



Statewatch analysis

EU Reform Treaty Analysis no. 3.2:

Revised text of Part Two of the Treaty establishing the European Community (TEC)

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Introduction

The following text sets out what will be the text of the new Part Two of the Treaty establishing the European Community (TEC) following the amendments to be agreed by the planned Reform Treaty. This text is based on the draft Reform Treaty released on 23 July 2007, and incorporates the amendments which are proposed by this draft Treaty to the current TEC into the current TEC text.

I have indicated by strikeout which provisions of the current TEC would be deleted, and by bold and underline which provisions would be added to the TEC. The provisions in italics are amendments following from the Reform Treaty mandate for an intergovernmental conference (IGC) as agreed at the EU leaders' summit on 23 June 2007, which amend what was agreed as part of the Constitutional Treaty.

It should be recalled that the TEC will be renamed the 'Treaty on the Functioning of the European Union' (TFEU) by the Reform Treaty.

The commentary on the Articles gives more detail on which Treaty provisions would be amended. Unless indicated otherwise, all of the amendments which the draft Reform Treaty would make to the text of the existing Treaty are essentially identical to the text of the Constitutional Treaty (OJ 2004 C 310), to the extent that the Constitutional Treaty was different from the existing Treaty. The changes which would be made by the draft Reform Treaty mandate to the Constitutional Treaty text are clearly indicated.

Some further changes to the text are possible before the final agreement upon it (planned for 18-19 October) and possibly even further changes could be made before signature of the Treaty - which is likely on 13 December (the planned date of an EU summit meeting), if the IGC concludes as planned in October.

This analysis will be updated in the event of changes to the text.

The draft Reform Treaty confirms that the Treaty Articles will be renumbered, but does not yet include the new numbering. I have inserted the likely new numbering of the Treaty provisions in square brackets throughout. It is possible that, if there are changes to the text, the final numbering will be different.

The Reform Treaty will make a number of standardized changes to the TEC/TFEU, such as the following:

- the word ‘Community’ will be replaced with ‘Union’ throughout;
- references to ‘this Treaty’ will be replaced by references to ‘the Treaties’, ie including the Treaty on European Union (TEU) together with the TEC/TFEU;
- references to the Council voting by qualified majority (QMV) will be deleted, since this will be the default method by which the Council votes;
- the references to the co-decision procedure (currently variants of, ‘The Council, acting in accordance with the procedure referred to in Article 251’) will be replaced by references to the ‘ordinary legislative procedure’; and
- the adoption of legislation other than by means of the co-decision procedure will be referred to as a ‘special legislative procedure’.

I have amended the current Treaty to reflect all of these changes, but since they do not amount to changes to the substance of the existing text, I have not commented on them. I have, however, pointed out all cases where QMV and/or the co-decision procedure would be extended, or where the decision-making procedure would otherwise be altered, or where the competence of the EU would be changed in some way.

General comments

Under the Reform Treaty, the citizenship provisions of the TEC will be enlarged to cover non-discrimination on various grounds on the one hand, and ‘new’ citizenship rights relating to access to documents and data protection on the other. In fact, these ‘new’ provisions have merely been moved into the citizenship Part of the Treaty from other parts of the Treaty. Conversely, in accordance with the mandate for the Reform Treaty negotiations, part of one clause would be moved *out* of Part Two: the new ‘legal base’ to adopt legislation on passports, ID cards and the like would be moved to the JHA provisions of the Treaty. The only genuinely ‘new’ clause in Part Two relates to the ‘citizens’ initiative’, a form of mass petition to request the Commission to propose an EU legal act.

It should be kept in mind that like some of the existing citizenship rights, most of the additions to Part Two will *not* be restricted in scope to EU citizens. This is clearly true of the provisions on data protection, access to documents and non-discrimination on grounds of sex, race, etc., and arguably true of the clause concerning non-discrimination on grounds of nationality. In fact, this is reflected by the new title of Part Two: non-discrimination *and* citizenship.

Apart from adding ‘new’ clauses, the Reform Treaty would make a number of substantive changes to the citizenship and non-discrimination provisions, as follows:

- a) the EP has consent powers, rather than consultation powers, over non-discrimination legislation (Article 17a);
- b) there is a new ‘legal base’ for legislation concerning social benefits in relation to the free movement of citizens (Article 18(3));
- c) there is a new ‘legal base’ for legislation relating to protection by diplomatic and consular authorities (Article 20);
- d) there is a ‘legal base’ for adopting legislation to implement the new TEU Article providing for the possibility of ‘citizens’ initiatives’ (Article 21);
- e) the scope of the access to documents rules is wider, as is the scope of the obligation to hold open meetings (Article 21a);
- f) the scope of the Article on data protection rules is wider (Article 21b);
- g) the European Parliament has the power of consent, instead of consultation, as regards the extension of citizenship rights (Article 22).

All of the amendments which the draft Reform Treaty would make to this Part of the TEC follow the text of the Constitutional Treaty, except for:

- a) a redraft of the new legal base concerning consular protection (to limit its scope);
- b) the transfer of the access to documents and data protection clauses, and the legal base relating to citizens’ initiatives, to this Part of the Treaty;
- c) the reduction in scope of the data protection clause to remove foreign policy (a separate Article has been drafted in the foreign policy provisions of the TEU to deal with this); and
- d) the transfer of the legal base relating to passports, ID cards, etc. to the JHA Title.

The second of these changes is purely cosmetic, but the others are substantive: the first change limits the EU’s powers, the third change prevents the EU institutions from having their normal role as regards the application of data protection rules to foreign policy, and the fourth change means that the UK, Ireland and Denmark have opt-outs as regards these measures.

Of course, it should be recalled that a significant proportion of the Constitutional Treaty simply repeated the text of the existing Treaties. The following analysis makes it easy to determine which provisions of the Reform/Constitutional Treaty are simply repetitive, or make merely cosmetic changes, and which make genuinely substantive amendments to the existing rules.

PART TWO

NON-DISCRIMINATION AND CITIZENSHIP OF THE UNION

The title of Part Two of the Treaty is amended, to reflect its wider scope.

Article 17 (ex-12) (I-4 and III-123)

Within the scope of application of ~~this Treaty~~ the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

~~The Council, acting in accordance with the procedure referred to in Article 251~~
~~The European Parliament and the Council, acting in accordance with the ordinary legislative procedure,~~ may adopt rules designed to prohibit such discrimination.

This Article has been moved here from Part One of the Treaty. It will now apply to the current second and third pillars.

Article 17a (ex-13) [18]
(III-124)

1. Without prejudice to the other provisions of ~~this Treaty~~ the Treaties and within the limits of the powers conferred by ~~it~~ them upon the Community Union, the Council, in accordance with a special legislative procedure, acting unanimously ~~unanimously on a proposal from the Commission and after consulting the consent of the~~ European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
2. By way of derogation from paragraph 1, when the Council adopts ~~the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt~~ Community Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, ~~it shall act in accordance with the procedure referred to in Article 251.~~

This Article has been moved here from Part One of the Treaty. The EP gains powers of consent (ie a veto), in place of consultation powers, as regards paragraph 1, but the Council must still vote unanimously on such legislation.

Article 17b (ex-17) [19]
(I-10)

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.
2. ~~Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby. Citizens of the Union shall enjoy the rights and be subject to the duties imposed by the Treaties. They shall have:~~
 - (a) the right to move and reside freely within the territory of the Member States;
 - (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
 - (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
 - (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the

Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

A list of EU citizens' rights has been inserted here. However, all of these rights exist already in the Treaties, as can be seen from the following Articles. Therefore this amendment is not a substantive change to the Treaties.

Article 18 [20]

(I-10 and III-125)

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in ~~this Treaty~~ the Treaties and by the measures adopted to give it effect.

2. If action by the ~~Community~~ Union should prove necessary to attain this objective and ~~this Treaty~~ the Treaties has have not provided the necessary powers, ~~the Council may adopt the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt~~ provisions with a view to facilitating the exercise of the rights referred to in paragraph 1. The Council shall act in accordance with the procedure referred to in Article 251.

~~3. Paragraph 2 shall not apply to provisions on passports, identity cards, residence permits or any other such document or to provisions on social security or social protection.~~

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure may establish measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

The exclusion from action set out in the current Article 18(3) has been turned into a legislative power, although the Council must be unanimous to take action. Such a power will also exist (subject to the same voting rules) as regards 'passports, identity cards, residence permits or any other such document'; in accordance with the Reform Treaty mandate, this power has been inserted into the external borders provisions of the JHA Title (Article 69 TEC), where the UK, Ireland and Denmark will be able to opt out of it.

Article 19 [21]

(III-126)

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, in accordance with a special legislative procedure, acting unanimously ~~on a proposal from the Commission and after consulting the European Parliament~~; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2. Without prejudice to Article 190(4) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, in accordance with a special legislative procedure, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

This is the first provision of the current TEC which has not been repealed, moved or substantively amended.

Article 20 [22]
(III-127)

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection.

The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection.

This is a new legal base to adopt EU legislation on this issue, in place of Member States' negotiations between themselves. However, in accordance with the Reform Treaty mandate, the EU powers are more limited than under the Constitutional Treaty. The new legal base now provides for Directives establishing 'coordination and cooperation measures necessary to facilitate such protection', rather than (under the Constitutional Treaty) European laws (regulations) setting out 'measures necessary to facilitate such protection'.

This is one of very few provisions of the Treaty where the Council adopts legislation by a qualified majority vote, but the European Parliament (EP) is only consulted.

Article 21 [23]
(I-47(4) and III-128)

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures determining the provisions for the procedures and conditions required for a citizens' initiative as referred to in Article [8x] of the Treaty on European Union, including the minimum number of Member States from which they must come.

Every citizen of the Union shall have the right to petition the European Parliament in accordance with Article 194.

Every citizen of the Union may apply to the Ombudsman established in accordance with Article 195.

Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 7 [xx] of the Treaty on European Union in one of the languages mentioned in Article 314 [xx] of the Treaty on European Union and have an answer in the same language.

In accordance with the Reform Treaty IGC mandate, the ‘legal base’ for adopting legislation concerning citizens’ initiatives has been placed in the TEC/TFEU. The TEU Article providing for possible citizens’ initiatives is a new clause, agreed as part of the Constitutional Treaty.

Article 21a (ex-255) [24]

(I-50 and III-399)

1. In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.

2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.

4. 3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, the documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3 this paragraph.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 the European Parliament and the Council, acting in accordance with the ordinary legislative procedure within two years of the entry into force of the Treaty of Amsterdam.

3. Each institution shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents in conformity with the legislative act referred to in the second subparagraph.

The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to the provisions of this paragraph only when exercising their administrative tasks.

The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the legislative act referred to in the second subparagraph.

This Article has been moved here, in accordance with the Reform Treaty IGC mandate, and has been amended to extend access to documents to all EU entities and to include further provisions on open meetings. This will entail a considerable increase in the openness of the Council. In practice, most EU bodies have already adopted rules on access to documents, except for the Court of Justice and the European Council.

The concept of a legislative act, which is relevant as regards both access to documents and open meetings of the Council, is further defined in the new Article 249a TEC. Essentially, whenever the Treaty refers to acts being adopted by means of a legislative procedure (whether an ‘ordinary’ or a ‘special’ procedure), this will mean that legislative acts are being adopted. A glance at the relevant Treaty Article which is the ‘legal base’ for the adoption of a measure will indicate whether an act is legislative or not.

Article 21b (ex-286) [25]
(I-51)

- 1. Everyone has the right to the protection of personal data concerning him or her.**
- 2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.**
- 3. The rules adopted pursuant to this Article shall be without prejudice to the specific rules referred to in Article 24 of the Treaty on European Union.**

Article 286 TEC has officially been repealed, but in effect has been moved here, and amended to cover third pillar acts and data protection by the Member States within the scope of first or third pillar law. In fact, a Directive harmonizing national data protection law within the scope of the first pillar exists already (Directive 95/46), and a proposed third pillar Framework Decision on this issue is under discussion.

The paragraph excluding data protection within the scope of EU foreign policy from the scope of this Article was agreed as part of the Reform Treaty IGC mandate.

For the sake of comparison, Article 286 TEC provides as follows:

- 1. From 1 January 1999, Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data shall apply to the institutions and bodies set up by, or on the basis of, this Treaty.*
- 2. Before the date referred to in paragraph 1, the Council, acting in accordance with the procedure referred to in Article 251, shall establish an independent supervisory body responsible for monitoring the application of such Community acts to Community institutions and bodies and shall adopt any other relevant provisions as appropriate.*

Article 22 [26]
(III-129)

The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee every three years on the application of the provisions of this part. This report shall take account of the development of the Union. **This paragraph shall not apply to the first paragraph of Article 21, to Article 21a or to Article 21b.**

On this basis, and without prejudice to the other provisions of ~~this Treaty~~ **the Treaties**, the Council, **in accordance with a special legislative procedure**, acting unanimously ~~on a proposal from the Commission and after consulting the consent of the~~ European Parliament, may adopt provisions to strengthen or to add to the rights laid down in this part, which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements.

The EP has gained the power of consent, rather than consultation, here. The new sentence added to the first paragraph (which was not found in the Constitutional Treaty) means that the Commission's report will not concern any of the 'new' citizenship rights inserted into Part Two by the Reform Treaty (citizens' initiative, openness and transparency and data protection).

However, the report will apply in future to the current Articles 12 and 13 TEC (non-discrimination on grounds of nationality, race, sex, sexual orientation, age, religion or disability), since those Articles have been added to this Part of the Treaty and are not excluded by the new sentence. But perhaps this is a drafting oversight.