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# *Are there Substantive Limits to the Amendment of the Treaties?*[*]

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## I. INTRODUCTION

### A. Article 236 of the EEC Treaty

ARTICLE 236 OF the Treaty establishing the European Economic Community (hereinafter the 'EEC Treaty' or the 'Treaty')[1] lays down the rules governing the procedure for the revision of that Treaty:

> 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 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.



[*] First published in French under the title 'Y a-t-il des limites matérielles à la révision des traités instituant les Communautés européennes?' (1993) 1-2 *Cahiers dr eur* 4–37. A slightly different English version of the same article was published by the Zentrum fur Europäisches Wirtschaftsrecht, Rheinische Friedrich-Wilhelms Universität Bonn, 43, October 1995. The text as it is published now owes to both versions of the article.

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[1] Article 236 of the EEC Treaty corresponds to Article 204 of the Treaty establishing the European Atomic Energy Community (EURATOM) and is similar to Article 96 of the Treaty establishing the European Coal and Steel Community (ECSC). All those provisions were subsequently repealed by the Treaty on European Union and replaced by Article N of the same Treaty, which became Article 48 of the EU Treaty post-Amsterdam. Our analysis is focused on the EEC Treaty, thus leaving in principle the other two founding Treaties aside. We kept in this publication the original wording and numbering of the EEC Treaty, which was still in application at the time when the article was first published. However, some references may be made, when appropriate, to the subsequent evolution of the relevant Treaty provisions and the case-law of the Court of Justice.

### B. Nature and Holders of the Revision Powers

Some introductory remarks may be made as regards the above quoted Treaty provisions.

It appears, first of all, that the Member States are still the holders of the revision powers. Each one of them shares the initiative with the Commission and no amendment of the Treaty is possible without their unanimous agreement. The refusal by one Member State to ratify the amendments agreed during an intergovernmental conference makes it impossible for those amendments to enter into force.

Secondly, the powers of revision are exercised according to a classical intergovernmental technique. Once the first phase of the procedure, dominated by the Community institutions, is completed, it is for the representatives of the governments of the Member States, meeting in conference, to decide, by unanimity, what modifications shall be introduced in the Treaty. The procedure is, thus, of a diplomatic, not of a constitutional, character.

Next, since all Member States are democratic nations governed by the rule of law, the participation in the revision procedure of their respective parliaments, or even of their electorates by means of a referendum, has a decisive constitutional dimension, namely from the point of view of the democratic legitimacy of the Community itself.

Lastly, it should be emphasised that the abovementioned Treaty provisions lay down specific requirements that must be met, as concerns both the forms and the procedure to be followed by the Member States in exercising their revision powers.



### C. Community Phase of the Revision Procedure

The first requirement relates to the mandatory participation of certain Community institutions—the Council, the Commission and the European Parliament—in the revision of the Treaty. That constitutes the so-called 'Community phase' of the revision procedure.

Other treaties establishing international organisations also provide for the participation of common institutions in the procedure for their amendment.[2] However, the tasks entrusted to the Community institutions by the Treaty are particularly relevant in that context. On the one hand, the European Parliament, and the Commission, if it hasn't taken the initiative with the proposal, must be consulted. On the other hand, the opinion which the Council is called upon to give in favour of initiating the procedure for revision constitutes in fact a decision to

[2] See, in this respect, J Smit and P Herzog, *The Law of the European Community* 6 (New York, Matthew Bender, 1989) 346.

call a conference of the representatives of the governments of the Member States[3] and not a mere 'opinion' within the meaning of Article 189 of the EEC Treaty. The Community intervention in the procedure goes therefore clearly beyond a mere consultation and constitutes a necessary pre-condition for launching an intergovernmental conference.[4]

## D. Characteristics of the Revision Mechanism

Quite often multilateral international treaties, in particular those establishing international organisations, do contain provisions concerning their amendment.

However, Article 236 of the EEC Treaty has the ability to produce such binding effects that clearly help to distinguish the Treaty from other international agreements establishing international organisations.

Indeed, the Treaty is designed as a kind of 'framework' or 'constitutional' agreement whose substantive provisions set the objectives that must be pursued by the institutions and establish the principles that govern their action. In order to carry out their mission, those institutions have been empowered by Article 189 to adopt acts of a legislative nature.

A reading of Article 189 in conjunction with Articles 173 and 177(1)(b) of the EEC Treaty,[5] highlights the supremacy of the Treaty over ordinary Community legislation. Article 236 must be understood in that same context. By establishing a complex procedure of revision, which differs from the ordinary legislative procedure, Article 236 confirms not only that the Community legislature must respect the Treaty, but also that the same legislature cannot modify it.[6] It is the mission



[3] Pursuant to Article 148(1) EEC, the Council shall act by a majority of its Members.

[4] See Vedder, in E Grabitz, 'Kommentar zum EWG-Vertrag', Article 236, (Munich, Beck, 1991)7. However, for a consultative reading of the intervention of the Community institutions, see M Waelbroeck, 'Peut-on parler d'un droit constitutionnel européen?' (1964) 2 *Travaux et Conférences de la Faculté de droit de l'Université libre de Bruxelles* 80. The author considers, nevertheless, that such an intervention, even if it is merely consultative, 'enables the Community institutions to make known their views, to give an authoritative opinion and to pave the way for a customary evolution leading to a more active role for those institutions'—our translation (in the original: 'permet aux institutions des Communautés de faire entendre leur voix, de donner un avis qui jouira nécessairement d'une autorité considérable, et de paver ainsi la voie d'une évolution coutumière au terme de laquelle elles auront un rôle plus actif à jouer'). It is worth noting that the Council acts in this context as a Community institution itself, entrusted with the task to 'ensure that the objectives set out in this Treaty are attained' (Article 145 of the EEC Treaty), distinct from the conference of representatives of the Member States (see Vedder (n 4) 6).

[5] See J Mertens de Wilmars, 'Annulation et appréciation de validité dans le traité CEE: convergence ou divergence?' in WG Grewe, H Rupp and H Schneider (eds), *Europäische Gerichtsbarkeit und nationale Verfassungsgerichtsbarkeit*, Festschrift zum 70. Geburtstag von Hans Kutscher (Baden-Baden, Nomos, 1981) 238.

[6] See, in this respect, Opinion of Advocate General Jacobs, in Case C-343/89 *Witzemann* [1990] ECR I-4488 para 20. According to the Advocate General, the Treaty provisions are binding on the legislature and can be altered only by an amendment of the Treaty.

of the Court of Justice, in its capacity as a constitutional court, to ensure that the supremacy of the Treaty is respected.

By adopting Article 236, the authors of the Treaty made it a 'rigid', not a 'flexible' body of law.[7] But at the same time, they showed their willingness to make the Treaty adaptable to a changing reality, thus preserving its binding force, without prejudice to its own identity.

The 'rigidity' of the Treaty regarding its revision is confirmed by Article 228(1), second subparagraph, relating to the matter of external relations of the European Community, in particular to its treaty making power.[8] It provides that:

> The Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 236.

That provision[9] constitutes indeed an expression of the supremacy of the Treaty in the Community legal order. That supremacy is ensured by the Court of Justice, which is empowered with a competence similar, in terms of constitutional law, to the prior control of constitutionality of international agreements.[10] A negative opinion of the Court thus prevents a draft international agreement concluded by the Community from entering into force, at least so long as it is not modified.[11]



## E. The Real Test: The Court's Opinions on the EEA

In this context, the question of the substantive limits to amending the Treaty may be formulated as follows: when the Court of Justice has given an adverse opinion on a draft international agreement in pursuance to Article 228(1), second subparagraph, may any modification, which would result in a fundamental change to the

[7] The classical reference book in this respect is James Bryce, 'Flexible and Rigid Constitutions', *Studies on History and Jurisprudence* (New York, Oxford University Press, 1901).

[8] On the treaty making power of the Community, see E Stein, 'External Relations of the European Community: Structure and Process' I, 1 *Collected Courses of the Academy of European Law* (Florence/London, European University Institute/Martinus Nijhoff, 1991) 115.

[9] The original version of the EEC Treaty, Article 238, third paragraph, also provided that where an association agreement concluded by the Community called for amendments to the Treaty, 'these amendments shall first be adopted in accordance with the procedure laid down in Article 236'. That provision actually contributed to reinforce the constitutional dimension of the Treaty. However, Article 238, third paragraph, of the EEC Treaty was repealed by Article G (84), adopted in Maastricht.

[10] Reference can be made, in this regard, to Article 54 of the French Constitution and to Article 91(3) of the Dutch Constitution.

[11] See R Kovar, 'La compétence consultative de la Cour de justice et la procédure de conclusion des accords internationaux de la Communauté économique européenne' in *Mélanges offerts à Paul Reuter: le droit international, unité et diversité* (Paris, A Pedone, 1981) 369. It must be stressed, however, that a declaration of incompatibility offers three solution possibilities: either a revision of the Treaty or the withdrawal of the draft agreement, or its renegotiation in order to eliminate the clauses incompatible with the Treaty.

existing Treaty, or even in a new treaty, be adopted in order to allow the agreement which has been declared incompatible with the Treaty to enter into force?

The Court of Justice itself had the opportunity to make known its views on that question in two opinions—Opinion 1/91 of 14 December 1991[12] and Opinion 1/92 of 10 April 1992[13]—delivered on the draft agreement between the European Community and its Member States, on the one hand, and the countries of the European Free Trade Association, on the other hand, relating to the creation of the European Economic Area (hereinafter, the 'EEA').

The agreement, which was finally signed on 2 May 1992, in Porto, was decisively influenced by those two opinions. In fact, on the one hand, the provisions that had been declared incompatible in the first Opinion were repealed. On the other hand, the new mechanisms that were renegotiated thereafter were upheld, under certain conditions, in the second Opinion.[14]

It follows from the Court's reasoning in those two opinions that, in certain circumstances, an international agreement which has been considered incompatible with the Treaty cannot enter into force as it stands, since that would require amendments to the Treaty that would not be possible to adopt even in accordance with the procedure laid down in Article 236. In other words, our view is that the two opinions paved the way for the recognition by the Court of the existence of certain implied substantive limits to the revision of the Treaty.



## F. Substantive Limits: A Constitutional Issue

The issue of substantive limits only becomes relevant by reference to a text of a constitutional nature, inherent to which there is a material and temporal 'claim to validity' ('*Geltungsanspruch*') of any other normative instrument belonging to the same legal order.

That issue thus acquires a real significance only by reference to the process of 'constitutionalisation' of the Treaty. Such process led to the conversion of the Treaty into a 'constitutional charter of a Community governed by the rule of law',[15] as well as to the gradual development of a new legal order, autonomous *vis-à-vis* both the international order and the national legal orders of the Member States.

[12] [1991] ECR I-6079.

[13] [1992] ECR I-2821.

[14] See, in this respect, HG Schermers, 'Commentary on Opinions 1/91 and 1/92' (1992) 29 *Common Market Law Review* 1004: 'Today, the standing of the Community as such is that its Court of Justice can prevent 19 sovereign states from accepting particular rules in an international agreement. This shows how much the sovereignty of the Member States has been limited over the years, also in the field of external relations.'

[15] See Opinion 1/91 (n 12) para 21. That expression goes back to the judgment in Case 294/83 *Les Verts v Parliament* [1986] ECR 1365. However, Advocate General Lagrange had already used the expression in his Opinion in Case 8/55 *Fédération Charbonnière Belgique v High Authority* [1954–1956] ECR 260.

We will therefore start by examining the meaning and the scope of the process of 'constitutionalisation' of the Treaty and the concomitant process of building an autonomous Community legal order. The case-law of the Court of Justice played in this context the decisive role, in particular as concerns the interpretation of Article 236 and the conditions for amending the Treaty.

Opinions 1/91 and 1/92 will provide the framework to answering the question of whether, and to what extent, the concept of substantive limits to the amendment of the Treaty already forms part of the Community legal order.

## II. THE REVISION OF THE TREATY, THE PROCESS OF 'CONSTITUTIONALISATION' AND THE BUILDING OF AN AUTONOMOUS COMMUNITY LEGAL ORDER

### A. Building a Constitutional Order

The term 'constitutionalisation' refers, in the Anglo-American literature, to a circular or spiral process in which a treaty such as the EC Treaty is interpreted by a court such as the Court of Justice in accordance with a systematic, teleological and, above all, dynamic method, similar to that used by the constitutional courts of the Member States and different from that characterising the approach usually taken by international courts and arbitrators for the interpretation of an international convention.

As both a cause and an effect of such process, the Treaty has gradually taken on the characteristics which are inherent in a 'fundamental law' of a constitutional kind.[16] As a matter of fact, that represented a process of constructive case-law ('*Rechtsfortbildung*'), which found its basis in the text of the Treaty, as an instrument of international law distinct from any other classical international agreement.



[16] On the process of constitutionalisation, see E Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' (1981) *The American Journal of International Law* 1 ff; GF Mancini, 'The Making of a Constitution for Europe' (1989) *Common Market Law Review* 595 ff; J-P Jacqué, 'Cours general de droit communautaire' (1990) I, 1 *Collected Courses of the Academy of European Law* 265 ff; JHH Weiler, 'The Transformation of Europe' (1991) *The Yale Law Journal* 2413; H Rasmussen, 'The Court of Justice of the European Communities and the Process of Integration' in E Orban (ed), *Fédéralisme et cours suprêmes* (Brussels, Bruylant, 1991) 199 ff; J Temple Lang, 'The Development of European Community Constitutional Law' (1991) *The International Lawyer* 455 ff. On the methods of interpretation of the Court of Justice, see H Kutscher, 'Méthodes d'interprétation du droit communautaire vues par un juge à la Cour', *Cour de justice des Communautés européennes*, Rencontre judiciaire et universitaire, 27–28 September 1976, Luxembourg, 1976.

### B. First Stage: Direct Effect

The first stage of that process of constitutionalisation, inaugurated by the well-known judgment in *Van Gend en Loos*,[17] was to recognise that the provisions of the Treaty that are clear, precise, complete and unconditional have direct effect, even when they contain only obligations for the Member States. A provision with direct effect enables the individuals to rely on it before the national courts, which are required to protect the individual rights that derive therefrom.

The specific feature of Community law in that regard is that direct effect was spelled out as a general principle of Community law by virtue only of the content of its provisions, regardless of the will of the Contracting Parties,[18] whereas in international law such an effect is just the exception.[19]

In this context, the impact of the Treaty on individuals goes beyond the boundaries of classical international law and may be compared with what happens with a constitution to which the courts have 'direct access', irrespective of any intervention of the legislature.[20]

### C. Second Stage: Primacy

The second stage of the constitutionalisation process conducted by the Court of Justice derived as a natural consequence from the first stage.[21] We refer to the recognition of the principle of precedence or primacy of Community law over the national law of Member States, including constitutional law.



[17] Case 26/62 *Van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR-1. The Court stated therein for the first time that 'the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'.

[18] See, in this respect, P Pescatore, 'The Doctrine of 'Direct Effect': An Infant Disease of Community Law' (1983) *European Law Review* 155. In Pescatore's view, the discussion about the direct effect was the consequence of a kind of 'infant disease' of Community law, which was a necessary step before reaching the conclusion that every rule pertaining to the Community legal order must be fully effective not only between the Contracting States but also as regards the relations between the States and the individuals and even the relations among individuals themselves.

[19] That is the case of the so-called self-executing treaties.

[20] The concept of 'constitutionalisation' was originated in the United States where the Constitution, in particular its provisions on fundamental rights, have been, from earlier times, regarded as endowed with direct effect and capable of being relied upon by individuals before the courts, including to oppose the application of laws that are not in conformity with the Constitution. Conversely, constitutionalism in continental Europe, failing to fully recognise the normative value of the Constitution, started by regarding action by the legislature as indispensable for the effectiveness of the constitutional provisions relating to fundamental rights. A process of 'constitutionalisation of the constitutions' had to be conducted in some Member States, leading to the embodiment in those constitutions of the principle of direct effect of the provisions relating to fundamental rights and of the principle of direct access by judges to the Constitution (as in Germany, Spain, Italy and Portugal).

[21] See GF Mancini (n 16) 600.

Such principle of 'internal primacy' has, in Community law, a prospective dimension, entailing an obligation 'to do', which differs from the principle of precedence in international law. The latter merely requires the Contracting States to comply with their international obligations, subject to their retrospective liability, leaving it to their constitutional law to determine the status of international law in the internal legal order, so as to satisfy that requirement.[22]

As is shown by the case-law, in particular in *Costa v ENEL*,[23] *Simmenthal*[24] and *Factortame*,[25] the Court of Justice, despite the absence in the Treaty of any provision stating the primacy of Community law, has laid down the principles that govern the relationship between Community law and the law of Member States in a federal-like manner. In a way, the constitutional rules of the Member States that applied, in the beginning, to that relationship have been, as a consequence of the case-law, 'enshrined' in the legal order of the Community, which now determines the content and the scope of the principle of primacy.[26]

In spite of the strong reservations initially raised by some national courts, it is possible to say that nowadays that doctrine is widely accepted by the courts in all Member States.[27]



## D. Third Stage: An Unwritten Catalogue of Fundamental Rights

The 'discovery' in the Treaty, by the Court of Justice, of an unwritten catalogue of fundamental rights constitutes another step in the process of 'constitutionalisation' of the Treaty. Such a contribution to a 'constitution of Europe' was triggered by the pressure exerted by certain constitutional courts, in particular the *Bundesverfassungsgericht*, as a pre-condition for the gradual acceptance of the primacy of Community law.[28]

That catalogue of fundamental rights owes as much to the general principles common to the constitutions of the Member States as to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Formulated step by step since *Stauder*,[29] it offers individuals a protection, which was not originally

[22] See B de Witte, 'Retour à Costa. La primauté du droit communautaire à la lumière du droit international', in W Maihofer (ed), *Noi si mura: Selected working papers of the European University Institute* (Florence, European University Institute, 1986), 257.

[23] Case 6/64 *Flaminio Costa v ENEL* [1964] ECR-585.

[24] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR-629.

[25] Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433.

[26] See D Simon, 'Les exigences de la primauté du communautaire: continuité ou métamorphoses?' *L'Europe et le droit—Mélanges en hommage à Jean Boulouis* (Paris, Dalloz, 1991) 498.

[27] In that context, see the judgment of 28 January 1992 where the *Bundesvarfassungsgericht* stated that the principle of primacy is embodied in an unwritten provision of the basic Community law.

[28] See GF Mancini (n 16) 611.

[29] Case 29/69 *Erich Stauder v City of Ulm—Sozialamt* [1969] ECR-419 para 9: the Court is entrusted with the protection of fundamental human rights, which are among the general principles of Community law.

envisaged by the Treaty,[30] and constitutes a standard of appraisal of the validity of the acts of the institutions, both of a legislative and of an administrative nature, as well as of national measures adopted within the field of application of Community law.[31]

Another aspect that is worth mentioning in that same regard concerns the application of the regime of fundamental rights to the 'four fundamental freedoms' enshrined in the Treaty: goods, persons, capital and services. Indeed, the notion that those fundamental freedoms express the fundamental rights of citizens of the Member States of the Community to carry out an economic activity and to choose the place and orientation of their occupation or vocational training entails recognition that the relevant provisions of the Treaty[32] ensure the appropriate protection of those citizens against any undue interference from Member States.[33]

The Court of Justice appeared to uphold such an understanding in that it stated that the rules of the Treaty on freedom of trade, freedom to exercise an economic activity and free access to employment, which may be construed as prohibiting Member States from setting up restrictions or obstacles to the entry into their territory of nationals of other Member States, have the effect of conferring fundamental rights directly on all persons to which the aforementioned articles may apply.[34]



[30] On the recent evolution of the case-law relating to fundamental rights, see H Rasmussen (n 16) 221 ff; GF Mancini and D Keeling, 'From CILFIT to ERT: The Constitutional Challenge facing the European Court' (1991) *Yearbook of European Law* 11. The Maastricht Treaty has ratified the outcome of this evolution. Article F(2) of the EU Treaty states that '[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

[31] See, in particular, Case C-4/73 *Nold v Commission* [1974] ECR 491, para 13, Case 44/79 *Hauer v Land Rheinland Pfalz* (1979) ECR 3727, Joined Cases C-60 and C-61/84 *Cinéthèque v Fédération Nationale des Cinémas Français* [1985] ECR 2605, para 25, Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 18, Case 12/86 *Demirel v Stadt Schwäbisch Gmünd* [1987] ECR 3719, para 28, Case 5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2069, para 19, C-260/89 *Elliniki Radiophonia Tiléorassi and Others(ERT) v Dimotiki Etairia Pliroforissis and Others* [1991] ECR I-2951,paras 41-42 and C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan a o* [1991] ECR I-4655, para 31.

[32] As laid down, respectively, in Articles 30, 48, 61, 52 and 59 of the EEC Treaty.

[33] The recognition of such freedoms as fundamental rights may be found in the constitutions of some Member States, namely Article 12 of the *Grundgesetz*. See, in this respect, G Ress, 'La libre circulation des personnes, des services et des capitaux' European Commission, *Trente ans de droit communautaire* (Luxembourg, Office for Official Publications of the European Communities, 1982) 304. A Bleckmann, 'Considérations sur l'interprétation de l'article 7 du traité CEE' (1976) *Revue trimestrielle de Droit europeen* 481, underlines the fact that such understanding is not the mere expression of an ideology but is indeed required by the principles inherent in a State or Community based on the rule of law.

[34] Case 118/75 *Watson and Belmann* [1976] ECR 1185 para 12. The Court also stressed (para 16 of the same judgment) that those Treaty provisions and the implementing rules of secondary Community law give effect to the fundamental principle contained in Article 3(c) of the EEC Treaty, 'which states that, for the purposes set out in Article 2, the activities of the Community shall include the abolition, as between Member States, of obstacles to freedom of movement for persons, services

## E. Next Step: Autonomy Vis-à-Vis International Law

The stages of 'constitutionalisation' of the Treaty which we have just considered led essentially to establishing the autonomy of the Community legal order *vis-à-vis* the legal orders of the Member States. Indeed, at stake was, first, to ensure the effective and uniform application of Community law in all Member States as a necessary condition for the existence of the Community legal order and, second, the need for a catalogue of fundamental rights without which a true constitution cannot come to exist.[35]

Conversely, the next step of 'constitutionalisation' of the Treaty, which is related to its revision,[36] concerns essentially the autonomy of the Community legal order *vis-à-vis* the international legal order. To this effect, the main question is to determine the extent to which relations between the Community and the Member States are governed by an 'internal law' of a constitutional nature, to the exclusion of any rules of international law.[37]

In that regard, the problems are more complex and the answers are still being worked out. Not only were the Member States fully sovereign States when the Community was set up, but they still are so today and have preserved their capacity as entities subject to international law.[38] For that reason, it is more difficult to establish the independence of the Community as regards international law than as regards the domestic law of the Member States.[39]



and capital'). See also Case 240/83 *Procureur de la République v ADBHU* [1985] ECR 531 para 9 ('the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance'), and Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097 para 14 ('free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community'; the requirement of effective protection for that right 'reflects a general principle of Community law which underlies the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms'). However, in Joined Cases C-267 and 268/91 *Keck and Mithouard* [1993] ECR I-6097 paras 14–18, the Court underlined the idea that the scope of Article 30 is not to ensure the commercial freedom of traders as such but only insofar as it affects trade between Member States. In this respect, see the commentary by W-H Roth (1994) 31 *Common Market Law Review* 851.

[35] See Article 16 of the Declaration of the Rights of Man and of the Citizen, of 26 August 1789.

[36] As M Waelbroeck (n 4) 78–79, put it, 'the fundamental distinction between a constitution and an international treaty concerns the procedure that must be followed in order to periodically modify or repeal either of them'—our translation (in the original: 'la distinction fondamentale entre constitution et traité international tient à la procédure qui doit être mise en œuvre pour pouvoir, régulièrement, modifier ou abroger l'une ou l'autre').

[37] A similar view is expressed by U Everling, 'Sind die Mitgliedstaaten der Europäischen Gemeinshaft noch Herren der Verträge?' *Das Europäische Gemeinshaft im Spannungsfeld von Politik und Wirtschaft* (Baden-Baden, Nomos, 1985) 89.

[38] In that regard, it must be recalled that, as E Stein noted (n 8) 130, '[t]aking into account the general features of the Community and its unique attributes in external relations, the label of international organization can be explained only by the extraordinary penury in the conventional taxonomy of international persons'.

[39] See, in this connection, P Dagtoglou, 'La nature juridique de la Communauté européenne' in *Trente ans de droit communautaire* (n 33) 36.

The general principle of international law governing the amendment of treaties, which finds its expression in the Vienna Convention on the Law of Treaties, may be stated as follows: the States parties to any international agreement are the 'masters of the treaty' and may at any time amend and revoke it, whether formally or not, in principle by unanimity (see Articles 39, 54 and 57 of the Vienna Convention). Moreover, even when an international treaty lays down provisions establishing a specific procedure for its amendment, the Contracting Parties may, by common accord, disregard such provisions.

In view of that, it is not surprising that the discussions among academics about Article 236 of the EEC Treaty have been centred on the question of whether its provisions are optional ('*Sollvorschrift*') or instead binding for the Member States. If the former were true, those States would be entitled, by application of the international law principles of the *actus contrarius* and the freedom to choose the form, to amend the Treaty without regard to the formal and procedural limits set out in Article 236.[40]

Article 169 of the EEC Treaty is of particular importance for an interpretation of Article 236 that goes in the direction of an autonomous and binding meaning. By virtue of Article 169, the Court may, on application by the Commission, find that Member States have failed to comply with their obligations under Article 236 and, therefore, that any amendment provisions adopted in breach of the requirements laid down in that article are inapplicable.[41] In those circumstances, it is impossible to maintain that the provisions on revision contained in Article 236 are merely optional and do not prohibit alternative recourse to the general rules of international convention law. On the contrary, those cannot but be mandatory provisions whose application is subject to review by the Court.[42]

It follows from the foregoing that Article 236 of the EEC Treaty operates, *vis-à-vis* the general principles of international law, as a *lex specialis*: since the Treaty lays down, and guarantees, a specific system for its own amendment, there



[40] In favour of the legality of a Treaty revision outside the boundaries of Article 236, see M Deliege-Squaris, 'Révision des traités européens en dehors des procédures prévues' (1980) *Cahiers dr eur* 550; G Gaja, 'Fonti Comunitarie' VI, *Digesto delle Disciplina Pubblicistiche*, (Milan, UTET Giuridica, 1990) 437; H Steinberger, 'Der Verfassungsstaat als Glied einer Europäischen Gemeinschaft', H Steinberger, E Klein, D Thürer (eds) *Veröffentlichung der Vereinigung der Deutschen Staatsrechtslehrer* (Berlin, De Gruyter, 1991) 16–17.

[41] Moreover, according to Article 171 of the EEC Treaty, if the Court of Justice finds that a Member State has failed to fulfil any of its obligations under the Treaty; such State shall take the measures required for the implementation of the judgment.

[42] It was on the basis of Article 169 that the Court of Justice ruled, in Joined Cases 90 and 91/63, *Commission v Luxembourg and Belgium* [1964] ECR 625, that, by establishing a new legal order which governs the powers, rights and obligations of the natural and legal persons to whom it is applicable, as well as the necessary procedures for taking cognizance of and penalising any breach of it, the Treaty is not limited to creating reciprocal obligations between the said persons. On the contrary, as the Court stated, the basic concept of the Treaty requires that Member States shall not fail to carry out their obligations and shall not take the law into their own hands. It follows that recourse to the rule *inadimplenti non est adimplendum*, applicable, though with reservations, in international law, is excluded within the Community legal order.

can be no question of applying those general principles to any such amendment. In other words, the Member States cannot by common accord rely upon the principles governing the modification of treaties in international law so as to disregard the formal and procedural limits to the revision of the Treaty as laid down in Article 236.[43]

Not surprisingly, the Court of Justice did fully uphold the understanding that the provisions of Article 236 are mandatory for the Member States. In *Defrenne*,[44] the Court ruled that 'apart from any specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236'. It also declared in Opinion 1/92[45] that 'the powers conferred on the Court by the Treaty may be modified pursuant only to the procedure referred to in Article 236 of the Treaty'.

Furthermore, in *United Kingdom v Council*,[46] the Court pointed out that the rules regarding the manner in which the Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the Member States or of the institutions themselves.

It must also be recalled, in that regard, that the Court considered it competent to review the compatibility with the Treaty of agreements concluded by the Member States between themselves or with third parties, which introduce modifications or derogations in the Treaty or which may hinder its effective application in any way.

The Court therefore ruled that a convention concluded by the Member States to implement Article 220 of the EEC Treaty must be interpreted with regard both to its principles and objectives and to its relationship with the Treaty.[47] Moreover, the Court admitted that Article 5(2) of the same Treaty may serve as a reference framework for the appraisal of measures taken to implement any agreement concluded between Member States outside the scope of the Treaties, which are liable to impede the effective application of a Treaty provision or the functioning of the Community institutions.[48]



[43] In this connection, see J-P Jacqué (n 16) 273. See also W Meng, 'Artikle 236' in H von den Gröben, J Thiesing and C-D Ehlermann (eds), *Kommentar zum EWG-Vertrag*, 4th edn (Baden-Baden, Nomos, 1991) 5842–43, who rightly points out that the Member States cannot derogate by common accord, without regard to Article 236 and in breach of the principle of legal certainty, from the law that they have themselves made and which constitutes the basis of a legal order whose rules are mandatory for individuals and undertakings in the Community.

[44] Case 43/75 *Defrenne v Sabena* [1976] ECR 455 para 58. See also the opinions of Advocate General Dutheillet de Lamothe of 13 January 1971 in Case 37/70, *REWE v Hauptzollamt Emmerich* [1971] ECR 41, and of Advocate General J-P Warner of 25 October 1979 in Case 34/79 *Regina v Maurice Donald Henn and John Frederick Ernest Darby* [1979] ECR 3932.

[45] Opinion 1/92 [1992] ECR I-2843 para 32.

[46] Case 68/86 *United Kingdom v Council* [1988] ECR 900 para 38.

[47] Case 12/76 *Industrie tessili italiana v Dunlop AG* [1976] ECR 1485 para 9.

[48] Case 44/84 *Hurd v Jones* [1986] ECR 81 para 39.

Concerning agreements between Member States and third countries, the Court found, in *AETR*,[49] that

> to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.

As the Court explained in its Opinion 2/91,[50] 'the authority of the decision in that case cannot be restricted to instances where the Community has adopted Community rules within the framework of a common policy' and applies in 'all the areas corresponding to the objectives of the Treaty'.

However, since the Member States are the Contracting Parties to those agreements, the Court has no jurisdiction to annul their provisions by virtue of Article 173 of the EEC Treaty or to declare them invalid and inapplicable under Article 177(1)(b).[51]

The Court may only, by way of Article 169, declare that a Member State has failed to fulfil its obligations under the Treaty or, on a reference for preliminary ruling in interpretation, by virtue of Article 177(1)(a), consider any provisions in the agreement as contrary to the Treaty and therefore inapplicable.[52] It is therefore not impossible that individuals, by means of Article 177, indirectly claim application of Article 236.[53]

As a matter of fact, the Court could have been called upon to rule on the possible disregard for the amendment procedure set out in the Treaty on only two occasions where Member States have agreed to modify the ECSC Treaty. These were, on the one hand, the Treaty between France and Germany, of 27 October



[49] Case 22/70 *Commission v Council* [1971] ECR 275 para 22.

[50] [1993] ECR I-1061 para 19.

[51] In Joined Cases 31 and 35/86 *Laisa and CPC España v Council* [1988] ECR 2285 para 18, the Court ruled that the provisions set out in the act of accession of a new Member State adjusting acts adopted by the institutions do not constitute an act of the Council but provisions of primary law which may, in principle, not be suspended, amended or repealed otherwise as by means of the procedures laid down for the amendment of the original treaties. Consequently, they cannot fall within the category of acts of the institutions open to an action for a declaration that is void under Article 173 of the EEC Treaty. However, it seems possible for the Court to declare void, for breach of an essential formality, a decision to open an intergovernmental conference for the revision of the Treaty adopted by the Council without regard to the consultation procedure provided for in Article 236. Such is the conclusion that follows from para 33 of the judgment in Case 138/79 *Roquette Frères* [1980] ECR 3333, by which the Court declared void an act of the Council adopted in the framework of the ordinary legislative process without the prior consultation of the European Parliament.

[52] Without prejudice to the possibility of interpreting those provisions in conformity with the Treaty. See C-3/91 *Exportur* [1992] ECR I-5529. Where third countries are parties to the agreement, the fact that its provisions cannot be relied on against a Community obligation may lead to engaging the international responsibility of the Member States. See, as regards this latter aspect, R Joliet, 'Le droit institutionnel des Communautés européennes' (Liège, Faculté de droit, 1983) 209; J-V Louis, 'La révision des traités et l'Union européenne' in André Miroir (ed), *Pensée et construction européennes* (Brussels, Émile Van Balberghe, 1990)196; J Rideau, 'Les accords internationaux dans la jurisprudence de la Cour de justice des Communautés européennes' (1990) *Revue générale de Droit public* 289.

[53] See W Meng (n 43) 5842.

1956, that modified the weighing of votes of Member States as established in Article 28(5) of the ECSC Treaty, following the accession of Saarland to the Federal Republic of Germany, and, on the other hand, the Convention on certain institutions common to the European Communities, signed in Rome on 25 March 1957, which modified the provisions of the ECSC Treaty concerning the composition and the working of the Assembly and the Court of Justice. Those two agreements were immediately subject to severe criticism.[54]

In all the other cases where the Treaties have been subject to revision—eight cases, including the Maastricht Treaty—the Treaty provision laying down the applicable procedure has, in substance, been complied with. In fact, Member States seem to have become definitively aware of the fact that they are not the absolute masters of the amendment procedure.

The evolution described so far shows that the rules of international law which apply to the amendment of treaties are formally excluded as regards the revision of the Treaty, thus allowing for the conclusion that the latter has been 'constitutionalised'[55] as concerns the *formal and procedural limits* to its amendment and the Community legal order has, to that extent, become autonomous *vis-à-vis* the international legal order.

It is now time to examine the question of whether there are any *substantive limits* to the amendment of the Treaty. Opinions 1/91 and 1/92 are of the utmost importance in this regard.



## III. OPINIONS 1/91 AND 1/92 OF THE COURT OF JUSTICE: A NEW STEP IN THE PROCESS OF CONSTITUTIONALISATION OF THE TREATY?

### A. The Judicial System in the Draft EEA Agreement

The Draft Agreement on the EEA submitted to the Court of Justice for an Opinion pursuant to Article 228(1), second subparagraph, of the EEC Treaty, envisaged in particular the establishment of a judicial system intended to guarantee the objective of uniform interpretation and application of the law within the EEA. That concerned the fundamental freedoms (goods, persons, capital, establishment and services) as well as the rules on competition, which are identical to the corresponding provisions of the EEC and the ECSC Treaties and with the measures adopted to implement those Treaties.

[54] The Dutch Parliament held a debate introduced by MP VG van Naters, who subsequently published a study on the subject entitled 'La révision des traités supranationaux', *Liber Amicorum Jean Pierre François* (Leyden, 1959) 120. The abovementioned agreements were subsequently considered 'youthful sins' due to the lack of experience. See JHH Weiler and J Modrall, 'The Creation of the European Union and its Relationship to the EEC Treaties' in R Bieber, J-P Jacqué and JHH Weiler (eds), *An Ever Closer Union—A Crtitical Analysis of the Draft Treaty Establishing the European Union* (Luxembourg, Office for Official Publications of the EC, 1985) 161.

[55] See J-P Jacqué (n 16) 269.

The judicial system set up in the Draft Agreement established an EEA Court and an EEA Court of First Instance partially composed of members of the Court of Justice and the Court of First Instance of the European Communities respectively.

It was envisaged (Article 96(1)(a) of the Draft Agreement) that the EEA Court would have jurisdiction to adjudicate, in particular, on disputes between the Contracting Parties upon application by one of them, on condition that the dispute had been submitted to two consecutive meetings of a Joint Committee without being resolved.

By virtue of Article 6 of the Draft Agreement, the EEA Court was to interpret the provisions of the Agreement in conformity with rulings of the Court of Justice on the corresponding provisions of Community law which were given prior to, but not subsequent to, the date of signature of the Agreement. The EEA Court of First Instance, for its part, was to have jurisdiction in particular to ensure judicial review of decisions of the European Free Trade Association (EFTA) Surveillance Authority relating to competition rules.

Moreover, the Draft Agreement allowed the EFTA States to authorise their Courts, when they found it necessary, to refer to the Court of Justice, for a preliminary ruling, questions on the interpretation of the provisions of the EEA Agreement regarding the free movement of goods, persons, services and capital and the rules on competition. However, the Court's rulings were not to be binding on the courts of the EFTA Member States.

The last question that was put to the Court for an opinion and the one that is of most interest for our study was whether Article 238, first paragraph, of the EEC Treaty[56] permitted the creation of a judicial system of the type envisaged by the Draft Agreement. In the event of the Court's finding that the system of EEA courts as laid down in the Draft Agreement was incompatible with the Treaty, the Commission admitted the possibility of activating the procedure for amendment provided for in Article 236 of the EEC Treaty, with a view to amending Article 238, first paragraph, so as to permit the conclusion of the EEA association agreement without modifying the system of courts then envisaged.



### B. The Three Questions Examined by the Court

The Court of Justice examined the compatibility with the Treaty of three aspects of the judicial system envisaged in the Draft Agreement[57]: (i) the jurisdiction of

[56] According to that provision: 'The Community may conclude with a third country, a union of States or an international organisation agreements creating an association embodying reciprocal rights and obligations, joint actions and special procedures.'

[57] In two opinions previously delivered in pursuance of Article 228(1), second subparagraph (Opinion 1/75 [1975] ECR 1355, and Opinion 1/78 [1979] ECR 2871), the Court of Justice held that the compatibility of an agreement with the Treaty must be assessed in the light of all the rules

the EEA Court to settle disputes between the Contracting Parties; (ii) the objective of guaranteeing legal homogeneity within the EEA; (iii) the lack of binding effect to be attached to the answers given by the EEA Court following a reference for preliminary ruling from a court of a country member of EFTA.

As regards the first aspect, the Court of Justice held that the jurisdiction which the Draft Agreement conferred on the EEA Court, by virtue of Article 96(1)(a), to settle disputes between the Contracting Parties, as defined in Article 2(c) of said Draft Agreement, was not compatible with the jurisdiction conferred on the Court by the Treaty. In fact, since, according to that latter provision, the expression 'Contracting Party' may cover the Community, the Community and its Member States or simply the Member States, the EEA Court 'would have to rule on the respective competences of the Community and the Member States as regards the matters governed by the provisions of the agreement'. In other words, the EEA Court would have to decide on the balance of powers within the Community and to determine, in the light of the Treaty, whether or not a given competence had been conferred on the Community.

The Court of Justice took the view that conferring such competence on the EEA Court would be incompatible with Article 164 of the EEC Treaty and in particular that it would hinder the autonomy of the Community legal order.[58]

With regard to the second aspect, the Court of Justice emphasised that the objectives pursued by the Community legal order differed from those of the EEA: whereas the latter aims at applying rules on free trade and competition in economic and commercial relations between the Contracting Parties, as an end in itself, the same system of rules in the Community has been conceived as a means of achieving integration leading to the establishment of a single market and an economic and monetary union.[59]

The Court inferred from there that the objective of homogeneity in the interpretation and application of the law in the EEA not only was not secured by the identity or similarity of content or wording between the Community law provisions and the corresponding provisions of the EEA Agreement but also was frustrated by the divergence between the aims and context of the agreement *vis-à-vis* those of Community law.[60] Nevertheless, with the entry into force of the EEA



of the Treaty, both those rules which determine the extent of the powers of the institutions of the Community and the substantive rules.

[58] See Opinion 1/91 (n 12) paras 31–36.

[59] See Opinion 1/91 (n 12) paras 15–19, and Opinion 1/92 (n 13) para 17.

[60] In that respect, the Court of Justice, after referring to *Van Gend en Loos* (n 17) noted that whilst the Treaty creates rights and obligations for nationals of Member States and provides for a transfer of sovereignty from those Member States to the Community, the EEA Agreement 'merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up' (Opinion 1/91 (n 12) para 20). In fact, according to Protocol 35 to the EEA Agreement, the commitment of the Parties is restricted to introducing into their respective legal orders a provision of a legislative nature ensuring the precedence of the Agreement over contrary national legislation. On that point, see O Jacot-Guillarmod, 'Préambule, objectifs et principes (art. 1er-7 EEE)' in O Jacot-Guillarmod (ed), *Accord EEE—Commentaires et*

Agreement, its provisions, similar to the Community rules on free movement and competition, would be embodied in the Community legal order[61] and 'juxtaposed' to its corresponding rules.

In those circumstances, Article 6 of the Draft Agreement allowed the EEA Court to interpret the latter rules in a manner incompatible with the relevant case-law of the Court of Justice subsequent to the date on which the Agreement was signed. The autonomy of the Court of Justice in interpreting the Community law would thus be affected. In fact, with regard to the objective of uniform application of the Agreement throughout the EEA, the Court of Justice would have to take account of the possibly divergent case-law of the EEA Court on such fundamental rules of Community law as those on freedom of movement and competition.[62]

On those grounds, the Court of Justice held that Article 6 of the Draft EEA Agreement was incompatible with Article 169 of the EEC Treaty and 'more generally with the very foundations of the Community'.

Lastly, concerning the third aspect of the judicial system under consideration, the Court of Justice stated that to admit that the institutions set up by the Agreement were empowered to disregard the binding nature of the Court's decisions would adversely affect the autonomy of the Community legal order, respect for which the Court is required to assure by virtue of Article 164 of the EEC Treaty. The Court then made clear that, although the powers conferred on the Court by the Treaty may be modified pursuant to the procedure provided for in Article 236 of the Treaty, an international agreement concluded by the Community may only confer new powers on the Court, including jurisdiction to interpret the provisions of such an agreement provided that, in so doing, it does not change the nature of the function of the Court as conceived in the EEC Treaty, in particular the binding nature of its decisions.[63]



### C. The EC Legal Order and its Autonomy

It follows from the aforementioned that Article 164 has been interpreted in Opinions 1/91 and 1/92 as conferring on the Court of Justice the essential mission of safeguarding the autonomy of the Community legal order, which is an order of integration, distinct from the international legal order, which is essentially an order of cooperation.

*reflexions* (Zürich, Schulthless Polygraphischer, 1992) 54, 58–59; A Saggio, 'L'incidence de l'accord EEE sur le système communautaire', report to the Association amicale des référendaires de la Cour de justice, 20 November 1992.

[61] The Court observed (Opinion 1/91 (n 12) para 37) that the provisions of international agreements concluded by means of the procedure set out in Article 228 of the Treaty and the measures adopted by institutions set up by such agreements become an integral part of the Community legal order when they enter into force.

[62] See Opinion 1/91 (n 12) paras 37–46, and Opinion 1/92 (n 13) para 16.

[63] See Opinion 1/92 (n 13) paras 22, 32, 33.

It also follows from those Opinions that Article 164 confers on the Court an exclusive and unconditional jurisdiction of last instance to interpret and to determine the scope of application of Community law,[64] in particular the boundaries of competence between the Community and the Member States.[65] From that point of view, Article 164 can only be regarded as one of the very foundations of the Community.

In those circumstances, it is no surprise that the Court, in answering the last question submitted to it, has stated that 'Article 238 of the EEC Treaty does not provide any basis for setting up a system of courts which conflicts with Article 164 of the Treaty and, more generally, with the very foundations of the Community'.[66]

By contrast, the second part of the Court's answer, according to which, for the same reasons, an amendment to Article 238 could not cure the incompatibility with Community law of the system of courts to be set up by the agreement, cannot be so easily understood. Indeed, the Court admits, in principle, the compatibility with the Treaty of a system of courts established by an international agreement concluded by the Community, since the Community's competences in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court created or designated by such an agreement as regards the interpretation and application of its provisions.[67] Such a system of courts may indeed be considered as a 'special procedure' authorised by Article 238, first paragraph.

As a matter of fact, the relevant question seems to be a different one, not related to the possibility, or the effectiveness, of an amendment to Article 238. The explanations given in that regard by the Court in the two Opinions under analysis show that the real problem concerns mainly the nature and the scope of the provisions that the system of courts provided for in the EEA Agreement would be empowered to apply, which are mostly identical to those provisions that constitute the main object of the Court's case-law.[68]



[64] The Court sees confirmation of that exclusive jurisdiction in Article 219 of the EEC Treaty, pursuant to which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaty to any method of settlement other than those provided for in the Treaty (Opinion 1/91 (n 12) para 35).

[65] According to JHH Weiler (n 16) 2414–15, the Court was 'implicitly, but unquestionably, asserting its "*Kompetenz-Kompetenz*", its exclusive competence to determine the competence of the Community', ie 'which norms come within the sphere of application of Community law'. This had a notable expression in 314/85 *Foto-Frost* [1987] ECR 4199, where the Court reserved for itself the exclusive power to declare the invalidity of secondary Community law. See also H Rasmussen (n 16) 202.

[66] See Opinion 1/91 (n 12) paras 69–72.

[67] ibid para 40.

[68] See, in that respect, J-G Huglo, 'L'incompatibilité de l'accord sur l'Espace économique européen au regard du traité de Rome' (1992) 78/79 *Gazette du Palais* 5.

## D. A New Step Towards 'Constitutionalisation'?

The fundamental question underlying the reasoning of the Court of Justice, which does not, however, find a clear and unequivocal answer in the two Opinions, is the following: when the Court considers, so radically, that the system of courts envisaged by the Draft EEA Agreement is incompatible with Article 164 of the EEC Treaty, and more generally with the very foundations of the Community, to what extent may Article 164 be amended in pursuance with the procedure laid down in Article 236 so as to permit the Agreement to enter into force without its content being modified?

A negative answer to that question would apparently be tantamount to prohibiting an amendment to Article 164 so as to render the Agreement compatible with that Article, since such an amendment would necessarily bring into question the very foundations of the Community or the autonomy of the Community legal order. In other words, the question is whether Article 164, a corner-stone of the Community judicial system and a very foundation of the Community, may normally be revised under Article 236 or whether, on the contrary, it constitutes an implied substantive limit to the revision of the Treaty.[69]

That question reminds us of the classical notions of constitutional law, where the foundations or the characteristic features of a constitution are recognised as implied substantive limits to the exercise of the amending powers.

In that context, it is difficult to interpret Opinions 1/91 and 1/92 otherwise than implying that 'Article 164 and, more generally, the very foundations of the Community' may *not* be modified in pursuance of the procedure provided for



[69] For a similar view, see J Boulouis, 'La jurisprudence de la Cour de justice des Communautés européennes relative aux relations extérieures des Communautés' (1978) *Recueil des cours de l'Académie de droit international* 355: 'Incompatibilities may also lead to a revision of the Treaty or, if that seems uncertain or too difficult, the withdrawal of the project. When, on the basis of its negative opinion, the Court relies on such fundamental grounds as "a change in the internal constitution of the Community" (Opinion 1/76) and refers to the risk of progressive and irreversible disintegration of the Community structure, the question arises whether a revision of the Treaty is still conceivable or whether the negative opinion, as a genuine veto, does not prevent both a revision of the Treaty and the entry into force of the agreement'—our translation (in the original: 'Les incompatibilités peuvent aussi conduire à une révision du traité ou, si celle-ci se révèle aléatoire ou trop malaisée, à l'abandon du projet. Lorsque, pour fonder son avis négatif, la Cour invoque des motifs aussi fondamentaux qu'une "modification de la constitution interne de la Communauté" (Opinion 1/76) et qu'elle évoque le risque de désintégration progressive et irréversible de l'œuvre communautaire, on est justifié à se demander si une révision du traité est encore envisageable ou si l'avis négatif, prenant valeur d'un véritable veto, ne fait pas échec tout autant à une révision du traité qu'à l'entrée en vigueur de l'accord'). Boulouis refers to para 12 of Opinion 1/76, of 26 April 1977, on the Draft Agreement establishing a European laying-up fund for inland waterway vessels (ECR 1977 p 741), which was also delivered in pursuance to Article 228(1), second subparagraph. The 'change in the internal constitution of the Community' was linked to 'the alteration of essential elements of the Community structure as regards both the prerogatives of the institutions and the position of Member States *vis-à-vis* one another'.

in Article 236,[70] in the same way as any other provision which has the character of a foundation of the Community can be.[71] From that point of view, what both Opinions bring out is the existence of a 'hard core' of Treaty provisions and principles that constitute a substantive limit to its amendment. Such a hard core of provisions and principles restricts the exercise of any power to amend the Treaty, which corresponds, to that extent, not to a 'constituent' but to a 'constituted power'.[72] Regarding these revision powers, the 'foundations of the Community' would thus possess in a certain way a 'supra-constitutional value'.

In such circumstances, we have reached a new and important stage in the process of constitutionalisation of the Treaty characterised by the elaboration by the Court of Justice in the performance of its duties of a constitutional nature[73] (although in somewhat sibylline terms) of a reference framework for the drawing up of implied substantive limits to the amendment of the Treaty.



[70] Interpreting the Opinions of the Court to the effect that it is impossible to amend Article 164 and thus in favour of the existence of implied limits to the revision of the Treaty, see J-G Huglo (n 68) 6 ('principes métacommunautaires auquels même une révision du traité ne pourrait porter atteinte'—'meta-Community principles which cannot be adversely affected even by a modification of the Treaty'—our translation); J Boulois, 'Les avis de la Cour de justice des Communautés sur la compatibilité avec le Traité CEE du projet d'accord créant l'Espace économique européen' (1992) *Revue trimestrielle de Droit europeen* 462 ('dispositions du traité qui ne sont pas révisables'—'provisions of the Treaty which cannot be revised'—our translation); J Dutheil de la Rochère, 'L'Espace économique européen sous le regard des juges de la Cour de justice des Communautés européennes' (1992) *Revue du Marché commun* 607 ('supra-constitutionalité communautaire'—'Community supra-constitutionality'—our translation); A Kaninsch, 'Kritische Bemerkungen zum EWR-Gutachten des EuGH' (1992) *Osterreichische Juristen-Zeitung* 325, although the author criticises 'the apodictic and scarcely reasoned position of the Court of Justice' (our translation); JHH Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective View of the European Court of Justice in the Arena of Political Integration' (1993) *Journal of Common Market Studies* 418, fn 2 ('legal principles which even Treaty amendments could not violate').

[71] However, interpreting the Opinions as indicating the need for a revision of Article 164, see W Hummer, 'Voraussetzungen und Hintergründe des des Gutachtens des EuGH zum EWRV' (1992) *Wirtschaftsrechtliche Blätter* 39; N Burrows, 'The Risks of Widening without Deepening' (1992) *European Law Review* 360 ('although the Court does not state this in so many words, in order to set up the proposed system, an amendment to Article 164 itself would be required'); T Trautwein 'Anmerkung zum Gutachten des EuGH vom 1991-12-14 1/91 zum Entwurf eines Abkommens zwischen EG und EFTA über die Schaffung des Europäischen Wirtschaftsraumes' (1992) *Zeitschrift für Rechtsverleichung internationales Privatrecht und Europarecht* 126-128 (the author admits that the Opinions are capable of two interpretations but discards any reading that might suggest the recognition of substantive limits to the modification of the Treaty). The possibility, in principle, of revising Article 164 seems also to be accepted by MA Gaudissard, 'La portée des avis 1/91 et 1/92 de la Cour de justice des Communautés européennes' (1992) *Revue du Marché unique européen* 130; D Simon and A Rigaux, 'L'avis de la Cour de justice sur le projet d'accord CEE/AELE portant création de l'Espace économique européen (EEE)' (1992) *Éditions Techniques Europe* 4.

[72] A different view, according to which the Member States would be free to amend the substance of the Treaty, provided that they followed the forms and the procedure laid down in Article 236, is expressed by J-P Jacqué (n 16) 262; T Oppermann, *Europarecht* (Munich, Beck, 1991) 164; T Trautwein (n 71).

[73] On the constitutional role of the Court of Justice, see GC Rodriguez Iglesias, 'Der Gerichtshof der Europäischen Gemeinschaft als Verfassungsgericht' (1992) *Europarecht* 225; O Due, 'A Constitutional Court for the European Communities' in D Curtin and D O'Keeffe (eds), *Constitutional Adjudication in European Community Law and National Law* (Dublin, Butterworths, 1992) 3.

The Court, having already set out the principle that the Treaty is the 'constitutional charter of a Community based on the rule of law', has this time drawn, somewhat hesitantly, legal consequences similar to those which the constitutional law of the Member States normally draws from the concept of constitution of 'un État de droit'.[74]

As Vlad Constantinesco puts it,[75]

> portraying the Treaty as a constitution in the material sense of the expression also amounts for the Court to describing itself as a constitutional court and to giving a clear indication that the Community is evolving into a novel legal order borrowing some of its structural features much more from national legal systems than from the international order, since it is above all a Community based on the rule of law.[76]

As if to corroborate the Court's line of reasoning, in a somewhat 'simultaneous and joint action' with Opinions 1/91 and 1/92, the Maastricht Treaty on European Union renders explicit a certain number of substantive limits to its own amendment. We shall proceed to consider that topic.

## IV. DOES THE MAASTRICHT TREATY CONTAIN SUBSTANTIVE LIMITS TO THE AMENDMENT OF THE EU TREATY?

### A. Amendment Provisions in the Maastricht Treaty

An analysis of the modifications to the European Community brought about by the Maastricht Treaty[77] might lead one *a priori* to believe that the general provisions on the procedure for amending the Treaty are substantially different from those of Article 236 of the EEC Treaty. This is not the case.

Article N(1) of the Treaty of Maastricht, which has been inserted in Title VII, Final Provisions, repeated verbatim the provisions of Article 236 of the EEC Treaty as regards the procedure for amendment. It adds, however, a paragraph 2, according to which:

> 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.



[74] In this regard, see A Bleckmann, 'Komentar über Gutachten 1/92', (1993) *Juristenzeitung*, 793, who takes the view that the characterisation of the Treaty as the 'constitution of the Community' allows for a 'prudent deepening' of the analogy with the constitutions of the Member States.

[75] V Constantinesco, 'Commentaire de l'avis 1/91' (1992) *Journal du Droit international* 425.

[76] Our translation. In the original: 'caractériser le traité de constitution au sens matériel du terme est aussi pour la Cour se désigner comme juridiction constitutionnelle et marquer fortement l'évolution de la Communauté vers un ordonnancement juridique inédit qui emprunte certains de ses éléments structurels bien d'avantage aux ordres juridiques internes qu'à l'ordre international, puisqu'elle est avant tout une communauté de droit'.

[77] On those modifications, see for instance J Rideau, 'Le Traité de Maastricht du 7 février 1992 sur l'Union européenne: aspects institutionnels' (1992) *Revue des affaires européennes* 21.