TREATY REVISION IN THE EU
- An analysis of potential issues facing the revision procedures in Article 48 TEU

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SUMMARY

The treaty revision procedures in the TEU have developed a lot over the years, to become more elaborate and include more actors, and with the introduction of the Lisbon Treaty general simplified ways to amend the Treaties were added for the first time. Two new ways of amending the Treaties using Article 48 TEU, a general simplified procedure for amending Part Three of the TFEU and a passerelle clause to change procedural rules, were introduced. Despite the recent introduction of these procedures there are still some uncertainties surrounding them, this thesis will focus on three of those. The first issue that will be examined is the delimitation of the requirements in Article 48(6), which states that the amendments made using that provision cannot increase the competences of the EU, and may not affect any other provisions than those in Part Three of the TFEU. While these requirements may seem clear they have proved problematic to interpret in practice. In the judgment of case C-370/12 Pringle, which was about the first and only time the simplified procedure in Article 48(6) has been used so far, the CJEU came to the conclusion that they have the competence to examine whether an amendment follows the requirements set out in the provision. This will help clear up any uncertainties and make sure the simplified procedure is used in a correct way in the future. Moreover, the ordinary procedure has evolved over the years to be more transparent, democratic and inclusive; however the simplified procedure moves away from this and goes back to the more closed methods. The second issue facing the revision procedures is therefore the question if the simplified procedure risks increasing the perceived democratic deficit in the EU, by limiting citizen participation. After analysis, the conclusions reached are that the mere fact that the simplified procedure exists does not increase the democratic deficit, however, that perception will depend on how it is used. Lastly, a problem facing all the revision procedures is the risk of blocking of proposed amendments, due to the unanimity rules and the fact that all amendments have to be approved in all MS according to their national rules. It will be shown that the doctrine is overwhelmingly in favor of removing the unanimity principle in favor of some kind of super-qualified majority; however this seems very unlikely to happen in the near future as the MS don’t want to give up their veto power. In conclusion, while there may be some issues facing the revision procedures, it is unlikely that they will change again in the near future.
SAMMANFATTNING

EU:s ändringsförfaranden har under årens lopp utvecklats till att bli mer genomarbetade och omfatta fler aktörer, och genom Lissabonfördraget tillkom för första gången allmänna förenklade sätt att ändra fördragen. Två nya sätt att ändra fördragen med hjälp av artikel 48 i EU-fördraget infördes, ett allmänt förenklat förfarande för ändring av tredje delen i EUF-fördraget och en passerelleklausul för att ändra procedurella regler. Trots att dessa förfaranden är nyligen skapade finns det vissa oklarheter som omger dem, denna uppsats kommer att fokusera på tre av dessa oklarheter. Den första frågan som kommer att undersökas är avgränsningsproblematiken kring kraven i artikel 48(6), där det anges att de ändringar som görs med bestämmelsen inte får öka EU:s befogenheter, och inte får påverka andra bestämmelser än de i den tredje delen av EUF-fördraget. Även om dessa krav kan verka tydliga har de visat sig vara problematiska att tolka i praktiken. I domen av mål C-370/12 Pringle, som handlade om den första och enda gången det förenklade förfarandet i artikel 48(6) har används hittills, kom EU-domstolen fram till att den har behörighet att pröva huruvida ett ändringsförslag följer de krav som anges i bestämmelsen. Detta kommer att bidra till att klara upp eventuella oklarheter och se till att det förenklade förfarandet används på ett korrekt sätt i framtiden. Vidare har det ordinarie förfarandet utvecklats under årens lopp till att vara mer öppet, demokratiskt och inkluderande; men det förenklade förfarandet rör sig bort från detta och går tillbaka till mer slutna metoder. Den andra frågan som behandlas är därför om det förenklade förfarandet riskerar att öka det upplevda demokratiska underskottet i EU, genom att begränsa medborgarnas deltagande. Efter analys, är slutsatserna att endast det faktum att det förenklade förfarandet finns till inte ökar det demokratiska underskottet, utan det beror på hur förfarandet används. Slutligen undersöks ett problem för alla ändringsförfaranden, nämligen risken för blockering av ändringsförslagen. På grund av enhållighetsregler och det faktum att alla ändringar måste godkännas i alla medlemsstater i enlighet med deras nationella regler finns det en risk att ändringsförslagen blockeras av en ensam MS. Det kommer att visas att det i doktrinen finns en överväldigande majoritet för att ta bort principen om enhållighet till förmån för något slags super-kvalificerad majoritet, men detta verkar mycket osannolikt att hända inom den närmaste framtiden eftersom MS inte vill ge upp sin votorätt. Sammanfattningsvis, även om det kan finnas vissa problem kring ändringsförfarandena, är det osannolikt att de kommer att ändras igen inom en snar framtid.
Table of Contents
SUMMARY ......................................................................................................................... 2
SAMMANFATTNING .......................................................................................................... 3
ABBREVIATIONS ............................................................................................................. 6
1. INTRODUCTION .......................................................................................................... 7
  1.1 General ...................................................................................................................... 7
  1.2 Purpose and Question Formulation ......................................................................... 8
  1.3 Method and Materials ............................................................................................ 9
  1.4 Considerations and Delimitations ........................................................................... 11
  1.5 Disposition .............................................................................................................. 12
2. THE DEVELOPMENT OF THE REVISION PROCEDURES ..................................... 13
  2.1 The original procedure for treaty amendment – The Treaty establishing the European
      Coal and Steel Community (1951) .......................................................................... 13
  2.2 The Treaty establishing the European Economic Community (1957) .................... 13
  2.3 The Single European Act (1986) ............................................................................. 14
  2.4 The Treaty on European Union (1992) .................................................................... 14
  2.5 The Treaty of Amsterdam (1997) .......................................................................... 15
  2.6 The beginning of a new treaty revision procedure .................................................. 15
    2.6.1 The Dehaene Report (1999) ............................................................................. 15
    2.6.2 The EUI Reports on the reorganization of the European Union Treaties (2000) .. 16
  2.7 The Treaty of Nice (2001) ..................................................................................... 18
  2.8 The Laeken Declaration and the European Convention on the Future of Europe ...... 18
  2.10 The Treaty of Lisbon (2007) ................................................................................ 21
    2.10.1 The Lisbon Treaty in the Constitutional Courts ............................................. 24
3. THE CURRENT REVISION PROCEDURES ................................................................. 27
  3.1 The ordinary revision procedure ........................................................................... 27
  3.2 The simplified revision procedures ........................................................................ 29
    3.2.1 Article 48(6) ..................................................................................................... 30
    3.2.2 Article 48(7) – The General Passerelle ............................................................ 30
    3.2.3 The Specific Passerelles ................................................................................ 31
  3.3 Comparison ............................................................................................................ 32
4. THE SIMPLIFIED REVISION PROCEDURE ADJUDICATED IN THE CJEU .......... 36
4.1 C-370/12 Thomas Pringle v Government of Ireland, Ireland and The Attorney General ................................................................. 36
  4.1.1 Background ........................................................................ 36
  4.1.2 Judgment ........................................................................ 37
  4.1.3 Conclusions ...................................................................... 42
5. CHALLENGES FOR THE REVISION PROCEDURES ................. 43
  5.1 Delimitations ....................................................................... 43
    5.1.1 Only affecting Part Three .................................................. 43
    5.1.2 Increasing the competences of the EU ............................... 44
    5.1.3 Conclusions .................................................................... 45
  5.2 Democratic deficit .................................................................... 45
  5.3 Unanimity ............................................................................. 49
6. CONCLUSIONS ........................................................................ 54
7. BIBLIOGRAPHY ....................................................................... 56
  7.1 EU legislation ........................................................................ 56
  7.2 International legislation .......................................................... 56
  7.3 Other official documents ........................................................ 57
  7.4 Case law ................................................................................ 58
    7.4.1 European Court of Justice ............................................... 58
    7.4.2 The Constitutional Court of the Czech Republic ............. 58
    7.4.3 The Federal Constitutional Court of Germany ............... 58
  7.5 Literature ............................................................................... 59
    7.5.1 Books ............................................................................. 59
    7.5.2 Articles ............................................................................ 60
  7.6 Other sources ......................................................................... 61
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
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<tr>
<td>AG</td>
<td>Advocate General</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>ECB</td>
<td>European Central Bank</td>
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<td>ECC</td>
<td>European Economic Community</td>
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<td>ECSC</td>
<td>European Coal and Steel Community</td>
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<td>EP</td>
<td>European Parliament</td>
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<td>ESM</td>
<td>European stability mechanism</td>
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<td>EU</td>
<td>European Union</td>
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<td>EUI</td>
<td>European University Institute</td>
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<td>IGC</td>
<td>Inter-governmental conference</td>
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<td>MEP</td>
<td>Member of the European Parliament</td>
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<td>MS</td>
<td>Member state</td>
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<td>QMV</td>
<td>Qualified majority voting</td>
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<td>SEA</td>
<td>Single European Act</td>
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<td>TCE</td>
<td>Treaty establishing a Constitution for Europe</td>
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<td>TEC</td>
<td>Treaty establishing the European Community</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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1. INTRODUCTION

1.1 General

The ability to revise the treaties, which are the foundation of the EU, is crucial for the Union to be able to adapt to the challenges and changes that it, along with its policies and legislation, has to face. Under general treaty law, treaty amendment is governed by the Vienna Convention on the Law of Treaties unless the treaty provides otherwise.\(^1\) In the EU, treaty amendment is regulated in Article 48 TEU, which does not provide more flexibility than the default rule in VCLT, contrary to many other treaties’ specific amendment clauses.\(^2\) Furthermore, in international law, changes in Treaties can be achieved implicitly, by all the parties acting the same way even if that is not in the treaty.\(^3\) However in EU law neither customary practice by MS nor tacit revisions can lead to amendments of the Treaties. The review procedures in EU law are limited exclusively to the letter of the Treaties\(^4\), which also has been stressed by the CJEU\(^5\).

The revision procedures in the EU Treaties have become increasingly more elaborate, and include more actors as the Treaties continue to develop, with the purpose of increasing the democratic legitimacy of the EU. With the introduction of the Lisbon Treaty in 2009, two new ways of amending the treaties were created in Article 48 of the TEU. In addition to the ordinary procedure, which remained very similar to before, a simplified procedure and a general passerelle\(^6\) procedure were introduced. The first simplified procedure allows the change all or parts of Part Three of the TFEU through a Council decision, without many of the procedural requirements in the ordinary procedure. The general passerelle procedure allows for the change from unanimity to qualified majority and to change from the special legislative procedure to the ordinary legislative procedure. The current version of the re-


\(^3\) “General international laws allows contracting parties unanimously to depart from a specific clause relating to the amendment procedure by adopting an actus contrarius, and more generally by invoking the principle of freedom as to the form of amendments (Articles 11 and 39 of the VCLT).” Ehlermann, C-D., Mény, Y., Robert Schuman Centre, European University Institute, Reforming the Treaties’ Amending Procedures, Second report on the reorganisation of the European Union Treaties, Report to the European Commission, 2000 p. 5

\(^4\) De Witte, B., Beukers, T., The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle, 50 Common Market Law Review, 2013, p. 826

\(^5\) See case C-43/75, Gabrielle Defrenne v. Sabena, where the CJEU excluded any informal agreement to revise the Treaties, and stated that revision only can be achieved on the basis of the relevant provisions in the treaties.

\(^6\) A French word for ‘footbridge’, used for ‘bridging clauses’
vision procedures was first introduced during the work with the European Constitution, where the articles were almost identical to the ones we have today.

Since the entry into force of the Lisbon Treaty, the Treaties have been amended four times using Article 48, three times using the ordinary procedure and one time using the simplified procedure in Article 48(6). The only time the simplified procedure has been used so far, legal action was started in Ireland which ended up before the CJEU to examine the validity of the amendment based on the fact that the simplified procedure was used. The case, C-370/12, will be further discussed in chapter 4.1.

Even though the revision procedures were amended in the latest update of the Treaties, there are still challenges facing them. The new simplified procedure in Article 48(6) is resulting in difficulties in interpreting the rules. The provision states that it cannot be used for any other provisions but those in Part Three of the TFEU and may not increase the competences of the Union, but, as will be discussed further in this thesis, while those criterions may seem clear in theory, they have turned out to be quite problematic to interpret in practice. Another problem facing the simplified procedure is the risk of increasing the democratic deficit of the EU by allowing amendments to be made without the recent added measures for increased openness and transparency and the participation of more actors. Finally, a problem for both the simplified procedure as well as the ordinary procedure is the problem of unanimity. A proposal for amendment has to first pass through the European Council acting on unanimity, and then be ratified in all MS before it can enter into force, meaning there are several times when a new amendment can be blocked by a single MS. All these problems will be discussed further in this thesis.

1.2 Purpose and Question Formulation

The purpose of this thesis is to examine the simplified revision procedure of the TEU as specified in Article 48. This will be done by analyzing both current and previous regulations as well as exiting case law. The revision procedures of the Treaties of the European Union

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7 There's also been an accession treaty.
8 A Protocol increasing the number of Members of the European Parliament temporarily, a Protocol on the concerns of the Irish people about the Treaty of Lisbon and a Protocol limiting the effect of the EU Charter of Fundamental Rights in the Czech Republic, however the ratification of the third Protocol stopped after a new Czech government withdrew its request, because it no longer wanted to limit the effect of the Charter.
9 A Decision adding a single paragraph to article 136 TFEU in order to provide for Member States to adopt a treaty establishing a European Stabilisation Mechanism (ESM), which will be discussed further in chapter 4.1.
have gone through major changes since the first EU Treaty, the ECSC Treaty, and it is likely that they will keep changing to keep up with the changing conditions of the EU. This thesis aims at examining the revision procedures more carefully, and also see what issues the new revision procedures might face and how they can be solved.

The main questions this thesis will look into are the challenges and problems facing the revision procedures of the EU Treaties, and mainly the new simplified procedure. There are a number of uncertainties surrounding the revision procedures; however, three issues will be explored more deeply. The first issue is the problem of delimitation. The provision regulating the simplified procedure states that it cannot be used to increase the competences of the Union, and amendments suggested can only affect Part Three of the TFEU; however, it is not always obvious if a suggested amendment follows these conditions. There are difficulties in anticipating what could potentially increase the competences of the Union as well as what actually affects other parts of the Treaties. The second issue facing the EU as a whole as well as the revision procedures is the perceived democratic deficit, and whether there is a risk of increasing it by the process in the simplified procedure. As the ordinary procedure has changed over the years to become more transparent and including more actors for a wider representation, the simplified procedure allows the European Council to act in a more closed way with less insight. The question is if this can affect the European citizens’ perception of the progress made trying to tackle the democratic deficit and in the broad sense their perception of the EU. Lastly, a problem facing both the ordinary procedure and the simplified procedure is the risk of blocking of proposed amendments, due to the unanimity rules and the fact that all amendments have to be approved in all MS according to their national rules. In an ever increasing union, this will only become a bigger problem as more MS join the EU. These three issues can be phrased with the following three questions:

- Is the delimitation of the substantial requirements in Article 48(6) clearly defined?
- Does the simplified procedure exacerbate the perceived democratic deficit in the EU?
- Is the unanimity rule the best option for the EU?

1.3 Method and Materials

Since the question for this thesis revolves around EU law, this thesis is written from an EU law perspective. This means that the materials and methods used are predominantly affected
by the EU legal system. The EU is an organization of a \textit{sui generis} character, completely unique in its composition and legal order.

EU law has three main sources of law: primary law, secondary law and supplementary law. Primary law is comprised of the founding Treaties, the TEU and the TFEU, along with amending Treaties, accession Treaties and protocols annexed to the Treaties. These treaties determine the legal framework of the EU, by setting out the distribution of powers between the EU and the MS as well as establishing the powers of the European institutions. Secondary law is comprised of regulations, directives, decisions, opinions, recommendations, white and green papers as well as international agreements and interinstitutional agreements. Supplementary law is comprised of law that is not in the Treaties, for example case law from the CJEU, international law as well as general principles of law, and helps fill in the areas not regulated by primary or secondary legislation. In the EU legal order, the case law from the CJEU plays an important role in clarifying and interpreting regulations, whereas preparatory works play a minor role. This is starting to change\textsuperscript{10}, as in the past preparatory works were hard to find and rarely used, while the present case law from the CJEU points to an increased use of preparatory works to interpret the regulations. Preambles can also help play a role in interpreting the rules, as they often specify the reasons behind the provision.\textsuperscript{11} Other non-binding acts, for example reports from the EU institutions, have also been used in this thesis to get a better understanding of the reasoning behind the changes in the treaty revision procedures. Case law has also been studied; particularly case C-370/12 Pringle. When interpreting the judgment from the CJEU, the View of the Advocate General has also been discussed to further develop the reasoning behind the judgment. Additionally, legal writing and articles relating to the questions and subjects have also been studied. Most importantly for this thesis has been the comparison of different versions of the Treaty revision procedures, as well as official suggestions for how the procedures could be revised. Besides those sources, articles and books which discuss this issue have been important for the writing of this thesis.

In assessing these materials a teleological interpretation has been applied, meaning a purpose driven interpretation of the legal rules. EU law is ordinarily interpreted using this

\textsuperscript{10} Hettne, J., Otkén Eriksson, I., EU-rättslig metod: Teori och genomslag i svensk rättstillämpning, 2011, p. 114
\textsuperscript{11} Bernitz, U., Kjellgren, A., Europarättens grunder, 2014, p. 187
method, trying to interpret the Treaties from the perspectives of the main objectives of the Union. Possible solutions for the issues raised in the thesis will also be defined. In doing so the analysis will contain some political and practical arguments; however these are always based on the conclusions reached during the legal analysis. This thesis will focus mostly on de lege lata, how the law is right now, nevertheless it will also discuss de lege ferenda, how the law should be in the future.

1.4 Considerations and Delimitations

This thesis will focus on the revision procedures of the Treaties as set out in Article 48 of the TEU, and will not take into account other possible ways of amending the Treaties. Article 49 of the TEU, regulating the accession of new MS and the possibility to amend the founding Treaties using Accession Treaties, will therefore not be further examined. The flexibility clause in Article 352 of the TFEU, which allows the EU to act in areas outside of its conferred competences if necessary to attain one of the objectives set out in the Treaties, will not be further analyzed either. There are a number of special passerelle procedures, which, apart from being mentioned will not be taken into account further. This is because these ways of amending the Treaties are outside of the scope of the question of this thesis, which will focus only on the procedures in Article 48. In the beginning of the thesis the history of the EU will be briefly depicted. This presentation will focus on the development of the treaty revision procedures and therefore not further develop the overall history and development of the Union.

Furthermore, to be able to further examine the requirement in Article 48(6) that an amendment using the simplified procedure may not increase the competences of the Union, a short presentation of what the existing competences of the Union are is necessary. This presentation will, however, be cursory and focused on explaining the competences from the perspective of being able to analyze the requirement in Article 48(6). Additionally, in the chapter dealing with the perceived democratic deficit the issue itself with the democratic deficit of the EU will be briefly explained, but the focus of that chapter is how the deficit relates to the revision procedures.

Lastly, to further understand the use of the simplified procedure, case C-370/12 Pringle will be analyzed. In the case, the Supreme Court of Ireland sent three questions to the CJEU for a preliminary ruling. However, only one of the three referred questions concern the use of
the simplified revision procedure and therefore fall within the scope of this thesis. Only this question will be presented and analyzed, as the other questions have no impact on the outcome of the first question.

1.5 Disposition

In the first chapter the history of the revision procedures will be explained, and how they have evolved since the first ECSC Treaty until today. This is to give the reader some background knowledge of the issue. The chapter will discuss how the revision procedures have changed, why the need for a simplified procedure has grown and how the idea of a simplified procedure came to be. The second chapter will explain the revision procedures as they stand today, and will look into both the procedural as well as the substantial requirements. It will also compare the revision procedures to each other to see how they differ from one another and what benefits the different procedures have. The third chapter will examine case law regarding the simplified revision procedure, more specific case C-370/12, and will also discuss what effects the case might have on the use of the procedure in the future. The fourth chapter will present the three different challenges facing the revision procedures which I have identified, explaining the issues and solutions that have been suggested to resolve them. Lastly, the fifth and final chapter will include my own thoughts and conclusions on the matter.
2. THE DEVELOPMENT OF THE REVISION PROCEDURES

2.1 The original procedure for treaty amendment – The Treaty establishing the European Coal and Steel Community (1951)

The Treaty establishing the European Coal and Steel Community, which would subsequently become part of the EU, was signed on 18 April 1951 in Paris, between France, West Germany, Italy, Belgium, Luxembourg, and the Netherlands. In this initial Treaty the treaty amendment was regulated in Article 96 and said the following:

“Article 96

Following the expiration of the transition period, the government of each Member State and the High Authority may propose amendments to the present Treaty. Such proposals will be submitted to the Council. If the Council, acting by a two-thirds majority, approves a conference of representatives of the governments of the member States, such a conference shall be immediately convoked by the President of the Council, with a view to agreeing on any modifications to be made in the provisions of the Treaty.

Such amendments will enter into force after having been ratified by all of the member States in conformity with their respective constitutional rules.”

2.2 The Treaty establishing the European Economic Community (1957)

In 1957 the EEC Treaty, the predecessor to the current TFEU, was signed in Rome. In the EEC Treaty the revision procedure was regulated in Article 236.

“ARTICLE 236

The Government of any Member State or the Commission may submit to the Council proposals for the amendment of this Treaty. If the Council, after consulting the Assembly [European Parliament] and, where appropriate, the Commission, delivers an opinion in favor of calling a conference of representatives of the Governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to this Treaty.”
The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.”

It resembles Article 96 of the ECSC Treaty, with the main differences being that the Commission replaced the High Authority and that the Council was required to consult the Assembly, the predecessor to the EP, and the Commission “where appropriate” before deciding whether or not to proceed with the amendment and call a conference. The reason for the Council only having to consult the Commission where appropriate was presumably because it was redundant to consult the Commission if the proposal came from them in the first place, whereas if a MS submit the proposal the consultation of the Commission would be required.

2.3 The Single European Act (1986)

The SEA was the first major revision of the Treaty of Rome, and was both an implementing and a supplementary Treaty. It didn’t amend the revision procedure, however Title III of the Act included a provision stating that “[f]ive years after the entry into force of this Act the High Contracting Parties shall examine whether any revision of Title III is required”. This sentence was the start of a process of evaluation of the Treaties that led to several revisions in a short time frame, which continued until the Treaty of Lisbon in 2009.

2.4 The Treaty on European Union (1992)

The preparations for the Treaty on European Union started even before the five years mentioned in the SEA had elapsed, with two IGC:s, one to establish the economic and monetary union and the other on the political union. Just like the SEA the TEU was a combination of new Treaty provisions and extensive amendments to the existing ones. One of the new treaty provisions in the new TEU was the formal establishment of the EU12 and the Treaty also introduced the pillar structure. The TEU, signed Maastricht in 1992, was the first time that the revision procedures were updated since the Rome Treaty. They were regulated in Article N, as follows:

“ARTICLE N

1. The government of any Member State or the Commission may submit to the Council proposals for the amendment of the Treaties on which the Union is

founded. If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.”

The procedure is almost identical to the previous one, with the addition that the ECB should be consulted “in the case of institutional changes in the monetary area”.

Article N also stated that a “conference of representatives of the governments of the Member States shall be convened in 1996 to examine those provisions of this Treaty for which revision is provided, in accordance with the objectives set out in Articles A and B.”

2.5 The Treaty of Amsterdam (1997)

The Treaty of Amsterdam was preceded by two IGC:s and a Reflection Group consisting of representatives of the then 15 MS, the Commission and the EP. The Treaty of Amsterdam led to big changes in the treaties, not only by renumbering the articles in all treaties, but also by changing the Third Pillar by transferring a great number of provisions to the TEC and by making changes to secure greater effectiveness to the TEU and to all three Community Treaties.

With the Treaty of Amsterdam the provision on treaty revision remained unaltered; the only change was that it changed its name from Article N to Article 48.

2.6 The beginning of a new treaty revision procedure

2.6.1 The Dehaene Report (1999)

One of the first times the idea to create a flexible revision procedure was formulated officially was in a 1999 report by a “Group of Wise Men”. This group was set up by European Commission President Romano Prodi to reflect on the institutional implications of European Union enlargement and to prepare for a post-Amsterdam IGC. The independent group was

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13 The idea had been looked over before, although no definitive decisions had been taken. For example the EP adopted a Draft Treaty Establishing the European Union in 1984 with different revision procedure.
chaired by Jean-Luc Dehaene, former Prime Minister of Belgium, and consisted apart from
him of Richard von Weizsacker, former President of the Federal Republic of Germany and
Lord Simon of Highbury, former chairman of British Petroleum and former Minister. The
group’s instruction was to “identify institutional problems which needed to be tackled and to
present arguments indicating why they needed to be dealt with by the IGC”\textsuperscript{14}; however, they
were not asked to make specific proposals. This was instead seen as the task of the MS and
the EU institutions during the IGC. In the group’s report, they suggested, among other
things, that the Treaties should be divided into two parts; one more fundamental basic treaty
and one less fundamental part, with different rules for amendment of the two parts. The
basic treaty would include the aims, principles and general policy orientations of the EU,
citizen’s rights and the institutional framework; and would only be able to be changed using
the then current system of treaty revision, through an IGC, acting unanimously and with
ratification by each MS. The report predicted that such modifications would be infrequent.
The less fundamental text would include all other provisions of the treaty, and would be
revised by a simplified procedure. This simplified procedure would consist of a decision of
the Council, acting on the basis of a new super-qualified majority, or on unanimity depend-
ing on the subjects, and the assent of the European Parliament, eventually with a special
qualified majority. This would avoid the need for lengthy ratification procedures in national
parliaments and referenda in certain countries. The report concluded that the European Uni-
versity Institute in Florence was already doing important preliminary work\textsuperscript{15}, and that a draft
indicating how a division of the Treaties could be operated already existed. The group there-
fore suggested that the Commission should give the EUI a mandate to elaborate on this idea
even further so that when the IGC was convened it could have a concrete proposal to start
negotiations with, if they decided to change the Treaties.

2.6.2 The EUI Reports on the reorganization of the European Union Treaties
(2000)

The Commission followed the suggestion by the Dehaene Report, and its request resulted in
two reports from the EUI, the first one dealing with the reorganization of the Treaties while
the second one concerned the reform of the Treaties amendment procedures. The first report
suggested, just like the Dehaene Report, a division of the Treaties into a Basic treaty and

\textsuperscript{14} Dehaene, J.-L., von Weizsacker, R., Simon, D., The institutional implications of enlargement, Report to the
European Commission, 1999, p. 2

\textsuperscript{15} The report by Amato, G., Robert Schuman Centre, European University Institute, What form of constitution
for the European Union, Report to the European Parliament. 1999 was currently being written
other less fundamental parts. The second report looked at how this division would and could affect the revision procedures of the Treaties. The report stated that in comparison to other international organizations and federal states, the revision procedure in the EU was particularly rigid. They criticized the fact that due to the unanimity, the compromises that had to be made to make sure the Treaties were accepted by all MS made the Treaties watered down and resulting in a constant need of revising. It was also emphasized that unanimity would become an even bigger obstacle should the EU grow with more MS, risking causing stagnation and preventing even smaller amendments to the Treaties. Apart from the effectiveness, the Report also mentioned the problem with democratic legitimacy and that the then current revision procedure was too closed to the public. To reduce the risk of blockage due to unanimity the Report suggested a rather radical change, to replace the unanimous vote with a super-qualified majority vote\textsuperscript{16} for the amendment of the Treaties. The authors of the Report realized, however, that this change would not be able to happen overnight, and that there may as well be some exceptions to this rule. The Report did nevertheless stress the fact that for the EU to continue to evolve it would have to move away from the unanimity principle at some point. They also included several ideas about protecting minority MS, by increasing the influence of the EP and the Commission, as well as having an opt-out mechanism.\textsuperscript{17} The Report suggested increased participation for the national Parliaments, to increase the democratic legitimacy as well as make the ratification process easier; and also suggested that not all provisions were of such importance as to justify the ratification of national Parliaments or referendums. Another suggestion to make the ratification process easier was the “negative ratification”, which would later come to be used in the general passerelle procedure in the Lisbon Treaty. “Negative ratification” means that MS would have to expressively disagree with an amendment for it not to enter into force. If no one objects, the amendment enters into force. The Report highlighted that the Treaties already contained a number of special amendment procedures, called “autonomous” and “quasi-autonomous”\textsuperscript{18} in the Report, showing that even in the then current Treaty there were ways to amend primary law by qualified majority.\textsuperscript{19} The Report also introduced the Convention procedure, which at the time of the writing of the Report was being used for the first time during the

\textsuperscript{16} The report defined super-qualified majority as for example either 4/5 or 9/10 of MS representing 4/5 of the population, with a blocking majority of at least two MS. p. 21-22.

\textsuperscript{17} The Second report on the reorganisation of the European Union Treaties, EUI, 2000, p. 14

\textsuperscript{18} The “autonomous” procedures were the ones solely decided by the EU institutions, without going through the MS, with ratifications and national approval, whereas the “quasi-autonomous” procedures involved the MS.

\textsuperscript{19} The Second report on the reorganisation of the European Union Treaties, EUI, 2000, p. 6
drafting of the Charter of Fundamental Rights. The Report argued that a Convention with increased participation would increase democratic legitimacy.

2.7 The Treaty of Nice (2001)

In 2001, only two years after the Treaty of Amsterdam entered into force, the Treaty of Nice was signed. The Treaty amended the TEU as well as all the Community Treaties. Most of the changes were related to streamlining the decision making and to make sure that the institutions could function efficiently after a significant increase in the amount of MS. Despite all the preparatory work, no changes were made by the Treaty of Nice to the revision procedures. At this point, the EU regulations were very complicated and numerous, as all these amendment Treaties mentioned previously not only amended the original EC Treaty, but also produced additional texts which were combined with it. With the Treaty of Nice, eight treaties and more than 50 protocols and annexes\(^\text{20}\) regulated the body of Community law as a whole, making the European structure very complex and difficult for European citizens to comprehend.

The IGC that was held during the work with the Treaty of Nice also provided for the continuous work on the Treaties, by adding a “Declaration on the future of the Union” to the Treaty. This Declaration called for a “deeper and wider debate about the future of the European Union”, to address “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”. Wide-ranging discussions involving all interested parties, “representatives of national parliaments and all those reflecting public opinion, namely political, economic and university circles, representatives of civil society, etc” as well as the Commission and the EP were to be started in 2001. After the preparatory steps, the Declaration stated that a new IGC should be convened in 2004 to address the results of the discussions with a “view to making corresponding changes to the Treaties”.

2.8 The Laeken Declaration and the European Convention on the Future of Europe

At the end of 2001 the European Council met in Laeken, Belgium, resulting in a new declaration, the Laeken Declaration of the Future of the European Union, as well as the conven-

ing of the European Convention on the Future of Europe to prepare for the IGC in 2004. The declaration raised, for the first time, the question of “whether this /…/ might not lead in the long run to the adoption of a constitutional text in the Union”. The European Convention on the Future of Europe consisted of 16 MEPs, two members of the Commission, a representative of each MS as well as two members of each national Parliament, one from the governing majority and one from the opposition, of the MS and the candidate states. Instead of preparing a recommendation for the IGC the Convention proposed a completely new draft European Constitution. The draft included many big changes for the EU; among the bigger ones was the removal of the pillar system, as well as the absorption of the EC into the EU and the legal personality for the EU.

The changing of the revision process was marginalized during the Convention, and the proposals came at the last minute which made the Presidium disregard them and propose a conservative form of the revision process without any bigger changes. One of the main reasons the suggested change didn’t go through was the weakening of the unanimity principle, which surely would require a lot of discussion and planning.\footnote{De Witte, B., 2012, p. 118-119} Despite this, there were some amendments to the revision procedure in the draft Constitution, and the procedure regulated in Article IV-7 was similar to what is now the ordinary procedure in the Lisbon Treaty’s Article 48 (2)-(5). The new elements introduced were that power of initiative was given to the EP for the first time, that national Parliaments were to be informed of proposals from the beginning and that the convening of a Convention with wide participation should be a rule, but could be bypassed if it was not justified by the extent of the proposed amendments. During the Convention there were proposals to modify the revision procedure by providing that “further amendments should be decided by the EP and should then enter into force if approved by four fifths of the national Parliaments”.\footnote{See Denza, E., Article 48 Treaty Revision Procedures in Blanke, H-J., Mangiameli, S., The Treaty on European Union (TEU): A Commentary, 2013, p. 1338 and Lenaerts, K., Gerard, D., The structure of the Union according to the Constitution for Europe: the emperor is getting dressed, 29 European Law Review, 2004 p. 303-304} This would radically have changed the intergovernmental basis of the Treaties and the EU, making it more similar to a federal constitution. This suggestion was however not accepted in the final version of the Constitution. In fact, there was only one way to amend the Treaty in the draft constitution text.

The IGC for the new Treaty revision began in October 2003; the final text was settled in June 2004 and signed in October 2004, adopting a Treaty establishing a Constitution for Europe. The new Constitution was intended to replace the EC Treaty and the EU Treaty as well as all the acts and treaties supplementing and amending them.

The ordinary revision procedure, now regulated in Article IV-443 in the text of the Constitution, remained very similar to the suggested one in the draft; and although the Convention didn’t suggest them, the TCE saw the addition of the two simplified procedures for amending the Treaty for the first time. The procedures, in Articles IV-444 and IV-445, did not follow the proposal from the EUI Report to remove the unanimity rule. The first simplified procedure, in Article IV-444, suggested a passerelle procedure which would allow The European Council to authorize the Council to move from unanimity to qualified majority, except for decisions with military implications or those in the area of defense. The passerelle procedure also allowed the European Council to authorize the Council to change from the special legislative procedure to the ordinary legislative procedure. The second simplified procedure, in Article IV-445, allowed for the revision of Title III of Part III on the internal policies and action of the Union without convening a convention or an IGC. The amendment would be made through a decision by the European Council acting in unanimity. The only limit was that the amendment could not increase the competences conferred on the EU. The addition of these procedures by the IGC showed that the lengthy procedures and intricate democratic safeguards contained in the ordinary revision procedure were making the MS concerned that Treaty amendment, even of a limited character, would be difficult to achieve. These two simplified procedures were the predecessors to paragraphs 6 and 7 in Article 48 of the current TEU.

Before the TCE could enter into force it had to be ratified by all MS in accordance with their respective constitutional requirements, in some countries meaning that referenda had to be held. While the TCE was ratified by some MS, referenda in both France and the Netherlands rejected the Treaty. Since all MS had to agree, the negative votes in these countries meant that the TCE failed and could not enter into force. A “period o reflection” was held to determine how to proceed, and after a report by a new group of “wise men” the European Council decided to abandon the TCE and try to compose a new Treaty to amend the existing treaties.
2.10 The Treaty of Lisbon (2007)

After the failure of the TCE a new IGC was held to come up with a new Treaty that could be agreed upon. The TCE represented a lot of hard work, as well as many significant changes aimed at increasing the effectiveness of the EU as well as the democratic legitimacy. It was therefore desirable to keep some of the substantive changes from the TCE, while some other changes, like the introduction of symbols such as a flag and an anthem which reminded of statehood and the title “Constitution”, were removed. While the work with the TCE had been largely open to a lot of different actors, the work on the Treaty of Lisbon, initially known as the Reform Treaty, went back to the earlier more closed methods in order to reach an acceptable political compromise. While the work on the Treaty of Lisbon formally used the TEU and the TEC as the basis of its work, it did also use the failed TCE as a starting point for negotiations. This made the Treaty of Lisbon quite similar to the TCE, with many provisions being almost identical in both versions. Despite their similarities, the Lisbon treaty is an amending treaty whereas the TCE was drafted as a completely new treaty. In the process the TEC was renamed the TFEU.

For the revision procedures not much was changed from the TCE to the Treaty of Lisbon. Some smaller changes consisted of moving the revision procedures into one article instead of being in three separate articles, and of course of the reference to which part was allowed to be amended being changed to match the new format of the Treaty. Another, perhaps more significant, change was the addition to 48(2) in the regulation of the ordinary procedure, stating that apart from increasing the competences of the Union the revision procedures could also be used to reduce the competences conferred to the EU. This was the first time that it was specified that the competences referred to the EU could be reduced, and even the first time the Treaties gave the suggestion that the future could be anything other than deeper integration and collaboration. It was also the first time the new procedures entered into force and were to be used. The latest and current version of the treaty revision procedures is, as evident below, significantly more elaborate than its very first predecessor:

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“Article 48

1. The Treaties may be amended in accordance with an ordinary revision procedure. They may also be amended in accordance with simplified revision procedures.

Ordinary revision procedure

2. The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.

3. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States as provided for in paragraph 4. The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States.

4. A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties. The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

5. If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.
Simplified revision procedures

6. The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union.

The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties.

7. Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorizing the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defense.

Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure.

Any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph shall not be adopted. In the absence of opposition, the European Council may adopt the decision.

For the adoption of the decisions referred to in the first and second subparagraphs, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.”
The Treaty of Lisbon was adopted by the IGC on 13 December 2007, and was ratified and entered into force two years later. The ratification process took longer than expected, with several states facing difficulties in ratifying the Treaty. In Ireland a referendum initially voted against ratifying the treaty, however a second referendum was held which accepted the Treaty. In several MS the ratification of the Treaty ended up before the national courts, which meant that the MS couldn’t ratify it until the Courts had concluded the cases.

2.10.1 The Lisbon Treaty in the Constitutional Courts

In the Czech Republic, Germany and Poland actions were brought before their Constitutional Courts, although the Polish Constitutional Tribunal rejected the case. In the UK the case brought before the High Court consisted of whether the government was bound by an earlier promise to hold a referendum on the Treaty. Since the promise concerned the TCE the Court rejected the claim. These cases would have defined the interpretation of the Treaty in certain MS, but have no legal bearing on the interpretation in other countries or on an EU level. This interpretation however, if found against national constitutions, could have led the MS to not be able to ratify the Treaty, meaning that the Treaty would have failed since it requires all MS to ratify it for it to enter into force. The Czech Constitutional Court had to rule on two separate constitutional challenges, the first one concluded November 26th 2008 and the second one November 3rd 2009. The president waited to sign the ratification of the Treaty until the judgment of the court was announced, leading the Czech Republic to become the last MS to complete the ratification process. On both occasions the Court found the Treaty of Lisbon compatible with the Czech constitution. In the German case, the simplified revision procedures were one of the factors that the court focused on, especially the general passerelle.

2.10.1.1 The German Constitutional Court

During the German ratification procedure, the constitutionality of the treaty was challenged, resulting in the German Constitutional Court delivering a verdict regarding the compatibility of the Lisbon Treaty and the German Constitution in June 2009. The case was initiated by several members of the Bundestag (the national parliament) claiming the Lisbon Treaty was unconstitutional, and wondered whether the Lisbon Treaty deteriorated the German parliament’s powers of participation in EU decision making. The judgment stated that the Treaty did not create a European federal state, something that would have been against Basic Law
and furthermore required a referendum, and that the substance of German state authority is protected. Somewhat controversially, and subject to clarification in a case a year later\textsuperscript{24}, the Court also reserved the right to overrule judgments by the CJEU within Germany, if they should be found in violation of Basic Law. The Court nevertheless reached the conclusion that the Treaty, along with the German statute incorporating it into German Law and authorizing the ratification of the Treaty, was compatible with the Basic Law. An accompanying statute, however, which related to the powers of the Bundestag to oversee how the German government votes in the EU granted insufficient powers to the Bundestag. This was considered incompatible with the Basic Law, meaning Germany could not sign the ratification of the Treaty until the statute was amended. The statute was quickly amended, increasing the control of the Bundestag over the actions of Germany's representatives, and the ratification process could be completed.

While the judgment allowed for Germany to ratify the Lisbon Treaty, the process of the simplified revision procedures which were designed to facilitate and speed up the work of the EU will certainly be slowed down\textsuperscript{25} because of it. Before agreeing to strategically important EU decisions, the new procedures will force the German government to try to secure prior legislative approval from the Bundestag and the Bundesrat (the upper chamber comprising the 16 Länder governments). This especially concerns the use of the general passerelle clause, other passerelle-type provisions, and also the flexibility clause\textsuperscript{26}. The Court classified these procedures as Treaty amendment clauses and consequently insisted that each amendment should be ratified by the German legislature. The court found that giving the government free rein in action in the Council only supported by tacit approval would violate the Basic Law. The court asserted that the MS are the masters of the treaties, and pointed to the fact that the MS through their national parliaments remain the constituents in the EU Staatenverbund\textsuperscript{27}. Where these decisions establish \textit{de jure} or \textit{de facto} Treaty amendments which confer sovereign powers on the EU, in deviation from the Basic Law, that approval

\textsuperscript{24}The Constitutional Court of Germany stated that EU decisions may only be checked if European institutions seriously overstep their powers. CJEU decisions can only be re-examined “if the breach of EU competences by the EU authority is obvious and the act in question leads to a structurally significant shift in the arrangement of competences between the member states and the European Union to the detriment of member states,” according to the ruling.


\textsuperscript{26}The “flexibility clause” in Article 352 TFEU enables the EU to act beyond the power of action conferred upon it by the Treaties if the objective pursued so requires. However, this clause is framed by a strict procedure and by certain restrictions in terms of its application.

\textsuperscript{27}Association of sovereign national States

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will have to be adopted by two thirds majority in both chambers, in accordance with Article 23(1) of the Basic Law, which is the same threshold that applies to regular constitutional amendments. The general simplified procedure in Article 48(6) does not appear to be affected by this though, as it already specifies that the Decision to amend the Treaty should be approved by all MS in accordance with their respective constitutional requirements and therefore grants enough national oversight according to the Court. The passerelle clause does not require positive approval of the national parliaments, instead it relies on the national parliament’s objection within six months of notification if they do not approve. The court expressly objects to this tacit approval, and require positive ratification as for the other Treaty amendment procedures. According to the Court, the veto procedure is not equivalent to the requirement of a ratification. This tacit approval would violate Article 38(1) on the right to vote for the German parliament in combination with Article 23(1) of the Basic Law, which regulates the conferral of powers to the EU. Philipp Kiiver argued that the judgment “imposes ordinary ratification procedures where the Lisbon Treaty provides simplified procedures; this is diametrically opposed to the purpose of the relevant Treaty provisions but consistent with domestic constitutional law and not inconsistent with EU Treaty law”. Kiiver further argues that the Lisbon judgment undoes the ambitions of some of the original drafters of the Constitutional Treaty, at least for Germany. In conclusion the German constitutional court’s approval of the compatibility of the Lisbon Treaty and the German basic law ended up complicating the intended simplified version of the procedure.

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28 Kiiver, P., 2010, p. 579
3. THE CURRENT REVISION PROCEDURES

3.1 The ordinary revision procedure

The ordinary revision procedure concerns significant amendments made to the Treaties, meaning there are no limits on what kind of amendments that can be proposed. The ordinary revision procedure is regulated in Article 48 (2)-(5) TEU, and can be broken down into four basic steps: initiative, approval, processing and decision. The MS, the Commission and the EP have right of initiative, and can initiate a revision procedure. The EP was granted this right only in the latest version of the Treaties, before that only the MS and the Commission could suggest amendments of the Treaties. The party that wishes to initiate the procedure submits a proposal for amendment to the Council. The Council then submits the proposal to the European Council and notifies the national Parliaments in the MS. Informing the national Parliaments, which did not exist before, was first introduced with the Lisbon Treaty. This is presumably a reform to increase the democratic legitimacy, and including the national Parliaments this early in the process gives them time to examine the proposals and therefore be more prepared when asking to ratify the amendments.

The second step, approval, is then realized when the European Council, after consulting the EP and the Commission, adopts, by simple majority, a decision in favor of considering the proposed amendments. If the proposed amendment concerns institutional changes in the monetary area the ECB also has to be consulted. If the decision to move forward with the proposed amendment is taken, the third step is set in motion by the President of the European Council starting the process by convening a convention containing representatives of national parliaments, governments, the EP and the Commission, with the purpose of further examining and considering the proposals. However, if it not justified by the extent of the proposed amendments to hold a convention, the European Council can decide by simple majority not to hold one, after getting the consent of the EP. The Convention shall examine the proposals for amendments and adopt, by consensus, a recommendation of a course of action to an IGC. This recommendation is however not binding for the IGC, which still has the dominant and decisive role in the drafting of the final version of the amendments. If a convention is not held, the European Council sets the terms of reference for the IGC itself.
After the Convention, or the decision not to convene a Convention, the President of the European Council convenes an IGC consisting of representatives of each MS which drafts and finalizes the amendments to be made to the Treaties. The IGC makes the final decision whether or not to revise the treaties by unanimity among all the MS, thus completing the fourth step in the process. After the amendments are finalized, all MS must ratify them "in accordance with their respective constitutional requirements" for them to enter into force. MS only have the right to approve or reject the amendments, without any possibility of making changes to the amendments proposed. The ratification process is different in each MS, due to each MS legal and constitutional arrangements, political processes and even traditions. Most MS ratify EU treaties following parliamentary votes, while some, for example Ireland, Denmark and now the UK, also hold referenda.

The final paragraph of the ordinary revision procedure states that if two years after the signature of the amendments, four fifths of the MS have ratified it but one or more MS have encountered difficulties in the ratification process, the matter shall be referred to the European Council. This paragraph is quite ambiguous, when it comes to what the European Council actually can do, as it only specifies that the matter should be referred back to the European Council without further instructions, causing confusion. Adding to the uncertainty is the fact that there are some variations in the different language versions. The addition of this paragraph, which was added with the Lisbon Treaty, is probably a reflection of the previous difficulties ratifying the Treaties, were the European Council had to come up with solutions to move past the initial problems. However, in the past when issues with ratification have come up, the matter has been referred back to the European Council, with the responsibility for further developments, despite the absence of a specific provision stating it. Therefore it can be argued that since the European Council dealt with these difficulties without such a paragraph, it is in fact redundant. Another issue with this provision is

29 The provision have been described variously as “enigmatic” (Lenaerts and Gerard (2004), p. 304), (De Witte (2012) p. 121); and as “modest” by H Oberdorff.
30 For example, in the Spanish version of Art. 48.5 TEU it is stated that “el Consejo Europeo examinara´ la cuestio´n”, in the French version we find “le Conseil europe´en se saisit de la question”; the German version presents this wording: “so befasst sich der Europa¨ische Rat mit der Frage”; the Italian version foresees that “la questione e` deferita al Consiglio europeo”; according to the Portuguese version “o Conselho Europeu analisa a questãºo”.
31 Denmark with the Treaty of Maastricht, Ireland with the Treaty of Nice, France and the Netherlands with the TCE and Ireland again with the Treaty of Lisbon
32 Denza, E., 2013, p. 1346: “Art. 48.5 TEU does not take matters very far” and De Witte, B., 2012 p. 121: “The new paragraph 5 is both unnecessary (it instructs the European Council to do something which it has
that the legal possibilities open to the European Council to actually do something are rather limited. As will be discussed further in chapter 5.3, the requirement for all MS to ratify a treaty, as hindering as it may be, has existed since the very first provision for revision of the treaties and is not something that can be set aside. It is also not possible to force a MS to withdraw\(^{33}\) if they run into problems with ratifying a treaty amendment. In fact, the only options available are to either simply abandon the attempt, although this has never happened with a project for treaty revision in the EU since 1950\(^{34}\), or to call for a period of reflection and then offer to “sweeten the deal” for recalcitrant MS in order for them to reconsider and fall into line with the majority of MS\(^{35}\).

However, it should be noted that even though there are numerous procedural steps in the revision procedures, a failure to follow one or more of these steps would not make the subsequent treaty invalid, provided it was approved and ratified by all MS in accordance with their respective constitutional procedures. This is because the EU is foremost an international organization of sovereign states, and the CJEU has no power to annul or overrule provisions in the Treaties or an amending treaty approved by all the MS, which would be valid under international law. This is in contrast to the fact that the CJEU can annul secondary legislation by EU institutions, if the correct procedural steps have not been taken before its adoption. However, it is extremely unlikely that any deliberate disregard of the procedural requirements would occur or that the resulting treaty would be ratified by all MS if it did.

### 3.2 The simplified revision procedures

Apart from the ordinary procedure the Treaty of Lisbon also introduced two simplified procedures for the TFEU. The first one is a more general procedure, while the second one concerns two specific cases and is sometimes known as a passerelle clause.

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\(^{33}\) Art. 50 TEU now permits voluntary withdrawal by a MS in accordance with its own constitutional requirements; however this is a voluntary procedure. No provision is made in the Treaties for expulsion, and it would in practice be inconceivable that a MS honoring its existing obligations to the Union would be forced out because it did not want to agree to a new treaty amendment.

\(^{34}\) Denza, E., 2013 p. 1346

\(^{35}\) This was the course required for the entry into force of the Treaty of Maastricht, the Treaty of Nice and for the Treaty of Lisbon (in this context regarding the Treaty of Lisbon as a “sweetened” form of the TCE).
3.2.1 Article 48(6)

The first simplified revision procedure is a general revision procedure, and is regulated in Article 48(6) TEU. It can only be used on Part three of the TFEU, containing some 171 treaty articles and regulating Union policies and internal actions. The provision also states that it cannot be used to increase the competences conferred on the EU. As will be discussed further in chapter 5, both these paragraphs may be more complicated to interpret than they first seem. The procedure is initiated just like the ordinary procedure by an amendment proposal submitted by a MS, the EP or the Commission. In the simplified procedure, however, the proposal is submitted to the European Council directly, instead of the Council who then forwards it to the European Council in the ordinary procedure. After receiving the proposal the European Council shall consult the EP and the Commission, as well as the ECB if the proposal concerns institutional changes in the monetary area. Instead of holding a Convention and an IGC, the proposal to amend the Treaty is decided directly by the European Council adopting a decision. The decision has to be taken with unanimity, and will not come into force until it had been approved by all MS in accordance with their respective constitutional requirements. The provision does not specify how the approval should be given, leaving it up to the MS to decide. It could be expected that the approval would consist of consultation and probably also a positive vote by the national Parliaments. The national Parliaments will, however, not be informed during the amendment process, and only have to approve the decision once it is made in the instances they are consulted.  

3.2.2. Article 48(7) – The General Passerelle

The second new simplified procedure introduced with the Lisbon Treaty is known as a passerelle. Passerelles are provisions that enable procedural requirements to be reduced, or other adjustments made, without formal Treaty revision. Regulated in Article 48(7) TEU, the general passerelle concerns two specific cases. Firstly, the European Council can adopt a decision authorizing the Council to use qualified majority voting where the Treaties provide that an act is to be adopted by the Council unanimously. This however cannot be used regarding decisions with military implications or those in the area of defense. Secondly the European Council can adopt a decision allowing acts where the Treaties provide for them to be adopted in accordance with a special legislative procedure, to instead be adopted in accordance with ordinary legislative procedure. However, both these decisions require una-

nimity in the European Council as well as the consent of the EP, given by a majority of the MEPs. Any other consultation with the Institutions is not required. National parliaments must be notified of any intended use of a general passerelle clause and can prevent the general passerelle clause from being activated by objecting within six months. In the original version this provision stated that it could only be prevented from being used if “‘X’ national parliaments expressed their opposition, whereby ‘X’ stood for an unspecified number higher than one”, meaning there would be no national veto. This was however changed, on the insistence, above all, of the British government. The two general passerelle procedures do not require a proposal submitted by a MS, the EP or the Commission, instead they can only be proposed by the European Council. Confusingly enough, Article 353 TFEU contain limitations to Article 48(7); however there is no reference to this in Article 48(7) itself.

3.2.3 The Specific Passerelles

Additionally to the general passerelle there are six special passerelle clauses in the TEU and TFEU applicable to specific policy areas, which can be easier to adopt than the general clause as they require fewer prerequisites. The concept of passerelles is not new; a few of the ones present in the Lisbon Treaty also existed in the TEC. These special passerelles constitute *lex specialis* to the general passerelle in Article 48(7); however they are not referenced in Article 48(7). Apart from these passerelles there are other provisions in the Treaties that allow easy modification of certain provisions through the adoption of unanimous Council decisions.

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37 De Witte, B., 2011, p. 3  
38 De Witte, B., 2012, p. 15  
39 Article 353 stipulates that Article 48(7) does not apply to Article 311, third and fourth paragraphs, Article 312(2), first subparagraph, Article 352 and Article 354.  
40 Article 31(3) and (4) TEU enabling the switching of legal bases in the CFSP Chapter from unanimity in the Council to QMV (except for decisions having military or defense implications). Article 81(3), 2nd subpara., TFEU enabling the switching of aspects of family law with cross-border implications from a special legislative procedure (with unanimity) to the ordinary legislative procedure (co decision). Article 153(2), 2nd subpara., TFEU enabling the switching of certain matters of social policy from a special legislative procedure (with unanimity) to the ordinary legislative procedure (co decision). Article 192(2), 2nd subpara., TFEU enabling the switching of certain matters in the field of environment (fiscal measures, country planning, etc.) from a special legislative procedure (with unanimity) to the ordinary legislative procedure (co decision). Article 312(2), 2nd subpara., TFEU enabling the switching of the legal basis on multiannual financial framework from unanimity in the Council to QMV. Article 333 TFEU enabling the switching, within a reinforced co-operation, of unanimity in the Council to QMV (except for defense) or from a special legislative procedure (with unanimity) to the ordinary legislative procedure (co decision). Article 333 TFEU enabling the switching, within a reinforced co-operation, of unanimity in the Council to QMV (except for defense) or from a special legislative procedure (with unanimity) to the ordinary legislative procedure (co decision).  
41 Article 25, 2nd subpara., TFEU enables the Council, by unanimity and with the EP’s consent, to strengthen or add to the rights of the EU citizens, followed by a ratification procedure within Member States, but without the need to convene a Convention and an Intergovernmental Conference. Article 82(2)(d) TFEU enables the
3.3 Comparison

This subchapter will only examine the differences between the procedures regulated in Article 48 TEU. While the ordinary procedure and the procedure in Article 48(6) are revision procedures aimed at making amendments to the treaties, the general passerelle is a way to enable procedural requirements to be reduced, or other adjustments made, without formal Treaty revision. Since it is, nonetheless, a way to revise the treaties, it will be taken into account in this comparison.

There are plenty of similarities between the ordinary procedure and the simplified procedure in Article 48(6), however the general passerelle differs quite a lot from the other two procedures. For the first two procedures mentioned, to begin with, the same actors, the MS, the EP and the Commission, have the right to initiative. Both the EP and the Commission, along with the ECB in the case of institutional changes in the monetary area, have to be consulted before any action can begin. The conclusions of these consultations are however not mandatory for the Council or the European Council. In the ordinary procedure the consultation takes place before the European Council decides to examine the proposed amendment and convene a Convention, whereas in the procedure in Article 48(6) the consulting occurs before the European Council are to take a Decision leading to amendment of the Treaty. Furthermore, in both procedures the rule of unanimity is important. In the procedure in Article 48(6) the European Council has to take the Decision by unanimity, whereas in the ordinary procedure the decision by the IGC has to be unanimous. The unanimity has proven to be both an asset and an obstacle; however, it is very important to many MS which have refused to change it in the past. This will be discussed further in chapter 5.3. Lastly, both provisions state that the amendments should not enter into force until all MS have approved

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Council, by unanimity and with the EP’s consent, to identify other aspects of criminal procedure for which minimum rules may be established. Article 83(1), 3rd subpara., TFEU enables the Council, by unanimity and with the EP’s consent, to extend the list of areas of crime which may be subject to minimum EU rules. Article 86(4) TFEU enables the European Council, by unanimity and with the EP’s consent, to extend the powers of the European Public Prosecutor’s Office. Article 98, 2nd sentence, TFEU enables the Council, by QMV, to repeal a provision allowing aid to be granted to the economy of certain areas of Germany affected by its division. Article 107(2)(c) TFEU enables the Council, by QMV, to repeal a provision allowing aid to be granted to the economy of certain areas of Germany affected by its division. Article 126(14), 2nd subpara., TFEU enables the Council, by unanimity, to replace the whole Protocol on the excessive deficit procedure (consultation of the EP and ECB). Article 129(3) and (4) TFEU allows for amending certain articles of the ECB Protocol (some in co decision, others by the Council using QMV). Article 281, 2nd subpara., TFEU allows for amending certain articles of the Protocol on the EU Court of Justice (co decision). Article 308, 3rd subpara., TFEU allows for amending certain articles of the EIB Protocol (Council, by unanimity).
or ratified them in accordance with their respective constitutional requirements. The main principle, that the amendment will not be valid until all MS have gotten approval from either their national Parliaments or their people, is however the same in both procedures. This requirement has in the past caused significant delays between signing and ratification, and is creating uncertainty on the entry into force of the amendments.

While the procedures do have similarities, there are also many and relevant differences. Especially the general passerelle is notably quite different from the other two procedures. A minor difference, but a difference none the less, is that the proposal for amendment has to be sent to the Council in the ordinary procedure and to the European Council in the procedure in Article 48(6). However, in the ordinary procedure the Council has to forward the proposals to the European Council, before any action is taken. In the general passerelle clause no proposal has to be submitted, but instead the European Council adopts decisions allowing or authorizing the Council to take the measures specified in the provision. The council also has to notify the national Parliaments in the ordinary procedure and in the general passerelle procedure, something that doesn’t have to be done in the procedure in Article 48(6). It could be argued that this is because the amendment has to be approved by national requirements, where the national Parliaments have the power to block it there; however, this is also the case in the ordinary procedure, and due to the early notification the national Parliaments have more time to better prepare the issue at hand.43 The difference between the ordinary procedure and the procedure in Article 48(6), and the general passerelle, is that the approval of the national Parliaments is tacit in the general passerelle where national Parliaments have to object for the amendment not to take place, whereas it is a positive approval in the other two cases, where the national Parliaments have to agree for an amendment to enter into force. Another difference is that when amending the Treaty using the procedure in Article 48(6), it is done so by the European Council adopting a decision.

One of the main differences between the ordinary procedure and the procedure in Article 48(6) is that the ordinary can be used to either increase or reduce the Unions competences, which is specified in Article 48(2), whereas the procedure in Article 48(6) cannot be used to increase the competences of the Union, specified in the last sentence of Article 48(6). The procedure in Article 48(6) can, however, be used to reduce the EU’s competences, as only

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43 Denza, E., 2011, p. 1339
increasing the EU’s competences is specifically prohibited. As will be discussed in chapter 5.1, it can sometimes be difficult to specify if a new amendment will increase the competences or not. Another issue that may turn out to be more complicated than it may seem, is that the procedure in Article 48(6) only can be used to amend Part Three of the TFEU, whereas the ordinary procedure can be used for any part of the Treaties. As will be shown further down, and as is evident from recent case law, even if an amendment technically concerns a provision within Part Three it could have indirect effects on other provisions outside of Part Three. When it comes to the general passerelle, the only restriction is that the first subparagraph of Article 48(7) does not apply to decision with military implications or those in the area of defense.

Another major difference, especially when it comes to the openness and democratic legitimacy of the amendments, is the presumption of convening a Convention when using the ordinary procedure. As it has been stated, representatives of the national Parliaments, of the Heads of State or Government of the MS, of the EP and of the Commission would all be represented at the Convention, meaning of course a much wider representation of the European people. It also means that since the national Parliaments are able to participate in the process and have a say, they may face the final proposed amendment with more good faith when asked to ratify it and the ratification process might go quicker and smoother. In the procedure in Article 48(6) the EP and the Commission are simply consulted, whereas they are part of adopting a recommendation in the ordinary procedure. The same goes for MS, who in the procedure in Article 48(6) only have the right to approve or reject the amendments, without any possibility of making changes to the amendments proposed.

The amendment proposal is then further discussed in the ordinary procedure by a conference of representatives of the MS, which does not happen in the procedure in Article 48(6). The procedure in Article 48(6) lacks both the Convention and the conference, making it much more time efficient. Nonetheless, and in accordance with what was stated above, it can have negative effects on the reception of the amendment. A convention and an IGC may seem very time consuming and heavy work, but it must also not be forgotten that it is the same parties that have to agree in the end regardless of if it is a decision with unanimity or an IGC. It is worth noting, for example, that during the first treaty amendment after the Lisbon

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44 Specifically case C-370/12 Pringle
Treaty entered into force it only took six days between the convening of the IGC and the signature of the amendment\textsuperscript{45}, meaning that an IGC can act just as quick as the European Council, given that everybody agrees. Another aspect of the Convention affecting the ratification process is that since the ordinary procedure is much more debated and negotiated, the chance of it later being turned down by national governments is significantly smaller. The final difference between the procedures is the provision in the ordinary procedure specifically stating what will happen if a MS is having difficulties ratifying the treaty. As it has been discussed earlier however, this provision might be redundant and it is very likely that the same or similar measures will be taken if an amendment cannot be ratified whether it be through the ordinary procedure or the procedure in Article 48(6).

In conclusion it can be said that while the ordinary procedure is more thorough and goes through a greater number of actors, which can lead to broader support and greater democratic legitimacy, the simplified procedure is more time efficient and can be easier to approve in the MS. The ordinary procedure might also prove so burdensome that it will in fact be “extra-ordinary” in the future, apart from the next major reconstruction of the treaties. After the ordeal with the TCE and the Lisbon Treaty it is however not very likely that the Treaties will be completely revised in the foreseeable future.\textsuperscript{46}


\textsuperscript{46} Piris, J-C., The Lisbon Treaty: a legal and political analysis, 2010, p. 105
4. THE SIMPLIFIED REVISION PROCEDURE ADJUDICATED IN THE CJEU

The first, and so far only, time the simplified procedure has been used to amend the Treaty a procedure was started in Ireland that ended up before the CJEU. The case is of great importance, which can be understood by the fact that 11 other MS along with the EP, the Commission and the European Council submitted observations.

4.1 C-370/12 Thomas Pringle v Government of Ireland, Ireland and The Attorney General

4.1.1 Background

To deal with the financial crisis going on in Europe, the European Council decided to adopt Decision 2011/199 on March 25\textsuperscript{th} 2011, providing for the amendment of article 136 of the TFEU using the simplified revision procedure in Article 48(6) TEU, by the addition of a new paragraph. The new paragraph stated that “the MS whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole” and that the granting of any required financial assistance under the mechanism will be made subject to strict conditionality. The euro area MS decided to establish a mechanism in accordance with the new paragraph, and on February 2\textsuperscript{nd} 2012 they concluded the Treaty establishing the European Stability Mechanism.

On 13 April 2012 Mr. Pringle, a member of the Dáil; the lower house of the Irish Parliament, brought proceedings before the Irish High Court against the Irish Government and Others claiming, among other things, that the Decision amending the TFEU was not lawfully adopted and that the simplified procedure should not have been used to amend the TFEU. He claimed that the amendment resulted in an alteration of the competences of the EU contrary to the third paragraph of Article 48(6) TEU. Furthermore he claimed that the amendment was inconsistent with provisions of the Treaties concerning economic and monetary union and with general principles of EU law. He also made several other claims which will not be discussed; instead the focus will be on the use of the simplified revision procedure.

The High Court dismissed Mr. Pringle’s action in its entirety, leading Mr. Pringle to bring an appeal to the Irish Supreme Court. The Supreme Court rejected Mr. Pringle’s arguments
based on Irish constitutional law; nonetheless it decided to refer questions regarding EU law to the CJEU.

4.1.1.1 The Referred Question

The Supreme Court referred three questions to the CJEU for a preliminary ruling, however since only the first question is relevant to this thesis, only that question will be discussed further:

(1) Is European Council Decision 2011/199/EU of 25 March 2011 valid:
   – having regard to the use of the simplified revision procedure pursuant to Article 48(6) TEU and, in particular, whether the proposed amendment to Article 136 TFEU involved an increase in the competences conferred on the Union in the Treaties;
   – having regard to the content of the proposed amendment, in particular whether it involves any violation of the Treaties or of the general principles of law of the Union?

4.1.2 Judgment

In view of the pressing time issue, with just a few months before the amendment was due to take effect, and the importance of the case, the President of the Court decided to apply the accelerated procedure\(^{47}\) to the case and it was heard before the full Court with all 27 judges, something which is very rare.\(^{48}\) Since an accelerated procedure was followed, there was no formal Opinion of an AG, however it is nevertheless stated in the Rules of Procedure of the Court that “the Court shall rule after hearing the Advocate General”.\(^{49}\) Given the importance of this case, this resulted in an elaborate written “View” by AG Kokott. In her View Kokott uses many of the same arguments later made in the Court’s judgment, and she also comes to the same conclusions as the Court. Nevertheless, Kokott presents a different analysis at

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\(^{47}\) The accelerated procedure is provided by Art. 105 of the Rules of Procedure of the Court of Justice, and enables the CJEU to give its rulings quickly in very urgent cases by greatly shortening the time-limits.

\(^{48}\) “The Court shall sit as a full Court where cases are brought before it pursuant to Article 228(2), Article 245(2), Article 247 or Article 286(6) of the Treaty on the Functioning of the European Union. Moreover, where it considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate-General, to refer the case to the full Court.” Article 16 Statute of the CJEU

\(^{49}\) Art. 105 (5), Rules of Procedure of the Court of Justice.
times, which is why it will be presented below along with the Court’s judgment. It will be clearly stated whenever a reference is being made to the AG instead of the Court.

Prior to dealing with the referred question, the Court had to examine whether they had jurisdiction to make the judgment. The Court found that since the decision was made by the European Council, one of the Union’s institutions\textsuperscript{50}, the Court had, in principle, jurisdiction.\textsuperscript{51} However, the Court stated that Decision 2011/199 concerned the insertion of a new provision of primary law, an area where the court does not have jurisdiction.\textsuperscript{52} While the Court acknowledged that it does not in fact have jurisdiction to examine primary law, the Court raised the question whether it is required to ensure that the MS, when undertaking a revision of the TFEU using the simplified procedure, comply with the conditions laid down by Article 48(6) TEU.\textsuperscript{53} The Court found that in accordance with Article 19(1) TEU it falls to the Court to ensure that the law is observed in the interpretation and application of the Treaties, and therefore to examine the validity of a decision of the European Council based on Article 48(6) TEU. Accordingly, it is for the Court to monitor compliance to the conditions, that the procedural rules are followed, that the amendments decided upon concern only Part Three of the TFEU and that they do not increase the competences of the Union, to make sure the simplified procedure is applicable.\textsuperscript{54}

With regards to the question, the Court first examined whether the amendment solely concerned Part Three of the TFEU, as specified in the first subparagraph of Article 48(6) TEU. The Court quickly established that formally the condition was met, as Decision 2011/199 amends Article 136 which is in Part Three of the TFEU. However while the amendment didn’t formally exceed what it was allowed to amend, the substance can still have an effect on other provisions outside of Part Three. General Advocate Kokott specified that the rule

\textsuperscript{50} The European Council is one of the Union’s institutions listed in Article 13(1) TEU

\textsuperscript{51} Under indent (b) of the first paragraph of Article 267 TFEU ‘to give preliminary rulings concerning ... the validity … of acts of the institutions’, see also AG Kokott View C-370/12 para 21

\textsuperscript{52} In accordance with indent (a) of the first paragraph of Article 267 TFEU, the examination of the validity of primary law does not fall within the Court’s jurisdiction. The Court of Justice of the EU can interpret the Treaties, but it cannot rule on their validity, which depends on international law. The Court had also previously stated that treaty revisions under the ordinary procedure as well as accession treaties were not acts of an EU institution and that the Court therefore had no authority to review them. See Case C-253/94 P Olivier Roujansky v Council, para 11 and case C-313/89 Commission v Spain, para 9.

\textsuperscript{53} Under the first subparagraph of Article 48(6) TEU, the simplified revision procedure concerns ‘revising all or part of the provisions of Part Three of the TFEU, relating to the internal policies and actions of the Union’. The second subparagraph of Article 48(6) confirms that ‘[t]he European Council may adopt a decision amending all or part of the provisions of Part Three of the TFEU’. Under the third subparagraph of Article 48(6), such a decision ‘shall not increase the competences conferred on the Union in the Treaties’. See also Lenaerts, K., Van Nuffel, P., European Union Law, Third edition, 2011, p 84

\textsuperscript{54} Case Note C-370/12, 2 Common Market law Review, 2013, p 28
stating that nothing outside of Part Three can be changed “must be applied not only when considering the form, but also when considering the substance”55 and therefore the European Council is “barred from amending the text of Part Three of the TFEU in a way that is incompatible with provisions of primary law outside Part Three”.56 In the present case, the issue was if the Decision granted MS competence in the area of monetary policy, or in the area of the coordination of the economic policies of the MS.57 The Court stated that the TFEU contains no definition of monetary policy; instead the Treaty refers to the objectives of monetary policy rather than the instruments in its provisions relating to the policy. The primary objective of the EU’s monetary policy is, according to the Court, to maintain price stability58 whereas the objective of the ESM is to safeguard the stability of the euro area as a whole, two clearly distinct objectives. The Court further elaborated on the issue, saying “[e]ven though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro”.59

When it comes to the means to attain the objective, the Decision to amend the Treaty only states that the ESM will grant any required financial assistance; however, it contains no further information on the operation of the mechanism. According to the Court, the grant of financial assistance to a MS clearly does not fall within monetary policy.60 Furthermore the Court stated that the ESM was intended to serve as a complement to a new regulatory framework61 for strengthened economic governance of the Union, which establishes “closer

55 View of AG Kokott C-370/12, para 28
56 View of AG Kokott C-370/12, para 29
57 The monetary policy of the Union is the subject of, inter alia, Article 3(1)(c) TFEU and Articles 127 TFEU to 133 TFEU. The ECB and the central banks of the Member States whose currency is the euro, which constitute the Euro system, are to conduct the monetary policy of the Union, under Article 282(1) TFEU. Article 3(1)(c) TFEU states that the Union is to have exclusive competence in the area of monetary policy for the Member States whose currency is the euro. Moreover, under Article 119(1) TFEU, the activities of the Member States and the Union are to include the adoption of an economic policy based on the close coordination of Member States’ economic policies, on the internal market and on the definition of common objectives, conducted in accordance with the principle of an open market economy with free competition. The Union’s economic policy is the subject of Articles 2(3) TFEU, 5(1) TFEU and 120 TFEU to 126 TFEU.
58 Judgment of C-370/12 para 54. Under Articles 127(1) TFEU and 282(2) TFEU, the primary objective of the Union’s monetary policy is to maintain price stability.
59 Judgment of C-370/12 para 56
60 Judgment of C-370/12 para 57
coordination and surveillance of the economic and budgetary policies conducted by the MS and is intended to consolidate macroeconomic stability and the sustainability of public finances”. The Court additionally concluded that the framework and the ESM had different objectives, on the account of the ESM dealing with the management of financial crises which might arise, whereas the framework is trying to reduce as far as possible the risk of public debt crises, making it essentially preventive. The Court thereby concluded that the establishment of the ESM fell within the area of economic policy, something that was not challenged by the fact that the ECB had issued an opinion on the draft Decision. While the second subparagraph of Article 48 (6) TEU states that the European Council should consult the ECB “in the case of institutional changes in the monetary area”, the Court was of the opinion that the European Council consulted the ECB on its own initiative in this case, and not because it was under any obligation to do so. Finally, the Court concluded that the Decision which, by the addition of a paragraph 3 to Article 136 TFEU, envisages the establishment of a stability mechanism was not capable of affecting the exclusive competence held by the EU in the area of monetary policy.

Subsequently the Court concluded that the stability mechanism complemented the EU’s competence in economic policy without encroaching on it, with the explanation that the EU only has coordination competence in the area and therefore doesn’t have the power to establish a stability mechanism like the one envisioned in the Decision. While the EU has the power to grant ad hoc financial assistance to a MS according to Article 122(2) TFEU, it is only under the condition that the difficulties were caused by natural disasters or exceptional occurrences beyond the MS control. Since the envisaged stability mechanism was of a more permanent character and with the objective to safeguard the financial stability of the whole euro area, Article 122(2) was not an appropriate legal basis for the stability mechanism. The Court also concluded that the MS were entitled to establish an agreement between themselves for the establishment of a stability mechanism like the one envisaged in the Decision.


62 Judgment of C-370/12 para 58
63 17 March 2011, an opinion on the draft European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (OJ 2011 C 140, p. 8)
sion\textsuperscript{64}, as long as they did not disregard their duty to comply with EU law when exercising their competences in that area. In the present case the Court stated that the strict conditionality in the new Article 136(3) as a condition to grant financial assistance was in place to ensure that the mechanism will operate in a way that will comply with EU law.

All the preceding arguments led the Court to reach the conclusion that Decision 2011/199 fulfilled, both in form and content, the conditions laid down in the first and second subparagraphs of Article 48(6) TEU that a simplified revision of the TFEU can only concern provisions of Part Three of the TFEU.

Secondly, the Court examined the second part of the first question, namely whether the revision of the TFEU increased the competences of the EU. The Court reminded that the new Article 136(3) TFEU confirmed that MS have the power to establish a stability mechanism and is further intended to ensure that the mechanism will operate in a way that will comply with European Union law; therefore, the amendment does not confer any new competence on the EU. The new paragraph in Article 36 TFEU is directed solely to the MS and creates no legal basis for the EU to be able to undertake any action which was not possible before the entry into force of the amendment of the TFEU. Although the MS can act, the new provision does not impose any obligation under EU law to do so. The Court lastly found that, although the ESM made use of the EU institutions, it was not capable of effecting the validity of the Decision, which provided only for the establishment of a stability mechanism and was silent on any possible role for the EU’s institutions in that connection. AG Kokott further stated that “the mere fact that a rule of European Union law is affected at all cannot entail an increase in the competences of the Union within the meaning of the third subparagraph of Article 48(6) TEU. Otherwise that provision would prevent any Treaty addition in accordance with the simplified revision procedure of Article 48(6) TEU”.\textsuperscript{65} The AG also stated that an amendment made using the simplified procedure has to be interpreted in the light of the restrictions of the procedure, as to not use the provision to later increase the competences of the Union.\textsuperscript{66}

Conclusively, the Court found that the answer to the first question was that examination had disclosed nothing capable of affecting the validity of Decision 2011/199.

\textsuperscript{64} Judgment of C-370/12 para 68, Articles 4(1) TEU and 5(2) TEU
\textsuperscript{65} View of AG Kokott C-370/12 para 43
\textsuperscript{66} View of AG Kokott C-370/12 para 58
4.1.3 Conclusions

This was the first time the Court had examined treaty revisions, as it had previously stated that it lacks jurisdiction to do so under the ordinary procedure. The Court had, however, also established in earlier case law that the MS must respect the procedural conditions when amending the Treaties. It should be noted that this court examination only involves reviewing whether the EU institutions or the MS have chosen the correct procedure for Treaty amendment in relation to the amendment they want to introduce, and does not involve imposing any restriction on the content of the treaty amendment itself. It is reasonable that the European Council decisions adopting simplified Treaty amendments should be subject to judicial review, from the perspective of the rule of law and the protection of the institutional balance, since the simplified procedure has significantly less involvement of other actors compared to the ordinary procedure. It is also reasonable that the CJEU is the appropriate body for this judicial review, since it is stated in Article 19(1) TEU that the Court “shall ensure that in the interpretation and application of the Treaties the law is observed”, which is also highlighted in para 35 of the Pringle judgment. In fact, in the EUI Report it had been envisaged a more active role for the CJEU during the simplified process. The Report suggested that the Court should give a prior opinion and used Article 95 of the ECSC Treaty as a model, where it was stated that “modifications […] shall then be submitted to the opinion of the Court. In its examination, the Court may look into all elements of law and fact”.

While the Pringle case was indeed of great importance, the judgment was quite expected. According to Hinarejos “few expected the Court of Justice to dismantle an emergency mechanism that had broad political support, and whose demise would likely have sent the euro area back into the acute phase of the crisis”. Nevertheless, the fact that the CJEU came to the conclusion that they had authority to examine the simplified procedures adds legal certainty to the procedures, and ensures that the procedures will not be abused in the future. It also allows for the chance to clear up the possibly hard to interpret rules of the simplified procedure.

68 De Witte, B., Beukers, T., 2013, p.827
69 The Second report on the reorganisation of the European Union Treaties, EUI, 2000, p. 14
70 Craig, P., Pringle: Legal Reasoning, Text, Purpose and Teleology, 20 Maastricht Journal of European and Comparative Law , 2013, p 5
5. CHALLENGES FOR THE REVISION PROCEDURES

5.1 Delimitations

The main problem with the simplified revision procedure in Article 48(6) is the phrasing of the provision. On the surface the provisions may appear clear; it cannot be used to increase the competences of the Union and it can only be used for amendments regarding Part Three of the TFEU. The problem is that the interpretation of these two requirements rarely is black and white. As argued in the Pringle case, an amendment can technically regulate Part Three and still affect provisions in other parts of the Treaties. So how do you know where to draw the line?

5.1.1 Only affecting Part Three

The text in the article states that amendments can be made through the simplified procedure to “all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union”, which is the part dealing with Union policies and internal actions. That part consists of some 171 Articles, Article 26 to Article 197. As it has been explained above however, the problem is not that Part Three of the TFEU is hard to define, since it is very clearly marked in the Treaty, but to anticipate whether the proposed amendment might also affect provisions outside of Part Three. As mentioned in the previous chapter, when the CJEU and the AG dealt with this issue in the Pringle case, they highlighted the fact that the requirement must be applied “not only when considering the form, but also [...] when considering the substance”.72 The consequence of the amendment must not be a substantive amendment of primary law which cannot be amended by the simplified procedure.73 AG Kokott emphasized that “the European Council is not merely barred from adopting a decision to amend the text of the Treaties outside Part Three of the TFEU. It is equally barred from amending the text of Part Three in a way that is incompatible with provisions of primary law outside Part Three”.74

The fact that the Court clarified that even if the amendment technically concerns Part Three, it cannot have effects on the other parts of the Treaty, is significant because otherwise the European Council could take a decision to add a provision to Part Three which would have as its main purpose to affect a provision outside of Part Three. That would mean that all

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72 View of AG Kokott C-370/12 para 28, Judgment of case C-370/12 para 46-47
73 View of AG Kokott C-370/12 para 28
74 View of AG Kokott C-370/12 para 29
parts of the Treaties could be amended by the simplified procedure, as long as the specific provision formally amended was in Part Three.\textsuperscript{75}

The result of this is that when considering if an amendment can be made using the simplified procedure, the European Council must also consider the effects on primary law which lie outside Part Three of the TFEU.

\textbf{5.1.2 Increasing the competences of the EU}

The competences of the EU are a complicated matter, and as specified above, this thesis will not go too deep in discussing them. However, to understand what increasing the competences of the Union means, a brief passage about the competences of the Union is necessary.

The competences of the EU determine which decisions are to be taken by the EU, and which should be taken by the MS. The exercise of those competences is subject to fundamental principles set out in Article 5 of the TEU. First of all, there is the principle of conferral, meaning that EU only has the competences conferred upon it by the Treaties.\textsuperscript{76} After that, there is the principle of subsidiarity, which provides that the EU only should act when a matter is handled better at EU level than by the separate MS in areas where the Union does not have exclusive competence.\textsuperscript{77} Lastly, there is the principle of proportionality, stating that the actions should not exceed what is necessary to achieve the objectives of the Treaties.

There are different kinds of competences regulated in the TFEU. The EU can have either exclusive, shared or supporting competences. The six exclusive competences\textsuperscript{78}, found in Article 3 of the TFEU, are policy areas where the EU is the only one able to legislate and adopt binding acts. There are also a number of shared competences\textsuperscript{79}, found in Article 4 of

\textsuperscript{75} View of AG Kokott C-370/12 para 30
\textsuperscript{76} Article 5(2) TEU
\textsuperscript{77} Article 5(3) TEU
\textsuperscript{78} The exclusive competences are: customs union, the establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the MS whose currency is the euro, the conservation of marine biological resources under the common fisheries policy, common commercial policy and the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.
\textsuperscript{79} The shared competences are: internal market, social policy, for the aspects defined in this Treaty, economic, social and territorial cohesion, agriculture and fisheries, excluding the conservation of marine biological resources, environment, consumer protection, transport, trans-European networks, energy, area of freedom, security and justice and common safety concerns in public health matters, for the aspects defined in this Treaty. In the areas of research, technological development and space, the Union shall have competence to carry out activities; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.
the TFEU, which are areas where both the EU and the MS are authorized to adopt binding acts. MS can however only exercise their competence in so far as the EU has not exercised, or has decided not to exercise, its own competence. Lastly there are supporting or coordinating competences, regulated in Article 5-6 in the TFEU, in areas where the EU can only intervene to support, coordinate or complement the action of the MS. The EU has no legislative power in these fields and may not interfere in the exercise of these competences reserved for MS.

The rule in Article 48(6) says that an amendment using the simplified revision procedure may not increase the competences conferred on the Union. As evident from above, given the competences are regulated through naming policy areas and not specific provisions, it is not always crystal clear what the competences of the Union are. In the Pringle case for example, the Court had to determine whether the amendment concerned monetary or economic policy, as there are different rules for the two. It is easy to imagine that, just like in the Pringle case, arguments can be made easily for both why an amendment does and does not increase the competences of the Union. However, as AG Kokott pointed out, “the mere fact that a rule of EU law is affected at all cannot entail an increase in the competences of the Union”\(^{80}\), since that would make the provision in Article 48(6) impossible to use in practice.

### 5.1.3 Conclusions

For both requirements in Article 48(6) it can be argued that the fact that the CJEU found itself competent to examine the application of them will enhance the legal certainty as well as clarity of the provision. It will also ensure that the provisions are used in a democratic and lawful way.

While the Pringle judgment provided some clarity in how to interpret the provision, its main benefit for the legal certainty is the fact that the Court found itself competent and can help judge in future cases where it may be uncertain whether or not a simplified amendment affects other parts of the Treaties.

### 5.2 Democratic deficit

The sometimes perceived democratic deficit within the EU comes from the idea that the EU and its bodies in some way lacks democratic legitimacy, and appear unattainable to the European citizens. Initially the term was used to criticize the transfer of legislative powers

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\(^{80}\) View of AG Kokott C-370/12 para 43
from the MS to the Council, which led to the elected EP being created and given the power to approve or reject EU legislation. After that, and along with the growth of the Union, the usage of the term has been extended to describe more and newer issues facing the EU. Nevertheless, there is no broad consensus whether or not the deficit even exists.\textsuperscript{81} One reason for this might be that whether one considers the EU to suffer from a democratic deficit or not depends on which model of democracy one considers to be appropriate for the EU.\textsuperscript{82} For example one can consider the ideal to be that the EU is run by representatives from each MS, or one could want the citizen to be in focus and closer to the decisions. Hence, the more the EU deviates from that model, the more one will consider the EU to suffer from democratic deficit.

One common idea is that the democratic ideal model is maximum citizen participation; however, Dahl\textsuperscript{83} argues that size and participation correspond negatively and that as the size of a state or organization increases, the possibility of effective citizen participation decreases. Jensen claims that “[i]f the democratic ideal is maximum citizen participation, then large-scale representative structures will inevitably fall short in comparison with those of their smaller counterparts”.\textsuperscript{84} This would argue for why citizens might have the perception of the EU being less democratic than their national state; they simply have less direct influence.

Since the perception of the EU as an organization with a democratic deficit is held by a significant number of scholars as well as some of the public, it needs to be addressed by the EU. This chapter will therefore discuss the issue based on the perception of the deficit that exists.\textsuperscript{85}

Attempts to tackle this perceived problem and make the EU machinery simpler and more easily accessible has been made in the past revisions of the Treaties. As the Union and both

\textsuperscript{81} For a more thorough examination of the democratic deficit see Jensen, T., The Democratic Deficit of the European Union, 2 Living Reviews in Democracy, 2009, where Jensen presents a number of scholars who argue that the deficit exists. Moravcsik, A., The Myth of Europe’s “Democratic Deficit”, Intereconomics: Journal of European Politic Policy (2008), on the other hand is one of numerous scholars that argue that the deficit does not exist.
\textsuperscript{82} Jensen, T., 2009, p. 1
\textsuperscript{83} Dahl, R., On democracy, 1998, p. 107
\textsuperscript{84} Jensen, T., 2009, p. 1
\textsuperscript{85} The German Constitutional Court, for example, argued several times that the EU suffers from a democratic deficit in the ruling of the Lisbon case, however it found it to be acceptable at this stage of EU integration. In the view of the Court – which assessed the EU structure by means of classic National State standards (para. 289) – the Union suffers from a structural democratic deficit. See also Piris, J-C., 2010, p. 352-352
its institutions and powers continue to grow, the question of democratic legitimacy has become increasingly important as well as sensitive. Several initiatives to bring Europe closer to its citizens were launched following the Nice Treaty, where the governments admitted that there was a need for a “deeper and wider” reform debate than the one the IGC had been conducting. The Dehaene Report discussed the necessity of simplicity and clarity in the governance of the Union, as well as transparency and accountability in the way the institutions work, concluding that “[w]e must find ways of connecting or reconnecting to the people”. This was also mentioned in the Laeken declaration, where democratic legitimacy is specifically mentioned, saying “the Conference recognizes 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”.

Before the entry into force of the Lisbon Treaty, there was also criticism due to the fact that the treaty amendments and revisions were subject to the traditional diplomatic forms of treaty negotiation, i.e. behind closed doors. De Witte wrote that the procedure appeared “increasingly […] ill-suited to the crucial questions of democracy and governance that are invariably dealt with on the occasion of treaty revision” and that the “traditional mode of negotiation [is] no longer suited to the complexity and constitutional importance of the matter at issue”. The EUI Report regarding the Treaty amendment procedures also called attention to the legitimacy problem of the Treaty amendment procedure, saying “[g]iven the subject of Treaty revisions, which affect the lives of citizens ever more closely, recourse to a diplomatic conference seems an increasingly inappropriate way to reform the European Treaties”, and suggesting that incorporating a Convention into the procedure would enhance the democratic nature of the amendment process, particularly by closer involvement of national parliaments and the EP, as well as aid more active participation by civil society.

The ordinary revision procedure has, as it has been shown in previous chapters, evolved over time into being more inclusive and open to more actors. The initiative to include the Convention as the rule in the ordinary revision procedure can be seen as a way to tackle this

86 De Witte, B., 2012, p. 6
87 The Dehaene report, 1999, p. 4
88 De Witte, B., 2012, p. 4
89 The Second report on the reorganisation of the European Union Treaties, EUI, 2000, p. 10
90 The Second report on the reorganisation of the European Union Treaties, EUI, 2000, p. 27
perceived democratic deficit by opening up the process and involving more actors and therefore increasing its democratic legitimacy. The Convention shortens the distance between the citizens to their representatives, as they are presented by national and European parliamentarians. The Convention also makes the negotiations before the treaty amendments more transparent and public than before. The fact that national Parliaments are informed about the proposal right at the beginning of the procedure is also a big step forward to enhance democratic involvement and legitimacy in the initiative stage of revision.\(^91\) Additionally, indicating the importance now placed within the EU on wider democratic consultation among the institutions, there is now a broader requirement for consultation with the EP and the Commission.\(^92\) In conclusion, there is greater legitimacy revision procedure by the inclusion of the EU institutions, the informing of the national parliaments and most importantly by opening up the process through the use of a Convention.\(^93\) The Lisbon Treaty also takes other steps to ensure the democratic legitimacy of the Union.\(^94\)

Is there then a chance that the simplified procedure, which goes back to the more closed way of operating, could be thwarting the progress made in the eyes of the public? The lack of a convention will save time, but will it serve to seem as a way for the EU to avoid insight?

One of the reasons why the Lisbon Treaty was a subject for examination in both the German Federal Constitutional Court and the Czech Constitutional Court was because of the simplified revision procedure. Both Courts expressed skepticism of the procedure, even going so far as to suggest that it may be used in dubious attempts to pass controversial amendments.

\(^91\) Denza, E., 2013, p. 1343  
\(^92\) Denza, E., 2013, p. 1349  
\(^93\) Jimena Quesada, L., 2012, p. 328  
\(^94\) “The Treaty of Lisbon defines, for the first time, the democratic foundations of the Union, which are based on three principles: those of democratic equality, representative democracy and participatory democracy. It declares that in all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies (Article 9TEU). The functioning of the Union shall be founded on representative democracy. Citizens are directly represented at Union level in the European Parliament. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen (Article 10 TEU). The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties (Article 11 TEU).” Moussis, N., http://www.europedia.moussis.eu/books/Book_2/2/2/5/index.tkl?all=1&pos=23
where the strenuous ordinary procedure might have been more appropriate.\textsuperscript{95} In fact, Kiiver even went so far as to claim that “the Lisbon judgment should be interpreted as a warning to the Council not to expand EU powers through the back door without proper Treaty authorization”.\textsuperscript{96} This means that there is a fear that the lack of insight in the simplified revision procedure could lead to abuse of this privilege by the European Council. This is enhanced by the fact that the UK government has provided that before they can give their approval in the Council a referendum as well as primary legislation would be required.\textsuperscript{97} De Witte and Beukers also raised the issue, when they claimed that judicial review was necessary, otherwise “the European Council could be tempted to by-pass the Convention with its ‘cumbersome’ involvement of national and European members of parliament”.\textsuperscript{98}

Since there is no Convention requirement in the simplified procedure and since the use of the simplified procedure implies that there would not be a referendum in most countries that would have held one for an ordinary revision, there is also a risk that the European citizens feel cheated out of their participation in the process. This can lead to the general feeling of a democratic deficit increasing, and for the feeling of distance from the actual power in the EU to increase as well. In fact, one could argue that all the progress made by the ordinary procedure with the Lisbon Treaty is being defeated by the simplified procedure that goes back to the less inclusive way of the past.

\textbf{5.3 Unanimity}

Finally, a challenge facing all revision procedures is the risk of the amendment being blocked, either by the unanimity rule during negotiations or by the ratification process in the MS. In the first European Treaty, the unanimity requirement was not much of a problem since there were only six MS; however, as the Union grew, it became more and more of a problem and with 28 MS the requirement has become a major obstacle to change. As more countries join the EU, the rule of unanimity becomes more of a risk of derailing progress. One lone MS could keep a new treaty, seen as progress for the EU by the other MS and the EU institutions, from entering into force.

\textsuperscript{95} ó Broin, P, How to Change the EU Treaties, An Overview of Revision Procedures under the Treaty of Lisbon, 215 Centre for European Policy Studies Policy Brief, 2010, p. 4
\textsuperscript{96} Kiiver, P., 2010, p. 587
\textsuperscript{97} Denza, E., 2013, p. 1348
\textsuperscript{98} De Witte, B., Beukers, T., 2013, p. 827
The result of everybody having to agree, is frequent compromising on many substantive issues, as well as stagnation in relation to necessary institutional changes. It has also made treaty revisions difficult, and can explain why previous treaty amendments weren’t entirely satisfactory and why they were often accompanied by “leftovers”, i.e. questions on which the negotiators could not agree and that were therefore postponed for the next Treaty revision. De Witte also pointed out that “governments favoring the status quo are, in fact, put in an advantageous position compared to those favoring changes in the European Union's constitutional framework”, since any MS can veto a rule, even if all the other MS see it as progress for the Union.99

The problems with unanimity and MS ratification are serious obstacles to achieve the original intended purpose of the introduction of a simplified procedure, facilitating and accelerating the decision-making process. One can even question whether the simplified procedure really is that much simpler, since even in that provision the most difficult requirements, the unanimity principle and the need of ratification by all MS, are the same.

The fact that all MS have to ratify the amendments in accordance with their national requirements adds uncertainty to the procedures, which was especially highlighted in the EUI Report. Considering the other EU MS have no influence in each other’s ratification process, political negotiations and bargaining cannot solve the issue if a MS has a negative referendum for example. This issue makes it very difficult to anticipate when, or even if, treaty amendments will enter into force. The recent case with the TCE, which, despite having a convention with extensive participation from different EU institutions and MS, and general support from all the MS governments, failed at the ratification step proves how problematic this issue is.

The reason for the use of the unanimity requirement is due to the fact that the EU Treaties have great power and affect the MS enormously, therefore, MS do not want to give up the right to veto treaty amendments they might not agree with. As highlighted in the case before the German Constitutional court, it is important for the MS to be the “masters of the Treaties”, and to not give up too much of their sovereignty.

99 De Witte, B., 2012, p. 5
Nevertheless, all the major reports mentioned previously in this thesis argued for the removal or at least less use of the unanimity principle. The 1999 Report for the European Parliament said “[t]he negotiating method, which aims to achieve an agreement between all the fifteen states and often results in incoherent and unstructured texts, universally unsatisfactory compromises or ever more differentiated rules, has been severely criticized” and argued that the use of unanimity should be reduced. The Dehaene Report of 1999 was also critical, saying that while the principle had been working for six MS in the beginning, it had become problematic in a Union with fifteen MS and they foresaw that it would cause paralysis in a Union of twenty-five or more MS. They called for a comprehensive reform of the revision procedure. For them, the need for QMV to be the rule was “self-evident”, if decision making was to remain effective. The EUI Report said that “there is reason to fear that in a EU enlarged to 21, 27 or 30 MS, the unanimity principle and national approval procedures risk constitution a source of total paralysis, preventing even the slightest adjustment of the treaties”.

Compared to other multilateral international organizations, the EU has the most rigid rules for amendment of their founding Treaties. As it has been said above, this can be explained by the major impact the EU rules have over the MS, as well as the fact that the MS confer some of their sovereignty to the EU. In other organizations though, different kinds of special majorities allow for amendments in the Treaties. For example the United Nations Organization, the International Labor Organization, the World Health Organization, the World Trade Organization and the Council of Europe in principle require two-thirds majority of MS for the amendment of their establishing treaties. Even for the International Monetary Fund, whose activities affect the MS financial sovereignty, amendments to its Agreement can enter into force with the agreement of 3/5 of the MS representing at least 85% of the weighted votes. The EUI Report also highlighted that even in federal states, approval by a special majority of the member states is sufficient to adopt a new constitutional

100 The Amato report, 1999, p 15
102 The Dehaene report, 1999, p 8
103 The Second report on the reorganisation of the European Union Treaties, EUI, 2000, p10
104 Articles 108 and 109 of the UN Charter
105 Article 36 of the Constitution of the ILO
106 Article 73 of the Constitution of WHO
107 Article X of the Agreement establishing the WTO
108 Article 41 of the Statute of the Council of Europe
norm for the whole federation. In Germany two thirds of the Bundesrat must approve amendments to the Basic Law\(^\text{109}\), and in the USA two thirds of the states needs to approve a proposal for it to be considered, and then four fifths need to ratify it for it to enter into force\(^\text{110}\). However, as the EUI Report also points out, the EU is not an international organization like any other, and the degree of integration between sovereign MS make it unique in its kind.

Though the Convention on the Future of Europe suggested many big changes for the Treaties, they conceded to the fact that the unanimity requirement was inevitable. Piris takes the same view, concluding that “[i]t is therefore clear that common agreement will, in the future, remain the rule for agreement on a revision of the Treaties”.\(^\text{111}\) It then seems much more likely that the Union would keep enhancing the elements of a “multi-speed Europe”, where some MS that want to deepen their collaboration go further than the other MS. Such collaborations already exist for economic and monetary union, for defense policy and for Schengen integration for example. Already in the Dehaene Report they noticed this tendency, stating that it should be noted that “the rigidity and solemnity of the general amendment procedure have been able to contribute to the emergence of parallel practices”. However, there is also a danger in this practice, since the foundation of the EU is collaboration between all MS. The Dehaene Report also called this to attention, stating that flexibility in the framework did not mean MS should be allowed to opt out carelessly of any policy they chose, stating that “the European Union would not survive if Member States were allowed to pick and choose among obligations of the Union”.\(^\text{112}\)

There is, however, not much that can be done as it stands today to improve this problem. As phrased by Blanke and Mangiameli “[e]ven though the increase in membership of the EU makes the procedure more and more challenging, and the greater public involvement in the process and in particular national requirements for a referendum or other legislative safeguards makes it more and more likely that it will at some point be derailed, it is almost impossible to envisage a system under which a recalcitrant MS would be forced into a choice

\(^{109}\) Article 79(2) of the Basic Law  
\(^{110}\) Article V of the Constitution  
\(^{111}\) Piris, J.-C., The future of Europe: towards a two-speed EU, 2012, p. 59  
\(^{112}\) The Dehaene report, 1999, p. 7
between acceptance of an amendment rejected by its Parliament or its electorate and withdrawal from the Union (which in itself would require treaty amendment).”  

There has been some measures taken to show how a solution to this problem of unanimity would look like. The EUI Report suggested a solution by enforcing a special kind of majority. Their suggestion was to make decisions with a superqualified majority, consisting of either 4/5 or 9/10 of MS representing 4/5 of the population, with a blocking minority of at least two States. Another suggestion has been to increase the use of QMV voting, but not removing the unanimity as a rule.

113 Denza, E., 2013, p. 1354
114 The Second report on the reorganisation of the European Union Treaties, EUI, 2000, p 24
6. CONCLUSIONS

Given what has been presented here in this thesis so far, it is safe to say that the revision procedures of the Treaties are more complex than they first might seem. All of the procedures have their own benefits as well as issues, which needs to be taken into account when choosing which procedure to use when amending the Treaties. When it comes to the simplified procedure, while there are benefits to it, the downsides could prove to outweigh the benefits in some cases, leading to it not being used as much as the ordinary procedure.

The uncertainty created by the vague formulation of the provision in Article 48(6) has, in my opinion, been made up for, at least in part, by the fact that the CJEU found itself competent to do a judicial review of the choice of amendment procedure. This will not only increase the legal certainty, but also help the European citizens feel more secure about the procedure chosen and give credibility to the simplified procedure. The fact that there is a safeguard in place to stop any potential abuse of the simplified procedure will, in my opinion, make the public and national MS trust the use of the simplified procedure more, as they know they can challenge it if they suspect it has been used in a wrongful way. To answer the question set out in the beginning of this thesis, while the definition of the substantial requirements in Article 48(6) may not always be completely clear, the fact that the CJEU can solve questionable cases will make sure the rules are always being followed.

Although the risk of the European Council abusing the use of the simplified procedure is very slim in reality, there is still a risk of a perceived abuse or a general fear, from the public, of misuse and mistrust of the European Council. This perception needs to be properly taken into account when choosing to use simplified procedure instead of the ordinary one, to reduce the risk of exacerbating the perceived democratic deficit in the Union. In issues which are controversial, or where there is a strong public interest and scrutiny, the use of the simplified revision procedure needs to be very limited and well founded, as to not risk increasing the image of the EU as a closed organization without transparency. According to me, the mere fact that the simplified procedure exists does not increase the democratic deficit of the EU, instead it will all depend on how it is used. There is, however, a real risk that if there would ever be questionable use of the procedure, it would lead to an increased mistrust and increased democratic deficit.

What is, in my opinion, the biggest obstacle for all the revision procedures to overcome is the unanimity rule. As was shown in the previous chapter, the doctrine is overwhelmingly in
favor of removing the unanimity principle in favor of some kind of super-qualified majority. I would agree that it seems like a very difficult task to get 28 MS to agree. The fact that amendments then have to be ratified in each MS according to their national rules enhances the difficulties of passing amendments. For an EU that wants to keep evolving, and be, if not ahead of, at least keeping up with the times, it will be difficult to accomplish with 28 possible vetos. The fact is that the MS of the EU have very different positions and traditions in everything from social to environmental rules, from legal orders to fiscal policies. That means that there is possibility for some more conservative MS to hold back more progressive ones. But while this issue seems clear in theory, it is highly unlikely that the MS would agree to let go of the power of veto in practice. The change from unanimity would mean that the EU would move more toward a federal state, and the individual MS would give up a bit of their sovereignty. The price they pay, with watered down treaty amendments and the risk of failed treaty amendments, as was the case with the TCE, might not seem severe enough to convince the MS to replace the unanimity principle. Especially in countries like the UK, where they are currently facing a negative public opinion of the EU and the possibility of a referendum whether to stay in the Union or not, the suggestion to transfer even more powers to the EU and give up more of their sovereignty would most likely not go over very well. Given these points, unanimity might not be the best option for the EU in the long run, but the prospect of changing the system is not likely to happen within the nearest future.

In conclusion, I think that while there may be some problems with the way the revision procedures are today, it is unlikely that they will go through any massive changes in the near future. If the EU decides to move towards a closer collaboration and more of a federation of states, it is not impossible, in fact it would then be very likely, that the revision procedures would change a lot and remove the unanimity principle. Nevertheless, if the Union continues as it has been going it will likely be many years before we see a change in the way the revision procedures operate.
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