

DECISION 97-394 DC OF 31 DECEMBER 1997

Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related instruments

On 4 December 1997 the President of the Republic referred to the Constitutional Council, pursuant to Article 54 of the Constitution, the question whether, in view of the agreements entered into by France and the terms of their entry into force, authorisation to ratify the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related instruments, signed on 2 October 1997, must be preceded by revision of the Constitution.

THE CONSTITUTIONAL COUNCIL,

Having regard to the Constitution of 4 October 1958, and in particular title XV “On the European communities and the European Union”,

Having regard to the Preamble to the Constitution of 27 October 1946,

Having regard to Ordinance 58-1067 of 7 November 1958 enacting the Institutional Act on the Constitutional Council, and in particular sections 18(2), 19 and 20 thereof,

Having regard to Act 52-387 of 10 April 1952 authorising ratification of the Treaty establishing the European Coal and Steel Community, signed at Paris on 18 April 1951, together with Decree No 52-993 of 20 August 1952 publishing that Treaty,

Having regard to Act 57-880 of 2 August 1957 authorising ratification of (1) the Treaty establishing the European Economic Community and the annexes thereto, (2) the Treaty establishing the European Atomic Energy Community and (3) the Convention on certain institutions common to the European Communities, together with Decree No 58-84 publishing these international agreements,

Having regard to Act 65-506 of 30 June 1965 authorising ratification of the Treaty establishing a single Council and a single Commission of the European Communities, the Protocol, the Final Act and the annexes, all signed on 8 April 1965, together with Decree 67-606 of 28 July 1967 publishing these international agreements,

Having regard to Act 70-583 of 8 July 1970 authorising ratification of the Decision of the Council of the European Communities of 21 April 1970 replacing the financial contributions of the Member States by the Communities’ own resources, together with Decree 71-168 of 26 February 1971 publishing that Decision,

Having regard to Act 70-584 of 8 July 1970 authorising ratification of the Treaty amending certain budgetary provisions of the Treaty establishing a single Council and a single Commission of the European Communities, together with Decree 71-169 of 26 February 1971 publishing that Treaty,

Having regard to Act 72-339 of 3 May 1972 authorising ratification of the Treaty signed at Brussels on 22 January 1972 for the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and the European Atomic Energy Community, together with Decree of 5 April 1972 deciding that a Bill would be presented to the people at a referendum,

Having regard to Act 76-1196 of 24 December 1976 authorising ratification of the Treaty amending certain budgetary provisions of the Treaties establishing the European Communities and the Treaty establishing a single Council and a single Commission of the European Communities,

Having regard to Act 77-680 of 30 June 1977 authorising approval of the provisions annexed to the Decision of the Council of the European Communities of 20 September 1976

concerning the election of the European Parliament by direct universal suffrage, together with Decree 79-92 of 30 January 1979 publishing those provisions,

Having regard to Act 77-710 of 5 July 1977 authorising ratification of the Treaty amending certain budgetary provisions of the Protocol on the statute of the European Investment Bank, signed in Brussels on 10 July 1975,

Having regard to Act 79-1112 of 22 September 1979 authorising ratification of the Treaty for the accession of Hellenic Republic to the European Economic Community and the European Atomic Energy Community, together with Decree No 81-35 publishing that Treaty,

Having regard to Act 85-1 of 2 January 1985 authorising approval of the agreement reached in the Council of the European Communities on 2 and 3 October 1984 on the financing of supplementary and amending budget No 1 of the Communities,

Having regard to Act 85-1334 of 18 December 1985 authorising ratification of the Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland Member States of the European Communities, and the Kingdom of Spain and the Republic of Portugal, for the accession of the Kingdom of Spain and the Republic of Portugal to the European Economic Community and the European Atomic Energy Community, together with Decree 86-415 of 11 March 1986 publishing that Treaty,

Having regard to Act 85-1335 of 18 December 1985 authorising approval of the Decision of the Council of the European Communities of 7 May 1985 on the system of the Communities' own resources,

Having regard to Act 86-1275 of 16 December 1986 authorising ratification of the Single European Act, together with Decree 87-990 of 4 December 1987 publishing that Treaty,

Having regard to Act 88-1253 of 14 March 1988 authorising approval of a Decision of the Council of the European Communities on the system of the Communities' own resources,

Having regard to Act 91-642 of 10 July 1991 authorising approval of the agreement for the accession of the Italian Republic to the convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the Member States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic for the gradual removal of controls at their common borders, together with Decree 97-970 of 15 October 1997 publishing the agreement,

Having regard to Act 91-737 of 30 July 1991 authorising approval of the Convention implementing the Schengen Agreement between the Governments of the Member States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic for the gradual removal of controls at their common borders, together with Decrees 86-907 of 30 July 1985 publishing the agreement and 95-304 of 21 March 1995 publishing the convention,

Having regard to Act 92-1017 of 24 September 1992 authorising ratification of the Treaty on European Union, together with Decree No 94-80 of 18 January 1994 publishing the Treaty;

Having regard to Act 93-1421 of 31 December 1993 authorising approval of the agreement for the accession of the Kingdom of Spain to the convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the Member States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic for the gradual removal of controls at their common borders, to which the Italian Republic acceded by the agreement signed at Paris on 27 September 1990, together with Decree 95-305 of 21 March 1995 publishing the agreement,

Having regard to Act 93-1422 of 31 December 1993 authorising approval of the agreement for the accession of the Portuguese Republic to the convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the Member States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic for the gradual

removal of controls at their common borders, to which the Italian Republic acceded by the agreement signed at Paris on 27 September 1990, together with Decree 95-306 of 21 March 1995 publishing the agreement,

Having regard to Act 94-1099 of 19 December 1994 authorising ratification of the Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the kingdom of the Netherlands, the Portuguese Republic, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union), and the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden for the accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union, together with Decree 95-224 of 21 February 1995 publishing the Treaty,

Having regard to Act 94-1205 of 30 December 1994 authorising ratification of the Decision of the Council of the European Union on the system of the Communities' own resources, adopted at Luxembourg on 31 October 1994,

Having regard to Act 97-966 of 21 October 1997 authorising approval of the agreement for the accession of the Republic of Austria to the convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the Member States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic for the gradual removal of controls at their common borders, to which the Italian Republic, the Kingdom of Spain and the Portuguese republic acceded by agreements signed on 27 September 1990, 25 June 1991 and 6 November 1992 respectively,

Having regard to Act 97-967 of 21 October 1997 authorising approval of the agreement for the accession of the Hellenic Republic to the convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the Member States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic for the gradual removal of controls at their common borders, to which the Italian Republic acceded by agreement signed at Paris on 27 September and the Kingdom of Spain and the Portuguese Republic acceded by agreements signed at Bonn on 25 June 1991,

Having regard to Decree 53-192 of 14 March 1953 on the ratification and publication of international agreements signed by France, as amended by Decree 86-707 of 11 April 1986, and in particular section 3 thereof,

Having heard the rapporteur,

On the following grounds:

ON THE PARAMETERS TO BE FOLLOWED:

1. By the Preamble to the 1958 Constitution, the French people declared its solemn "attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946".

2. Article 3 of the Declaration of Human and Civic Rights states that "The principle of any sovereignty lies primarily in the Nation"; the first paragraph of Article 3 of the 1958 Constitution provides that "national sovereignty shall belong to the people, who shall exercise it through their representatives and by means of referendum".

3. Paragraph 14 of the Preamble to the Constitution of 1946 states that France "shall respect the rules of public international law"; paragraph 15 states that "subject to reciprocity, France shall consent to the limitations upon its sovereignty necessary to the organisation and preservation of peace".

4. Article 53 of the 1958 Constitution provides, like Article 27 of the 1946 Constitution, for “treaties or agreements relating to international organisation”; such treaties or agreements may be ratified by the President of the Republic only by way of statute.

5. By Article 88-1, inserted by the Constitutional Act of 25 June 1992: “The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common.”

6. It follows from these various institutional provisions that respect for national sovereignty does not preclude France, acting in accordance with the Preamble to the 1946 Constitution, from concluding international agreements for participation in the establishment or development of a permanent international organisation enjoying legal personality and decision-making powers on the basis of transfers of powers decided on by the Member States, subject to reciprocity.

7. However, should an international agreement entered into to this end involve a clause conflicting with the Constitution or jeopardising the essential conditions for the exercise of national sovereignty, authorisation to ratify would require prior revision of the Constitution.

8. The Constitutional Council should undertake its review of the Treaty signed at Amsterdam on 2 October 1997 in the light of these principles.

ON MEASURES RELATING TO VISAS, ASYLUM AND THE FREE MOVEMENT OF PERSONS:

9. By Article 88-2, inserted by the Constitutional Act of 25 June 1992: “Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, France agrees to the transfer of powers necessary for the establishment of European economic and monetary union and for the determination of rules relating to the crossing of the external borders of the Member States of the European Community”. It follows that further amendment to the Constitution will be required for the clauses of the Treaty of Amsterdam which transfer powers to the European Community in such a way as to jeopardise the essential conditions for the exercise of national sovereignty, either because these transfers do not relate to European economic and monetary union or the crossing of external borders, or because they lay down conditions not already provided by the Treaty on European Union signed on 7 February 1992 for the exercise of powers the transfer of which was authorised by Article 88-2.

10. Article 2 of the Treaty of Amsterdam inserts in the Treaty establishing the European Community a new Title IIIa intitled “Visas, asylum, immigration and other policies relating to the free movement of persons”.

11. Regarding the free movement of persons, the new Title includes Article 73j, which empowers the Council, acting in accordance with the procedure laid down by Article 73o in the same Title within five years following the entry into force of the Treaty, to enact a number of specified measures for the crossing of the internal and external frontiers of the Member States and the movement of third-country nationals in their territory;

12. The measures for the crossing of internal frontiers include “measures pursuant to Article 7a to ensure the absence of all checks on persons, both Union citizens and third-country nationals, when they cross internal frontiers”;

13. The measures for the crossing of external frontiers lay down “the rules and procedures to be applied by the Member States for checks on persons crossing external frontiers” and “rules applicable to visas for residence for periods not exceeding three months”; the latter rules are to include “the list of third countries whose nationals shall be required to hold a visa”, “the

procedures and conditions for issuing visas by the Member States”, the definition of the “standard model visa” and rules applicable “to the uniform visa”;

14. Measures for the movement of third-country nationals lay down the conditions for their free movement throughout the territory of the Member States for a period not exceeding three months;

15. Regarding asylum and immigration policies, the new Title IIIa further includes an Article 73k empowering the Council, acting in accordance with the procedure laid down by Article 73o in the same Title within five years following the entry into force of the Treaty, to enact a number of specified measures relating to asylum, refugees and immigration;

16. Measures relating to asylum relate to the “criteria and mechanisms for determining the Member State responsible for examining an asylum application presented within one of the Member States by a third-country national”, the “minimum standards for admission of asylum-seekers in the Member States”, the “minimum conditions to be met by third-country nationals applying for refugee status” and the “minimum standards for the procedure for granting or withholding refugee status in the Member States”;

17. Measures relating to refugees and displaced persons will concern the “minimum standards for the grant of temporary protection” of such persons and “measures to secure balance in the efforts made by the Member States” to admit them and bear the consequences of admission;

18. Measures relating to immigration policy will concern “conditions for entry and residence”, “standards for the issuance by the Member States of long-term visas and residence authorisations, including for the purpose of family reunification” and “unlawful residence, including the return of illegal residents to their country of origin”;

19. Measures are also envisaged to define “the rights of third-country nationals residing lawfully in one Member State in the other Member States and the conditions in which they may reside there”; the penultimate paragraph of Article 73k provides that measures enacted by the Council in respect of immigration and the right of residence in the Member States “do not preclude a Member State from maintaining or introducing national provisions that are compatible with this Treaty or international agreements”;

20. Article 73o determines the procedure for adoption by the Council of the decisions provided for by Title IIIa; the first paragraph provides that “during a transitional period of five years following the entry into force of the Treaty” the Council shall “act unanimously on a proposal from the Commission or at the initiative of a Member State, after consulting the European Parliament”; by the second paragraph, “after that five-year period, the Council shall act on proposals from the Commission”, which must have regard to any request from a Member State that it make such a proposal; “the Council, acting unanimously after consulting the European Parliament, may decide that the procedure laid down by Article 189b shall apply to all the areas covered by this Title or to some of them, and adapt the provisions relating to the jurisdiction of the Court of Justice”; the third paragraph provides that, by way of derogation from the first two, the rules governing the list of third countries whose nationals must be in possession of a visa for a short stay and the rules governing the standard-form visa “shall, following the entry into force of this Treaty, be adopted by the Council acting by a qualified majority after consulting the European Parliament”; the fourth paragraph provides that, by way of derogation from the second, measures relating to the procedures and conditions for issuing visas and the rules governing the uniform visa shall, after a period of five years following entry into force of the Treaty, be “adopted by the Council, acting in accordance with the procedure laid down by Article 189b”;

Regarding measures relating to asylum, immigration and the crossing of the internal frontiers of the Member States:

21. The first and third paragraphs of Article 73j and Article 73k of the Treaty of Amsterdam provide for transfers of powers to the Community in matters of asylum, immigration and the crossing of internal borders which affect the exercise of national sovereignty and are not within the authorisation given by Article 88-2 of the Constitution;
22. It is true that in matters not within the exclusive powers of the European Community, respect for the subsidiarity principle imposed by Article 3b of the Treaty establishing the European Community and implemented on the terms set out in a protocol to the Treaty of Amsterdam implies that the Community shall act only where the objectives of the proposed action cannot be adequately attained by the Member States alone. However, it is possible that application of this principle will not on its own preclude the transfers of power authorised by the Treaty referred from being on such a scale and made by such procedures as to affect the essential conditions for the exercise of national sovereignty;
23. The essential conditions for the exercise of national sovereignty will not be affected during a transitional period of five years from the entry into force of the Treaty, during which, in accordance with Article 73o, Council decisions will be taken unanimously and the Member States will retain their right of initiative;
24. By opposite, a simple Council decision taken unanimously may determine that all or some measures in the relevant matters may be taken henceforth by qualified majority by the codecision procedure established by Article 189b of the Treaty establishing the European Community; the changeover from unanimity to qualified majority voting and to the codecision procedure will require, when the time comes, no national ratification or approval and will thus escape constitutional review on the basis of Article 54 or the second paragraph of Article 61 of the Constitution;
25. The effect of the second paragraph of Article 73o, despite the provisions of the penultimate paragraph of Article 73k, could therefore be to affect the essential conditions for the exercise of national sovereignty;
26. It follows that the second paragraph of Article 73o, inserted in the Treaty establishing the European Community by Article 2 of the Treaty of Amsterdam, is unconstitutional as it applies to the measures provided for by the first and third paragraph of Article 73j and Article 73k of the Treaty establishing the European Community;

Regarding measures for the crossing of the external frontiers of the Member States:

27. In its decision of 2 September 1992 the Constitutional Council stated that Article 100c of the Treaty establishing the European Community concerning the list of non-member countries whose nationals require a visa and the model of such visa was compatible with the Constitution, and in particular Article 88-2. The status of *res judicata* of the Constitutional Council's decision precludes questions as to the validity of provisions of the Treaty of Amsterdam concerning the rules relating to the list of non-member countries whose nationals require a short-term visa and the model of such visa, which merely reproduce the decision-making rules of Article 100c;
28. By opposite, the automatic changeover from unanimity to qualified majority voting and to the codecision procedure after a five-year period following the entry into force of the Treaty of Amsterdam for the determination of procedures and conditions for the issuance of short-term visas by the Member States and the rules governing the uniform visa, provided for by the fourth paragraph of Article 73o, is, for the purposes of the Treaty on European Union, a new form of transfer of powers in matters where national sovereignty is at stake; the changeover to qualified majority voting and to the codecision procedure in these matters could have the effect of affecting the essential conditions for the exercise of national sovereignty;

29. It follows that the fourth paragraph of Article 73o, inserted in the Treaty establishing the European Community by Article 2 of the Treaty of Amsterdam, is accordingly unconstitutional;

30. The changeover to qualified majority voting and to the codecision procedure by simple Council decision, in accordance with the procedure provided for by the second paragraph of Article 73o, as regards the measures provided for by point (a) of the second paragraph of Article 73j, which are to determine the rules and procedures to be followed by the Member States for controls on persons crossing external borders jeopardises the essential conditions for the exercise of national sovereignty; the second paragraph of Article 73o, as regards the measures provided for by point (a) of the second paragraph of Article 73j, is accordingly unconstitutional;

ON THE INTERNATIONAL AGREEMENT REFERRED TO THE CONSTITUTIONAL COUNCIL, SEEN AS A WHOLE:

31. None of the other provisions of the international agreement referred to the Constitutional Council pursuant to Article 54 of the Constitution is contrary to the Constitution;

32. On the grounds set out above, the statutory authorisation to ratify the Treaty of Amsterdam requires revision of the Constitution.

Has decided as follows:

Article 1

Authorisation to ratify the Treaty on European Union may not be given without prior revision of the Constitution.

Article 2

The President of the Republic and the Prime Minister shall be notified of this Decision, which shall be published in the *Journal officiel de la République française*.

Deliberated by the Constitutional Council at its sitting of 31 December 1997, attended by Mr Roland DUMAS, President, Mr Georges ABADIE, Mr Michel AMELLER, Mr Jean CABANNES, Mr Maurice FAURE, Mr Yves GUÉNA, Mr Alain Lancelot, Ms Noëlle LENOIR and Mr Jacques ROBERT.