
ARTICLES

The Treaty of Nice

FRANK-FLORIAN SEIFERT *

1. Introduction: How to Make Ready the European Union for Enlargement?

The Treaty of Nice is the fourth comprehensive revision of the treaties establishing the European Communities and the European Union after the Single European Act (that came into force 1 July 1987), the Treaty of Maastricht (that came into force 1 November 1993) and the Treaty of Amsterdam (that came into force 1 May 1999).¹

The Intergovernmental Conference (ICG, “Conference”) concluded its work on the Treaty of Nice following difficult and tense negotiations on 11 December 2000. The agreement covers the institutional issues that had not been settled at Amsterdam (the so-called “Amsterdam-left-overs”)² and which had to be resolved before enlargement, and on a series of other points not directly connected with enlargement.³ This agreement, the “Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (2001 /C 80 /01)”,⁴ was signed in Nice on 26 February 2001.⁵ Its main aim is to make the European Union (EU) ready for enlargement through the accession of states of Middle-, East- and Southeast-Europe.⁶ Since the beginning of 1998 there have been accession negotiations with the Czech Republic, Estonia, Hungary, Slovenia, Poland and Cyprus, and since the end of 1999 with Bulgaria, Latvia, Lithuania, Malta, Romania and Slovakia;⁷ Turkey is a special case where negotiations are only about a “partnership for accession”.⁸ In accordance with the conclusions of the Helsinki⁹ and

* Attorney at Law, Baumann/Krüger/Eiding Rechtsanwälte, Würzburg, Germany.

¹ For a brief history relating the former comprehensive revisions see *Fischer*, Der Vertrag von Nizza, Baden-Baden: Nomos, 2001, 15-18; *Schäfer*, Der Vertrag von Nizza – seine Folgen für die Zukunft der Europäischen Union, in: Bayerische Verwaltungsblätter 2001, 460-466 (460-461); *Wiedmann*, Der Vertrag von Nizza – Genesis einer Reform, in: Europarecht 2001, 185-215 (189-191).

² See *Borchmann*, Der Vertrag von Nizza, in: Europäische Zeitschrift für Wirtschaftsrecht 2001, 171-173 (171-172); *Hatje*, Die institutionelle Reform der Europäischen Union – der Vertrag von Nizza auf dem Prüfstand, in: Europarecht 2001, 143-184 (143-147).

³ Especially for the negotiations see *Fischer* (fn. 1), 23-60, 559-562; *Wiedmann* (fn. 1), 185-189, 191-195.

⁴ The Treaty of Nice is available in the web under address: “<http://europa.eu.int/eur-lex/en/treaties/index.html>” (5 April 2002); for information “http://europa.eu.int/comm/nice_treaty/index_en.htm” (5 April 2002), too. See *Fischer* (fn. 1), 79-261.

⁵ For a short summary see *Fischer* (fn. 1), 61-76; *Riedel*, Reform der EU durch den Vertrag von Nizza, in: Juristische Ausbildung 2001, 821-823.

⁶ See *Gnan*, Der Vertrag von Nizza, in: Bayerische Verwaltungsblätter 2001, 449-459 (459); *Wiedmann*, Anmerkungen zum Vertrag von Nizza, in: Juristische Schulung 2001, 846-851 (846).

⁷ See *von Kyaw*, Weichenstellungen des EU-Gipfels von Nizza, in: Internationale Politik 2001, 5-12 (11-12).

⁸ See *Fischer* (fn. 1), 249-250; *Wessels*, Zukunftsfähig? – Die Europäische Union à 27, in: Internationale Politik 2001, 13-22 (13).

⁹ See *Fischer* (fn. 1), 29-30, 35.

Nice European Councils, the EU must from the end of 2002 be in a position to take in the new Member States that are ready.

2. The Treaty of Nice: Substantive Amendments

In the main part of this article some aspects of the substantive amendments relating to EU/EC law follow.

2.1 Systematic of the Treaty of Nice

The Treaty of Nice consists of two main parts.¹⁰ In the first part there are substantive amendments relating to EU/EC law. Article one of the Treaty of Nice leads to several amendments of the Treaty on European Union (EU Treaty) in 15 points. Article 2 changes the Treaty establishing the European Community (EC Treaty) in 47 different points. Article 3 relates to the Treaty establishing the European Atomic Energy Community (amendments in 25 points). Article 4 relates to the Treaty establishing the European Coal and Steel Community (amendments in 19 points). According to Article 5 the Protocol on the Statute of the European System of Central Banks and of the European Central Bank shall be amended. Article 6 refers to the Protocol on the privileges and immunities of the European Communities. Part two contains in Articles 7 to 13 transitional and final provisions.

Following these two main parts there are the important protocols to the Treaty of Nice. First, there is the Protocol annexed to the Treaty on European Union and to the Treaties establishing the European Communities: the Protocol on enlargement of the European Union. Second, there is the Protocol annexed to the Treaty on European Union, to the Treaty establishing the European Community and to the Treaty establishing the European Atomic Energy Community: the Protocol on the Statute of the Court of Justice. Third and last, there are the Protocols annexed to the Treaty establishing the European Community: the Protocol on the financial consequences of the expiry of the ECSC Treaty and on the research fund for coal and steel¹¹ and the Protocol on Article 67 of the Treaty establishing the European Community.

The Final Act concludes the Treaty of Nice. The Conference adopted twenty four declarations and took note of three further declarations annexed to this Final Act. Among the adopted declarations are the Declaration on the enlargement of the European Union (declaration No. 20), the Declaration on the qualified majority threshold and the number of votes for a blocking minority in an enlarged Union (declaration No. 21) and the Declaration on the future of the Union (declaration No. 23). These are considered the most important.

¹⁰ See *Borchmann* (fn. 2), 171; *Gnan* (fn. 6), 449; *Wiedmann* (fn. 6), 846-847.

¹¹ The ECSC Treaty will expire on 23 July 2002, 97 Treaty establishing the European Coal and Steel Community. At the request of the Council, the Commission in September 2000 put forward a draft decision on the transfer of ECSC funds to the EC to be used for research in sectors related to the coal and steel industry. For reasons of legal certainty, it has been deemed preferable to settle this matter through a protocol annexed to the Treaty of Nice.

2.2 The Treaty of Nice and its Substantive Amendments in Particular

Amendments relating to the EU Treaty on the one hand and to the EC Treaty on the other.

2.2.1 Amendments Relating to the Treaty on European Union

(1) Fundamental rights: Pursuant to Article 7 (2) EU Treaty (new), the European Council can declare the existence of a serious and persistent breach of fundamental rights. If this occurs, the Council may suspend certain rights of the country concerned, Article 7 (3) EU Treaty (new). The Treaty of Nice has supplemented this procedure with a preventative instrument.¹² Upon a proposal of one-third of the Member States, the Parliament or the Commission or the Council, acting by a four-fifths majority of its members and with the assent of the European Parliament (EP), can declare that a clear danger exists of a Member State committing a serious breach of the fundamental rights and address to that Member State appropriate recommendations, Article 7 (1) EU Treaty (new). The Court of Justice (COJ) will be competent only for disputes concerning the procedural provisions under Article 7 EU Treaty (new), and not for the appreciation of the justification or the appropriateness of the decisions taken pursuant to this provision, Article 46 lit. e EU Treaty (new).¹³

(2) European security and defence policy: The Nice European Council adopted the Presidency's report¹⁴ on the European security and defence policy which, *inter alia*, provides for the development of the EU's military capacity, the creation of permanent political and military structures and the incorporation into the EU of the crisis management functions of the Western European Union (WEU).¹⁵ While this is not a precondition for making European security and defence policy operational speedily, on the basis of the current provisions of the Treaty, the Treaty of Nice amends Article 17 EU Treaty (new). It removes the provisions defining the relations between the EU and the WEU.¹⁶ In addition, the Political and Security Committee (PSC, a new designation of the political committee in the Treaty) may be authorised by the Council, to manage a crisis and for the duration of that crisis, take appropriate decisions under the so-called "second pillar" to ensure the political control and strategic leadership of the crisis management operation, Article 25 EU Treaty (new).¹⁷

(3) Eurojust: The Conference did not add, as the Commission proposed,¹⁸ a provision that would have made it possible to create a European prosecutor to protect the financial interests of the EC. However, the Treaty of Nice does supplement Article 31 of the EU

¹² See Fischer (fn. 1), 88-89; Gnan (fn. 6), 458; Hatje (fn. 2), 172-173; Wiedmann (fn. 6), 847.

¹³ See Fischer (fn. 1), 89-90; Hatje (fn. 2), 174-175.

¹⁴ See the Declaration on the European security and defence policy (declaration No. 1).

¹⁵ See O'Sullivan, Memorandum to the members of the Commission – Summary of the Treaty of Nice (Brussels, 18 January 2001, SEC (2001) 99), 1-15 (11).

¹⁶ See Fischer (fn. 1), 91; Hatje (fn. 2), 153; Wiedmann (fn. 6), 847.

¹⁷ See Fischer (fn. 1), 93-94; Hatje (fn. 2), 153; Wiedmann (fn. 6), 847.

¹⁸ See O'Sullivan (fn. 15), 11.

Treaty (new) and makes reference to and provides the description of the tasks of “Eurojust”.¹⁹ This is a unit of seconded magistrates whose task it will be, within the framework of judicial cooperation in criminal matters, to contribute to the proper coordination of the national authorities responsible for criminal proceedings,²⁰ see Article 29 (2) EU Treaty (new).

(4) Venue for European Councils meetings: The Conference adopted a declaration annexed to the Treaty of Nice²¹ stipulating that “as from 2002, one European Council meeting per presidency will be held in Brussels. When the Union comprises 18 members, all European Council meetings will be held in Brussels”.²² It should be noted that this declaration relates only to formal European Council meetings. The presidencies are free to organise informal Council meetings wherever they like (or even not to organise any), in line with the informal Council meetings which can be organised in places other than those stipulated in the so-called Protocol on the seat of the institutions.²³

2.2.2 Amendments Relating to the Treaty Establishing the European Community

The Conference adopted a declaration attached to the Treaty of Nice on inter-institutional agreements.²⁴ The declaration states that relations between community institutions are governed by a duty to co-operate sincerely²⁵ and that when it is necessary, to facilitate the application of the provisions of the Treaty, the EP, the Council and the Commission can conclude inter-institutional agreements.²⁶ These agreements can neither change nor supplement the provisions of the Treaty and can be concluded only with the agreement of these three institutions.

2.2.2.1 Amendments Relating to Institutional Provisions

(1) The European Parliament: Article 191 of the EC Treaty has been supplemented by a legal base that allows the adoption via the co-decision procedure, of a statute for European level political parties and particularly the rules concerning their funding, Article 191 (2) EC Treaty (new).²⁷ The regulations and general conditions governing the performance of the duties of members of the EP will be approved by the Council by a

¹⁹ See *Fischer* (fn. 1), 96-98; *Gnan* (fn. 6), 459; *Hatje* (fn. 2), 153-154; *Wiedmann* (fn. 6), 847-848.

²⁰ See the Declaration on Article 31 (2) of the Treaty on European Union (declaration No. 2).

²¹ See the Declaration on the venue for European Councils (declaration No. 22).

²² See *Fischer* (fn. 1), 252-253; *Hatje* (fn. 2), 154.

²³ Protokoll über die Festlegung der Sitze der Organe und bestimmter Einrichtungen und Dienststellen der Europäischen Gemeinschaften sowie des Sitzes von Europol (Amtsblatt der Europäischen Gemeinschaften, Nr. C 340 vom 10.11.1997, 112).

²⁴ See the Declaration on Article 10 of the Treaty establishing the European Community (declaration No. 3).

²⁵ See *Geiger*, EUV/EGV, 3. Ed. 2000, Article 10 EC Treaty, 179-181 (No. 4-7); *Gnan* (fn. 6), 459.

²⁶ See *O’Sullivan* (fn. 15), 11-12.

²⁷ See *Fischer* (fn. 1), 130; *Gnan* (fn. 6), 454.

qualified majority, with the exception of the provisions relating to taxation, Article 190 (5) EC Treaty (new).²⁸

The EP will henceforth be able, in the same way as the Council, the Commission and the Member States, to institute proceedings, to have acts of the institutions to be declared void without having to demonstrate specific concern, Article 230 (2), (3) EC Treaty (new),²⁹ and to seek a prior opinion from the COJ on the compatibility of an international agreement with the Treaty, Article 300 (6) EC Treaty (new).³⁰

The responsibilities of the EP have been extended by expanding the scope of the co-decision³¹ and by the assent required to establish enhanced cooperation in an area covered by the co-decision process.³² The EP will also be called upon to state its opinion when the Council intends to declare that a clear danger exists of a serious breach of fundamental rights occurring, Article 7 (2) EU Treaty (new).³³

(2) The Commission: The Conference decided to change the procedure for nominating the Commission.³⁴ Henceforth, the nomination of the President is a matter for the European Council acting by a qualified majority. This appointment must be approved by the EP, Article 214 (2) (sub. 1) EC Treaty (new). Thereafter, the Council, acting by a qualified majority and in agreement with the appointed President, will adopt the list of other persons it intends to appoint as members of the Commission, drawn up in accordance with the proposals made by each Member State, Article 214 (2) (sub. 2) EC Treaty (new). The purpose of this is solely to ensure that the Council cannot designate as a member of the Commission a person not proposed by the government of the Member State of which he or she is a national.³⁵ It has no effect on the procedure whereby the president appointed, before he gives his agreement to this list, undertakes political contacts with each government to ensure that the new Commission is composed in a harmonious and balanced manner. Lastly, the President and the members of the Commission will be appointed by the Council acting by a qualified majority after the approval of the body of Commissioners by the EP, Article 214 (2) (sub. 3) EC Treaty (new).

The new wording of Article 217 of the EC Treaty increases the President's powers. Political leadership lies in the hands of the President, Article 217 (1) EC Treaty (new).³⁶ He will

- Decide the internal organisation of the Commission, Article 217 (1) EC Treaty (new);

²⁸ See *Fischer* (fn. 1), 130; *Gnan* (fn. 6), 454.

²⁹ See *Fischer* (fn. 1), 145; *Gnan* (fn. 6), 457; *Hatje* (fn. 2), 176.

³⁰ See *Fischer* (fn. 1), 155; *Gnan* (fn. 6), 457; *Hatje* (fn. 2), 176.

³¹ See *Gnan* (fn. 6), 456; *Hatje* (fn. 2), 178; *Wiedmann* (fn. 1), 211.

³² See *Gnan* (fn. 6), 456; *Hatje* (fn. 2), 162-163; *Wiedmann* (fn. 1), 209-210.

³³ See *Fischer* (fn. 1), 90; *Hatje* (fn. 2), 172-173, 178; *Wiedmann* (fn. 6), 847.

³⁴ See *Fischer* (fn. 1), 132-133; *Gnan* (fn. 6), 455; *Hatje* (fn. 2), 149-150; *Schäfer* (fn. 1), 464; *Wiedmann* (fn. 1), 203.

³⁵ See *O'Sullivan* (fn. 15), 4.

³⁶ See *Fischer* (fn. 1), 135-137; *Gnan* (fn. 6), 455; *Hatje* (fn. 2), 151; *Schäfer* (fn. 1), 463; *Wiedmann* (fn. 1), 203; *Wiedmann* (fn. 6), 849.

- Allocate portfolios to the Commissioners and if necessary reassign responsibilities during his term of office, Article 217 (2) EC Treaty (new);
- Appoint, after collective approval of the body, vice-presidents, whose number is no longer established in the Treaty, Article 217 (3) EC Treaty (new); and
- May demand a commissioner's resignation, subject to the Commission's approval, Article 217 (4) EC Treaty (new), the so-called "*lex Prodi*".³⁷

(3) The legal system: The Conference has made major reforms to the EU's legal system.³⁸ The main provisions concerning the Court of First Instance (CFI), and particularly its responsibilities, are henceforth to be found in the Treaty.³⁹ In addition, the Treaty provides for the possibility to establish internal chambers to deal at first instance with certain proceedings relating to specific issues.⁴⁰ The Treaty has introduced greater flexibility to prepare the legal system for the future, has settled certain issues in the Court's statute,⁴¹ which can henceforth be amended by the Council acting unanimously at the request of the Court or of the Commission, Article 245 EC Treaty (new).⁴² The approval of the rules of procedure of the COJ and of the CFI will henceforth be by qualified majority, Article 223 (sub. 6), 224 (sub. 5) EC Treaty (new).⁴³

While the COJ will, as before, be composed of one judge from each Member State, Article 221 (sub. 1) EC Treaty (new), steps have been taken to maintain the effectiveness of the jurisdiction and coherence of its jurisprudence.⁴⁴ The "grand chamber", comprising eleven judges (including the President of the Court and the Presidents of the five-judge chambers), will generally deal with cases that are today handled by plenary session, Article 221 (sub. 2) EC Treaty (new), Article 16 (sub. 2-5) Protocol on the Statute of the Court of Justice (new).⁴⁵ The Presidents of the five-judge chambers will be elected for a three-year term of office which will be renewable once, Article 16 (sub. 1) Protocol on the Statute of the Court of Justice (new).⁴⁶

The CFI will have at least one judge from each Member State (the number is determined in the statute, which currently makes provision for 15 judges, Article 224 (sub. 1) EC Treaty

³⁷ See *Fischer* (fn. 1), 135-137; *Wiedmann* (fn. 6), 849.

³⁸ See *Gnan* (fn. 6), 457; *Hatje* (fn. 2), 164-165; *Lipp*, Europäische Justizreform, in: *Neue Juristische Wochenschrift* 2001, 2657-2663 (2657); *Sack*, Zur künftigen europäischen Gerichtsbarkeit nach Nizza, in: *Europäische Zeitschrift für Wirtschaftsrecht* 2001, 77-80 (77-78, 80).

³⁹ See *Fischer* (fn. 1), 143; *Hatje* (fn. 2), 165; *Lipp* (fn. 38), 2658-2659; *Sack* (fn. 38), 79.

⁴⁰ See *Gnan* (fn. 6), 458; *Hatje* (fn. 2), 167-168; *Sack* (fn. 38), 78-79.

⁴¹ See the Protocol on the Statute of the Court of Justice (Protocol annexed to the Treaty on European Union, to the Treaty establishing the European Community and to the Treaty establishing the European Atomic Energy Community); *Hatje* (fn. 2), 171-172.

⁴² See *Fischer* (fn. 1), 146; *Sack* (fn. 38), 79.

⁴³ See *Fischer* (fn. 1), 140-142; *Sack* (fn. 38), 79-80.

⁴⁴ See *Fischer* (fn. 1), 138-139; *Hatje* (fn. 2), 168-170.

⁴⁵ See *Hatje* (fn. 2), 169; *Sack* (fn. 38), 79.

⁴⁶ See *Hatje* (fn. 2), 169; *Sack* (fn. 38), 79.

(new), Article 48 Protocol on the Statute of the Court of Justice (new)).⁴⁷ As before, the number of judges in the CFI (stipulated up to now in the Decision establishing the Court of First Instance⁴⁸) can be changed. It should be noted that in response to a request submitted by the Court outside the framework of the Conference, the COREPER⁴⁹ agreed to an increase of six judges for the CFI.⁵⁰ The arrangement regarding the system of rotation for appointments has still to be decided.⁵¹

The Treaty sets out the distribution of responsibilities between the COJ and the CFI but it will be possible to make adjustments through the statute, see Article 220 (sub 1) EC Treaty (new). The CFI becomes the common law judge for all direct actions (particularly for proceedings against a decision, Article 230 EC Treaty, action for failure to act, Article 232 EC Treaty, action for damages, Article 235 EC Treaty),⁵² with the exception of those which will be attributed to a specialised chamber and those the statute reserves for the Court itself, Article 225 (1) EC Treaty (new).

The COJ retains responsibility for other proceedings (particularly action for failure to fulfil obligations, Article 226 EC Treaty), but the statute can entrust to the CFI categories of proceedings other than those listed in Article 225 EC Treaty. The idea is to maintain within the Court, as the jurisdictional supreme body of the EU, disputes concerning essential Community issues.⁵³ The Conference has accordingly asked the Court and the Commission to review the distribution of responsibilities as soon as possible so that appropriate proposals can be examined as soon as the Treaty of Nice comes into force.⁵⁴

The COJ, which is responsible for ensuring uniform application of Community law within the EU, in principle retains competence for investigating questions referred for a preliminary ruling.⁵⁵ However, pursuant to Article 225 EC Treaty, the statute may entrust to the CFI the responsibility for preliminary rulings in certain specific matters, Article 225 (3) EC Treaty (new).⁵⁶

The Council can set up specialised chambers to examine at first instance certain categories of actions in specific matters (e.g. in the area of intellectual property), Article 220 (sub. 3), 225a EC Treaty (new).⁵⁷ The Conference through a declaration asks that a draft decision be prepared to set up such chambers in order to settle disputes between the Community

⁴⁷ See *Gnan* (fn. 6), 458; *Sack* (fn. 38), 80.

⁴⁸ Doc. 88/591/EEC, ECSC, EAC, 24/11/1988. See *Geiger* (fn. 25), Article 225 EC Treaty, 723 (No. 1-5).

⁴⁹ See *Geiger* (fn. 25), Article 207 EC Treaty, 685 (No. 1-3).

⁵⁰ See *Fischer* (fn. 1), 141-142; *O'Sullivan* (fn. 15), 5.

⁵¹ See *Fischer* (fn. 1), 141-142; *O'Sullivan* (fn. 15), 5.

⁵² See *Fischer* (fn. 1), 143; *Gnan* (fn. 6), 457-458; *Sack* (fn. 38), 79.

⁵³ See *Lipp* (fn. 38), 2663; *Wiedmann* (fn. 6), 850.

⁵⁴ See the Declaration on Article 225 of the Treaty establishing the European Community (declaration no. 12); *O'Sullivan* (fn. 15), 5; *Sack* (fn. 38), 79.

⁵⁵ See *Geiger* (fn. 25), Article 234 EC Treaty, 760-771 (No. 1-41).

⁵⁶ See *Gnan* (fn. 6), 457; *Hatje* (fn. 2), 166-167; *Lipp* (fn. 38), 2658, 2661-2663; *Sack* (fn. 38), 78.

⁵⁷ See *Gnan* (fn. 6), 458; *Lipp* (fn. 38), 2659, 2661, 2663. See the Declaration on Article 225a of the Treaty establishing the European Community (declaration No. 16).

and its servants, Article 236 EC Treaty.⁵⁸

An appeal in cassation can be made before the CFI against a decision by the specialised chambers, Article 225 (2) EC Treaty (new).⁵⁹

The new Article 229a EC Treaty will allow the Council, acting unanimously, to attribute to the COJ the responsibility for settling disputes related to Community intellectual property rights.⁶⁰ This provision is aimed essentially at disputes between private parties in which the future European patent is involved.⁶¹ This Council decision will enter into force only after it has been adopted by the Member States (i.e. after ratification).

(4) The Court of Auditors:⁶² The Treaty henceforth stipulates explicitly that the Court of Auditors will consist of one national from each Member State, Article 247 (1) EC Treaty (new). The Court of Auditors may establish internal chambers to adopt certain categories of reports or opinions, Article 248 (4) (sub. 3) EC Treaty (new).

(5) The Economic and Social Committee (ESC)⁶³ and the Committee of the Regions (COR):⁶⁴ The Conference has not altered the number and distribution per Member State of the seats of the ESC and the COR. The Treaty henceforth stipulates that the number of members of these committees cannot exceed 350, Article 258 (sub. 1), 263 (sub. 2) EC Treaty (new), but this ceiling is not reached with the seats envisaged for the new Member States. The description of the members of the ESC has been changed and the Treaty states that the Committee is to consist of “representatives of the various economic and social components of organised civil society”, Article 257 (sub. 2) EC Treaty (new). For the COR, the Treaty of Nice henceforth explicitly stipulates that the members must hold a regional or local electoral mandate or be politically accountable to an elected assembly, Article 263 (sub. 1) EC Treaty (new).

(6) The European Central Bank (ECB)⁶⁵ and the European Investment Bank (EIB):⁶⁶ The Treaty of Nice does not change the composition of the Governing Council of the ECB (comprising the members of the executive board and the governors of the national central banks) but allows for changes to the rules on decision-making. At present, decisions are generally adopted by a simple majority of the members, each having one vote, Article 10 ECB Statute. This change requires a unanimous European Council decision, which must then be ratified by the Member States.

⁵⁸ See *Geiger* (fn. 25), Article 236 EC Treaty, 773-774 (No. 1-4).

⁵⁹ See *Fischer* (fn. 1), 142-144; *Sack* (fn. 38), 78.

⁶⁰ See *Fischer* (fn. 1), 145; *Gnan* (fn. 6), 458; *Lipp* (fn. 38), 2659, 2661, 2663.

⁶¹ See *Lipp* (fn. 38), 2659, 2661, 2663; *O'Sullivan* (fn. 15), 6.

⁶² See *Fischer* (fn. 1), 146-148; *Gnan* (fn. 6), 458.

⁶³ See *Fischer* (fn. 1), 148-150; *Gnan* (fn. 6), 457; *Wiedmann* (fn. 6), 850.

⁶⁴ See *Fischer* (fn. 1), 152-153; *Gnan* (fn. 6), 457; *Wiedmann* (fn. 6), 850.

⁶⁵ See *Häde*, *Der Vertrag von Nizza und die Wirtschafts- und Währungsunion*, in: *Europäisches Wirtschafts- und Steuerrecht 2001*, 97-102 (97-100).

⁶⁶ See *Fischer* (fn. 1), 153; *Gnan* (fn. 6), 459.

The Conference has stated that it expects the Governing Council to submit as quickly as possible a recommendation for amending the voting rules. As far as the EIB is concerned, the Treaty of Nice allows for the possibility of altering the composition of the board of directors and the rules on decision-making by a unanimous Council decision, Article 266 EC Treaty (new).

2.2.2.2 Amendments Relating to the Decision-Making Process

(1) Qualified majority vote:⁶⁷ The Treaty of Nice to some extent widens the scope of decision-making by qualified majority.⁶⁸ The most important provisions, which do so, as soon as the Treaty of Nice enters into force, are:⁶⁹

- Measures to facilitate freedom of movement for the citizens of the Union, Article 18 (2) EC Treaty (new);
- Judicial cooperation in civil matters, Article 65 EC Treaty (new);
- Conclusion of international agreements in the area of trade in services and the commercial aspects of intellectual property, Article 133 (4) EC Treaty (new), with exceptions;
- Industrial policy, Article 157 (3) (sub. 1) EC Treaty (new);
- Economic, financial and technical cooperation with third countries, Article 181a (2) EC Treaty, a new provision to adopt measures hitherto based on Article 308 EC Treaty;⁷⁰
- Approval of regulations and general conditions governing the performance of the duties of members of the EP, Article 190 (5) EC Treaty (new), with the exception of matters relating to the fiscal regime;
- Statute of political parties at the European level, Article 191 (2) EC Treaty (new);
- Approval of the rules of procedure of the COJ and the CFI, Article 223 (sub. 6), 224 (sub. 5) EC-Treaty (new).

⁶⁷ See *Gnan* (fn. 6), 452-454; *Hatje* (fn. 2), 154-156; *Schäfer* (fn. 1), 463; *Wiedmann* (fn. 1), 208-209.

⁶⁸ List of provisions to which the qualified majority rule will apply: A. Qualified majority as from the entry into force of the Treaty of Nice: I. Article 23 (2) (sub. 1), 24 (3), (4) EU Treaty (new), II. Article 13 (2), 18 (2), 65, 100 (1), (2), 111 (4), 123 (4), 133 (4), 157 (3) (sub. 1), 159 (3), 181a (2), 190 (5), 191 (2), 207 (2) (sub. 2), 214 (2) (sub. 1-3), 223 (sub. 6), 224 (sub. 5), 247 (3) (sub. 1), 248 (4) (sub. 5), 259 (1), 263 (4) EC Treaty (new); B. Deferred qualified majority: Article 62 No. 2 lit. a, 62 No. 3, 63 No. 3 lit. b (see the Declaration on Article 67 of the Treaty establishing the European Community (declaration No. 5)), 63 (sub. 1) No. 1, No. 2 lit. a, 66 (see the Protocol on Article 67 of the Treaty establishing the European Community), 161 (3), 279 (1) (sub. 2) EC Treaty (new).

⁶⁹ See *O'Sullivan* (fn. 15), 8.

⁷⁰ See *Fischer* (fn. 1), 128-129; *Wiedmann* (fn. 6), 850. See *Geiger* (fn. 25), Article 308 EC Treaty, 939-943 (No. 1-14.)

For the provisions of Title IV EC Treaty (new) – visas, asylum, immigration and other policies linked to the free movement of persons –, the Conference has agreed on a partial and deferred switch to qualified majority voting by means of different instruments (amendment of Article 67 EC Treaty (new), see Protocol on Article 67 of the Treaty establishing the European Community) and subject to different conditions (either from 1 May 2004, or after the adoption of Community legislation setting out the common rules and essential principles).⁷¹

Lastly, the changeover to qualified majority voting has been deferred until 2007 for the Structural Funds and the Cohesion Funds, Article 161 (3) EC Treaty (new), and for the adoption of financial regulations, Article 279 (1) (sub. 2) EC Treaty (new).

(2) In that (point (1)) –the opinion of the Commission⁷²– the picture is somewhat mixed for the five areas the Commission had identified as key areas:

- Taxation (Article 93, 94 and 175 EC Treaty (new)): maintenance of unanimity for all measures.

- Social policy (Article 42 and 137 EC Treaty (new)): maintenance of the status quo. However, the Council, acting in unanimity, can make the co-decision procedure applicable to those areas of social policy which are currently still subject to the rule of unanimity. This “bridge” cannot, however, be used for social security.

- Cohesion policy (Article 161 EC Treaty (new)):⁷³ it has been decided to switch to qualified majority voting but this will not apply until after the adoption of the multi-annual financial perspectives applicable from 1 January 2007.

- Policy on asylum and immigration (Article 62 and 63 EC Treaty (new)): application of the qualified majority rule has been postponed (2004) and will not concern the central elements of these policies, e.g. the so-called “sharing of the burden”, Article 63 No. 2 lit. b EC Treaty (new), or the conditions for entry and residence of nationals from third countries, Article 63 No. 3 lit. a EC Treaty (new).

- Common commercial policy (Article 133 EC Treaty (new)):⁷⁴ this henceforth includes the negotiation and conclusion of international agreements in the area of trade in services and the commercial aspects of intellectual property. These agreements are concluded by a qualified majority, except when the agreement includes provisions for which unanimity is required for the adoption of internal rules or when the agreement concerns an area on which the Community has not yet exercised its responsibilities. In addition, the agreements concerning the harmonisation of cultural and audiovisual services, education services, social services and health services continue to be the subject of responsibility shared

⁷¹ See *Fischer* (fn. 1), 111-112; *Wiedmann* (fn. 6), 848.

⁷² See *O’Sullivan* (fn. 15), 8-9.

⁷³ See *Fischer* (fn. 1), 125; *Wiedmann* (fn. 6), 849.

⁷⁴ See *Fischer* (fn. 1), 116-118; *Wiedmann* (fn. 6), 848-849.

with the Member States.

(3) Appointment: The appointment of members of certain institutions or bodies will henceforth be done by a qualified majority; this belongs to the members of the

- Commission, Article 214 (2), 215 (2), (3) EC Treaty (new),
- Court of Auditors, Article 247 (3) (sub. 1) EC Treaty (new),
- Economic and Social Committee, Article 259 (1) EC Treaty (new),
- Committee of the Regions, Article 263 (sub. 4) EC Treaty (new),

further, to the Secretary-General / High Representative for the common foreign and security policy and the Deputy Secretary-General of the Council, Article 207 (2) No. 2 EC Treaty (new), and a special representative, Article 23 (2) (sub. 1) EU Treaty (new), see Article 18 (5) EU Treaty.⁷⁵

(4) Co-decision: The Treaty of Nice has extended the scope of co-decision.⁷⁶ This procedure⁷⁷ will be applicable for seven provisions, which change over from unanimity to qualified majority voting (Articles 13, 62, 63, 65, 157, 159 and 191 EC Treaty (new), for Article 161 EC Treaty (new), the Treaty stipulates assent). Accordingly, most of the legislative measures, which, after the Treaty of Nice, require a decision from the Council acting by a qualified majority will be decided via the co-decision procedure. The Conference has not, however, extended the co-decision procedure to legislative measures, which already come under the qualified majority rule (e.g. in agricultural policy or trade policy).⁷⁸

2.2.2.3 Amendments Relating to Enhanced Cooperation

The Conference has comprehensively overhauled the provisions on enhanced cooperation,⁷⁹ particularly by listing in a single provision, the ten conditions necessary to establish enhanced cooperation, Article 43 EU Treaty (new), the so-called “clause A”.⁸⁰ While the essential characteristics of this instrument are largely unchanged (such as the principles whereby enhanced cooperation can be undertaken only as a last resort, Article 43a EU Treaty (new), and must be open to all Member States, Article 43b EU Treaty (new)), substantial changes have nevertheless been agreed.⁸¹

⁷⁵ See *Geiger* (fn. 25), Article 18 EU Treaty, 59 (No. 6).

⁷⁶ See *Wiedmann* (fn. 6), 850; *Geiger* (fn. 25), Article 251 EC Treaty, 811 (No. 1-2).

⁷⁷ See *Geiger* (fn. 25), Article 251 EC Treaty, 812-813 (No. 3-16).

⁷⁸ See *O’Sullivan* (fn. 15), 9.

⁷⁹ See *Fischer* (fn. 1), 104-107; *Gnan* (fn. 6), 455-456; *Hatje* (fn. 2), 160-163; *Schäfer* (fn. 1), 464; *Wiedmann* (fn. 1), 209-211, 214-215; *Wiedmann* (fn. 6), 848.

⁸⁰ See *O’Sullivan* (fn. 15), 9.

⁸¹ See *Hatje* (fn. 2), 160; *Wiedmann* (fn. 1), 209.

The minimum number of Member States required to establish enhanced cooperation is now set at eight, Article 43 lit. g EU Treaty (new), whereas the Treaty currently stipulates that a majority of Member States is needed, Article 43 lit. d EU Treaty.⁸² Thus the minimum number of States needed to establish enhanced cooperation will fall, with the successive enlargements, to under one-third of the members of the Union (as had been proposed by the Commission).⁸³

In the Treaty establishing the European Community (one part of the so-called “first pillar”) the possibility of opposing enhanced cooperation (the “veto”, Article 11 (2) (sub. 1, sub. 2) EC Treaty) has been removed. It has been replaced by the possibility for a Member State to take the matter up with the European Council, Article 11 (2) (sub. 1, sub. 2) EC Treaty (new).⁸⁴ In such an event, the Council may nevertheless act by a qualified majority on any proposal for enhanced cooperation. Furthermore, when enhanced cooperation concerns an area, which comes under the co-decision process, the assent of the EP is required.

The Treaty of Nice has introduced the possibility of establishing enhanced cooperation in the area of common foreign and security policy (the so-called “second pillar”), for the implementation of joint action or a common position, Article 27a-27e EU Treaty (new).⁸⁵ Enhanced cooperation of this kind cannot be used for issues which have military implications or which affect defence matters, Article 27b EU Treaty (new). The authorisation for enhanced cooperation is given by the Council after receiving the opinion of the Commission, particularly on the consistency of this enhanced cooperation with the EU’s policies, Article 27c (sub. 2) EU Treaty (new). The Council will decide by a qualified majority, Article 27e (sub. 2) EU Treaty (new), but each Member State may ask that the matter be referred to the European Council for the purpose of a unanimous decision, the so-called “emergency brake”, Article 23 (2) (sub. 2) EU Treaty.⁸⁶

For Police and judicial cooperation in criminal matters (the so-called “third pillar”), the possibility of the “veto” has been removed in line with what is envisaged for enhanced cooperation for the “first pillar”, Article 40a (2) (sub. 1, sub. 2) EU Treaty (new).⁸⁷

2.2.2.4 Other Amendments in Short

(1) Through Article 144 EC Treaty (new), the Treaty of Nice incorporates within the Treaty the Social Protection Committee, which had been established by the Council pursuant to the conclusions of the Lisbon European Council.⁸⁸

(2) The name of the Official Journal of the European Communities will be changed to

⁸² See *Geiger* (fn. 25), Article 43 EU Treaty, 117 (No. 7).

⁸³ See *Hatje* (fn. 2), 160-161; *O’Sullivan* (fn. 15), 9; *Wiedmann* (fn. 1), 209.

⁸⁴ See *Hatje* (fn. 2), 162-163; *Wiedmann* (fn. 1), 209-210.

⁸⁵ See *Fischer* (fn. 1), 96; *Hatje* (fn. 2), 162; *Wiedmann* (fn. 1), 209.

⁸⁶ See *Hatje* (fn. 2), 162-163.

⁸⁷ See *Hatje* (fn. 2), 162-163.

⁸⁸ See *Fischer* (fn. 1), 122-123.

“Official Journal of the European Union”, Article 254 EC Treaty (new).⁸⁹

3. Some Good News for Enlargement: The Protocol on the Enlargement of the European Union

First of all, because it is not yet known exactly when and in what order the applicant countries will join the Union, the new distribution of seats in the EP, the new composition of the Commission and the new definition of qualified majority within the Council are determined by the Treaty of Nice for a Union of only 15 Member States. The Treaty of Nice restricts itself to setting out the principles and methods for changing this system as the Union grows.

3.1 Changes within the Institutions During the Enlargement Process: General Explanations

These principles and methods are listed in the Protocol on the enlargement of the European Union⁹⁰ and attached declarations, particularly the Declaration on the enlargement of the European Union (declaration No. 20), which establishes the “common position”⁹¹ to be adopted by the current Member States during the accession negotiations with the applicant countries.⁹² The number of seats in the EP for the new Member States, the number of votes allocated to them within the Council, and particularly the qualified majority threshold applicable in the future, will thus be legally determined in the accession treaties. The Protocol on the enlargement of the European Union and the relevant declarations take account of only the 12 applicant countries with which accession negotiations have actually begun.

The changes brought by the Treaty of Nice to the composition of the Commission and the weighting of votes will be applicable only from 2005 and the new composition of the EP will apply from the elections in 2004.⁹³ For the applicant countries joining before these dates, the accession treaties must therefore also establish the number of members of the EP, commissioners, votes within the Council, which will be allocated to them, and the qualified majority threshold, up until the entry into force of the new rules. These temporary provisions will be based on the principles that have applied up until now in the accession

⁸⁹ See *Fischer* (fn. 1), 148; *Hatje* (fn. 2), 183.

⁹⁰ See *Fischer* (fn. 1), 185-197.

⁹¹ As a brief summary of the “common position” a list with every Member State and its EP seats (in total: 732), weighted votes (in total: 345), members in the Economic and Social Committee (in total: 344) and in the Committee of the Regions (in total: 344) as it the Declaration on the enlargement of the European Union (declaration No. 20) contains: Germany: 99/29/24/24, United Kingdom: 72/29/24/24, France: 72/29/24/24, Italy: 72/29/24/24, Spain: 50/27/21/21, Poland: 50/27/21/21, Romania: 33/14/15/15, The Netherlands: 25/13/12/12, Greece: 22/12/12/12, Czech Republic: 20/12/12/12, Belgium: 22/12/12/12, Hungary: 20/12/12/12, Portugal: 22/12/12/12, Sweden: 18/10/12/12, Bulgaria: 17/10/12/12, Austria: 17/10/12/12, Slovakia: 13/7/9/9, Denmark: 13/7/9/9, Finland: 13/7/9/9, Ireland: 12/7/9/9, Lithuania: 12/7/9/9, Latvia: 8/4/7/7, Slovenia: 7/4/7/7, Estonia: 6/4/7/7, Cyprus: 6/4/6/6, Luxembourg: 6/4/6/6, Malta: 5/3/5/5.

⁹² See *Schäfer* (fn. 1), 464.

⁹³ See *O’Sullivan* (fn. 15), 2.

negotiations, i.e. the transformation of the current system, ensuring equal treatment with the Member States of equivalent size.

3.2 Article 2 Protocol on the Enlargement of the European Union: The Composition of the European Parliament

The Conference has introduced a new distribution of seats in the EP looking ahead to a Union of 27 Member States, which will be applicable as from the next European elections in 2004.⁹⁴ The maximum number of members of the EP (currently set at 700) will rise to 732, Article 189 (2) EC Treaty (new). The number of seats allocated to the current Member States has been brought down by 91 (from the current 626 to 535). Only Germany (99 seats) and Luxembourg (six seats) retain the same number of members of the EP, Article 2.1 of the Protocol on the enlargement of the European Union. However, this reduction will be applicable in full, only for the assembly elected in 2009.

As the Union will undoubtedly not have 27 Member States in 2004, it has been decided for the 2004 European elections to increase on a *pro rata* basis the number of members of the EP to be elected (in the current Member States and in the new Member States with which accession treaties will have been signed by 1 January 2004) to reach the total of 732 (although the number of members of the EP to be elected in each Member State cannot be higher than the current number), Article 2.2, 2.3 of the Protocol on the enlargement of the European Union. As the likelihood is that new Member States will enter the Union during the 2004-2009 term of office – and that as a result additional members of the EP will be elected in these countries – it is anticipated that the maximum number of 732 seats in the EP may be temporarily exceeded in order to accommodate members of the EP from the countries that will have signed accession treaties after the 2004 European elections, Article 2.4 of the Protocol on the enlargement of the European Union.

3.3 Article 3 Protocol on the Enlargement of the European Union: The Weighting of Votes in the Council

The decision-making system by qualified majority will be changed as from 2005.⁹⁵ In future, a qualified majority will be obtained if the decision receives at least a specified number of votes (the qualified majority threshold) and the decision is approved by a majority of Member States, Article 3.1 (a) (i) Protocol on the enlargement of the European Union. The number of votes allocated to each Member State has been changed. While the number of votes has been increased for all Member States, the increase is higher for the most populated Member States, Article 3.1 (a) (i) Protocol on the enlargement of the European Union. The five biggest Member States' in terms of population will, in the 15-strong European Union, have 60% of votes compared with 55% at present.

The qualified majority threshold was at the centre of debates during the closing stages of the

⁹⁴ See *Gnan* (fn. 6), 456; *Hatje* (fn. 2), 151-153; *Schäfer* (fn. 1), 461.

⁹⁵ See *Gnan* (fn. 6), 449-452; *Hatje* (fn. 2), 156-160; *Schäfer* (fn. 1), 462-463; *Wiedmann* (fn. 1), 203-207; *Wiedmann* (fn. 6), 850-851.

Conference.⁹⁶ The final compromise is complex. This notwithstanding, the qualified majority threshold will be fixed in the successive accession treaties on the basis of principles determined by the Treaty of Nice, particularly by the Declaration on the qualified majority threshold and the number of votes for a blocking minority in an enlarged Union (declaration No. 21), Article 3.2 of the Protocol on the enlargement of the European Union.

The Treaty of Nice also provides for the possibility for a member of the Council to request verification that the qualified majority represents at least 62% of the total population of the EU, Article 3.1 (a) (ii), (b), (c) Protocol on the enlargement of the European Union. If this condition is not met, the decision will not be adopted. However, this condition applies only if verification is requested.

3.4 Article 4 Protocol on the Enlargement of the European Union: The Composition of the Commission

The Conference has decided to defer imposing a ceiling on the number of members of the Commission.⁹⁷ With effect from 2005, the Commission will comprise one national per Member State, Article 4.1 of the Protocol on the enlargement of the EU. The larger Member States thus lose at that time the opportunity of proposing a second member of the Commission, irrespective of how many Member States the EU has at that date. When the Commission is appointed when the Union reaches 27 Member States, there will be fewer Commissioners than there are Member States, Article 4.2 of the Protocol on the enlargement of the European Union. The Commissioners will be selected by a system of rotation that will be fair to all countries,⁹⁸ Article 4.2 of the Protocol on the enlargement of the European Union.

In concrete terms, once the accession treaty for the 27 Member States has been signed, the Council will have to take a unanimous decision on the exact number of Commissioners and on the arrangements for a fair system of rotation, bearing in mind that all Member States will be treated on an equal footing and that each Commission must satisfactorily reflect the different demographic and geographic characteristics of the Member States, Article 4.3 of the Protocol on the enlargement of the European Union.

4. The “Post-Nice-Process”: Towards a “European Constitution”?

“Nice” is over. The Member States of the European Community are now in the so-called “Post-Nice-Process”.⁹⁹ What does it mean? The answer contains point 5 of the Declaration on the future of the Union (declaration No. 23). The “Post-Nice-Process” should address, *inter alia*, the following four main questions:

(1) how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity,¹⁰⁰

⁹⁶ See Fischer (fn. 1), 190; Hatje (fn. 2), 156.

⁹⁷ See Gnan (fn. 6), 454-455; Hatje (fn. 2), 150; Schäfer (fn. 1), 463; Wiedmann (fn. 6), 851.

⁹⁸ See Hatje (fn. 2), 148-149, 180; von Kyaw (fn. 7), 9; O’Sullivan (fn. 15), 4.

⁹⁹ See Borchmann (fn. 2), 173; Fischer (fn. 1), 77; Gnan (fn. 6), 459; Hatje (fn. 2), 181-182; Wessels (fn. 8), 20-22; Wiedmann (fn. 1), 213.

¹⁰⁰ See Schäfer (fn. 1), 465-466.

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- (2) the status of the Charter of Fundamental Rights of the European Union, proclaimed in Nice, in accordance with the conclusions of the European Council in Cologne,¹⁰¹
- (3) a simplification of the Treaties with a view to making them clearer and better understood without changing their meaning, and
- (4) the role of national parliaments in the European architecture.

Addressing the abovementioned issues, the Conference recognised the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States.¹⁰² This is one further step to make good the so-called “democratic deficiency” of the EU.¹⁰³

A new Conference of the Representatives of the Governments of the Member States will be convened in 2004, to address the abovementioned items with a view to making corresponding changes to the Treaties,¹⁰⁴ but the conference will in no way impede or be a precondition to the enlargement process. Meanwhile, a discussion about a “European constitution” has begun.¹⁰⁵ This is what the Conference called for: a deeper and wider debate about the future of the European Union.¹⁰⁶

¹⁰¹ See *Fischer* (fn. 1), 27-28, 35, 263-269, 513-554; *Gnan* (fn. 6), 458-459; *Hatje* (fn. 2), 176-177; *Schäfer* (fn. 1), 464-465; *Geiger* (fn. 25), Article 5 EC Treaty, 164-167 (No. 4-12).

¹⁰² See point 6 of the Declaration on the future of the Union (declaration No. 23).

¹⁰³ See *Hatje* (fn. 2), 177-179.

¹⁰⁴ See point 7 of the Declaration on the future of the Union (declaration No. 23). See *Wiedmann* (fn. 1), 213-214.

¹⁰⁵ See *Hatje* (fn. 2), 182-183; *Hirsch* (fn. 102), 2678.

¹⁰⁶ See point 3 of the Declaration on the future of the Union (declaration No. 23).