Chapter 9: Constitutional Aspects of the Final Provisions

Summary of the Final Provisions

9-1 Eight short provisions conclude the main text of the Treaty on European Union: most of them have some constitutional importance. All of them are subject to interpretation by the Court of Justice of the European Communities.[1] The eight provisions cover the following matters:

- the powers of the Court of Justice[2],
- the continued validity of the principal Treaties (subject to amendments)[3],
- the procedure for amending the Treaties in the future[4],
- the conditions of admission of other states to membership of the European Union[5],
- the repeal of parts of earlier Treaties[6],
- the conclusion of the Treaty for an unlimited period[7],
- the ratification and coming into force of the Treaty on European Union[8] and
- the language and deposit of the text of the Treaty on European Union.[9]

Powers of the Court of Justice of the European Communities

9-2 Most of the powers of the Court of Justice stem from the basic Treaties.[10] The provisions of those Treaties concerning the powers of the Court of Justice and the exercise of those powers apply to the following provisions of the Treaty on European Union:

- the provisions amending the basic Treaties[11],
- the provisions on police and judicial cooperation in criminal matters, subject to the conditions prescribed therein[12],
- the provisions on closer cooperation in other areas[13],
- the provisions on respect for human rights, with regard to the action of the institutions, insofar as the Court has jurisdiction under the Treaties[14] and
- the Final Provisions (discussed in this chapter).[15]

It follows that the Court's powers do not extend to the other provisions of the Treaty.

Continued Validity of Basic and Amending Treaties

9-3 Nothing in the Treaty on European Union, except for the amending provisions[16], affects the basic Treaties, or the subsequent Treaties or Acts modifying or supplementing them.[17]

Procedure for amending the Treaties

9-4 Amendment of the Treaties on which the Union is founded[18] is subject to the following procedure:

- first, the government of any Member State, or the Commission, may submit to the Council proposals for amendment;
- second, the Council consults the European Parliament and, where appropriate[19], the Commission;
- third, the Council (if it thinks fit) delivers an opinion in favour of calling an inter-

governmental conference;
- fourth, the President of the Council convenes the inter-governmental conference;
- fifth, the inter-governmental conference determines by common accord the amendments to be made to the Treaties;
- sixth, where institutional changes are proposed in the monetary area, the European Central Bank must be consulted[20];
- seventh, after all the Member States ratify the amendments in accordance with their respective constitutional requirements, the amendments come into force.[21]

9-5 Under the original terms of the Treaty on European Union, there was a specific obligation to convene an inter-governmental conference in 1996 to examine the provisions of the Treaty for which revision was provided, in accordance with the objectives of the Treaty.[22] The amendments determined by this conference led to the Treaty amending the Treaty on European Union[23] which came into force on 1 May 1999.[24]

Conditions of Admission to Membership of the European Union

9-6 Applications to become a Member of the European Union are subject to the following conditions and procedures:
- the applicant must be a European State (which excludes Morocco, but does not appear to exclude Turkey, even though most of the territorial area of Turkey is in Asia);
- the applicant must respect the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law[25];
- the application must be addressed to the Council;
- the Council must act unanimously after -
  - consulting the Commission and
  - receiving the assent of the European Parliament, which must act by an absolute majority of its component members;
- the conditions of admission and the adjustments to the Treaties on which the Union is founded which admission entails must be the subject of agreement between the Member States and the applicant State and enshrined in what is normally known as a Treaty of Accession, ratified by all the contracting states in accordance with their respective constitutional requirements.[26]

It will be seen that an application may be blocked if the assent of the European Parliament or of any one Member State cannot be obtained. It may also be blocked if, for example, the Court of Justice held that the applicant State was not a European State within the meaning of the Treaty.

Repeal of Parts of Earlier Treaties

9-7 Certain provisions of the 1965 Treaty establishing a Single Council and a Single Commission of the European Communities, as well as of the Single European Act of 1986, were repealed by the Treaty on European Union.[27]

Conclusion of the Treaty for an Unlimited Period

9-8 This, the briefest of the provisions of the Treaty on European Union, is nevertheless one of the most difficult to interpret.[28] At the time when Greenland left the European Communities under the corresponding provision of the Treaty establishing the European Economic Community[29], it was argued in the European Parliament that conclusion of a Treaty for an unlimited period prevented or prohibited contracting parties from ever denouncing the Treaty. This argument was never put to the final test, since it was not the contracting State as such (Denmark) which was leaving the Community but a territorial dependency. In any case, whatever the legalities, it is ultimately a political rather than a constitutional question whether a contracting State can denounce a Treaty. The wording expresses a general intention - that there should be no specific date of termination - rather than an enforceable obligation on individual States.[30]

Ratification and Coming into Force of the Treaty on European Union

9-9 Under the Treaty on European Union there is a provision, normal in most Treaties, to the effect that the Treaty is to be ratified by the High Contracting Parties in accordance with their respective constitutional requirements.[31] (In the United Kingdom, for example, the Treaty can be ratified only after an affirmative resolution in each House of Parliament.) There is no provision for amendment of the Treaty by the elected parliaments or assemblies of the Member States, nor does the European Parliament play any part in the ratification process.

9-10 Instruments of ratification have to be deposited with the government of the Italian Republic.[32] This follows the precedent of the Treaty establishing the European Economic Community.[33]

9-11 It was intended that the Treaty on European Union should come into force on 1 January 1993; but, since all the instruments of ratification had not been deposited by then, the alternative provision applied, according to which it should come into force on the first day of the month following the deposit of the instrument of ratification by the last signatory State to take this step.[34] Following litigation in the German constitutional court, it was Germany which was the last signatory state to ratify; and, as a result of the ensuing delay, the date on which the Treaty on European Union came into force was 1 November 1993.

Language and Deposit of the Text of the Treaty on European Union

9-12 It has always been a principle of the European Communities that legal texts should be equally authentic in all the languages of the Member States[35]; and the principle is maintained in the Treaty on European Union.[36] Thus the Treaty is drawn up "in a single original" in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, the texts of these languages being equally authentic.

9-13 Equal authenticity is easier to proclaim than to implement. Three examples illustrate the point. In a case involving the rules on competition in the European Union, it emerged that the texts in all languages except Italian spoke of agreements which had "as their object or effect the prevention, restriction or distortion of competition within the common market"; in Italian, it was

"their object and effect", a difference which, as any anti-trust lawyer knows, is substantial. The Court ruled that the Italian text must be interpreted in the sense in which the other languages were worded.[37] In the second place, some words in (for example) the English text do not correspond to their foreign equivalents. The word "approximation" is used incorrectly in the Treaties[38]; and the non-word "conjunctural", which was in the earlier version of the Treaty establishing the European Community, has now been deleted from the text. In the third place, the requirement that the Treaty should be drawn up in the respective languages is breached in the use of French words in the English text: in one sense, equal authenticity is assured, in another it is challenged, since the words in question are open to different interpretations.[39]

9-14 Italy is entrusted with the original texts of the Treaty on European Union and with transmitting certified copies to each of the governments of the other signatory States.[40]

1. Article 46(e) (formerly L(e)), EU Treaty.

2. Article 46 (formerly L), EU Treaty.

3. Article 47 (formerly M), EU Treaty.

4. Article 48 (formerly N), EU Treaty.

5. Article 49 (formerly O), EU Treaty.

6. Article 50 (formerly P), EU Treaty.

7. Article 51 (formerly Q), EU Treaty.

8. Article 52 (formerly R), EU Treaty.

9. Article 53 (formerly S), EU Treaty.

10. Articles 220 to 245 (formerly 164 to 188), EC Treaty and the corresponding provisions of the ECSC Treaty and EAEC Treaty. See Chapter 19.

11. Article 46(a) (formerly L(a)), EU Treaty. The provisions amending the basic Treaties are Articles 8, 9 and 10 (formerly G, H and I), EU Treaty.

12. Article 46(b) (formerly L(b)), EU Treaty. The conditions are set out in Article 35.

13. Article 46(c) (formerly L(c)), EU Treaty. This is subject to the conditions laid down in Article 40, EU Treaty, and Article 11, EC Treaty.

14. Article 46(d) (formerly L(d)), EU Treaty. The provisions on human rights are are set out in Article 6(2), EU Treaty.

15. Article 46(e) (formerly L(c)), EU Treaty. The Final Provisions are Articles 46 to 53 (formerly L to S), EU Treaty.

16. The main provisions amending the basic Treaties are Articles 8, 9 and 10 (formerly G, H and I), EU Treaty.

17. Article 47 (formerly M), EU Treaty.

18. That is, the founding Treaties, the subsequent Treaties and Acts modifying or supplementing them and the Treaty on European Union itself. The expression "Treaties on which the Union is founded" is not exactly the same as the concept of the Union being "founded on the European Communities"; Article 1 (formerly A), third paragraph, EU Treaty.

19. The Commission itself may have submitted the proposal for amendment.

20. As this constitutional requirement is expressed in the passive voice, it leaves open the matter of who must consult the European Central Bank; but it is reasonable to suppose that the duty is intended to fall on the inter-governmental conference.

21. Article 48 (formerly N), EU Treaty.

22. Previous Article N(2)), EU Treaty, applying the objectives set out in Articles A and B, EU Treaty. This provision was removed from the amended Treaty by Article 1(14) of the Treaty amending the EU Treaty.

23. Informally, the "Treaty of Amsterdam". The date on which the Treaty came into force, following the final ratification, was announced on the European Union's web-site.

24. See paragraphs 1-18 to 1-20 above.

25. These are the principles set out in Article 6(1) (formerly F.1(1)), EU Treaty.

26. Article 49 (formerly O), EU Treaty.

27. Article 50 (formerly P), EU Treaty, repealing Articles 2 to 7 and 10 to 19 of the 1965 Treaty and Article 2, Article 3(2) and Title III of the Single European Act.

28. Article 51 (formerly Q), EU Treaty.

29. Article 312 (formerly 240), EEC Treaty.

30. See further Chapter 25.

31. Article 52(1) (formerly R(1)), first sentence, EU Treaty.

32. Ibid, second sentence, EU Treaty.

33. Article 313 (formerly 247), EC Treaty (which had originally been signed in Rome).

34. Article 52(2) (formerly R(2)), EU Treaty.

35. Article 314 (formerly 248), EC Treaty, as amended by subsequent Treaties of Accession; and Council Regulation 1 of 1958, similarly amended. (But the Regulation does not include Irish as an official language of the Communities.) Official languages should be distinguished from the entirely unofficial "working languages" used within the Commission for convenience.

36. Article 53 (formerly S), EU Treaty, as amended by the Treaty of Accession of Austria,

Finland and Sweden.

37. Case C-219/95P: *Ferriere Nord SpA v Commission of the European Communities.*

38. "Approximation" is defined in Collins as (1) the process or result of making a rough calculation and (2) an imprecise or unreliable record or version. The more appropriate word in English is "harmonisation", which is used (erratically) in more recent legislation and case law. The Community Trade Mark office is officially known as the Office for Harmonisation of the Internal Market; and, although this name is unsatisfactory for other reasons, it does at least avoid the use of the word, "approximation".

39. The expression "*acquis communautaire*" is in Article 2 (formerly B), fifth indent, EU Treaty. The word "*acquis*" appears again in Article 40(5) (formerly K.12(5)), EU Treaty, and elsewhere.

40. Article 53 (formerly S), EU Treaty.