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How to Change the EU Treaties

An Overview of Revision Procedures under the Treaty of Lisbon

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1. Introduction

Less than a year has passed since the Lisbon Treaty became part of EU law, thereby bringing to an end almost a decade of intergovernmental wrangling over EU institutional reform. Yet despite its protracted ratification process and pledges from national administrations and EU authorities that the Lisbon Treaty had closed the issue of treaty reform for the foreseeable future, a number of modifications to the EU treaties are currently in the pipeline. One such proposal, relating to the number of seats in the European Parliament, has already left the drawing board and is presently pending national ratification.[1] But perhaps most significant are those proposals that could amount to major treaty reform in areas such as the Franco-German Declaration of Deauville, which proposes significant changes in the area of economic and monetary union and, possibly also institutional reform.

This Policy Brief provides an overview of the procedures that are available to change the Treaty of Lisbon. A companion piece[2] looks at the political issues raised by the debate on a substantive treaty change that is currently underway.

2. How to amend the EU treaties

The Lisbon Treaty modified the way in which the EU treaties can be amended, with Art. 48 of the Treaty on European Union (TEU) creating a new system for treaty reform at EU level prior to an eventual intergovernmental conference and national ratification. Under this new system, there is now a choice between four procedures: 1) the *ordinary revision procedure*, 2) the *simplified revision procedure*, 3) the *general passerelle clause* and 4) the procedure applicable to *accession treaties*.

The *ordinary revision procedure* (ORP) is, as its name implies, the standard means of modifying the treaties, whereas the *simplified revision procedure* (SRP) can only be used for reforms that do not increase[3] EU competences and that are limited to Part Three of the Treaty on the Functioning of the European Union (which covers essentially all EU internal policies, such as the internal market,

[1] Protocol amending the Protocol (No. 36) on transitional provisions annexed to the Treaty on European Union, to the Treaty on the Functioning of the European Union and to the Treaty establishing the European Atomic Energy Community (OJ 2010/C 263/01).

[2] See Piotr Maciej. Kaczyński and Peadar ó Broin (2010), *From Lisbon to Deauville: Practicalities of the Lisbon Treaty Revisions*, CEPS Policy Brief No. 215, CEPS, Brussels, October.

[3] Art. 48 TEU seems to allow the use of the simplified revision procedure for proposals designed to decrease EU competences, as the text specifically refers to the prohibition of the simplified revision procedure for proposals designed to "*increase* the competences conferred on the Union" (emphasis added).

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economic and monetary union, the area of freedom, security and justice, environment, agriculture and competition policies, etc.).

The *general 'passerelle clause'* allows the European Council to a) temporarily or permanently authorise the Council to act by a qualified majority in a specific case where the treaties provide for it to act by unanimity and/or b) turn a special legislative procedure into an ordinary legislative procedure (in other words, allow for co-decision with the European Parliament following a proposal from the Commission in a specific area). In both cases, the European Council must reach a unanimous agreement. Each national parliament has a veto power over the use of a general passerelle clause, provided that it communicates its opposition within six months of notification.

Accession treaties fall outside the remit of the ordinary and simplified revision procedures. Although accession treaties alter and supplement the EU treaties, all that is required upon the completion of negotiations between the EU and the applicant state is an intergovernmental conference that drafts the accession treaty (Art. 49 TEU). Ratification of that treaty is then subject to national constitutional procedures.

3. Proposing treaty change

In both the ordinary and simplified revision procedures, the initial proposal for treaty reform can be made by one of three entities: 1) any national government, 2) the European Parliament or 3) the European Commission.

In the case of the European Parliament, Rules 41 and 48 of its internal Rules of Procedure[4] apply. Rule 41 relates to the procedure to be used where a right of initiative is conferred on the Parliament by the treaties, while Rule 48 concerns own-initiative reports. Pursuant to Rule 41, the relevant parliamentary committee may decide to draft an own-initiative report. This report must include a motion for a resolution and the draft proposal or decision, together with an explanatory statement.

The European Council is the only institution that may propose the use of the general passerelle clause, while the accession treaty procedure is activated by common accord between the member states and the applicant state once membership negotiations have been completed.

[4] Rules of Procedure of the European Parliament, 7th Parliamentary term – July 2010.

4. Ordinary revision procedure

Overview

The ordinary revision procedure applies to two broad categories of treaty change: 1) 'prominent' treaty change, where a significant reform of the EU Treaties is required; and 2) cases where a smaller reform is proposed, but where the simplified revision procedure is not available (due to the nature or scope of the proposal).

The distinction between these two categories is both politically and legally important. The first category may be used in instances where the nature of treaty change is considered to warrant a noteworthy reform process along the lines of the Convention that drafted the EU Charter of Fundamental Rights and the Convention on the Future of Europe that drew up the reforms enacted via the Lisbon Treaty.

However, it is not necessarily the case that the ordinary revision procedure entails a substantial or lengthy treaty change process. The second category in which the ordinary revision procedure may be used concerns cases where the nature of the reform is largely technical (e.g. adjusting the number of seats in the European Parliament) or, indeed, where the nature of the reform is controversial and for political reasons member states may prefer not to convene a Convention in order to protect against almost certain changes that would be made to a treaty reform compromise reached among the member states by a Convention (e.g. in situations where the reform package agreed among the member states is considered to be to only political compromise available).

Since the entry into force of the Lisbon Treaty, the treaty amendment procedure contained in Art. 48 TEU has been used once already in the case of the ordinary revision procedure.

Procedure

Under the ordinary revision procedure, a proposal for treaty reform is addressed first to the Council,[5] which then submits the proposal to the European Council. Presumably the Council serves as a type of antechamber for initial debate and scrutiny of the proposal before passing it over to the European Council. At the same time, national parliaments are

[5] Art. 48 TEU does not stipulate a particular Council formation, but it is likely that the General Affairs Council (GAC) will process the treaty change request, as was the case for the proposal to amend the Protocol (No. 36) on transitional provisions (in this case the Spanish Government addressed its proposal for treaty reform to the Secretary-General of the Council, who then sent the proposal to Coreper; the General Affairs Council dealt with the Spanish proposal at its meeting of 7 December 2009).

notified of the proposal (presumably by the Council, although Art. 48 TEU is not specific on the institution responsible for making the notification). National parliaments, however, are assigned no formal role under the ordinary revision procedure, but in theory notification of the proposal allows them to begin advance scrutiny of the proposal.

The European Council, upon receipt of the proposal from the Council, consults with the Commission and the European Parliament. The European Central Bank (ECB) is also consulted if the proposal concerns "institutional changes to monetary policy". The European Council may choose to voluntarily consult the ECB in the case of reforms that concern fiscal policy, although the wording of Art. 48 TEU seems to require consultation with the ECB only in the case of reform proposals that concern institutional changes to monetary policy.

The European Parliament, when consulted by the European Council, refers the proposal to the relevant parliamentary committee(s), which drafts a report containing a motion for a resolution stating whether the European Parliament supports or rejects the proposal, plus recommendations for the attention of an eventual Convention or the IGC in the case where it supports the proposal (Rule 74a(2), Rules of Procedure of the European Parliament, under ordinary treaty revision).

Once the consultation stage is complete, the European Council takes a vote on the proposal. If it is carried by a simple majority, the default rule is that the President of the European Council shall convene a Convention.

The use of a Convention follows the model used for drafting the EU Charter of Fundamental Rights and the Constitutional Treaty. The treaties, however, do not prescribe the rules of procedure to be followed in the event that a Convention is used as part of the treaty change process, other than a requirement that a Convention be composed of representatives from four entities: 1) national parliaments; 2) national governments; 3) the European Parliament and 4) the Commission. Art. 48 TEU does not set the relative weight of these groups in a Convention.

The President of the European Council is likely to be responsible for defining the mandate and nature of a Convention, as it falls to the President to convene a Convention. In this case the European Council plays a key role in establishing the nature and mandate of a Convention, as was the case for the 1999-2000 Convention (mandated by the Cologne European Council) and the Convention on the Future of Europe (mandated by the Laeken European Council). While the two previous Conventions of 1999-2000 and 2002-03 will undoubtedly set precedents that will influence the shape of future Conventions, the criticisms levied at the internal organisation of those Conventions should equally serve as guidelines.[6]

The use of a Convention breaks the monopoly that national governments normally hold over treaty negotiations, as they must include in treaty talks delegations from national parliaments, the European Parliament and the Commission. Although the member states remain 'Masters of the Treaties' in the sense that they alone may sign off on the final version of treaty reform in an intergovernmental conference, their hands will be tied by the version that is recommended by a Convention. Any attempt to set aside or deviate significantly from the version drafted by a Convention would seriously undermine the use of such a body as part of the treaty reform process and would undoubtedly provoke resistance, but Art. 48 TEU does not compel the intergovernmental conference to accept the recommendations drafted by a Convention.

In cases where the European Council decides that a Convention is not required, it must adopt such a decision by a simple majority and obtain the consent of the European Parliament. Art. 48(3) TEU does not provide any criteria for determining when a Convention should be used. It simply states that the European Council may decide not to convene a Convention "should this not be justified by the extent of the proposed amendments". While the initial interpretation of this clause falls to the European Council, the consent of the European Parliament is required to avoid a Convention – a procedural requirement that has the potential to be a battleground between the two institutions in the case of controversial treaty reform proposals.

If a Convention is convened, it is responsible for recommending by consensus a draft treaty text to an intergovernmental conference (IGC). If not, the European Council defines the IGC's mandate.

Once the IGC has agreed the final version of treaty reform, the proposal is sent to the member states for ratification in accordance with their domestic procedures.

[6] See for instance criticisms regarding a lack of substantive procedural rules and an overbearing governing body (*praesidium*) in J. Jarlebring, "Taking stock of the European Convention: What added value does the Convention bring to the process of treaty revision?", *German Law Journal,* Vol. 4, No. 8, 2003, pp. 785-799.

Box 1. Ordinary Revision Procedure

1. Proposal for treaty change can come from any **national government**, the **European Parliament**, or the **European Commission**, and may relate to **any aspect** of the treaties (including proposals designed to increase Union competence).
2. Proposal is addressed to the **Council** (presumably for early debate on the nature of the proposal), which then submits the proposal to the **European Council** and notifies national parliaments.
3. European Council must **consult** the **European Parliament** and the **European Commission**.
4. **European Council** then **votes** whether to examine the proposal; a **simple majority** in favour is sufficient to proceed to the next stage.
5. Two options are available at this point:
    a. **President of the European Council** is automatically mandated to convene a **Convention** to examine the draft proposal and adopt by consensus a recommendation to a future IGC, *but*
    b. **European Council** may **vote** by a **simple majority**, after having **obtained the consent** of the **European Parliament**, not to convene a Convention – in this case the **European Council** defines the mandate of the IGC.
6. **Intergovernmental Conference** (IGC) is called by the **President of the Council** (at this stage the rotating presidency takes over from the European Council, as the intergovernmental conference is the domain of the member states only, not the EU institutions per se).
7. **Ratification** at national level begins; proposal enters into force if it is ratified by all member states according to their own domestic ratification procedures.

5. Simplified revision procedure

Overview

The Lisbon Treaty introduced a number of so-called 'flexibility mechanisms' into the EU Treaties, which are essentially provisions that allow for simpler methods of decision-making in specific areas of the treaties. The simplified revision procedure (SRP) is one of such mechanisms, investing the European Council with treaty-making powers, but with two limitations: any proposal for treaty reform must 1) be limited to Part Three of the Treaty on the Functioning of the European Union; and 2) not alter Union competences (i.e. national sovereignty that is pooled in the Union's institutional framework).

Confining the use of the simplified revision procedure to Part Three TFEU means that this procedure can only be used for substantive changes to EU internal policies, but not for institutional reforms, Union citizenship, the Charter of Fundamental Rights, the Euratom Treaty, provisions relating to EU external action or protocols appended to the EU treaties.

The German Federal Constitutional Court and the Czech Constitutional Court expressed reservations about the simplified revision procedure, suggesting that it may be used in dubious attempts to pass controversial amendments when the more onerous ordinary revision procedure may be more appropriate. Indeed the simplified revision procedure is not necessarily confined to *de minima* modifications; Art. 48(6) TEU states that the procedure may be used for changes to the entire Part Three TFEU, which would amount to a major treaty reform.

Procedure

A proposal for treaty reform is addressed to the European Council, which evaluates whether the proposal meets the criteria for use under the simplified revision procedure. If so, the European Council consults with the Commission and the European Parliament (and the European Central Bank in the case of institutional changes to monetary policy) before it may take a unanimous decision to adopt the treaty reform proposal.

National ratification, however, is not avoided under the simplified revision procedure: each member state must ratify the European Council's decision in accordance with their domestic requirements.

In essence, the simplified revision procedure is very similar to former Art. 48 TEU prior to the Lisbon Treaty reform, with the European Council accumulating the roles accorded to the Council and the IGC under that article, but with the distinction that its remit is limited to changes to Part Three TFEU and must not increase Union competences.

Box 2. Simplified Revision Procedure

1. Proposal for treaty change can come from any **national government**, the **European Parliament** or the **European Commission**, but the proposal must be **limited** in two respects:
    a. proposal must be limited to changes to **Part Three** of the Treaty on the Functioning of the European Union (i.e. the part of the Treaty that deals with internal EU policies); and
    b. proposal must **not increase the Union's competence**, but Art. 48 is silent as to whether the simplified revision procedure could be used to decrease Union competence
2. Proposal is addressed to the **European Council**, which adopts the proposal by **unanimity** after consulting the **European Parliament** and the **European Commission** (and the **European Central Bank** if the proposal concerns monetary policy)
3. **Ratification** at national level begins; proposal enters into force if it is ratified by all member states according to their own domestic ratification procedures.

Policy areas to which the SRP applies (provided Union competences are not increased)

- Internal market (Arts 26-27)
- Free movement of goods (Arts 23-37)
- Agriculture and fisheries (Arts 38-44)
- Free movement of persons, services and capital (Arts 45-66)
- Area of freedom, security and justice (Arts 67-89)
- Transport (Arts 90-100)
- Common rules of competition, taxation and approximation of laws (Arts 101-118)
- Economic and monetary policy (Arts 119-144)
- Employment (Arts 145-150)
- Social policy (Arts 151-161)
- European Social Fund (Arts 162-164)
- Education, vocational training, youth and sport (Arts 165-166)
- Culture (Art. 167)
- Public health (Art. 168)
- Consumer protection (Art. 169)
- Trans-European networks (Arts 170-172)
- Industry (Art. 173)
- Economic, social and territorial cohesion (Arts 174-178)
- Research and technological development and space (Arts 179-190)
- Environment (Arts 191-193)
- Energy (Art. 194)
- Tourism (Art. 195)
- Civil protection (Art. 196)
- Administrative cooperation (Art. 197)

6. Conclusion

Although the Lisbon Treaty will be only one year old on 1 December 2010, a number of proposals for treaty reform have already been introduced or debated. Some of them have been known for some time to be necessary, such as the Croatian Accession Treaty, the Irish Guarantees[7] and the Czech opt-out from the Charter on Fundamental Rights. But the 'Deauville Declaration' on economic governance,[8] has now added a new element in the form of a Franco-German proposal to make a substantive change to the Treaty.

Some of the processes by which to make such proposals part of EU law may be interlinked, yet it remains unclear which proposals (if any) will be coupled together as part of the same revision process. For instance, the Croatian accession treaty could be linked to the economic governance treaty change, or vice versa.

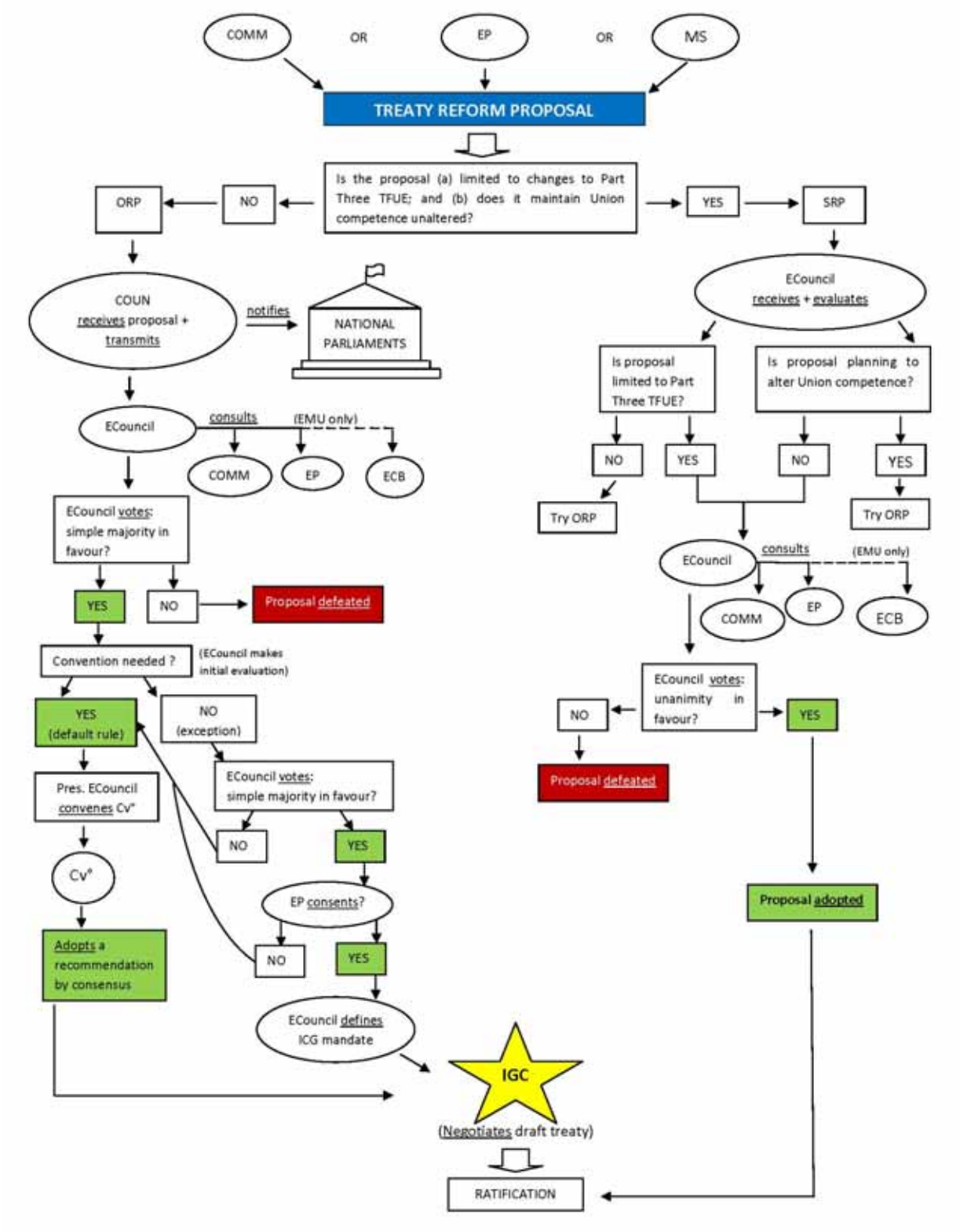
However, as the Lisbon Treaty created four categories of treaty reform, each with their own distinct procedures, there is undoubtedly a limit as to what proposals can be fused together when distinct procedures apply. For instance, would it be legally correct to annex non-accession-related reforms (such as a proposal to change EU economic governance) to the Croatian accession treaty, since Croatian accession is governed by Art. 49 TEU and other non-accession issues are governed by Art. 48 TEU? The member states remain the 'Masters of the Treaties', but they have agreed in the Lisbon Treaty distinct amendment procedures that apply to different categories of reform. Attempting to 'piggy back' treaty reform on an Art. 49 TEU accession treaty procedure would surely be considered an attempt to escape the more onerous provisions of Art. 48 TEU.

Considerations such as these will weigh on any treaty reform proposal and will therefore shape the political process associated with treaty change.

[7] Informal name given to the "Decision of the Heads of State or Government of the 27 Member States of the EU, meeting within the European Council, on the concerns of the Irish people on the Treaty of Lisbon". This Decision was drafted in advance of the second Irish referendum on the Lisbon Treaty and is designed to protect certain sensitive areas of Irish sovereignty (including Ireland's traditional policy of military neutrality and certain socio-economic rights guaranteed in the Irish Constitution) from the application of EU law.

[8] Franco-German Declaration on the margins of the France-Germany-Russia tripartite meeting at Deauville on 18 October 2010 (available from the press service of the French Presidency at http://www.elysee.fr/president/root/bank_objects/Franco-german_declaration.pdf).

Figure 1. Flowchart of revision procedures under the Treaty of Lisbon



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