governmental organisations, associations, etc.) is largely left out of the debate. As for the European Parliament, which could convey the aspirations of European citizens, it is represented at the IGC only unofficially by two of its members acting as observers. The national parliaments, for their part, are involved only at the end of the procedure, and are faced with the *fait accompli* of a document that cannot be renegotiated. Their intervention at this late stage is, moreover, likely to cause difficulties in obtaining their approval.

More fundamentally, the amendment procedure would benefit from a greater dose of the “Community method” which is more conducive to the emergence of a common interest which transcends the sum of the particular interests of each Member State.

### **III. — GUIDELINES FOR A REFORM OF THE AMENDMENT PROCEDURES**

We shall in this section seek to identify guidelines which may guide our thinking on the ways to improve the treaties’ amendment procedures. These guidelines amount essentially, on the one hand, to a means of reducing the risks of blockage inherent in the unanimity principle while protecting any States which may end up in the minority, and on the other to a means of enhancing the role of the national parliaments and the European Parliament. In the light of these guidelines, we shall at the end of the report seek to make a few more specific reform proposals.

#### **1. — Reducing the risks of blockage inherent in unanimity**

The practice of international organisations shows that in the majority of cases the founding charter is subject to an amendment procedure which dispenses with the unanimity principle. For instance, the treaties establishing the United Nations

Organization,<sup>21</sup> the World Trade Organization (WTO),<sup>22</sup> the International Labour Organization (ILO)<sup>23</sup> and the World Health Organization (WHO)<sup>24</sup> in principle require a two-thirds majority of Member States for their amendment.<sup>25</sup> In the case of the UN and GATT, the majority principle was adopted at a time when the number of their Member States was much lower than today.

A two-thirds majority is also required for amending the Statute of the Council of Europe, an organisation whose number of members is not much higher than the membership of the European Union once the latter's enlargement is completed.<sup>26</sup> Even an organisation like the International Monetary Fund (IMF), whose activities affect the Member States' financial sovereignty, provides that amendments to its Agreement shall enter into force with the agreement of 3/5 of the Member States representing a majority of 85% of the weighted votes (the votes being weighted according to the financial contribution of each member).<sup>27</sup>

To be sure, the European Union is not an international organisation like any other. The number and nature of its powers, and especially the degree of integration, make it unique amongst organisations of this kind. It may however be noted that even in Federal States—which, in principle, in one way or another involve their member states in the process of revising their constitution—approval by a special majority of these member states is sufficient to adopt a new constitutional norm for the whole Federation. For instance, amendments to the Basic Law of the Federal Republic of Germany must be approved by two thirds of the votes in the *Bundesrat*, which is made up of members of the *Länder* governments.<sup>28</sup> The case of the United States

---

<sup>21</sup> Articles 108 and 109 of the United Nations Charter.

<sup>22</sup> Article X of the Agreement establishing the WTO.

<sup>23</sup> Article 36 of the Constitution of the ILO.

<sup>24</sup> Article 73 of the Constitution of the WHO.

<sup>25</sup> Which must include the five permanent Security Council Members as regards the UN Charter, and five of the 10 most industrialized States for the ILO constitution.

<sup>26</sup> Article 41 of the Statute of the Council of Europe.

<sup>27</sup> Article XXVIII of the Agreement of the IMF.

<sup>28</sup> Article 79(2) of the Basic Law. Each of the *Länder* is represented by three to six members of its government according to the size of its population (Article 51 of the Basic Law).

Constitution illustrates the fact that recourse to a majority procedure does not prevent a constitutional text from remaining very rigid.<sup>29</sup>

The unanimity principle in the process for amending the European Union treaties thus constitutes rather an exception in relation to other comparable systems. It can be explained, originally, by the fact that there was a limited number of founding States. Given the prospect of a Union consisting of thirty or so members by the end of this decade, a reform aimed at limiting the risks of blockage inherent in the unanimity rule ought to be considered. The objective is not to compel recalcitrant States, but to prevent the dynamics of integration being completely frozen or subjected to blackmail by a single Member State.

One option suggested by the Schuman Centre group is to replace the unanimous vote by a superqualified majority vote for amending the treaties.<sup>30</sup> Needless to say, this transformation need not necessarily be carried out overnight, and it would always be possible to retain a number of exceptional cases where unanimity would continue to be required, as in the case of the IMF Agreement<sup>31</sup> or the Agreement establishing the WTO.<sup>32</sup> In the case of the European Union, one might think first and foremost of the sensitive provisions which have a direct impact on the relative influence of each Member State in the decision-making system.<sup>33</sup>

---

<sup>29</sup> Article V of the Constitution of the United States requires in particular the agreement of two thirds of the states (whether directly or through the Senate) at the stage of proposing amendments. The amendments enter into force once ratified by three fourths of the states.

<sup>30</sup> On the details of the superqualified majority, vote see below. This rule would obviously have to apply also to all the legal bases for the adoption of secondary EU law that still involve – even after the current IGC—recourse to unanimity: superqualified majority voting would replace unanimity.

<sup>31</sup> Unanimity remains in relation to the right of withdrawal, as well as for the provisions whereby a Member State's quota cannot be altered without its consent, or the *per value* of a Member State's currency can be altered only on a its own proposal (Article XXVIII (b) of the IMF Agreement).

<sup>32</sup> Article X.2 of the Agreement establishing the WTO refers in this connection to four articles, including Article X itself on the amending procedure. The same Article X also provides in certain specific cases for an enhanced majority of three fourths of Member States. A former version of Article 36 of the Constitution of the ILO did the same for amending particular provisions concerning the “fundamental objectives of the organization”, or again “the permanent structure of the organization, the composition and functions of its collegiate organs and the appointment and responsibilities of the Director General”.

<sup>33</sup> See e.g. Articles 190 (representatives in the European Parliament), 205 (weighting of votes), 213 (number of commissioners), 258 and 263 TEC (composition of the Economic and Social Committee and Committee of the Regions), etc.

In the long term, the move away from unanimity is inevitable if any process of further evolution is not to be blocked. Failure to amend the revision procedure in good time would entail the risk of subsequent change being carried out in the heat of the moment, against a background of crisis.

## **2. — Protecting States placed in the minority**

If the principle of renouncing unanimous voting is accepted, it is necessary to ensure adequate protection for Member States which may find themselves in a minority. In this connection one might imagine two types of mechanism, which are not mutually exclusive.

The first is of an institutional nature: increasing the influence of the Commission (initiative or approval) and of the European Parliament (assent or effective participation). The Court of Justice too might be involved by giving a prior opinion, on the model of the simplified revision procedure for the ECSC Treaty.<sup>34</sup> A certain communitarisation of the amendment procedure in fact constitutes a guarantee for the States placed in a minority, by ensuring that they would not have to yield other than to a collective interest, at the conclusion of a procedure which would be legally proper.

The second mechanism is an opt-out clause enabling the States in question not to be bound by amendments adopted by superqualified majority. The protocol on social policy, the protocols on EMU exempting the United Kingdom and Denmark, and more recently the protocols creating a variable-geometry area of freedom, security and justice, are all examples of differentiation which emerged from intergovernmental conferences and which directly affect the “constitutional” dimension of the Union. Consideration could be given to an attempt to organise and rationalise this kind of practice by incorporating it in the rules on treaty revision, so as to make the requirement of “common accord” more flexible.<sup>35</sup>

---

<sup>34</sup> See above.

<sup>35</sup> In this connection, the current mechanism of closer cooperation does not fulfill this need. Indeed, it is only at the legislative level, as opposed to the constitutional one, that closer cooperation is likely to overcome the deadlock due to unanimity voting: closer cooperation is to take place within the existing constitutional framework of the Union (in particular, within the limits of existing competences).

In this connection inspiration could be drawn from techniques which are often used in the practice of international organisations.<sup>36</sup> The Agreement establishing the WTO supplies a good example: where amendments adopted by a two-thirds majority of Member States are “of a nature that would alter the rights and obligations of the Members”, or relate to some of the non-institutional provisions of the General Agreement on Trade in Services (GATS), States which have not consented to amendments are not bound by them.<sup>37</sup> Similar arrangements are made by the Constitution of the United Nations Food and Agriculture Organization (FAO), in cases where the amendments in force entail “new obligations on Member States”.<sup>38</sup> In certain cases, however, non-uniform participation may give rise to difficulties, so that it sometimes involves the risk of being excluded from the organisation.<sup>39</sup>

These precedents imply that such “constitutional” differentiation in the Union should relate only to the substantive scope of competences and the intensity of the instruments of action. The opting-out technique would, by contrast be impracticable for anything concerning the organisational structure in the broad sense, including the decision-making procedures.<sup>40</sup> Here again, the Commission or the Court of Justice might be called on to review the feasibility of the opt-out.

The only institutional adjustment resulting from a declaration by a Member State that it would not participate in some aspect of a new policy would be its inability to take part in Council voting, in accordance with the present Treaty rules in relation to enhanced cooperation.<sup>41</sup>

---

<sup>36</sup> See e.g. Article 94(a) of the Convention on the International Civil Aviation Organization (ICAO).

<sup>37</sup> Article X.3 and X.6 of the Agreement establishing the WTO.

<sup>38</sup> Article 20(b) of the Constitution the FAO.

<sup>39</sup> See e.g. Article 94(b) of the ICAO Convention and Articles X.3 and X.5 of the Agreement establishing the WTO.

<sup>40</sup> The group did not, in the context of this study, wish to deal with the idea of a limited group of Member States setting up new institutions outside the Union in order to pursue closer cooperation between themselves.

<sup>41</sup> One should however consider giving the European Parliament a variable-geometry formation, according to the participating States.

### 3. — Optimising the role of national parliaments

In the practice of the law of international organisations, their founding charters are often to be amended by a further treaty whose entry into force is made subordinate to ratification by the States, and therefore to approval by the national parliaments. However, there are many exceptions to this main rule, as we have already noted in the Community context.<sup>42</sup> Recourse to an “autonomous” amendment procedure by means of a unilateral decision of the institutions of the organisation itself is a familiar practice, aimed at facilitating amendments. While in certain cases, the whole founding charter is made subject to such a lighter procedure, this more frequently applies only to a certain number of its provisions.<sup>43</sup> For instance, the Statute of the Council of Europe does not require national ratification for the amendment of provisions relating to the organisation and functioning of the Parliamentary Assembly, and to the financing of the Council,<sup>44</sup> and the European Free Trade Association (EFTA) Convention does not require ratification for changes to a large number of its substantive rules.<sup>45</sup>

In federal States, by contrast, the principle is reversed: their constitutions are in general revised through a centralized procedure at the federal level, which does not require formal approval by the parliaments of the member states of the federation. In this connection, the example of the Basic Law of the Federal Republic of Germany can be cited,<sup>46</sup> but there are also some rare exceptions to the principle, the best known of which can be found in the Constitution of the United States.<sup>47</sup>

In the context of the European Union, approval by the national parliaments (or by referendum) of the original treaties and the successive revisions constitutes an important source of legitimacy. However, national parliaments are often faced with a treaty draft which is essentially a *fait accompli*, in which they have had little or no

---

<sup>42</sup> See the special “autonomous” procedures, above.

<sup>43</sup> H. Schermers and N. Blokker, *International Institutional Law*, Martinus Nijhof, The Hague/London/Boston, Third Revised Edition, 1995, pp. 731 to 734.

<sup>44</sup> Articles 23-35, 38 and 39 of the Statute, referred to by Article 41(d) of the Statute.

<sup>45</sup> See Articles 3(5) (customs duties), 4(5) (Rules of origin), 5(7) (deflection of trade) and 13(3) (State aids) of the Convention establishing the EFTA.

<sup>46</sup> Article 79 of the Basic Law.

<sup>47</sup> Article V provides for ratification by the legislatures of three fourths of the states.

chance to participate. Also in view of the importance of such limitations of national sovereignty, consideration should be given to involving them more at an earlier stage, when amendments are being drafted. This form of participation might, moreover, facilitate and accelerate the final stage of ratification.

Having said that, in a Union of up to thirty Member states, the national ratification stage could risk the excessive slowing down of necessary reforms. In this connection it seems appropriate to distinguish between two types of provisions of primary law: on the one hand those which directly affect the division of powers between the Union and its Member States, or those which define the latter's role in the decision-making process, and on the other hand the less important provisions which do not directly affect the States' sovereignty. The very nature of the former category requires that amendments be approved by national assemblies or referenda. For the other provisions, consideration might, by contrast, be given to the proposal to dispense with the need for lengthy processes of national ratification.<sup>48</sup>

Perhaps paradoxically, such a distinction might also have the effect of enhancing the role of national parliaments, which could concentrate their attention on the important matters. It would not, in any case, prevent national parliaments from being fully informed of every kind of amendment procedure, so that they could always exercise an influence on their governments.

The practice of international relations provides another technique which could make the ratification process less burdensome: the procedure of "negative ratification". This procedure implies that treaty amendments are considered, after a certain period of time, to have been approved by the States, and to have entered into force, in the absence of notice expressing their disagreement (which can be made before entry into force for the other states, and sometimes also after that point in time). This

---

<sup>48</sup> The draft Treaty embodying the Statute of the European Political Community adopted at Strasbourg on 10 March 1953 by the *ad hoc* Assembly provides an interesting source of inspiration here. Articles 111-113 of the Statute distinguished between three different amendment procedures according to whether amendments concerned: 1) alterations of the Community's powers and competences vis-à-vis Member States or fundamental rights, 2) relations and the division of powers among the Community institutions, including the procedural guarantees allowed to States in the decision-making process, 3) the treaty's other provisions. Only amendments coming under the first category would have required approval by national parliaments to enter into force.

“contracting out” technique<sup>49</sup> can, therefore, be assimilated to an “opting out” at the time of ratification rather than signature.

#### **4. — Enhancing the influence of the European Parliament**

The growth of the European Parliament’s powers is one feature radically distinguishing the Union from most international organisations. The treaties have gradually allowed the European Parliament a measure of real legitimacy in taking on the role of Community co-legislator. Additionally, it has been given the power of assent to the conclusion of association agreements, accession treaties, and especially the adjustments to the European treaties which these accessions entail.<sup>50</sup> Accordingly, in our view, it becomes difficult to understand why the European Parliament should be kept on the margins of the process of treaty amendment. Enhancing its powers would reflect the progressive emergence of a democratic legitimacy, the utility of which at this level cannot be denied. An increased role for the European Parliament may also have the effect of protecting Member States against treaty amendments which they would not have approved, as we mentioned earlier.

The European Parliament has a fundamental role to play in legitimising and democratising the European constitutional debate. It seems logical for its assent to be required before amendments can enter into force, or for the European Parliament to be able to participate effectively in the amendment process. It ought, at the very least, to be placed on the same footing as the European Commission in being allowed “to submit to the Council proposals for the amendment” of the European treaties,<sup>51</sup> or to be granted a genuine power of consultation.

Whichever increase of the European Parliament’s powers might be contemplated, the argument applies *a fortiori* to treaty amendments made through an autonomous procedure which enter into force without being submitted to national parliaments or to a referendum. There are examples in the law of international organisations, as for

---

<sup>49</sup> See the examples set out by H. Schermers and Blokker, *International Institutional Law*, cit., pp. 794-798.

<sup>50</sup> Article 49 TUE.

<sup>51</sup> Article 48 TUE.

instance in the Statute of the Council of Europe,<sup>52</sup> of the procedure of national ratification being replaced by a procedure of approval by the assembly of the organisation.

## IV — PROPOSALS

The guidelines set forth above lead us to make more specific reform proposals. These aim essentially at expanding the scope of the special, autonomous, amendment procedures, and at strengthening the Community nature of these procedures as well as systematising them somewhat. In addition, the general amendment procedure could also to some extent be reformed, so that certain adjustments would not even require a formal amendment of Article 48 TEU.

### **1. — Reform and extension of the special autonomous amendment procedures**

The treaties establishing the Union already now contain a number of special amendment procedures, derogating from the general procedure, which can be called “autonomous”: only the Union institutions are involved in the amendment procedure, and national procedures associated with ratification are discarded. All the examples presented in the first section of this report are pointers to the fact that in certain cases the need to complete the formal ratification procedures is not felt, and would instead constitute a burden.

In this context note should be taken of the suggestions from the Portuguese Presidency in its report to the Feira European Council about the ongoing ICG on institutional reform.<sup>53</sup> These suggestions, which refer to the organisation of the Court of Justice, are motivated by the need “to provide as of now for a sufficient degree of flexibility so that, in the future, adjustments can be made to the new circumstances that enlargement will bring, without any need for a cumbersome procedure of amendments to the Treaty.”<sup>54</sup>

---

<sup>52</sup> Article 41(d) of the Statute provides that amendments to Articles 23-35, 38 and 39 shall enter into force after approval by the Committee of Ministers and the Parliamentary Assembly.

<sup>53</sup> CONFER 4750/00, Brussels, 14 June 2000, p. 39 f., and p. 99 f.

<sup>54</sup> CONFER 4750/00, Brussels, 14 June 2000, p. 39.

Specifically, the suggestion was made to incorporate into the Statute of the Court of Justice some matters related to the Court's organisation and functioning,<sup>55</sup> but also the content of the Council decision on the Court of First Instance.<sup>56</sup> Later amendments of this revised Statute<sup>57</sup> would then be adopted by a unanimous Council decision at the request of either the Court after consulting the Parliament and Commission, or of the Commission after consulting the European Parliament and the Court. A right of initiative on the part of the Commission would thus be recognised. The same procedure would be used for the creation of new specialised appeal chambers for staff disputes or in other areas.<sup>58</sup>

The prospect of enlargement of the Union ought to lead us to consider other cases of the same type as those relating to the Court of Justice and the Court of First Instance. One might think first, of the provisions concerning the organisation and internal functioning of the other institutions, organs or committees of the Union. The case of the Court of Auditors is certainly the closest to that of the Court of Justice.<sup>59</sup> It seems logical also that the treaty provisions affecting inter-institutional relations, including some relatively technical aspects of the decision-making procedures, should be modifiable by the institutions themselves, at least when the proposed amendments would scarcely affect the relative influence of the Member States in the decision-making process. To give a specific example, is there really a need for almost thirty national parliaments to be mobilised in order to decide on the addition or removal of a stage in the codecision procedure, or in the budgetary procedure?<sup>60</sup>

At a later stage, systematic use could be made of "Statutes" or organic laws, on the model of many national constitutions,<sup>61</sup> so as to introduce an intermediate norm

---

<sup>55</sup> See the draft amendments to Articles 221, 222, 223, and 225 TEC, CONFER 4750/00, Brussels, 14 June 2000, pp. 101-104.

<sup>56</sup> Council Decision n° 88/591 of 24 October 1988 setting up a Court of First Instance, as last amended by Council Decision 99/291, OJ L 144, 1 May 1999, p. 52, in accordance with Article 225 TEC.

<sup>57</sup> Except for Title I relating to the judges and advocates-general.

<sup>58</sup> CONFER 4750/00, Brussels, 14 June 2000, pp. 105-107.

<sup>59</sup> See e.g. Articles 247 and 248 TEC.

<sup>60</sup> Articles 251 and 272 TEC. In this connection cf. Article 112 of the draft Statute embodying the Political European Community, cited above.

<sup>61</sup> See e.g. Article 46 of the French Constitution, regulating the nature of and the special procedure for adopting organic laws, which are aimed at clarifying or supplementing some fifteen constitutional provisions (presidential elections, status of members of the National Assembly and magistrates, constitutional council, arrangements for finance bills etc.).

between the treaty level and that of the institutions' rules of procedure. The "Statute" of each institution could thus be adopted and modified following an autonomous procedure of decision.<sup>62</sup> A Statute or organic law might similarly provide a useful framework for detailed institutional rules where the treaties only sketch out broad principles,<sup>63</sup> or for certain inter-institutional agreements whose legal bases are not very certain today.<sup>64</sup>

Whichever provisions may eventually be deemed capable of amendment by the special procedures for autonomous revision, these procedures should be marked, apart from the absence of a national ratification requirement, by the generalisation of voting by superqualified majority in the Council.<sup>65</sup> Indeed, the nature of the provisions involved, which justifies the use of the autonomous procedure, would also justify a State being bound by an amendment to which it had not consented.

The superqualified majority mechanism would be based on the principle of double legitimacy which already guides the institutional reforms under way: representative legitimacy and State legitimacy. The group proposes in this connection to have a twofold enhanced majority mechanism, enabling automatic adjustment as enlargement proceeds, while respecting as much as possible the principle of equality of States in the amendment process. This twofold enhanced majority might be, say, 4/5 (or 9/10)

---

<sup>62</sup> One might also consider "upgrading" certain important institutional rules at present located in the institutions' internal rules into a Statute or organic law. Thus, the Feira report cited above proposes to incorporate into the Statute of the Court of Justice certain provisions of the Court's Rules of Procedure on the use of languages (CONFER 4750/00, Brussels, 14 June 2000, pp. 108-109).

<sup>63</sup> Here we have in mind, for instance, the composition and competence of the Court of First Instance (Article 225(2) TEC), the regulations and general working conditions of members of the European Parliament (Article 190(5) TEC), those of the ombudsman (Article 195(4) TEC), and the Statutes of the agencies and various committees provided for by the TEC (Article 209 TEC). See also Articles 114(3) and 130 TEC covering respectively the provisions on the Economic and Financial Committee and on the Employment Committee.

<sup>64</sup> The inter-institutional agreements might systematically be concluded at an "inter-institutional conference" where the institutions concerned would negotiate on an equal footing (Cf. Article 193(4) TEC: "The detailed provisions governing the exercise of the right of inquiry shall be determined by common accord of the European Parliament, the Council and the Commission").

<sup>65</sup> Except, of course, in cases where the qualified majority has already been laid down—see below.

of Member States representing 4/5 of the population,<sup>66</sup> on the understanding that the blocking minority would have to comprise at least two States.

It would also be appropriate to increase the Community legitimacy of the autonomous special procedures still more, either by strengthening the Commission's influence and/or that of the other institution involved under a particular provision, or by conferring a power of approval or codecision on the European Parliament. In this regard, it may be noted with interest that the European Parliament already has such powers in certain cases, often in conjunction with majority voting in the Council.<sup>67</sup>

A communitarisation of the autonomous amending procedures along these lines would also constitute a guarantee for States placed in a minority, as their possibilities for opting-out from an amendment would normally not be available in relation to provisions of an institutional nature.

The Court of Justice, for its part, could be asked to give an opinion prior to amendment in order to confirm that recourse to the special autonomous procedure rather than to the general amendment procedure was justified in the case in point. In this connection national parliaments—which are directly affected by recourse to an autonomous procedure—could be granted the right, on the same footing as the EU institutions and the Member State governments, to ask the Court for such an opinion.

In any case, national parliaments ought to be fully informed of any autonomous amendment procedures which are underway, so that they may, where appropriate, make their views known. One might draw inspiration, here, from the protocol on

---

<sup>66</sup> As suggested by Justus Lipsius, in “La Conférence intergouvernementale”, *RTDE*, 1995, p. 198. One should also bear in mind an interesting alternative formula on the model of Article 20 of the 1994 draft Constitution (the “Herman” project): “A double qualified majority shall be deemed not to have been obtained where a decision is opposed by at least one quarter of the Member States representing at least one eighth of the population, or by one eighth of the Member States representing at least one quarter of the population of the Union.”

<sup>67</sup> Thus, recourse to qualified majority in the Council and assent by the European Parliament is provided for the amendment of certain provisions of the ESCB Statute (Article 107(5) TEC), and for adopting the Statute and working conditions for the ombudsman (Article 195(4) TEC). The approval of the European Parliament deciding by special majority is also required for amending the ECSC treaty by the so-called “small revision” procedure, when the Council has first decided by a majority of twelve fifteenths (see above). The codecision procedure is, however, to be used for setting general principles and limits concerning access to documents (Article 255(2) TEC).

national parliaments accompanying the Amsterdam Treaty, especially where it provides that a time period should be allowed for conveying information to national parliaments before the governments take a final decision.

## **2. — Reform of the general Treaties' amendment procedure**

The most urgent adjustments to the general amendment procedure are also the easiest to make, since they require no formal amendment of Article 48 TEU.

The aim would be to prepare the European Council meetings more carefully, especially at the end of an Intergovernmental Conference negotiation, so as not to burden them with a number of questions which ought to be resolved previously. In this connection the Foreign Ministers ought to be involved more extensively, except if the direct negotiators at the conference could fully represent the views of their heads of government so as to facilitate arbitration in the capitals. Moreover, the European Council meetings at the end of IGCs should, themselves, be more tightly structured. They should be held in two stages, ten days apart, so that the document agreed the first time could be polished by the legal service before being definitively adopted. From the week preceding the first of these two European Councils, no new text should be allowed to be submitted, even by the Presidency, except at one point of time agreed in advance, perhaps during the first of the two European Council meetings. In thus compelling respect for deadlines and other formalities in the revision process, one would draw inspiration from a well-known technique in modern constitutions aimed at preventing decisions from being taken hastily.

The guidelines set out in the foregoing section lead us also to make some more substantive proposals that would involve amending Article 48 TEU. The main one would certainly be the move to a superqualified majority (with a possible opt-out) for adopting amending treaties, although this transformation could come about progressively, and, if necessary, while keeping some exceptions. Application of the new system could be postponed by, say, five to ten years, until the Union's membership would be considerably larger than now.

The details of the superqualified majority at the ICG were considered earlier—say 4/5 (or 9/10) of Member States representing 4/5 of the population, with a blocking majority of at least two States. Amendments would enter in force on ratification by 4/5 of Member States in accordance with their respective constitutional rules.<sup>68</sup>

The European Parliament might, like the Commission, be entitled to “submit to the Council proposals for the amendment of the treaties” and might also be called on to give its assent to treaty amendments in the same way as the national parliaments. The latter ought, moreover, to be more closely associated at the stage of drafting treaty amendments, since this should also facilitate their ratification. At the very least, they ought to be kept systematically informed of the state of the negotiations.

In this light, the Schuman Centre group proposes that consideration be given to the establishment, alongside the classical Intergovernmental Conference procedure (possibly revised in the manner set out above), of a second, alternative, amendment procedure. This second procedure could be inspired by the formula of the “Convention” by which the EU fundamental rights Charter is currently being drafted. The original feature of this Convention is its quadripartite composition: one representative of the government of each Member State, one representative of the Commission, sixteen members of the European Parliament, and two delegates from each national parliament. Adopting a similar formula for the revision of the treaties would undoubtedly enhance the legitimacy of the procedure, and would also better enable civil society to express its views. However, the rules of procedure of such a body ought to be formalised so as to avoid, among other things, recourse to a consensus rule which could paralyse its activity.

---

<sup>68</sup> Other formulas would allow a more progressive departure from unanimity in the amendment process, say by providing for superqualified majority voting at the signature stage, while amendments would enter into force only after ratification by all Member States (cf. the amendment procedure provided for in Article 33 of the Spinelli draft, though admittedly in a context of a Europe with ten or twelve members). Conversely, one might retain unanimity at the stage of signature, while amendments would enter into force on ratification by a special qualified majority of Member States. Some further thinking should be done about such details, since these methods might prove interesting at least on a transitional basis.

The Convention might be initiated, either by a decision of the European Council or by a joint decision of Commission, Parliament and Council, with the latter deciding by a majority of States. The Convention would draft the proposed amendments, while the European Council would have to give its approval (possibly with the power to amend the draft), and the European Parliament would have to give its assent to the definitive text. The national approval procedures associated with ratification of the revision treaty would certainly be facilitated because of the participation of national parliaments in the work of the Convention.

The choice between the two procedures set out above (the IGC, possibly revised as suggested above, and the Convention) would be a free one, which would introduce some flexibility in the amendment process, on the model of examples which can be found in French<sup>69</sup> and American<sup>70</sup> constitutional law. The choice would depend on political circumstances, but also on the importance or extent of the envisaged amendments. For instance, the Convention model would certainly be more appropriate for establishing a European Constitution, or even for starting such a process by a reorganisation of the treaties and the incorporation of fundamental rights into a single document, and also for subsequently making further far-reaching institutional reforms.

\* \*  
\*

---

<sup>69</sup> Article 89 of the 1958 French Constitution provides for two alternative procedures, both at the initiation stage and at the final adoption stage. The right of initiative belongs concurrently to the President of the Republic, on a proposal of the Prime Minister, and to each of the members of the National Assembly and the Senate. After adoption by both assemblies according to the same procedure as for an ordinary law, amendments are submitted, for approval, to a referendum. However, if the initiative comes from the President of the Republic, he may choose to submit it to the two assemblies meeting together in Congress, which decides by a two-thirds majority.

<sup>70</sup> Like the French Constitution, Article V of the American Constitution distinguishes between the initial and final stages. Amendments are proposed either by two thirds of both houses of Congress or by a National Convention called and organized by the Congress on the application of the legislatures of two thirds of the States. Congress may then choose whether to have the amendments ratified by the legislatures of three fourths of the States, or by three fourths of Conventions called for the purpose in each of the States.

The first report of 15 May 2000 on reorganisation of the treaties, and this report on the procedures for amending primary law, have been drafted separately, and following a logic specific to each case. At the end of this two-part study, there nevertheless appears to be a, non-systematic, link between the two operations.

In view of the nature of the provisions in the Basic Treaty, the rigidity and solemnity characterising the general amendment procedure are required for modifying them: whether one opts for a Convention or for an IGC, possibly as revised, the national procedures for approval and ratification are maintained.<sup>71</sup> If the Charter of fundamental rights were to be incorporated into the Basic Treaty, account ought to be taken of the procedure which was used for its drafting and adoption.

By contrast, this solemn procedure might prove disproportionate for a large number of the provisions which do not appear in the Basic Treaty, which often do no more than apply one of the basic principles, or have an organic nature and, hence, only remotely affect the prerogatives of the Member States. These detailed texts of primary law will, moreover, often evolve faster and more frequently than the others, in the light of new circumstances. They might thus be made subject to a special autonomous amendment procedure, without subsequent ratification.

The fact remains that the general procedure for amending primary law—or, possibly, the two concurrent general procedures—would continue to apply by default whenever and for as long as a special procedure is not provided for. That would be so because some of the provisions of primary law omitted from the Basic Treaty, such as the legal bases for EC legislation, were excluded because they are much too numerous and technical to appear in a Basic Treaty, but they nevertheless directly affect Member State powers, and therefore do not lend themselves to the application of an autonomous amendment procedure.

---

<sup>71</sup> See also the few cases of so-called “quasi-autonomous” procedures included into the draft Basic Treaty (report of 15 May 2000): Clause 3(2) (Article 22 TEC - adding to rights of citizens), Clause 47(1) (Article 17(1) TEU - common defence policy), Clause 49(2) (Article 42 TEU - “communitarisation” of the third pillar), Clause 56(2) (Article 190(4) TEC - uniform procedure for elections to the European Parliament), Clause 82(2) (Article 269 TEC - system of own resources).

## SUMMARY

The prospect of a European Union with thirty or more members requires a re-examination of the treaties' amendment procedure. In this connection it would be useful, with an eye to efficacy but also to legitimacy, to consider the following reforms:

- 1) Regulating the operation of the European Council, in particular in the final stage of Intergovernmental Conferences, which might be done without formally amending Article 48 TEU.
- 2) Enhancing the democratic nature of the amendment process, particularly by closer involvement of national parliaments and the European Parliament. The formula of the Convention may provide an adequate model for this, and would also facilitate more active participation by civil society. In any case, the European Parliament's assent ought to be a condition for treaty amendments.
- 3) Progressively replacing the "common accord" requirement by the requirement of a superqualified majority, even though exceptions might remain. Member States in a minority would be protected by institutional guarantees, including the ability not to apply amendments to which they did not consent (as long as these do not apply to the organisational structure of the Union).
- 4) In certain cases, approval by national parliaments would not be required, especially where the proposed amendments do not directly affect Member States' powers and influence (organisation and internal functioning of institutions, relations between institutions, etc.).

The Schuman Centre group proposes, in this light, to extend the cases in which a special autonomous revision procedure is used, and to emphasise the Community nature of this procedure. Moreover, it is suggested that two alternative general amendment procedures could be established: on the one hand the Intergovernmental Conference procedure, possibly with some innovations, and on the other an adapted

form of the Convention which drafted the Charter of fundamental rights. The choice between these two procedures would be a source of additional flexibility, according to the political circumstances and the extent of the reforms considered.

Florence, 28 July 2000