# CURRENT DEVELOPMENTS

## EUROPEAN COMMUNITY LAW

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## I. CONSTITUTIONAL ASPECTS

ARTICLE N of the Treaty on European Union (TEU) called for an intergovernmental conference (IGC) in 1996 to reform the articles of the Treaty for which a revision is provided. Also, it was felt that the institutional question should be addressed before the next wave of enlargement; the institutional structure which was adopted to deal with six member States could hardly be stretched further to include the Eastern European applicant States. A complete re-engineering of the institutional framework was required. Furthermore, the reform of the institutions should tend to increase democracy in the Union.

Although the Treaty of Amsterdam which was negotiated during the 1996 IGC was meant to address all these questions, it fell short of these hopes. The Treaty has now been ratified by all member States and came into force on 1 May 1999. Although reform of the institutional framework has not been as thorough as was once predicted, some significant changes were adopted.[1]

### *A. The Institutional Structure of the European Union*

The three-pillar structure which was inaugurated by the Treaty on European Union is retained in the Amsterdam Treaty. However, the Amsterdam Treaty has shown that there is a certain fluidity of the pillars and that all subject matters have a propensity sooner or later to be included in the European Community pillar. In fact, a migration from the third pillar has already started: for instance, provisions

* This section covers at half-yearly intervals developments during the preceding two to three years in selected fields of the law of the European Union. Notes I and III follow up notes on the same subjects in the July 1997 issue of the I.C.L.Q. (Vol.46, Part 3, pp.701–703 and pp.712–716). Notes II and IV follow up notes in the January 1995 issue (Vol.44, Part 1, pp.214–218 and pp.225–234).

1. The Amsterdam Treaty failed to address major issues such as the weighting of Council votes, the number of commissioners, etc. (but see the "Protocol on the institutions with the prospect of enlargement of the European Union").

on immigration policy and the crossing of external borders which were previously included in the third pillar are now included in Title IV of the EC Treaty on "Visas, asylum, immigration and other policies related to free movement of persons"; similarly, provisions on customs co-operation are now included in Title X.

Furthermore, a protocol of the Amsterdam Treaty incorporates into the Union the Schengen Agreement itself and all its *acquis*.[2] This incorporation might seem ingenious if rather unorthodox. One might wonder whether it was desirable that the entirety of Schengen *acquis* be included in this way.[3]

### *B. The Reform of the Co-Decision Procedure*

The main increase in democracy is in the area of legislative procedures. These have been reduced to two: the consultation and the co-decision procedures; the co-operation procedure which had appeared in the Single European Act has been abandoned,[4] and the use of the assent procedure for legislative purposes is being phased out. Accordingly, the field of the co-decision procedure has been extended considerably.[5]

The redrafting of the co-decision procedure was another significant advance for democracy. The original drafting included in the Treaty on European Union had been heavily criticised: the procedure was too complex, too long, lacked transparency, was riddled with legal uncertainties and gave unequal powers to the European Parliament. However, to the surprise of many, the procedure was a success and allowed Council, Commission and European Parliament to adopt legislation in common.

Still, it was felt that the working of the procedure could be improved. Consequently, Article 251 of the EC Treaty has been streamlined: texts which raise no controversy, that is, for which the European Parliament does not put forward any amendments or only amendments which are agreed to by the Council, can now be adopted directly without going through the charade of the common position. Also, the balance of power has been slightly altered in favour of the European Parliament: for instance, in the case of a text not being agreed to in conciliation committee, the text is deemed to have failed; the Council is not allowed to confirm its common position any more.

Furthermore a number of legal uncertainties have been addressed: for instance, there was a time lapse between the moment the Council declared its inability to

2. The Schengen *acquis* comprises all decisions and declarations previously taken under the Schengen Agreement (which provides for the removal of all frontier controls on movements of persons).

3. Not only is there an issue of accountability as the European Parliament was not involved in these decisions, but the Treaty creates an objectionable fiction that all *acquis* was enacted either under the relevant provisions of the EC Treaty or under Title VI TEU.

4. With the exception of provisions concerning monetary union; it was felt that negotiations in this area should not be reopened for fear of unpicking it entirely.

5. E.g. co-decision is used in some new measures (Arts.255, 280 EC etc.) and replaces other procedures in existing provisions (Arts.12, 71(1), 80, 175(1), 179 EC etc.). However, it has been argued that it has not gone far enough, because, for instance, some existing provisions (see Art.37 EC—agricultural policy) and some new measures (see Art.11 EC—closer co-operation) use the consultation procedure.

adopt all Parliament's amendments in the third reading and the time the conciliation committee was convened. This "flaw" has been addressed in the new drafting and the gap has been filled.[6]

### *C. The Appointment of the Commission*

The appointment of commissioners has also been reformed significantly to help democratise the institution. The new provisions appear to have been influenced by the principles of parliamentary democracy, if one considers the increased involvement of the European Parliament in the nomination process. Article 158(2) has been amended so that the appointment of the Commission takes place in two stages: first, member States choose the President of the Commission, as was the case before, but this nomination must now also be approved by the European Parliament. Then, member States appoint the other commissioners after consultation with the President; the entire Commission must then be approved by the European Parliament.

The approval of the President of the Commission by the European Parliament might create some interesting practices: not only is the Parliament likely to organise a formal hearing of the President of the Commission before it grants its approval, but it might also try to strike a deal on the appointment of individual commissioners and/or the adoption of specific policy lines. In time, it might create a sort of parliamentary responsibility of the Commission and of its President.[7]

### *D. The European Parliament*

#### *1. The number of members of the European Parliament (MEPs)*

One of the few changes to the institutions with a view to future enlargement of the European Union has been to limit the total number of MEPs to 700.[8] It was felt that no Parliament could successfully work with a larger chamber;[9] cohesion would be lost. However, the number might seem optimistically low if one considers that there are 626 MEPs at present. Once new member States have joined the European Union, there will need to be a redistribution of seats between member States and this might prove somewhat difficult to achieve.

#### *2. In search of a uniform electoral procedure*

It is well known that it has not been possible for member States to agree on a uniform electoral procedure for elections to the European Parliament.[10] While

6. In practice, the time lapse had been exploited by all institutions in order to conduct further informal negotiations prior to conciliation committee meetings. As a result, the new drafting has recognised that a certain leeway was necessary and a period of six weeks has been allowed between the Council's rejection of the Parliament's amendments and the convening of the conciliation committee.

7. See also new Art.219 EC, which mentions that the Commission "works under the political guidance of its President".

8. See Art.189 EC.

9. This was suggested by the European Parliament itself in its report to the IGC.

10. The European Parliament adopted a resolution in 1993 containing a uniform electoral procedure. The procedure, however, needed to be agreed to by a unanimous vote of the Council, which was never obtained.

the procedure to adopt this uniform electoral system stays unaltered, it has been felt necessary to be more flexible as to the electoral system itself. The European Parliament has now two options (in Article 190) when drafting its proposal: it either proposes a uniform procedure as before, or it recommends a list of common principles that all member States will have to respect when adopting their own electoral system (for instance, it could list the principle of proportional representation, which would allow member States to have their own, different versions).

### *E. The Council: More Qualified Majority Voting*

It was expected that the Amsterdam Treaty, with an eye on future enlargement, would reform decision-making in the Council to achieve greater efficiency. Although the reweighting of the votes which was hoped for did not take place, a genuine effort was made to extend the scope of qualified majority voting.

Unanimity slows decision-making considerably and therefore hinders further integration. To increase the number of provisions using majority voting is arguably a step in the right direction. The Amsterdam Treaty not only switched a number of existing provisions to majority voting,[11] but it also included majority voting in some new measures.[12]

One interesting feature of the Amsterdam Treaty is that it also adopts a variant of qualified majority voting which resembles the Luxembourg Accord. This variant specifies that when a member State, for important reasons of national policy, intends to oppose the decision, a vote will not be taken. However, it is possible to break this deadlock by referring the matter to the European Council. There, the decision has to be taken by unanimity.[13]

### *F. More Transparency*

A general right of access to European Parliament, Council and Commission documents is now included in the Treaty on the European Community. Although Article 255 EC creates a general right of access to documents, the Council must adopt general principles regulating this right within the first two years of the ratification of the Amsterdam Treaty, using the co-decision procedure. The Council is allowed to include some restrictions so as to protect public and private interests. In turn, each institution will have to incorporate these principles into its rules of procedure and organise access to its documents.

There are, however, some limitations as regards access to documents of the Council.[14] It applies only when the Council is acting in its legislative capacity; if this is the case, the result, explanations of the votes and statements in the minutes

11. Most of these changes are due to the extension of the co-decision procedure (however, see also Art.166(1) EC-adoption of research framework programme).

12. For instance, Art.172 EC (joint undertakings for research and technological development), Arts.128(2) and 129 EC—some social policy provisions.

13. This form of qualified majority voting is used in three cases: Art.11(2) EC (authorisation of closer co-operation), Art.40(2) TEU (closer co-operation in police and justice matters), Art.23(2) TEU (implementing measures for the common security and foreign policy).

14. See Art.207(3) EC.

are made public. At present, most decisions are not taken by a formal vote[15] and one wonders whether the provision will have the desired effect. Moreover, since the Council itself defines the cases in which it acts in a legislative capacity, one might wonder how the Council will apply these provisions.[16]

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## II. COMPANY LAW AND TRADE IN SECURITIES

### *A. Legislation and Policy Initiatives*

In the last two years, there has been a dearth of legislative initiatives in the field of company law.[1] This may be attributed to several reasons. Whilst the company law harmonisation programme is now largely complete, the principle of subsidiarity has to some extent hampered moves toward further harmonisation. Disagreement still reigns over certain crucial issues such as employee participation in corporate management. Also, in the light of the objective to advance EMU, there has been a shift in the Community's priorities. The search for consensus continues in relation to the proposal for a thirteenth company law directive on take-overs and the proposed European Company Statute, although, currently, the national delegations seem to be closer to agreement in relation to the latter than in relation to the former.[2]

In the field of financial services, the Council and the Parliament have adopted Directive 97/9 on investor compensation schemes,[3] and Directive 98/26 on settlement finality in payment and securities settlement systems.[4] The first directive seeks to supplement the Investment Services Directive.[5] It requires each member State to have an investor compensation scheme that guarantees a minimum level of protection at least for the small investor[6] in the event of an

15. The presidency indicates only that "the necessary majority is given". It is impossible therefore to trace the vote of individual member States.

16. Still, the ECJ will have jurisdiction to deal with such issue.

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1. Not much progress has been made in relation to the Proposed Fifth Company Law Directive. Work is under way in relation to the proposed Tenth Directive on cross-border mergers. The Commission's plans for 1996 also announced a new proposal for a Fourteenth Company Law Directive on the inter-State transfer of a corporate seat. In 1997 the Commission initiated a consultation process seeking to determine the suitability of the current regulatory framework for the needs of the internal market and to identify opportunities for simplification or deregulation. See Commission Consultation Paper on Company Law, 1997.

2. The UK continues to oppose the proposed thirteenth directive mainly on the grounds that it would lead to an increase in tactical litigation and would jeopardise the successful system of self-regulation operating in the UK. There is also disagreement regarding the rules pertaining to conflicts of jurisdiction in inter-state take-overs.

3. (1997) O.J. L84/22.

4. (1998) O.J. L166/45. Note also Directive 97/5 on cross-border credit transfers ((1997) O.J. L43/25) and Council Decision of 14 Dec. 1998 concerning the conclusion on behalf of the EC, as regards matters within its competence, of the results of the World Trade Organization negotiations on financial services ((1999) O.J. L20/38).

5. Directive 93/22 on investment services in the securities field (1993) O.J. L141/27.

6. Certain types of investor may be excluded. They include institutional and professional investors, government bodies and large corporations.