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The *European Communities (Amendment) Bill*: Implementing the Treaty of Nice

Bill 3 of 2001-2002

The European Communities (Amendment) Bill will pave the way for ratification in the UK of the Treaty of Nice, which was agreed by European Union Heads of State and Government in December 2000. The Treaty aims to prepare the EU for enlargement up to 27 members.

The Treaty must be ratified by all Member States in order to come into force. Implementation has already been put in doubt following rejection of the Treaty in a referendum in Ireland on 7 June 2001. The referendum is considered in Research Paper 01/57, *The Irish Referendum on the Treaty of Nice*, 21 June 2001.

This Paper looks at the Bill, the Treaty text, the treaty ratification process in the UK and the progress of ratification in the other EU Member States.

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Summary of main points

- The *European Communities (Amendment) Bill* (Bill 3, 2001-2002) had its First Reading on 21 June 2001. The Bill is to give legal effect to those parts of the *Treaty of Nice* that need to be upheld in UK courts and thus allow the Government to proceed with ratification of the Treaty.

- The Treaty was concluded under the French Presidency on 10 December 2000 after a lengthy meeting of the Intergovernmental Conference (IGC) in Nice. The IGC session followed on from the European Council summit at which an agreement was reached on the European Security and Defence Policy (ESDP).

- Formulas were agreed for the main institutional issues outstanding from the last IGC in 1996-97 that gave rise to the *Treaty of Amsterdam* (size of the Commission, weighting of votes in the Council and extension of Qualified Majority Voting). Changes to the role and competences of the European Court of Justice (ECJ) and the Court of First Instance (CFI) were introduced and amendments to a range of other Treaty Articles were also decided.. The new Treaty aims to prepare the Union to expand to 27 members.

- The Treaty was signed on 26 February 2001 and published in the UK in March 2001 as Command Paper 5090 in the European Treaties series (European Communities No.1 (2001)).

- The ratification process has begun in most EU Member States and it will probably take about a year for all the instruments of ratification to be deposited in Rome. The Treaty is expected to come into force in 2002.

- All EU Member States except Ireland will ratify the Treaty following a parliamentary procedure alone. A ratification referendum in Ireland on 7 June 2001 resulted in a negative vote. The Treaty must be ratified by all 15 Member States in order to come into force.

- The Gothenburg European Council on 15-16 June decided to continue speedily with the enlargement process in spite of the Irish setback.

- Even before the Treaty of Nice had been signed, views were forthcoming on preparations for the next IGC. The Treaty includes a Declaration on areas for the next IGC to consider when it opens in 2004.

CONTENTS

I EC Treaty Ratification in the UK 9

II The Bill 9

A. Clause 1 (1) 10

1. Definition of Treaties in the ECA 10

2. Articles 2-10 of the *Treaty of Nice* 11

B. Clause 1(2) and (3) 13

C. Clause 2 References to the European Courts etc 14

D. Clause 3 Approval of increase in powers of European Parliament 14

E. Omissions from the Bill 14

III The Parliamentary Procedure 15

IV The Treaty of Nice 16

A. Structure of the Treaty 16

B. Aim of the Treaty 17

V Institutional Amendments 17

A. The Commission 17

1. Size of the Commission 17

2. Appointment of the Commission 18

3. Powers of the Commission President 18

B. Council of Ministers 19

1. Weighting of Votes 19

2. Qualified Majority Threshold and the Blocking Minority 21

C. European Parliament 23

1. Size of EP and Allocation of Seats 23

2. MEPs and Political Parties at European Level 25
3. Redress before the ECJ 29
D. Court of Justice and Court of First Instance (Articles 220-225a, 229a, 230 and 245) 29
E. Committee of the Regions, Economic and Social Committee (Article 263) 34
VI Extension of QMV 35
VII Enhanced Co-operation (Articles 11 TEC, 40 – 45 TEU) 41
A. General Principles and Rules of Application 41
B. Second Pillar: Common Foreign and Security Policy 42
C. Third Pillar: Justice and Home Affairs 43
VIII Human rights (Articles 7 TEU, 309 TEC) 43
IX Visas, Asylum, Immigration and Freedom of Movement of Persons (Article 67) 43
X Common Commercial Policy (Article 133) 47
XI Areas of the Treaty not covered by the Bill 49
A. Common Foreign and Security Policy 49
B. Police and Judicial Cooperation in Criminal Matters (Article 31 TEU) 50
C. Human Rights 53
XII Could there be a referendum in the UK? 53
XIII The Ratification Process 53
A. Ratification Timetable 53
B. Ratification in the other Member States 54

I EC Treaty Ratification in the UK

Treaties are ratified by the Foreign Secretary or his/her representative, acting on behalf of the Crown (the so-called Royal Prerogative). Parliament does not have a direct role in treaty ratification but there can be parliamentary activity relevant to it. This must be qualified to be applied to the *Treaty of Nice*:

- Starting in the 1920s, and continuously since the 1930s, there has been a constitutional practice (not a law) known as the Ponsonby Rule which requires that treaties subject to ratification should be laid before Parliament for 21 sitting days before ratification, for information and to give Parliament an opportunity (not always taken) to debate them. The formal submission of the treaty text to Parliament as a Command Paper, together with the debates on the *European Communities (Amendment) Bill*, cover this requirement for European Community treaties.

- When the UK joined the Community in 1973, accession was preceded by the passing of an Act of Parliament which made the obligations under the Treaty and the law deriving from it applicable within the UK. This was the *European Communities Act 1972*. On all subsequent occasions when new treaties have been agreed, including treaties of accession, there has been new legislation in the UK to amend the *European Communities Act* so that those parts of the new treaties which are intended to have domestic legal effect are also made applicable within the UK. Consequently, similar legislation is required to cover all parts of the Nice Treaty which are intended to have direct legal effect within the Member States. These parts are also sometimes described as forming part of the "Community legal order". The passage of the implementing legislation is not formally part of ratification, but it is necessary if ratification is to proceed smoothly. Without legislation, the Government might be faced with a conflict between its obligations under the Treaty and the domestic legal order.

II The Bill

A *European Communities (Amendment) Bill* was introduced on 21 June 2001[1] to amend the *European Communities Act 1972* (ECA)[2] by approving those parts of the new Treaty that give rise to Community rights and obligations and therefore need to have legal effect in the UK. The Bill is short, consisting of only 3 substantive clauses. The purpose of the Bill is to "make provision consequential on the Treaty signed at Nice on 26th February 2001 amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts",[3] but there is no reference to ratification in the Bill

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1 Bill 3 of 2001-02.

2 See *Statutes in Force*, 1972 Chap. 68.

3 See also, for example, *European Communities (Amendment) Bill* to approve Treaty of Amsterdam in 1997, Bill 71 of 1997-98.

because the ratification of treaties by the UK is a matter for the Crown. Successive European Community (Amendment) Bills have been designed to make all the legislative provisions necessary for the implementation of the new Treaty in question, clearing the way for the Government to deposit an instrument of ratification after the Bill has received the Royal Assent and become an Act of Parliament.

A. Clause 1 (1)

1. Definition of Treaties in the ECA

The Bill, if passed, will amend the ECA, i.e. the statute that entrenches the fundamental relationship between the UK and the European Communities. The ECA gives legal effect in the UK only to the main Community Treaties, i.e. those establishing the European Community, the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (Euratom). Treaty of Nice amendments in the second and third 'intergovernmental' pillars of the *Treaty on European Union* (Common Foreign and Security Policy and Justice and Home Affairs), remain outside the remit of the Bill and are like other international treaties, which are binding externally on the UK, but not enforced internally by British courts.

Thus, Subsection (1) of Clause 1 adds only specified parts of the Nice Treaty to the list of texts which are defined as 'Community Treaties' in section 1(2) of the ECA for the purpose of that Act (i.e. for the purpose of their enforcement in the UK by section 2 of the Act). Nice Treaty Articles 2-10, other Nice provisions in so far as they relate to these Articles, and the Protocols attached to the Treaty will be added to the list in the ECA section 1(2), which to date contains the following:

- UK accession treaty to EEC and Euratom, 1972 (relating also to Denmark, Ireland and Norway)[4]
- Council decision on UK accession to ECSC, 1972
- Greek accession treaty to EEC and Euratom, 1979[5]
- Council decision on Greek accession to ECSC, 1979[6]
- Council decisions on Community's system of Own Resources, 1985, 1988 and 1994[7]
- Spanish and Portuguese accession treaties to EEC and Euratom, 1985[8]
- Council decision on Spanish and Portuguese accession to Euratom, 1985[9]
- Provisions in Titles I, II and IV of the Single European Act, 1986[10]

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4 Cmnd 5179 I and II, 1973, including Council decision. Norway did not join, following a negative referendum on membership.

5 Cmnd 7650, 1979.

6 OJL 291, 19 November 1979.

7 OJL 128, 14 May 1985, OJL 185, 15 July 1988 and OJL 293, 12 November 1994 respectively.

8 Cmnd 9634, 1985.

9 OJL 302, 15 November 1985.

- Titles II, III and IV of the *Treaty on European Union* and related provisions, with the exception of the Social Protocol, 1992[11]
- Council decision on European Parliament representatives, taking account of the reallocation of EP seats following German unification, 1993[12]
- European Economic Area Agreement, 1992, and adjusting Protocol, 1993[13]
- Accession treaty for Norway, Austria, Finland and Sweden to European Union, 1994[14]
- Articles 2-9, 12 and related provisions and TEC Protocols in *Treaty of Amsterdam*, 1997.[15]

2. Articles 2-10 of the *Treaty of Nice*

These concern amendments to the following Articles of the Treaty Establishing the European Community (TEC), as amended by the Amsterdam Treaty:

Article 2

Article 2 contains amendments to the EC Treaty. A number of Articles are amended to change unanimous voting in the Council of Ministers to Qualified Majority Voting (QMV). These are listed in Section VI of this Paper. Other amended articles are listed below and many of these are discussed in more detail in other sections of this Paper.

11 and 11a	Enhanced co-operation.
139(2)	Agreements between management and labour.
144	Establishment of Social Protection Committee.
181	New Title XXI. Economic, financial and technical cooperation with third countries.
189	Number of MEPs not to exceed 732.
217	Responsibilities of Commission President and appointment of Commission.
219	Deletion of paragraph on political guidance of President.
220	Jurisdiction of ECJ and CFI; establishment of judicial panels.
221	Judges of ECJ and Statute provisions.
222	ECJ composition and role of Advocate-General
225	CFI jurisdiction.
225a	Creation of judicial panels and composition.
229a	Jurisdiction of ECJ concerning Community industrial property rights.
230	ECJ jurisdiction.
245	Amending the ECJ Statute
247	Composition of Court of Auditors
248	Supplementary assessments in Court of Auditors' statement on accounts.

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10 Cmnd 9758, 1986.
11 Cmnd 1934, 1992.
12 OJL 33, 9 February 1993.
13 Cmnd 2073, 1992, and OJL 1, 3 January 1994 for Protocol.
14 OJL 241, 29 August 1994.
15 Cm 3780, 1997.

254(1) & (2)	*Official Journal of European Communities* amended to *Official Journal of European Union*
257	Composition of Economic and Social Committee.
258	Membership of above not to exceed 350.
266	Amending European Investment Bank Statute.
290	ECJ Statute and languages of EC institutions.
300	Suspension of agreement between Community and third party; addition of EP right to obtain ECJ opinion on compatibility of agreement with Treaty
309	Renumbering of Article 7 subsections.

Articles 3 and 4

Amendments to the Euratom and the ECSC Treaties.

Article 5

Amends Article 10 of the Protocol on the Statute of the European System of Central Banks

Article 6

Amends Article 21 of the Protocol on the privileges and immunities of the European Communities

Articles 7 - 10

These Articles are in Part Two of the Nice Treaty, the "Transitional and Final Provisions". They concern amendments to provisions on the Community Courts (Court of Justice and Court of First Instance).

Article 7 repeals the Protocols on the Statute of the Court of Justice in the EC and Euratom Treaties and replaces them with a new single Protocol on the ECJ Statute annexed to the EU, EC and Euratom Treaties. Consequentially, under Nice Article 10, the Articles in the Protocol on the ECSC Treaty would be largely repealed, as would the 1988 Council Decision which established the Court of First Instance.

Articles 8 and 9 provide transitional arrangements for the ECJ's relations with the ECSC, pending expiry of the ECSC Treaty in July 2002.

Other provisions of the Treaty so far as they relate to those Articles

These concern amendments to the TEU which also relate to TEC matters and are mainly the general provisions on "enhanced co-operation" in Articles 43, 44 and 45 (see section VIII).[16] Aspects of Article 7 TEU which apply to TEC Article 309 also apply here.

Protocols

The four Protocols attached to the Treaty concern enlargement, the ECJ Statute, the financial consequences of the expiry of the ECSC Treaty and Article 67 of the TEC (see also Sections IV, V, VII and XI of this Paper).

B. Clause 1(2) and (3)

An enabling clause of this kind has not before been included in an EC Amendment Bill. It would allow the Government to amend by Order in Council the definition of the 'Treaties' or 'Community Treaties' in section 1(2) of the ECA (see list above) to include measures adopted by the Council of Ministers under new Article 229a that confer jurisdiction on the ECJ in disputes arising from the application of EC acts creating industrial property rights (e.g. patents, designs, trade marks, bio-technological inventions, plant varieties etc).

The Council will 'recommend' the provisions for adoption in accordance with national procedures. The provisions, which will take the form of Council decisions, will be, in effect, international agreements. They will have to be ratified by all the Member States in order to come into force.

The Bill provides that the Draft Order be laid before Parliament and approved by a resolution of both Houses of Parliament through the affirmative resolution procedure.[17]

In the past, Council decisions deemed to be international agreements that were reached in the context of the European Council, for example, the three Own Resources Decisions and the 1993 EP elections decision, were brought into force in the UK by primary legislation under EC (Finance) Acts and the *European Parliamentary Elections Act 1993* respectively. The ECA was amended by adding the decisions to the list of Community Treaties in ECA section 1(2) (e) and (l). Decisions made under Article 229a and approved in the UK by Order under this Act would be added to the same list. The reason for taking a different approach in the case of Article 229a is because the provision is consequential on the Treaty in a way that the other decisions were not. In addition, the procedure by Order in Council will allow a speedier implementation of the EU measures.

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[16] For background see Library Research Paper 00/88, *IGC 200: Enhanced Co-operation*, 21 November 2000.

[17] See House of Commons Factsheet Series L Number 7, *Statutory Instruments and Deregulation Orders*, March 2000.

C. Clause 2 References to the European Courts etc

The *Treaty of Nice* changes the status of the Court of First Instance (CFI), separating it from the ECJ, giving it new powers of jurisdiction and introducing Judicial Panels under Articles 136 and 140(a) and (b). To ensure that the CFI's new powers have effect in the UK, Part II of Schedule 1 of the ECA must be amended to include the CFI within the meaning of 'Community Court'.

As the Government's Explanatory Notes on Clause 2 state, "the new definition will apply generally by virtue of the *Interpretation Act 1978*".

D. Clause 3 Approval of increase in powers of European Parliament

Under the *European Parliamentary Elections Act 1978*[18] the British Parliament introduced a specific limitation on the freedom of the Government to ratify treaties on the basis of the prerogative power. Section 6 of the Act requires that "no treaty which provides for any increase in the powers of the European Parliament shall be ratified by the United Kingdom unless it has been approved by an Act of Parliament". In other words, Parliament has to give its explicit approval (by Act of Parliament) to any future treaty or other international agreement which increases the powers of the European Parliament. The extension of co-decision in the Nice Treaty (giving the EP a greater say in the legislative process and the ultimate power of veto in certain circumstances) makes it such a treaty, and therefore it will have to be approved by the British Parliament for this purpose.

E. Omissions from the Bill

The articles of the Treaty of Nice which are not covered by the Bill are as follows: Article 1 concerns amendments to the *Treaty on European Union* (TEU). Article 11 establishes that the Nice Treaty will apply for an "unlimited period". Article 12 establishes the ratification procedure and the timing of entry into force. Article 13 establishes that the versions of the Treaty in the 12 different languages are equally authentic and that a single text, from which all other copies will be certified, will be deposited with the Italian government.

The Declarations adopted by the Conference (the IGC), which have political significance, but are not legally binding, are not specifically covered by the Bill, although they seek to clarify Treaty Articles that are within the remit of the Bill.

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[18] *Statutes in Force*, 1978, Chap. 10.

III The Parliamentary Procedure

Members of Parliament have expressed concern that new procedures introduced for Government bills at the beginning of the 2000-2001 Session might affect the debate on the Bill. Under these procedures, most Government Bills are now subject to timetabling after the Second Reading debate. This matter was raised at the Foreign Affairs Select Committee evidence session on 7 March 2001. Sir John Stanley asked whether this constitutional bill would be guillotined at the end of Second Reading, as far as the subsequent Committee stage was concerned, to which the then Minister for Europe, Keith Vaz, replied that "all the proper procedures … will be followed, in respect of this Bill".[19] He continued:

> We will follow all the procedures, we will give enough time for a proper, thorough debate on these issues, as we have always done. I cannot tell you now and deal with any questions about the guillotine, or about how long it is going to take to get through.[20]

The Bill cannot amend the Treaty. The Bill is not identical with the Treaty but consists of provisions 'consequential' on the Treaty. The scope for amendment of the Bill will be limited if ratification is to proceed smoothly, but amendments may be adopted that are relevant to the Treaty that would not prevent the Government from fulfilling its obligations under the Treaty. If the Bill is amended in a way that would no longer make provision in UK law for those parts of the Treaty which are intended to form part of the Community legal order, then ratification could not occur in a straightforward way.

During the passage of the *European Communities (Amendment) Bill* in 1992-93 to make provisions consequential on the TEU, amendments were passed which required the Government and the Bank of England to report annually to Parliament on matters relating to Economic and Monetary Union; provided that only elected members of local authorities could be nominated to represent the UK on the new Committee of the Regions; and provided that the Act could come into force only when both Houses of Parliament had come to a further resolution on the question of adopting the Protocol on Social Policy. The most controversial amendment varied the scope of the Bill to exclude the Protocol on Social Policy, by which the UK had acquiesced in the decision of the other Member States to proceed with an agreement on Social Policy.[21]

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19 Foreign Affairs Committee, Minutes of Evidence, 7 March 2001.

20 *Ibid*.

21 For details, see Library Research Paper 93/24, *The Maastricht Debate: Further Developments in the Argument over Ratification*, 3 March 1993.

IV The Treaty of Nice

A. Structure of the Treaty

The full title of the Treaty of Nice is the *Treaty of Nice amending the Treaty on European Union, the Treaties Establishing the European Communities and certain related Acts*. The Treaty was published in the *Official Journal of the European Communities*[22] and as Command Paper 5090 in the UK in March 2001. Nice is an amending and not a primary Treaty: that is to say, it consists of amendments to the existing EC Treaties that will, after ratification, be incorporated into the latter.

The Treaty is divided into two parts containing substantive amendments in the first part and transitional and final provisions in the second. There are around 90 amendments in all to the *Treaty Establishing the European Community* (TEC) and the *Treaty on European Union* (TEU), and more if the European Coal and Steel Community and the Euratom Treaties are taken into account.

There are 6 Articles in **Part 1** dealing with amendments to the TEU (Article 1), to the TEC (Article 2), the European Atomic Energy Community (EAEC) Treaty (Article 3) and the European Coal and Steel Community (ECSC) Treaty (Article 4), the Protocol on the Statute of the European System of Central Banks (ESCB), the European Central Bank, ECB (Article 5), and the Protocol on the privileges and immunities of the European Communities (Article 6).

Articles 7-13, the transitional and final provisions, are in **Part 2**. These concern the repeal of the Protocols on the Statute of the Court of Justice and their replacement by the Protocol annexed to the Nice Treaty. They also set out the timetable for implementation of the Nice Treaty on the first day of the second month following the deposit of the last instrument of ratification.

The results of some of the most difficult and contentious discussions are to be found in the Protocols and Declarations appended to the Treaty. There are four legally binding Protocols:

- **Protocol A** contains provisions on institutional reforms to be introduced in 2004 and 2005 for the 15 Member States to take account of the accession of new member states, but not applicable to them. These include for the EU-15 a re-allocation of votes in the EP, a re-weighting of votes in the Council and provisions on the size of the Commission.
- **Protocol B** concerns the Statute, organisation and procedure of the European Court of Justice (ECJ) and the Court of First Instance (CFI).

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[22] OJC 80, 10 March 2001.

- **Protocol C** concerns the financial consequences of the expiry of the ECSC Treaty on 23 July 2002, and the Research Fund for Coal and Steel, to which the ECSC assets will then be transferred.
- **Protocol D** concerns the move in May 2004 to voting by QMV for measures adopted under Article 67 and referred to in Article 66 (Title IV, visas, asylum, immigration and free movement of persons).

The Protocols are followed by the **Final Act**, 24 **Declarations adopted by the Conference** and 3 **Declarations of which the Conference took note**. The Declarations adopted by the Conference include the important *Declaration on the Enlargement of the European Union*, containing tables giving the allocations of seats in the European Parliament, the Economic and Social Committee and the Committee of the Regions, and weighted votes in the Council of Ministers, for the EU-15 and for all the applicant states with which accession negotiations have actually started. These texts express political intent, although their legal authority is debatable.

B. Aim of the Treaty

The Treaty of Nice sets out to amend the EC Treaties in two main ways: one in order to fulfil the requirements of the *Treaty of Amsterdam* by introducing new institutional and decision-making arrangements to prepare the EU for enlargement of up to 27 members; the other to amend existing institutional arrangements where there have been perceived weaknesses. The institutional changes required by the Amsterdam Treaty, the 'Amsterdam leftovers', concerned the size of the Commission, the weighting of votes in the Council of Ministers and the extension of Qualified Majority Voting (QMV). Other institutional issues, such as the future distribution of seats in the EP, also needed clarification.

Institutional changes linked to enlargement, but also to the way the Union operates at the moment, include the enhanced cooperation provisions, provisions governing the role and operation of the Commission and the powers of the Commission President, the Article 7 provisions on human rights violations by Member States, the operation of the European Central Bank, the organisation and operation of the European Court of Justice (ECJ) and the Court of First Instance (CFI), the inclusion of *Eurojust* in cooperative measures to combat organised crime and the introduction of a social policy committee.

V Institutional Amendments

A. The Commission

1. Size of the Commission

The size of the European Commission was one of the main Amsterdam 'leftovers', and had been problematic right up to the final stages of the IGC. Just days before the summit there was still no compromise proposal on the table. The main obstacle to agreement was the objection from smaller Member States to a proposal to abandon the traditional

formula of one Commissioner per Member State in order to cap the Commission at a level that would be manageable in an enlarged EU. Even the French Presidency proposal for a smaller, rotating Commission in which **all** States would rotate a Commissioner (not just the smaller ones) was rejected by some of the smaller countries. The applicant states were also against this proposal, fearing a potential loss of influence as soon as they joined.

Article 4 of Protocol A sets out provisions on the size of the Commission. The Treaty will require the large Member States, the UK, France, Germany, Italy and Spain, to relinquish one Commissioner in Jan 2005, which is when the current Commission's term of office ends and is also around the time that the first new states are expected to join.[23] From this date, the Commission will include one national from each Member State.

When the Union expands to 27 members new provisions will apply, requiring the Commission to have fewer members than the number of Member States, who will be rotated "on the principle of equality". The Council will decide unanimously on the size of the Commission and on implementing measures.

2. Appointment of the Commission

New procedures for the appointment of the Commission by the Council are contained in amended Article 214.2 TEC. The nomination for the Commission President will be by the Member State governments acting by QMV rather than by unanimity and approved by the EP. The Council will adopt the list of nominees for Members of the Commission by QMV and by common accord with the nominee for President. The EP will still approve the Commission as a body, but the final appointment by the Council will be by QMV instead of unanimity.

The new rules mean that one State could not block the nomination of the Commission President, as the British Government did in 1994 over the proposed appointment of the Belgian Prime Minister, Jean-Luc Dehaene.

3. Powers of the Commission President

Under amended Article 217 the Commission President acquires new powers to decide on rules for the internal organisation of the Commission, to reshuffle the allocation of Commission responsibilities and to require the resignation of individual Commissioners "after obtaining the collective approval" of the College of Commissioners. The President would be able to appoint Vice-Presidents only after obtaining approval from the whole Commission, which is not a current requirement.

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[23] There is no set date for the first accessions (Poland, Czech Republic, Hungary, Slovenia, Estonia and Cyprus, known as the 'Luxembourg Six') but the Gothenburg European Council stated the objective that the first entrants should participate in the EP elections in June 2004.

B. Council of Ministers

1. Weighting of Votes

This was one of the most contentious issues at Nice. Various combinations of weighted and dual majorities had been considered prior to Nice, all of which aimed to relate the number of votes more closely to the population of the Member States. The various proposals for dual majorities, although more representative of the size of the Member States, were complex and cumbersome. The double majority system favoured by the Commission, a majority of Member States representing a majority of the population of the EU, was criticised by some on the grounds that this could lead to an unacceptable predominance of a bare majority over a substantial minority.[24]

The *Declaration on the Enlargement of the European Union*, the so-called 'Enlargement Declaration', sets out a new weighting of votes in the Council. The final agreement groups the four large States together again, with more votes (29 instead of the present 10), and allocates a range of votes for other States, depending on their size. There has been some post-Nice criticism of the vote allocation. Poland was initially allocated fewer votes than Spain in spite of its comparable population. This 'mistake' was remedied and both Spain and Poland have 27 votes in the table in the Enlargement Protocol.

The following table gives the old and new voting powers, with reference to population:

COUNTRY	POPULATION (,000)	CURRENT VOTE	NEW VOTE
Germany	82,083	10	29
UK	59,247	10	29
France	58,966	10	29
Italy	57,610	10	29
Spain	39,394	8	27
Netherlands	15,760	5	13
Greece	10,533	5	12
Belgium	10,213	5	12
Portugal	9,980	5	12
Sweden	8,854	4	10
Austria	8,082	4	10
Denmark	5,313	3	7
Finland	5,160	3	7
Ireland	3,744	3	7
Luxembourg	0.429	2	4

[24] This point was made by the UK's European Scrutiny Committee in HC 23-xvii (1999-2000) para. 64.

Applicant States

Poland	38,667	27
Romania	22,489	14
Czech Republic	10,290	12
Hungary	10,092	12
Bulgaria	8,230	10
Slovakia	5,393	7
Lithuania	3,701	7
Latvia	2,439	4
Slovenia	1,978	4
Estonia	1,446	4
Cyprus	752	4
Malta	379	3

This allocation will alter the relative voting power of the Member States in favour of the smaller States in the EU of 27 members (the EU-27). At present the UK's 10 votes represent 11.4% of the total of 87 votes. The re-weighted vote of 29 in the existing EU-15 represents 12.2% of the total of 237 votes. However, in a Union of 27 the UK's re-weighted vote of 29 will represent 8.4% of a total of 345 votes. In a parliamentary answer in December 2000, the Government set out the relative voting influence of the UK:

> This is the first time that votes in the Council have been re-weighted and the effect that it will have on the UK's relative voting influence[25] is set out as follows: The vote weighting system is a compromise between one vote per member state and an allocation of votes proportional to population size. Smaller member states are therefore proportionately over represented and have ratios above one. The reverse is true of larger member states.
>
> **The UK's relative voting influence**
>
> | **Membership of EU** | **Current voting system** | **Nice agreement** |
> |---|---|---|
> | EU9 | 0.86 | 0.91 |
> | EU12 | 0.75 | 0.83 |
> | EU15 | 0.73 | 0.78 |
> | EU21[26] | 0.66 | 0.72 |
> | EU27[27] | 0.61 | 0.69 |

[25] Relative voting influence is a measure of the fairness of a member state's vote weighting. It is calculated as the ratio between a member state's percentage of the total number of votes and its percentage of the EU's total population.

[26] For the purposes of this calculation, EU21 includes Poland, the Czech Republic, Hungary, Slovenia, Estonia and Cyprus. EU27 then adds Latvia, Lithuania, Slovakia, Bulgaria, Romania and Malta. Of course other scenarios for enlargement are equally possible

[27] See Note 17.

> Under the Nice agreement, the voting system will be supplemented by a population safeguard. When a decision is to be adopted by the Council by a qualified majority, a member of the Council may request verification that the member states constituting the majority represent at least 62 per cent. of the total population of the Union. If this condition is not met, the decision in question shall not be adopted.
>
> The effect of these changes is to ensure that in an EU of 27, a decision cannot be passed in the Council where QMV applies if the three largest member states - Germany, the UK and France - are opposed. The Nice agreement also stipulates that a majority of member states must support a qualified majority for a decision to be passed by QMV.[28]

Germany, with by far the biggest population, will have the lowest relative voting influence. Using the methodology quoted above, the figures for Germany would be:

EU-15	0.52
EU-21	0.55
EU-27	0.49

Thus, although much of the press commentary on the Nice agreement suggested that the "big four" (Germany, France, UK and Italy) had fought to protect their power, their voting strength will be short-lived and will diminish as the Union enlarges.

2. Qualified Majority Threshold and the Blocking Minority

The *Economist* commented:

> Sad to say, the agreement that was eventually reached is almost as hard to understand as it was to achieve. … It is safe to say that few of the "citizens of Europe" will understand this system, meaning that at least one of the aims of the Nice summit - to bring Europe "closer to the people" by making European decision-making clearer - has not been achieved.[29]

The new voting arrangements will make it more difficult to achieve a qualified majority and accordingly easier to gather a blocking minority. In an expanding Union this may slow down the decision-making process.

The current qualified majority is 62 votes out of a total of 87 (representing 71.3% of total votes), with at least 10 Member States in favour where the act is not adopted on a proposal from the Commission. The majority can be constituted by the votes of States representing 58.2% of the population of the EU-15. A blocking minority is currently 26 votes. Blocking minorities have generally represented around 30% of the total.

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[28] HC Deb 14 December 2000 cc 226-7W.

[29] *The Economist*, 16 December 2000.

The new provisions on the QMV threshold for the EU-15 and the EU-27 are set out in Article 3 of Protocol A, the Enlargement Declaration and Declaration 21. The formula is complex, and forming a majority will require clearing at least two hurdles. The agreement takes account of the EU with and without enlargement, and is thus technically complicated. Under Article 3 of the Protocol, as from January 2005 and assuming no enlargement, Council Acts will require 169 out of a total of 237 votes, cast by a majority of Members on a Commission proposal. This will be equivalent to 71.7% of the vote in the EU-15. The blocking minority will be constituted by 69 votes.

Table 2 of the Enlargement Declaration provides for a total of 345 votes in a Union of 27, with a qualified majority of at least 258 votes cast by a majority of Member States (and cast by two thirds of Member States when adopting an act not based on a proposal from the Commission). The blocking minority would therefore be 88 votes under the present system of calculation (345 minus 258 + 1).

Declaration 21 states that in a Union of 27 the blocking minority will rise to 91 and the QMV threshold adjusted. This will make it easier to obtain a qualified majority. The Declaration states that as from 1 January 2005 a qualified majority will be lower than at present, but will increase in line with each enlargement until it reaches a maximum of 73.4%. This appears to be a last minute concession to the Belgian Prime Minister, who had fought for the smaller States to have greater weight in the Council.[30] Press reports indicate disagreement among the Member States over a blocking minority of 91 or 93, the latter reflecting more accurately the 73.4% of votes in the EU-27.

James Bevan, the Head of the European Union Department (I) at the FCO, explained the technicalities of the agreement "at its simplest" in evidence to the European Scrutiny Committee on 10 January 2001:

> ... at EU 15 where we are now from 1 January 2005, provided there is no enlargement, the blocking minority will be 69 – that is 169 votes out of 237 will be necessary for a qualified majority. At the first enlargement, which might come before January 2005, the qualified majority will be set at just below that percentage level; the new EU 15 percentage level is 71.3 per cent and we will set it just below that depending on who comes in. Then, at each enlargement thereafter, the qualified majority threshold will be reset so that it gradually rises but it will not exceed 73.4 per cent of the total votes, and when we reach the denouement at EU 27, the qualified majority will be set at 255 out of 345 votes, which is a 74 per cent threshold with a blocking minority of 91.[31]

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30 See *European Voice*, 14-20 December 2000.

31 European Scrutiny Committee, *Intergovernmental Conference 2000*, Minutes of Evidence, 10 January 2001, HC 119, 2000-2001, pp 7-8.

The calls to link the decision-making process to a demographic indicator resulted in an additional form of blocking minority in the Nice Treaty. Under a 'population safeguard', a Member State may request, in a QMV matter, verification that a decision has the support of countries representing at least 62% of the total population of the enlarged EU. If this condition is not met, the decision in question will not be adopted.

The relative voting strength of the larger States will fall as the EU enlarges. The four large States will not be able to adopt measures that do not have the support of at least some of the smaller States. The new mechanism will benefit the smaller States by allowing a majority of countries to block a decision, regardless of the weighted vote.

One critic accused President Chirac and the French Presidency of introducing a complicated and unfair system, serving French interests:

> First, he [President Chirac] managed to forge a united front among the four largest member states with his first proposals for a new share-out of votes in the Council of Ministers on Saturday morning. After that, he gradually picked off the small and medium-sized countries one by one with a few extra votes here and concessions there, starting with the Dutch and finishing with Belgian Prime Minister Guy Verhofstadt, but not without furious clashes both in private and in public.
>
> Then, because he steadfastly refused to give up France's parity of votes with Germany, even when Chancellor Gerhard Schröder suggested that just one more would be enough, Chirac killed any chance of a rational deal on reweighting. To reflect Germany's 22 million extra citizens, Chirac tabled a plan which would allow Berlin to block decisions if it could club together with other large states representing 38% of the EU's population.[32]

C. European Parliament

1. Size of EP and Allocation of Seats

There was already a consensus on the need to cap EP membership at around 700, which was enshrined in the Amsterdam Treaty in Article 189 TEC. The Nice agreement limits the EP to 732 in a Union of 27, with specific arrangements for the number of seats allocated during the various phases of the enlargement process. The EP itself had proposed a re-allocation of seats which would have reduced from 6 to 4 the number of guaranteed seats for each Member State, and allocated the remainder according to a population key. An alternative proposal put to the IGC was a reduction of each State's allocation on a proportionate basis. The French Presidency proposed deciding the allocation for each State from within the range identified by the two models.

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[32] Simon Taylor, *European Voice*, Vol 6, No.46, 14 December 2000.

In the Treaty seats have been reduced for current Member States to allow for the seats of future acceding states. Although Germany did not gain more votes in the Council to reflect its greater population, it has been allocated more seats in the Parliament than the other Member States by way of compensation.

Protocol A, Article 2 gives the new seat allocation for the EU-15, while the Enlargement Declaration provides allocations for the EU-27. The new allocations for the EU-15 will take effect as of 1 January 2004, from the start of the next Parliament. It was also agreed that, pending the accession of all current applicant states, the reduction in seat allocations would be implemented only to the extent necessary not to exceed the limit of 732. The new allocations are as follows:

Member States (current)

Germany	99	Portugal	25
UK	87	Sweden	22
France	87	Austria	21
Italy	87	Denmark	16
Spain	64	Finland	16
Netherlands	31	Ireland	15
Greece	25	Luxembourg	6
Belgium	25		

Member States (2004-2009)

Germany	99	Portugal	22
UK	72	Sweden	18
France	72	Austria	17
Italy	72	Denmark	13
Spain	50	Finland	13
Netherlands	25	Ireland	12
Greece	22	Luxembourg	6
Belgium	22		

Applicant states (as and when they accede)

Poland	50	Lithuania	12
Romania	33	Latvia	8
Czech Rep	20	Slovenia	7
Hungary	20	Estonia	6
Bulgaria	17	Cyprus	6
Slovakia	13	Malta	5

There has been further argument over the allocation of votes to Hungary and the Czech Republic, both of which have fewer votes than, but a similar population to, Portugal, Belgium and Greece. As the Declaration has political rather than legal weight, it is possible that the allocations for Hungary and the Czech Republic could be amended before their accession. The Government pointed this out in a Memorandum to the Foreign Affairs Committee on 7 March 2001:

> The figures for the applicant countries are contained in a Declaration annexed to the Treaty and do not therefore have legal force. They do, however, represent a political commitment and, as such, will be a guide for the accession negotiations. Any applicant country that feels it has been unfairly treated is free to raise the matter during these negotiations.[33]

2. MEPs and Political Parties at European Level

The Treaty of Nice provides a legal basis for a Statute to lay down regulations governing political parties at European level and in particular rules regarding their funding. The legal basis for the Statute under Article 190(5) was moved from unanimity to QMV, with the exception, at British insistence, of the taxation element.

Amended Article 191 adds:

> The Council, acting in accordance with the procedure referred to in Article 251 [co-decision], shall lay down the regulations governing political parties at European level and in particular the rules regarding their funding.[34]

While the majority of MEPs and the European political groups have supported calls for more transparency in funding, the EP had adopted a resolution on the IGC on 13 April 2000 calling for a more radical approach. Article 8.2 of the resolution stated:

> European political parties which do not respect democratic principles and fundamental rights, may be the subject of proceedings in the Court of Justice of the European Communities, at the request of the Commission, after consulting the European Parliament and the Council, to suspend their EU funding; the suspension procedures that may be applied pursuant to this Article shall be adopted, within twelve months of the entry into force of this Treaty, on a proposal from the Commission, by a decision of Parliament and the Council adopted in accordance with the procedure laid down in Article 251;[35]

EU funding for EP party information activities is already subject to the condition that parties must demonstrate "a clear link between [these] activities and the Community and its policies"[36], i.e. including respect for democracy and human rights. The EP resolution is thus not entirely surprising. However, the Nice amendment does not propose suspension procedures.

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33 Foreign Affairs Committee, Fifth Report, *European Union Enlargement and Nice Follow-up*, HC 318, 10 April 2001, 2000-01.

34 Cm 5090, p 22.

35 A5-0086/00 (Resolution Dimitrakopoulos/Leinen), 13 April 2000.

36 Rules laying down the procedures for utilising the appropriations set aside for information activities in Item '3708 of the budget of the European Parliament, PE 158.828/BUR/Annex II.

European political parties have close links with their respective groups in the EP and in the absence of any form of regulation, there has been some 'leakage' of Community funds for MEPs to the European political parties. This was criticised by the European Court of Auditors in 2000, which recommended that a Statute should regulate European political parties and ensure transparency in their funding:

> Pending adoption of a statute for European political parties, and of procedures for funding them at European level, Parliament will have to establish the following transparency measures through the various sets of rules:
>
> - contributions to European political parties paid by the parliamentary groups will have to be set out in their respective budgets, and the amount of those contributions will have to be capped,
> - direct or indirect funding of parties, political groupings or organisations affiliated at national level will be prohibited.
>
> European political parties which receive such contributions will have to publish their accounts and indicate their sources of funding.
>
> Parliament will have to establish the limits of and conditions for the use of the technical facilities (conference rooms and interpretation) made available to the European political parties under the rules applicable to European political groups.[37]

The Nice Treaty provides in Declaration 11, The *Declaration on Article 191*, a response to the UK's and other Member States' concerns about the proposed amendment. It states:

> The Conference recalls that the provisions of Article 191 do not imply any transfer of competence to the European Community and do not affect the application of the relevant national constitutional rules.
>
> The funding for political parties at European level provided out of the Community budget may not be used to fund, either directly or indirectly, political parties at national level.
>
> The provisions on the funding for political parties shall apply on the same basis to all the political forces represented in the European Parliament.[38]

The Declaration, secured at British insistence, ensures that the provisions of the Statute would not conflict with the *Political Parties, Elections and Referendums Act 2000*,[39]

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37 Court of Auditors Special report No 13/2000 on the expenditure of the European Parliament's political groups, together with the European Parliament's replies, OJC 181, 28 June 2000, p 15.

38 SN 533/00, p.44.

39 Chap 41, 2000.

which bans foreign parties; nor would it discriminate against European political parties on account of their attitudes to European integration.[40]

A European Foundation Working Paper analysis of the Nice Treaty by William Cash was sceptical of the amended Article and the Declaration:

> Despite the reassurances provided in the [Declaration], this article appears to mean that there will be some restriction on how political parties will be funded, potentially jeopardising free speech. The article … might also conceivably be interpreted as giving the Council the powers to ban political parties it dislikes. Furthermore, the Treaty fails to define what is really meant by "political parties at European level". Is the Conservative Party "a European" party because it fields candidates at European elections? Why bother to make these additions to the Treaties if "the provisions of [the new] Article 191 do not imply any transfer of competence to the European Community?"[41]

Mr Cash also suggested that the conditions for funding:

> … implicitly reinforces calls for pan-EU parties that are totally separate from national parties – there would be a Europe wide Christian Democratic party funded by the EU and the UK Conservatives would be potentially cut out of the European Parliament altogether.[42]

The adoption of a Statute both to regulate MEPs and political party funding has been broadly welcomed in the Member States. Keith Vaz said in a Parliamentary Answer:

> European political parties already exist and are recognised in the EC Treaty. The proposal for a legal base to allow the establishment of a statute to regulate these parties is intended to ensure the transparency of their funding. We strongly support this aim.[43]

Mr Vaz commented on the Nice amendment to Article 191 to the European Scrutiny Committee, as follows:

> We welcome this, It will help tighten up on the present system. The regulations will, at our behest, make clear that Community funding for political parties at European level may not be used to fund national political parties.[44]

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40 See European Scrutiny Committee Tenth Report, HC 28-x, 2000-2001, 28 March 2001.

41 European Foundation Working Paper Number 5, *Not Nice at all revisited: A preliminary analysis of the Nice Treaty*, William Cash, MP, March 2001.

42 European Foundation Working Paper Number 5.

43 HC Deb 2 November 2000 cc 607-9W.

44 European Scrutiny Committee Second Report, HC 28-ii, 10 January 2001.

The EP has not waited for Nice to be implemented before moving to adopt the Statute.[45] Negotiations between the Council and EP on its terms have been problematic in a number of areas and no agreement has yet been reached. A Commission proposal for a Council Regulation on the Statute and financing of European Political Parties has been put forward under Article 308[46] of the Treaty, requiring consultation of the EP and unanimity in the Council. Adoption of a Statute before implementation of Nice would allow the regulations to be in place before the next EP elections in 2004. The current proposal would expire at the end of the second financial year following its entry into force, and would be succeeded by a definitive Statute under amended Article 191.

The draft Statute makes the following provisions:

- Any European political party or union of European political parties may register a Statute of a European political party, subject to certain criteria:

  - it must either be established in the EU as a political group in the EP, or intend to establish such a group, or to participate in an existing group; and
  - its programme and activities must respect the fundamental principles of democracy, human rights and the rule of law, and establishment as a political group in the EP.

- Access to funding from the general budget of the EC may be granted to European political parties which have elected representatives in at least five Member States, or which have received at least 5% of the vote in the most recent EP elections in at least five Member States. 85% of the funding would go to parties in the EP, in proportion to their numbers;
- 15% of the annual amount should be distributed in equal shares among the parties that satisfy the conditions set out above and which make a 'duly substantial' request. Furthermore, a European pollitical party may not receive funds unless it can prove that it receives at least 25% of its budget from sources other than the general budget of the EC; and

- Accounts must be published and submitted to the Court of Auditors.[47]

The Financial Statement attached to the proposal provides for 7 million euros to be made available which would be divided between the five existing European political parties (Socialists, Christian Democrats/Conservatives, Liberals, Greens and Communists). This

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45 The Statute also aims to establish a salary for MEPs, Community taxation for salary and pensions and a reimbursement of expenses based on real costs.

46 Article allowing for EC action to achieve the objectives of the common market where the Treaty has not provided the necessary powers.

47 See European Scrutiny Committee Tenth Report, HC 28-x, 28 March 2001.

figure is drawn from estimates of the cash and 'in kind' donations currently given to the EPPs by political groups in the EP.[48]

The European Scrutiny Committee, which did not clear the document, questioned the Treaty base for the proposal, stating in its Tenth Report that Article 308:

> does not appear to us to conform to the requirements of that Article, in that it does not concern any of the objectives of the Community referred to in Article 2 EC, or any of its activities as set out in Article 3 EC. Neither does it appear to us to have any real connection with the operation of the common market.[49]

Failure to adopt the proposal on these grounds could mean a delay in introducing the Statute until the Treaty of Nice, which provides a specific legal base for the Statute, comes into force.

3. Redress before the ECJ

Amended Article 230 will give the EP the right of redress before the European Court of Justice, along with the other Institutions and the Member States.

D. Court of Justice and Court of First Instance (Articles 220-225a, 229a, 230 and 245)

Some significant amendments have been introduced in the new Treaty. The Progress Report presented to the European Council in Feira in June 2000 considered changes to the ECJ and CFI to take account of the increase in litigation before the two Courts and the prospect of a further increase with enlargement. The IGC agreed that the Courts needed to be able to adjust to new circumstances without going through the Treaty amendment process, which requires the convening of an IGC.
The Nice Treaty formalises for the first time the right of each Member State to nominate a judge to the ECJ, thus ensuring representation of all the legal systems in the Union. Nice contains measures that aim to make the administration of justice more efficient by expanding the role of the CFI while leaving the ECJ to deal with more important issues. Under amended Article 223 the ECJ shall establish its Rules of Procedure requiring the approval of the Council acting by QMV, rather than by unanimity as at present. Likewise, amended Article 224 allows the Council to approve by QMV, instead of by unanimity, the Rules of Procedure of the CFI.

The British Government supports these changes and stated in its White Paper on the IGC that QMV in this area "would help the Court to make judgments more quickly".[50]

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48 *Ibid*, p.xxvii.
49 European Scrutiny Committee Tenth Report, HC 28-x, 28 March 2001.
50 *IGC: Reform for Enlargement: the British Approach to the European Union Intergovernmental Conference 2000*, Cm 4595, February 2000, p.21.

Amended Article 220 provides for the creation of "judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific cases", which may be subject to the right of appeal. Amended Article 225 gives the CFI the jurisdiction to give preliminary rulings, with certain restrictions, and to hear and determine other actions brought under Articles presently applicable only to the ECJ. This will alleviate the burden on the ECJ as litigation increases, and also raise the status of the CFI. In an editorial in the *Common Market Law Review* Arjen W.H.Meij commented on proposals made in the run-up to Nice on the transfer of powers to the CFI:

> Clearly, such a transfer only makes sense if the CFI continues its practice of hearing cases only in chambers of three or five judges, also for preliminary references transferred to it. Otherwise, such a transfer would amount to nothing but shifting the problem from one court to another. Such a transfer can only concern relatively technical matters, for which in fact specialized assistance will be needed, as is currently taking shape within the CFI for Community trademark cases. Two major problems which remain are, on the one hand, how to select ex ante the cases to be transferred to the CFI and, on the other, how to preserve ex post the unity and coherence of Community law.
> …
> The best approach, because most practical in the short term, would probably be to make a modest, relatively experimental start by transferring to the CFI preliminary references in an area already within its jurisdiction, concerning questions submitted by the so-called Community trade-mark courts of the Member States, relating to disputes on the infringement and validity of Community trade marks. The second point, the ex post preservation of unity and coherence of Community law, raises its own problems, although it seems common ground that appeal from a CFI judgment to the Court under the present general rules must be excluded.[51]

New Article 229a confers an additional area of jurisdiction on the ECJ to rule in disputes relating to the application of acts adopted under the Treaty which create Community industrial property rights (IPR). According to Declaration 17, attached to the Treaty, Article 229a does not prejudge the choice of judicial framework which may be set up to rule in IPR disputes. Measures will be 'recommended' for adoption in accordance with national constitutional procedures. The conferring of new jurisdiction on the European Courts can only be achieved by Treaty change, not by secondary legislation (e.g. directives or regulations); hence the requirement that the measures be 'ratified' in the Member States.

Proposals for a Community patent are already on the table. In its Explanatory Memorandum on the "Proposal for a Council Regulation on the Community Patent"[52] the Commission set out its reasons for proposing a centralised court for disputes in this area:

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[51] *Common Market Law Review* Vol.37, No.5, October 2000, Guest Editorial, "Architects or Judges? Some comments in relation to the current debate", p.1043.

[52] COM(2000)412 final.

2.4.5. Legal certainty of the Community patent: the judicial system

European undertakings and inventors expect a judicial system that provides maximum legal certainty for the European patent. Only if this is the case can the often considerable research and development costs incurred upstream of the patent be offset.

Only a centralised Community court can guarantee without fail unity of law and consistent case law.

This relates exclusively to litigation between private parties (2.4.5.1.). Appeals against administrative decisions relating to the Community patent will be governed by the procedures provided for by the Munich Convention (2.4.5.2.). Finally, the link between the proposal for a Regulation and the Intergovernmental Conference on Institutional Reform (2.4.5.3.) and the division of responsibilities within the centralised Community court (2.4.5.4.) must be pointed out.

2.4.5.1. The judicial system in relation to litigation between private parties

The system adopted in the Luxembourg Convention has not been followed in this proposal. It would have enabled a national court hearing a counterclaim for a declaration of invalidity to declare the Community patent invalid throughout the Community.

The solution adopted in this proposal is ambitious: it provides for the creation of a centralised judicial system specialising in patent matters, particularly for the examination of questions concerning validity and infringement of the Community patent. To this end, a "Community Intellectual Property Court" will be established [12]. This court will comprise chambers of first instance and appeal. These two instances, whose jurisdiction will cover the entire Community territory, may deal with questions relating to the actual facts of a case as well as to points of law. They will apply their own rules of procedure, grant provisional measures, determine penalties and award damages. The judgments of the court will be enforceable. Enforcement will be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The national authorities shall automatically issue an enforcement order in respect of an authentic judgment.

[12] It is planned to establish this court by way of an amendment to the EC Treaty currently under discussion in the Intergovernmental Conference on Institutional Reform.

The Commission regards the creation of a centralised Community judicial system as being necessary for several reasons: first of all, less ambitious solutions which have been negotiated or sketched out in the past have failed. Inventors would not use the future Community patent without "Community-level" legal certainty.

A non-centralised judicial system such as that for European patents, under which, for example, legal actions relating to the validity of a patent have to be instituted separately in all the Contracting States for which the patent has been granted,

would be unacceptable for the Community patent. Not only would the management of patent rights under such a system be very costly for the proprietor, but - above all - a non-centralised system would not give proprietors of the Community patent the necessary legal certainty as regards the validity of the patent throughout the territory for which it was granted.

Only a centralised judicial system can guarantee unity of law and consistent case law. Moreover, it is necessary to avoid from the outset a situation where a national court with no experience of industrial property matters could decide on the validity or infringement of the Community patent.

Due account has also been taken of the need for the centralised court to have all the requisite qualifications in patent matters. The composition of the court should be such as to guarantee that the judges have the necessary qualifications in the field of patents, which can involve the examination of highly technical questions. This is not currently the case at the Court of First Instance of the Court of Justice, which has not had the opportunity to gain experience in patent matters.

The creation of a new centralised judicial system is also necessary in order to address the problem of excessive workload which is affecting both the Court of Justice and the Court of First Instance.

For the Community patent, it is essential that questions relating to the validity and infringement of the patent be answered definitively within a period of two years. This time limit takes into account the relatively short duration of the protection offered by the patent, which in principle is 20 years but in reality is much shorter on account of the progressive nature of the annual renewal fees which the proprietor of the patent has to pay and the rapid advance of technology.

For these reasons, the interesting alternative of assigning to the Court of First Instance the role of a court of appeal against national court decisions which would have decided on the validity of the patent throughout the Community territory was dropped.

The jurisdiction of the centralised court would cover only certain categories of actions. It is essential that it be able to deal at the same time with disputes relating to the infringement and the validity of the patent (for example, actions for a declaration of non-infringement, invalidity proceedings, or counterclaims for invalidity). The reason for this is that defendants in infringement actions almost always make a claim of patent invalidity as a means of defence. Separating the jurisdictions for these two types of action would be conducive neither to the sound administration of justice nor to the efficiency aimed for in this Regulation, given that the factors which the judge has to examine in the two cases are essentially the same.

The centralised court should also handle litigation relating to use of the patent in the period between publication of the application and the actual granting of the patent. The same applies to actions relating to the limitation or lapse of the patent.

It is essential that the jurisdiction of the centralised court be exclusive. This jurisdiction is based on the validity of the patent in the territory of the Community, as well as on the location of the facts and activities concerned taking place in the Community.

The Regulation will have to provide that all other disputes between private parties which do not specifically come under the jurisdiction of the centralised court are to be dealt with by the national courts of the Member States. Such disputes might concern, for example, the right to the patent, the transfer of the patent or contractual licences.

For situations where jurisdiction resides with national courts, the Regulation provides that the rules set out in the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (referred to hereinafter as the "Brussels Convention" [13] shall, in principle, be applicable. The Regulation will specify the necessary exceptions and adaptations.

[13] This Convention will be transformed into a Regulation (see the Commission Proposal of 14 July 1993, COM(1999) 348 final). It is understood that, for the Member States concerned, the reference to the Brussels Convention is to be deemed a reference to the Implementing Regulations once these have been definitively adopted by the Council.

However, whenever an action relates to the validity or infringement of the Community patent, the national court before which the case has been brought will be obliged to decline jurisdiction and declare the action inadmissible. If the validity of the patent is a preliminary issue in a case relating to another subject, e.g. unfair competition, the national court hearing the case will stay the proceedings to enable the parties to resolve the issue of a preliminary nature in an action brought before the centralised court.

The national courts remain free to submit a request to the Court of Justice for preliminary rulings on matters falling within their jurisdiction, for example concerning interpretation of Directive 98/44/EC on the legal protection of biotechnological inventions [14]. However, national courts will not, in principle, be authorised to request preliminary rulings concerning the validity of the Community patent on the basis of the Regulation, since they will not have jurisdiction in the matter.[53]

[53] http://europa.eu.int/eur-lex/en/com/dat/2000/en_500PC0412.html.

E. Committee of the Regions, Economic and Social Committee (Article 263)

Amendments concern the size of these institutions and the terms of office of their members. The maximum number of members for both institutions would be increased from 222 to 350.

Under amended Article 263 members of the Committee of the Regions (COR) would have to hold elected office in local or regional government. All members would either be directly elected or be "politically accountable to an elected assembly". This formulation would make it possible for politicians who are not directly elected (like mayors in the Netherlands) to become members of the COR.

The Government has noted that devolution in the UK will not alter the position with regard to the appointment of COR members. The then Europe Minister said of the draft amendment:

> The proposed amendment states that representatives to the Committee of the Regions will either hold a regional or local authority electoral mandate, or be politically accountable to an elected assembly. There would be no change to the present position in the UK.[54]

The new requirement is unlikely to alter the composition of the COR to any great extent since most of its members hold elected office in their home country anyway. It represents an acceptance by Member States of the political legitimacy of the COR, which the body had been demanding for some time. The new provision has political weight too, as it supports the COR's claim to be the political institution that is the closest to citizens. From the time the Committee was established by the Maastricht Treaty in 1991, it has emphasised its political vocation and has tried to distance itself from the concept of being a purely technical body.

The new Treaty stipulates that the term of office of Committee members should end at the same time as their regional or local government term of office.

Nice also amends the appointment process for members of the Committee of the Regions and the Economic and Social Committee (ESC). The list of members of both institutions will now be adopted by QMV rather than unanimity. The list must 'conform' to the proposals made by the Member States (the final list of members is arrived at by combining the lists put forward by each Member State). Under Amsterdam each Member State was free to assess the lists put forward by other Member States. The change will have a greater impact on the ESC, as under current provisions Member States have to

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[54] Keith Vaz, HC Deb, 13 November 2000, c 30W.

propose twice as many candidates as the number of seats allocated to the country in question.

The representative nature of the ESC has been clarified in so far as the Nice Treaty refers specifically to consumers in Article 257 TEC and stipulates that the ESC represents "the economic and social components of organised civil society".

VI Extension of QMV

There was agreement on moving 31 Treaty Articles to QMV out of the 70 or so still requiring unanimity.[55]

The Government has not commented on all aspects of reform in this area, but has set out its general policy on extending QMV on numerous occasions, primarily in its White Paper of February 2000[56]: this is that where the extension of QMV was in the UK's national interest, it would be strongly supported, and where it was not, it would be firmly opposed.[57]

Of the existing areas that will move to QMV, three are within the exclusive competence of the Community (i.e. the individual Member States cannot act unilaterally in these areas). These are Articles 111(4) and 123(4) TEC concerning monetary policy and Article 133(5)TEC, which extends the Common Commercial Policy to trade in services and the commercial aspects of intellectual property, subject to unanimity in certain circumstances. All the other areas are either within the shared competence of the Community and the Member States or within the intergovernmental 'pillars' of the TEU (justice and home affairs or common foreign and security policy) where the concept of shared and exclusive competence is not relevant.[58] Some new Treaty Articles will also be subject to QMV. The Treaty requires the following Articles and/or sub-Articles to be subject to QMV. Those marked with an asterisk will become subject to co-decision with the EP. Government and/or other comment is included where it is available:

Article	**Areas covered (Treaty Establishing the European Communities TEC)**
13*	incentive measures in area of anti-discrimination, excluding any harmonisation of Member States' legislation.

[55] The figure varies, depending on whether Articles or subsections of Articles are included. The Government has settled on 31 articles and 35 measures.

[56] Cm 4595, *IGC: Reform for Enlargement: the British Approach to the European Union Intergovernmental Conference 2000*.

[57] See also HC Deb, 30 October 2000 cc 234-8W.

[58] See HC Deb 12 February 2001 c 47W.

Comment: In practice, this is likely to mean the exchange of information and best practice between Member States, which the Government has supported:

> Incentive measures, such as the exchange of best practice or information between member states, are exactly what we are encouraging the Commission to pursue. Extending QMV to these will facilitate co-operative action on non-discrimination. This is an agenda that the Government are keen to pursue. But, at our insistence, the Treaty makes explicit that QMV cannot be used for any harmonisation of national legislation or regulation.[59]

Two Directives agreed recently under Article 13 have led sceptics to fear that with QMV there will be an increase in legislation that will shift the burden of proof in discrimination cases. Lord Shore of Stepney raised this in a Written Question, to which Lord Davies of Oldham (Government Whip) replied:

> The Directive establishing the principle of equal treatment between persons irrespective of race or ethnic origin (2000/43/EC) and the Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC) agreed under Article 13 of the Treaty of the European Union [sic][60] both include provisions relating to the burden of proof in cases (other than criminal proceedings), of alleged discrimination. These provisions do not mean that defendants will be required "to prove their innocence" in such cases. Instead they stipulate that, where a claimant is able to prove facts from which the Court or tribunal can properly infer that discrimination has occurred, it will be for the defendants to show that their actions did not contravene the law. This is a shift rather than a reversal of the burden of proof and largely represents what already happens in practice in the UK in sex and race discrimination cases, following the judgment from the House of Lords in Zafar v Glasgow City Council (1998 IRLR 36). The Directive requires this approach to be formalised as a rule of law in the Race Relations Act 1976 and in the new legislation needed to give effect to Directive 2000/78/EC.[61]

18 measures to facilitate rights of citizens to move freely and reside within the EU.

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59 Keith Vaz, Minister for Europe, 21 December 2000, c342W.

60 This should be Article 13 of the Treaty Establishing the European Community (TEC).

61 HL Deb 20 March 2001 c 150WA.

Comment:	The UK has an 'opt-in' to all aspects of the free movement Articles (see Section X).
67	Title IV: justice and home affairs 62.2.a: external border checks 62.2.b: certain rules relating to visas 62.3: conditions for freedom of movement for third country nationals 63.1.a,b,c,and d: measures relating to asylum 63.2.a: temporary protection of refugees 63.2.b: illegal immigration and residence 65.a,b,c: judicial cooperation in civil matters 66: cooperation between relevant national administrations
Comment:	The UK has an opt-in arrangement to measures in Title IV, set out in a Protocol to the Amsterdam Treaty. None of these provisions apply in the UK unless the Government decides to opt in to them. The Treaty of Nice does not amend the provisions of this Protocol.
100	Economic and Monetary Policy: appropriate measures, including financial assistance, to aid Member States in severe difficulties
Comment:	Two issues have been raised in this context: one linked to the UK's North Sea oil reserves and the other to the no bailout clause in Article 100(2). With regard to the former, there was no need for special provisions for North Sea oil as the UK has sovereign rights over its reserves under international law and the EC Treaty does not confer competence on the Community to claim ownership of or control over them.[62] The latter raised the possibility of some Member States having no veto over a decision to give financial assistance to other States with "severe difficulties" in the "supply of certain products". Critics suggest that this might be a matter of irresponsible financial management for which the prudent managers might have to pay the bill. Mr Vaz sought to allay fears of costly bailouts for poor economic control by the Declaration the Government had obtained: The Government negotiated a specific declaration linking Article 100(2) TEC with Article 103. Article 103 makes clear that a member state shall not be liable for or assume the commitments

[62] HC Deb 21 December 2000 c 341W.

of other member state Governments or other member state public bodies, except in the case of mutual financial guarantees.[63]

Declaration 6 states:

The Conference recalls that decisions regarding financial assistance, such as are provided for in Article 100 and are compatible with the "no bail-out" rule laid down in Article 103, must comply with the 2000-2006 financial perspective, and in particular paragraph 11 of the Interinstitutional Agreement of 6 May 1999 between the European Parliament, the Council and the Commission on budgetary discipline and improvement of the budgetary procedure, and with the corresponding provisions of future interinstitutional agreements and financial perspectives.[64]

111(4) EC representation at international level in EMU: formal agreements on exchange-rate system for euro in relation to non-EU states

Comment: This Article does not apply here unless or until the UK joins the single currency. Under Protocol 11.7 of the TEU "on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland", the UK's voting rights are suspended with regard to Article 111. Furthermore, Declaration 7 of the Nice Treaty, concerning Article 111 and the procedures for euro-area States to be involved in preparing the Community's position at international level, does not apply to the UK, which is not considered to be in the "euro-area".[65]

123(4) rapid introduction of euro.

Comment: This Article does not apply here unless or until the UK joins the single currency.

133 extension of Common Commercial Policy to trade in some services and the commercial aspects of intellectual property rights.

Comment: QMV will be extended to the negotiation and conclusion of agreements relating to trade in services and the commercial aspects of intellectual property. Unanimity will be retained for specified matters, where unanimity is required for the adoption of equivalent

63 HC Deb 21 December 2000 c 341W.
64 Cm 5090, p. 71
65 See HL Deb 5 February 2001 c WA80.

internal EU rules or where the Community has not exercised related internal rule-making powers. In certain other areas, where competence will continue to be shared between the Community and Member States (i.e. trade in cultural, audio-visual, educational, social and human health services), decisions will continue to be made by consensus. The current transport arrangements will prevail. (See also Section XI).

137(1)(k)* modernisation of social protection systems: provisions concerning health and safety at work; working conditions; information and consultation of workers; social exclusion (excluding harmonisation of Member States' legislation).

Comment: The Government commented on the need to extend QMV to this Article as follows:

> QMV under tiret (k) of Article 137 is limited to co-operation between the member states. Harmonisation of their laws and regulations is explicitly excluded. It makes sense to exchange information with our partners and encourage the development of modern and sustainable social protection systems. This was one of the goals we agreed at Lisbon. QMV will make it easier to bring it about.[66]

157(3)* Industrial policy: measures for action in support of industry (adjustment to structural changes; development of undertakings, particularly SMEs; cooperation between undertakings; fostering industrial potential in innovation, research and technological development).

159(3)* specific action to achieve economic and social cohesion outside Structural Funds.

161 from 2007 or from the next Financial Perspective, rules defining tasks, priorities and organisation of Structural Funds.

175* some environmental measures (aspects of qualitative management or water resources).

181a new Title XXI: economic, financial and technical cooperation with third countries.

190(5) regulations and conditions governing duties of MEPs (MEPs' Statute). Unanimity retained for fiscal measures.

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[66] Keith Vaz, HC Deb 21 December 2000 c 343W.

191(2)* regulations governing political parties at EU level, in particular rules on funding (Statute for European Political parties), subject to a declaration that Community funds cannot be used to fund, either directly or indirectly, national political parties.

Comment: See Section V.

207(2) appointment of secretary-general and deputy secretary-general of Council.

210 salaries, allowances and pensions of Members and Registrar of Court of First Instance.

214 nomination of Commission President; adoption of list of Commissioners nominated by Member States; appointment of President and other Commissioners.

Comment: The Government has said:

> In the White Paper "IGC: Reform for Enlargement" the Government made clear its commitment to the effective political and administrative leadership of the College of Commissioners. Making the appointment of the President of the European Commission subject to qualified majority voting will help to ensure that the best candidate, rather than the one most acceptable to all, is selected as the President.[67]

215 appointment of new Commission member upon death or resignation of a Commissioner.

Comment: See Section V(A).

223 approval of Rules of Procedure of Court of Justice.

Comment: See Section V(D).

224 approval of Rules of Procedure of Court of First Instance.

Comment: See Section V(D)

225(a) approval of the Rules of Procedure of judicial panels attached to the CFI.

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[67] HC Deb 16 January 2001 c 166W.

247(3)	appointment of Members of Court of Auditors.
248(4)	approval of Rules of Procedure of Court of Auditors.
259(1)	appointment of Members of Economic and Social Committee.
263	appointment of Members and alternates of Committee of the Regions and replacement of same.
Comment:	See Section V(E).
279 (a and c)	from 2007, Financial Regulation for budget and accounts; rules on responsibility of financial controllers, authorising officers and accounting officers, measures for inspection.

VII Enhanced Co-operation (Articles 11 TEC, 40 – 45 TEU)

A. General Principles and Rules of Application

The Nice Treaty amends Treaty Articles on enhanced co-operation[68] by removing the final reference for a decision to the European Council, acting by unanimity.[69]

Amended Article 43 (Title VII) lays down the general conditions for enhanced cooperation arrangements in both the TEC and the TEU. The existing requirements that enhanced cooperation must not affect the *acquis communautaire*, nor the interests of non-participating States, and must only be used as a last resort, that it must be within the limits of EC competence, and that it must not distort competition between Member States, are expanded. They now include the requirement that they should respect the single institutional framework, nor undermine the internal market or economic and social cohesion, nor prejudice the provisions of the Protocol integrating the Schengen *acquis*[70] into the EU framework; nor affect the competences, rights and obligations of non-participating States. This condition raises the question of whether the enhanced cooperation procedure would be used or usable any more in the future than it has been so far (i.e. not at all), given that it would almost always affect to some extent the internal market or the competences, rights and obligations of non-participating States.

The Amsterdam provisions require that "at least a majority" of Member States have to be involved, while amended Article 43 will require a minimum of eight Member States. This is a simple majority of the current EU-15 membership, and thus would not alter the

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[68] Also known as flexibility and closer co-operation.

[69] For a discussion of the background to these proposals see Library Research Paper 00/88, *IGC 2000:Enhanced Co-operation*, 21 November 2000.

[70] Schengen began life as an intergovernmental agreement among a group of Member States to abolish border controls between participating States.

present requirement in practical terms, but it would represent less than half the States in an enlarged Union. Those favouring a lower threshold had argued that the requirement for a majority of Member States in a Union of up to 27 members would be unrealistic.

Amended Article 43a, the 'last resort' clause already present in TEU Article 43(1)(c) of the Treaty of Amsterdam, emphasises that enhanced cooperation arrangements should only be used when the objectives of the cooperation cannot be achieved "within a reasonable period" using the relevant Treaty provisions. There had been some concern that requests for enhanced cooperation might be made as soon as there was a disagreement in the Council of Ministers.

Amended Article 43b provides that enhanced cooperation should be open to all Member States, even once it has been established. Articles 44, 44a and 45 deal with institutional procedures, financing and consistency with the policies of the Union.

Amended Article 11 sets out the procedure for cooperation under the TEC. Authorisation would come from the Council, acting by QMV on a proposal from the Commission and after consulting the EP. If the cooperation concerned a matter subject to the co-decision procedure, the EP's assent would be required. A Council member may 'request' that a matter be referred to the European Council, although there is no further provision on the role of the European Council in deciding whether or not to allow the arrangement. The final decision would appear to rest with the Council of Ministers, acting by QMV, regardless of whether or not the European Council reaches a consensus on the issue. Under existing provisions (Article 11.2), there is an 'emergency brake' procedure, whereby a Member State can declare that "for important and stated reasons of national policy" it will oppose the granting of authorisation by QMV, and a vote is not taken. The matter may then be referred to the European Council for a decision by unanimity.

Amended Article 11a sets out the procedure for a Member State wishing to participate in an established arrangement.

B. Second Pillar: Common Foreign and Security Policy

Cooperation in the CFSP area (Title V, second pillar of TEU) is established by Article 27a-e. Authorisation would also be from the Council acting by QMV according to Articles 43-45 and Article 23(2) of the existing provisions. There would appear to be an ambiguity here, in that Article 23(2) provides for an 'emergency brake' procedure, in the form of a final decision by the European Council by unanimity, whereas Article 43-45 do not. The Government is of the opinion that there remains a full emergency brake in the Second Pillar.[71]

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[71] See European Scrutiny Committee, *Inter Governmental Conference 2000*, HC 119, 2000-01, Minutes of Evidence, 10 January 2001, p. 5.

Article 27b provides that cooperation in this area would apply to the implementation of a joint action or a common position, but not to "matters having military or defence implications". This exemption was secured at British insistence.

C. Third Pillar: Justice and Home Affairs

In the Justice and Home Affairs area (Title VI, third pillar of TEU) enhanced cooperation is established in Articles 40 and 40a-b TEC.

The emergency brake in the Third Pillar, which at present requires a final decision by the European Council, has been replaced by a referral procedure. In both the First and Third Pillars there would be a right of reference to the European Council but not a veto.

VIII Human rights (Articles 7 TEU, 309 TEC)

Under Article 7 (TEU) the Council of Ministers may determine by a majority of four-fifths of its Members, after obtaining the assent of the EP, that there is a "clear risk of a serious breach by a Member States of the principles mentioned in Article 6(1) of the TEU,[72] and address appropriate recommendations to that State". The new Article proposes a mechanism which would require the Council to hear from the State confronted with a human rights charge and which allows for a report on the situation by independent persons "within a reasonable time". The corresponding Article in the TEC, Article 309, is amended to take account of the new wording of Article 7 TEU.

IX Visas, Asylum, Immigration and Freedom of Movement of Persons (Article 67)

The Treaty of Amsterdam split the former 'Third Pillar' justice and home affairs matters, into two. Some aspects remained essentially intergovernmental as 'Third Pillar' matters in the amended TEU, while others were moved into the main TEC and became subject to EU decision-making processes and the jurisdiction of the ECJ. The Treaty of Nice introduces changes in both the TEU and TEC justice and home affairs areas.

Title IV TEC contains measures on cooperation between Member States in matters concerning visas, asylum, immigration, border controls and other policies related to the free movement of persons, with the aim of creating progressively "an area of freedom, security and justice". At Nice Member States agreed to give up the national veto in Article 65 (TEC), with the exception of family law, when the Treaty comes into force.[73]

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[72] Article 6(1) TEU: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rules of law, principles which are common to the Member States".

[73] See section X on extension of QMV.

Article 65 states:

> Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:
>
> (a) improving and simplifying:
> - the system for cross-border service of judicial and extrajudicial documents;
> - cooperation in the taking of evidence;
> - the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
>
> (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
>
> (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

Other provisions in this Title introduce QMV but deferred until a later date. Article 67 currently provides for a transitional period of five years for measures in this title, during which the Council acts by unanimity. QMV with the co-decision procedure will apply **after** the Council adopts unanimously legislation laying down common rules and basic principles concerning the subjects in Article 63(1) (a, b, c, d) and 63(2)(a), all measures relating to asylum and/or refugees. In Nice **Declaration 5** the Council undertakes to do everything possible to ensure that co-decision with QMV applies from 1 May 2004 to Article 62(3), conditions governing the free movement of third country nationals, and Article 63(3)(b), measures relating to clandestine immigration. It also ensures that QMV with consultation of the EP will apply from 1 May 2004 to Article 66, cooperation between appropriate departments of Member State administrations, and that QMV applies to Article 66(2)(a), the procedures relating to checks at external borders, as soon as there is agreement on the scope of measures concerning the crossing of external borders by persons. Some or all of the other provisions in Title IV will become subject to Article 251 (co-decision) from the same date as soon as possible, if the Council takes a corresponding decision.

A Protocol to the Amsterdam Treaty governs the relationship of the UK and Ireland to Title IV. The basic provision in Articles 1 and 2 is that the UK and Ireland will not take part in this Title and that nothing agreed under it will apply to them. This exemption is explicitly made to encompass any relevant decisions of the Court of Justice. These do not apply to the UK or Ireland, nor will they enter into the *acquis communautaire* or the corpus of community law as far as the UK and Ireland are concerned. Thus the UK and Ireland do not only remain outside the existing Schengen arrangements, for example, but they are also fenced off from the future development of these arrangements under this Title, unless they choose to opt into them.

To summarise, under amended Article 67 the Treaty of Nice would make Articles in Title IV that are currently subject to unanimity, subject to QMV after the Council adopts

unanimously the legislation laying down common rules and basic principles governing areas covered by Articles 63 (asylum and refugees). From May 2004 QMV will apply to Article 62(3) relating to the free movement of third-country nationals, and Article 63(3)(b), measures relating to illegal immigration. These provisions will not affect the UK unless the Government chooses to opt in to them under the provisions of the Protocols described above.

In March 1999 the then Home Secretary, Jack Straw, set out those areas in this Title that the UK wanted to opt in to:

> Subject to the Amsterdam Protocol, the United Kingdom wishes to approach participation in Schengen and the Free Movement Chapter positively. Indeed we are keen to engage in co-operation in all areas of present and future JHA co-operation which do not conflict with our frontiers control. We are therefore ready to participate in law enforcement and criminal judicial co-operation derived from the Schengen provisions, including the Schengen Information System. We have been in the forefront of European Union co-ordination in the fight against crime and drugs and we shall maintain that position. We are also interested in developing co-operation with European Union partners on asylum - a European Union-wide phenomenon - and in the civil judicial co-operation measures of the Free Movement Chapter. Our intention to maintain our frontier controls has implications for our participation in the direct operation of external frontier controls. For similar reasons, enhanced visa co-operation raises difficulty for us. But, within this constraint, we shall seek discussions with European Union colleagues to maximise the scope for mutual operational co-operation in combating illegal immigration, without prejudice to the maintenance of our national immigration controls. We shall also look to participation in immigration policy where it does not conflict with our frontiers-based system of control.[74]

A Lords Written Answer in March 2001 details the proposed measures under Title IV that the Government intends to opt in to:

> … the UK has notified its intention under Article 3 of the Protocol on the position of the United Kingdom and Ireland to participate in the application and adoption of the following proposed measures under Title IV of the treaty establishing the European Community:
>
> *Asylum and Immigration Measures*
>
> Regulation: Commission proposal for a Council regulation concerning the establishment of 'Eurodac' for the comparison of the fingerprints of applicants for asylum and certain other aliens (title subsequently amended to "Council Regulation concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention").

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[74] HC Deb 12 March 1999 cc. 380-2W.

Directives: Initiative of the French Republic for a Council Directive defining the facilitation of unauthorised entry, movement and residence;

Commission proposal for a Council Directive on minimum standards on procedures in member states for granting and withdrawing refugee status;

Initiative of the French Republic for a Council Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the member states third country nationals not in possession of the documents necessary for admission;

Initiative of the French Republic for a Council Directive on mutual recognition of decisions concerning expulsion of third country nationals;

Commission proposal for a Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance between member states in receiving such persons and bearing the consequences thereof.

Decision

Commission proposal for a Council Decision establishing a European Refugee Fund.

External measures

Commission proposal for a Council Decision on the conclusion of an agreement between the European Community and Republic of Iceland and Kingdom of Norway concerning the criteria and mechanisms for establishing the state responsible for examining a request for asylum lodged in a member state or Iceland or Norway. (The UK also notified its intention to participate at an earlier stage when the Commission brought forward its proposal for a negotiating mandate.)

Recommendations for Council Decisions authorising the Commission to negotiate readmission agreements with Sri Lanka, the Kingdom of Morocco, the Islamic Republic of Pakistan and the Russian Federation.

Civil Judicial Co-operation Measures

Regulations: Commission proposal for a Council Regulation (Brussels I) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;

Initiative of the French Republic for a Council regulation on the mutual enforcement of judgments on rights of access to children (Brussels IIbis);

Initiative of the Federal Republic of Germany for a Council regulation on co-operation between the courts of the member states in taking evidence in civil and commercial matters;

Commission proposal for a Council regulation extending the programmes of incentives and exchanges for legal practitioners in the area of civil law (Grotius - Civil);

Initiative of the Federal Republic of Germany and the Republic of Finland for a Council regulation on insolvency proceedings;

Commission proposal for a Council regulation on the service in the member states of judicial and extrajudicial documents in civil or commercial matters;

Commission proposal for a Council regulation (Brussels II) on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children.

Decision: Commission proposal for a Council Decision establishing a European judicial network in civil and commercial matters.[75]

X Common Commercial Policy (Article 133)

At present trade in services is an area of so-called 'mixed competence', which means that Member States take full part in individual bilateral negotiations with other World Trade Organisation (WTO) Members, but the European Commission acts as lead negotiator and speaks on behalf of Member States in the WTO. Common positions are agreed unanimously with all EU Member States with respect to trade in services.

In contrast, for negotiations concerning trade in goods, the Commission has had 'exclusive competence'. This means that it has the power to negotiate agreements with international organisations on behalf of the Member States under Articles 133 and 300 of the EC Treaties.

There has been some pressure to extend the Community's competence to include other areas, notably the trade in services. The role of the Community, represented by the Commission, in negotiating the Uruguay Round GATT Agreement was the subject of an Opinion of the ECJ in 1994. The Court rejected the Commission's contention that the Community had exclusive external competence in all matters covered by the GATT Agreement, including services, transport and intellectual property. It concluded:

1. The Community is solely competent under Article 113 of the Treaty to conclude the multilateral agreements relating to trade in goods.

2. The competence to conclude GATS (i.e. the agreement which relates to trade in services) is shared between the Community and Member States.

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[75] HL Deb 1 March 2001 WA152-153.

3. The competence to conclude TRIPS (i.e. the agreement which concerns intellectual property rights) is also shared between the Community and Member States.[76]

In other words, as a result of this Opinion, the exclusive competence of the Community, in which ratification by the Member States is not required, was limited to the area of trade in goods. This was a landmark ruling by the ECJ and settled various long-standing disputes between the Commission and the Council of Ministers, as well as becoming a main point of reference for future questions concerning Community competence. It was, however, disappointing for the Commission, which had for many years asserted exclusive external competence on the basis of its broad interpretation of Article 13 and the scope of the Common Commercial Policy.

The 1994 Opinion confirmed that where external competence is not expressly provided for in the Treaty (as in Article 13), the existence and extent of implied external competence would be determined in accordance with the well-established principles of earlier ECJ case law. Once the Community has adopted common internal rules, Member States may no longer undertake international obligations which affect or contradict these rules. To this extent, the Community then acquires exclusive competence. In the areas in which the ECJ said the Community did not have exclusive competence, exclusive external competence is being acquired incrementally with the adoption of common internal Community rules.

On 9 November 1999, before the IGC 2000 was launched, the European Parliament's Committee on Constitutional Affairs adopted by 20 votes to 3 with 2 abstentions a proposal on institutional reform with regard to the IGC. An amendment by the Dutch Liberal MEP, Elly Plooij-van Gorsel, called for the extension of Commission powers to negotiate on intellectual property and services at the WTO and elsewhere. On 18 November 1999 the EP in plenary adopted by 359 votes to 62 (with 57 abstentions) the report by the German CDU MEP, Konrad Schwaiger, on the Commission's strategy for the Millennium Round negotiations in the WTO. One of the main elements of the EP's position concerned institutional reform. It called for Treaty changes to be made at the IGC to extend the Commission's prerogatives to areas other than goods alone, especially to services and intellectual property.[77]

Proposals to the IGC on the CCP included specific mention of the EU's position at WTO negotiations, but the WTO is not mentioned in the new Treaty. Article 133 is amended to include the negotiation by the Commission and the conclusion by the Council, acting by QMV, of external agreements relating to the trade in services and the commercial aspects of intellectual property. Unanimity would apply where internal Community rules are

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[76] ECJ Opinion 1/94, 15 November 1994, OJC 386, 31 December 1994.

[77] This particular proposal was approved by 361 votes to 99 with 12 abstentions.

decided by unanimity or for areas in which the Community has not yet adopted internal rules.

At French insistence, agreements relating to trade in cultural and audiovisual services, educational services and social and human health services will require unanimous agreement and would continue to be matters of 'shared competence' in which agreements would be concluded jointly by the Community and the Member States.

In a speech to the EP on 12 December 2000, the Commission President, Romano Prodi, said:

> I would … like to take the opportunity to thank President Chirac and Lionel Jospin for making it possible to end the main ambiguities affecting our commercial policy. A good balance was struck between the legitimate concerns surrounding issues like cultural diversity, on the one hand, and efficient powers for negotiating with our trading partners, on the other. [78]

XI Areas of the Treaty not covered by the Bill

A. Common Foreign and Security Policy

Amended Article 17(1)TEU makes explicit that the CFSP "shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework."[79] Most of the applicant states either already have or aspire to full membership of NATO. References to the Western European Union (WEU) are deleted in Article 17(1), but retained in 17(4) for bilateral cooperation.

The Treaty does not deal with the related question of the status of the European Security and Defence Policy (ESDP) vis-à-vis NATO. This matter is dealt with in a report attached to the Presidency Conclusions of the European Council, while a Declaration annexed to the Final Act of the Conference calls for the ESDP conclusions of that report to be implemented "as soon as possible in 2001" (i.e., without waiting for ratification of the Treaty of Nice). The Foreign Affairs Committee's Fifth Report on *European Union Enlargement and Nice Follow-up* concluded:

> It remains to be seen just how soon differing interpretations of the report's conclusions can be reconciled, and what the statement that EU-led military

[78] RAPID, speech 00/499, Strasbourg, 12 December 2000.
[79] Cm 5090, p.8.

> operations will take place only "where NATO as a whole is not engaged" will mean in practice.[80]

Amended Article 25 provides an enhanced role for the Political and Security Committee. This Committee (currently the Political Committee) will, under the authorisation of the Council, exercise "political control and strategic direction of the crisis management operations" and may, with Council authorisation, take decisions in this context.

The significant decisions on defence and security that were taken at Nice, but which do not form part of the Treaty, are not discussed in this Paper, but are the subject of Research Paper 01/50, *The European Security and Defence Policy: Nice and Beyond.*

B. Police and Judicial Cooperation in Criminal Matters (Article 31 TEU)

The Treaty of Nice includes specific reference to the European Judicial Cooperation Unit or *Eurojust* in amended Articles 29 and 31.

The TEU established the objective of combating organised crime in order to provide EU citizens with a high level of safety within an area of freedom, security and justice. The Tampere European Council in October 1999 agreed on the setting up of Eurojust. The Tampere Conclusions stated:

> … that a unit (Eurojust) should be set up composed of national prosecutors, magistrates or police officers of equivalent competence, detached from each Member State according to its legal system. Eurojust should have the task of facilitating the proper coordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases, notably based on Europol's analysis, as well as of cooperating closely with the European Judicial Network, in particular in order to simplify the execution of letters rogatory. The European Council requests the Council to adopt the necessary legal instrument by the end of 2001.[81]

Agreement was reached at Tampere on the shape of a provisional unit which in its final form would bring judicial cooperation up to the level of police cooperation.

The French IGC delegation proposed that *Eurojust* be given the same weight in the new Treaty as the European Police Office, *Europol*, to ensure a balanced and consistent approach to judicial cooperation and police cooperation in the legal basis. In a submission in November 2000, they proposed referring specifically to Eurojust in the Treaty.[82] The

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80 Foreign Affairs Committee Fifth Report, *European Union Enlargement and Nice Follow-up*, HC 318, 2000-01, 10 April 2001.

81 Presidency Conclusions, European Council, Tampere, 15-16 October 1999. The Tampere decision is recalled in Declaration 2 of the Treaty of Nice.

82 CONFER 4806/1/00, 19 November 2000.

final text of amended Article 29 TEU states that the Council shall promote "cooperation through the European Judicial Cooperation Unit ("Eurojust")".

Amended Article 31 TEU includes Eurojust in the scope of common action on judicial cooperation in criminal matters in three main areas:

- Enabling Eurojust to facilitate coordination between Member States' national prosecuting authorities;
- Promoting support by Eurojust for criminal investigations in serious cross-border crime, particularly organised crime, using Europol analysis;
- Facilitating close cooperation between Eurojust and the European Judicial Network,[83] especially to facilitate the execution of letters rogatory and extradition requests.

The Government set out its position on Eurojust in the following Parliamentary Answer:

> The Government fully support the decision to establish Eurojust and is actively participating in the current work to negotiate the necessary legal instrument. In discharging the remit from Tampere, the Government believe that Eurojust should co-ordinate and facilitate cross-border investigations, but without directing the national authorities involved. In addition to dealing with other types of serious crime, the Government consider that Eurojust should take an active part in the investigation and prosecution of cases of fraud against the finances of the European Union. Eurojust will also need to establish close links with Europol to enable the two organisations to co-operate fully in the European Union's fight against organised crime. The Government have fully supported the decision to establish a Provisional Judicial Co-operation Unit in Brussels in the interim period before Eurojust is established. A similar method was used successfully when Europol was established, and experience gained from the operation of the Provisional Unit will feed into the negotiations on Eurojust itself.[84]

Eurojust initiatives from the Member States and the Commission were discussed during 2000, based on the Tampere proposal but also drawing on national expertise and experience.[85] Since agreement on the Nice Treaty, Council proposals put forward under Articles 31 and 34(2)(c) of the Treaty (TEU)[86] have raised concerns in the UK relating to the powers of Eurojust, to the degree of influence the body is intended to exercise over national prosecution decisions, to the relationship between Eurojust and the Commission and to data protection.

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83 Set up by Joint Action 98/428/JHA adopted by Council on 29 June 1998 (OJL 191, 7 July 1998, p.4).

84 HC Deb 22 November 2000 cc 210-1W.

85 The background to Eurojust proposals is summarised in European Scrutiny Committee Scrutiny Sixth Report *European Judicial Cooperation Unit (Eurojust)*, HC 28-vi, 2000-2001, 14 February 2001.

86 Draft Council Decision setting up Eurojust, see European Scrutiny Committee Sixth Report.

The Government has said that it "could not accept any wording that accorded the Commission any 'operational' role in national investigations or prosecutions."[87] Referring to Articles Y and Z of Eurojust 21, the most recent Eurojust proposal, the then Home Office Minister, Barbara Roche, commented:

> Articles Y and Z set out the differentiated powers of Eurojust when it is acting collectively (or 'formally') or 'informally' through its national members. The main point to note is that Eurojust acting collectively can ask, but not order, Member States to undertake certain actions and can expect to be told the reasons if the Member State concerned declines. This power is not available to national members acting informally without the backing or authority of Eurojust acting as a unit.[88]

With regard to data protection the Government commented that it had:

> … made clear during negotiations that currently the regime lacks any provision relating to individuals' rights to gain access to the data held about them, lacks oversight by a national supervisory authority of the processing done by a Member State and lacks oversight by an EU-wide supervisory authority of the processing done by Eurojust itself.[89]

The Scrutiny Committee concluded:

> 2.19 We consider that a key aspect of the Eurojust proposal is the effect the creation of the unit may have on the discretions vested by national law in the prosecuting authorities. With this concern in mind, we welcome the Government's view that it could not accept any wording which accorded the Commission any operational role in national investigations or prosecutions.
>
> 2.20 We also note the Government's view that Eurojust should be an organisation which would co-ordinate and facilitate cross-border investigations without directing the national authorities. We agree with this view, but we consider that the current text is ambiguous on the degree of influence which Eurojust is expected to exercise. The requirement that a prosecuting authority in a Member State should be obliged to account to Eurojust for its reasons for not complying with a request to prosecute, or for not complying with a request to co-ordinate prosecutions with those of another Member State, suggests to us that Eurojust is intended to have some influence over prosecution discretions; otherwise there would seem to be little point in asking for the reasons to be stated. We invite the Minister to explain why it is thought necessary to include this requirement.[90]

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87 *Ibid.*

88 European Scrutiny Committee Sixth Report: http://esd.hclibrary.parliament.uk:8051/ESDHTML/esd.html

89 European Scrutiny Committee Sixth Report: http://esd.hclibrary.parliament.uk:8051/ESDHTML/esd.html

90 *Ibid.*

C. Human Rights

Article 7, concerning procedures for dealing with suspected human rights violations by Member State governments, except in so far as it applies to Article 309 TEC, is an intergovernmental matter.

XII Could there be a referendum in the UK?

There is no constitutional requirement to hold a referendum for any purpose in the UK, but Parliament is free to legislate for a referendum on any question at any time. Parliament cannot be formally bound by the outcome of a referendum, but a referendum could be made to have other legal effects. For example, referendum legislation might stipulate that, depending on the outcome, a minister will lay before Parliament an Order in Council which would either bring into force or repeal an Act of Parliament. Such a provision could, if Parliament so decided, be added to the *European Communities (Amendment) Bill* relating to the *Treaty of Nice*.

The Leader of the Opposition, William Hague, called for a referendum on the Amsterdam Treaty in 1997 and this demand was reiterated by the then shadow Foreign Secretary, Michael Howard, at the Conservative Party Conference on 8 October 1997. Mr Hague said that a Conservative government would not ratify the Treaty of Nice as it stands.[91]

The Prime Minister, Tony Blair, rejected calls for a referendum on the Amsterdam Treaty in parliamentary answers in July 1997,[92]and does not intend to hold one on the Treaty of Nice.[93]

XIII The Ratification Process

A. Ratification Timetable

The Treaty text agreed in Nice was subject to legal and linguistic editing for several weeks. The final text was signed in a fairly low-key ceremony in Brussels on 26 February 2001. It was published as Command Paper 5090 (European Communities 1(2001)) in the UK in March 2001.

The ratification process has now begun in the Member States, and will be carried out in accordance with their respective constitutional traditions. This could take a year or more to complete and the target for implementation is the end of 2002.

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91 HC Deb 11 December 2000 c 353.
92 HC Deb 2 July 1997 c 289 and 9 July 1997, 933.
93 HC Deb 11 December 2000 c 356.

Various elements in the Treaty do not require immediate implementation and will come into force at a deferred date (e.g. voting weights in the Council, EP seats etc). The whole Treaty will therefore come into force over time, rather than upon ratification by the Member States.

Although enlargement is not directly consequential on ratification of Nice, failure to ratify and implement the Treaty within the next 12-18 months could have repercussions for the enlargement process in the longer term. A solution to the Irish problem will have to be found if the Nice Treaty is to come into force, although failure to implement the Treaty would not necessarily prevent an initial, modest enlargement. The Irish Government is working with the Commission and with the Swedish Presidency to take any steps necessary to allow Ireland to ratify the Treaty. There are no specific measures currently on the table.

The winding up of the European Coal and Steel Community (ECSC), the Treaty on which is due to expire on 23 July 2002, might also be jeopardised by a failure to implement the Treaty. The Protocol annexed to the Nice Treaty "on the financial consequences of the expiry of the ECSC Treaty and on the research fund for coal and steel" will be the legal basis for proposals already made by the Commission.[94] If the Treaty is not ratified by 23 July 2002 "the post-ECSC legal situation could prove very uncertain".[95]

B. Ratification in the other Member States

All the other Member States except Ireland are ratifying the Treaty via a parliamentary process alone. Ireland held a referendum on ratification on 7 June 2001 in which the electorate voted against the Treaty.[96] Below is a synopsis of the ratification procedures and progress in the other EU Member States as of 16 June 2001.

Austria

There will be a vote on the Nice Treaty in the *Nationalrat* (National Council, the lower house), for which a two-thirds majority will be required. A referendum would only be necessary if the Treaty could be termed an amendment to the Constitution as a whole.

The First Reading of the draft law on Nice took place in the *Nationalrat* on 11 May.

Belgium

EC/EU treaties are generally considered to be "composite" treaties, that is to say, they do not deal exclusively with matters of either community, regional or federal competence as

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94 COM(2000)519; COM(2000)520 and COM(2000)21.
95 *European Report*, 14 March 2001.
96 See Library Research Paper 01/57, *The Irish Referendum on the Treaty of Nice*, 21 June 2001.

set out in the Belgian constitution. Arrangements for the ratification of such treaties are laid down in a cooperation agreement between the federal authorities and the regional and community authorities and are designed to strike a balance between the autonomous prerogatives of the different components of the state. All parties at national and sub-national government levels are involved on an equal footing at each stage of the ratification procedure, although the whole process is co-ordinated by the federal Foreign Affairs Ministry. Composite treaties are signed by the federal minister for foreign affairs and the minister designated by the government of the regions and/or communities concerned.

The ratification process has not yet been initiated, but as Belgium takes over the EU Presidency on 1 July, the Government will be expected to make progress on ratification.

Germany

The *Bundestag* and the *Bundesrat* will need to approve the Treaty by a two-thirds majority vote. The resulting law is then signed by the President. However, the German Constitutional Court (Article 93(1)) may have to take a decision on the constitutional implications of the Treaty, a process that could take around six months. Referendums are ruled out in principle by the German Constitution, unless the matter at issue relates to re-organisation of the federal Länder. The *Länder* are unlikely to reject the Treaty given the Annex IV Declaration pledging future action on the delimitation of competences.

A draft law on Nice was submitted to the *Bundesrat* on 14 March 2001 and first reading was completed on 11 May. The *Bundestag* has yet to consider the Treaty, which is likely to be approved before the end of 2001.

Denmark

On 27 February the Danish Ministry of Justice report confirmed that the Nice Treaty did not involve a transfer of power to a supranational organisation and could therefore be passed by a simple majority in the unicameral parliament, the *Folketing*.[97]

There are two possible routes for ratification according to the Danish Constitution. In order to ratify a treaty which involves the transfer of powers to a supranational organisation like the EU, there must be either a five-sixths majority in the *Folketing*, or, if there is a smaller majority in the *Folketing*, ratification can take place if the Bill is confirmed in a referendum. Had the Treaty been deemed to require a constitutional amendment, the procedure would have been even more demanding. This would have to be passed by two successive parliaments, with intervening elections, and then confirmed by at least 40% of the electorate.

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[97] *Agence France Presse*, 27 February 2001.

The *Folketing* adopted the draft ratification law on 1 June by 98 votes to 14 with 1 abstention, in spite of the powerful Eurosceptic lobby.

Spain

The ratification of the Treaty of Nice will take place according to the special procedure laid down in Article 93 of the Spanish Constitution, which requires an absolute majority in the Congress of Deputies.

The Council of State gave an Opinion on the Treaty on 19 April 2001 and the High Council of the Judiciary gave an Opinion on 22 May 2001. A draft 'organic' law authorising ratification of the Nice Treaty was presented by the government to the *Cortes Generales* (Congress and Senate) on 8 June and is presently being considered by the foreign affairs committee.

Finland

Treaties which enter into the domain of the legislative power of Parliament require approval by Parliament. Parliamentary approval is by a simple majority of the votes cast in the final, third reading of the Bill concerning the Treaty. However, if the provisions of the Treaty are at variance with the Constitution, the Bill has to be approved by a majority of two thirds of the votes cast in the third reading. The final decision on which procedure to apply will be made by the Constitutional Law Committee of Parliament.

Obligatory referendums do not exist under the Finnish Constitution. An optional referendum may be held for consultative purposes.

A draft ratification law was brought before Parliament on 14 June 2001.

France

It is the President of the Republic who ratifies treaties, but parliamentary authorisation is necessary for treaties which relate to international organisations. There is no obligation to hold a referendum, although a referendum was held on the Maastricht Treaty. The governing left-right cohabitation 'delivered' the Nice Treaty as a success and has promoted it in a positive light.

The *Conseil d'Etat* (Council of State) gave an Opinion on the Treaty on 3 May 2001. The National Assembly debated the Treaty on 5 June 2001 and formally approved it on 12 June by 407 votes to 27 with 113 abstentions.[98] It is likely to pass through all stages before the summer recess.

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[98] The verbatim report of the debate can be found on the French National Assembly website at: http://www.assemblee-nationale.fr/cra/2000%2D2001/2001061215.asp#P142_33496.

Greece

According to the Greek Constitution, the Treaty requires parliamentary ratification (simple majority). Article 44 of the Constitution allows the possibility, in the case of vital national interests, for the President of the Republic to call a referendum after a resolution supported by a majority in Parliament on a proposition from the Council of Ministers.

The parliamentary process has not yet begun.

Ireland

If ratification of an international treaty requires changes to the Irish Constitution, then a referendum must be held prior to the parliamentary process. The draft ratification law was published on 29 March 2001. In the referendum on 7 June 2001, 35% of the electorate voted by 53.9% to 46.1% against ratification of the Treaty. The Irish Government is now in the process of considering how to proceed.

Italy

Under the Italian Constitution, both the Senate and the Chamber of Deputies must authorise the ratification of the Treaty, on a vote by simple majority. This procedure could take an estimated six to twelve months. The Constitution does not provide a basis for a direct obligation to hold a referendum on ratification of the Treaty.

Italy's recent change of government, bringing in the right-wing Silvio Berlusconi, has created political uncertainty about the timetable for ratification.

Luxembourg

According to the terms of Article 37 of the Luxembourg Constitution, the Grand Duke concludes treaties, but they are not effective until they have been approved by the Chamber of Deputies. The Luxembourg Constitution does not make provision for referendums as an instrument of ratification of international treaties.

A draft ratification law has been under the scrutiny of the European Affairs Committee since 23 April 2001.

Netherlands

The ratification of the Treaty of Amsterdam requires the vote of the national parliament, by a simple majority of votes.

The ratification process has not yet begun.

Portugal

Ratification is completed by means of a decree adopted by the Assembly of the Republic, following a report by the competent Standing Committees. A new Constitution came into force in October 1997, and established that a referendum can be held on questions of relevant national interest that concern international conventions. However, the Nice Treaty was not considered to be in this category.

A draft ratification law was submitted to the Parliament on 30 May 2001.

Sweden

The approval of the *Riksdag* (the Swedish Parliament) by three-quarters of those voting is required if a treaty relates to a subject over which the Parliament has competence.

The ratification process has not yet begun.