



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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**THE BUREAU OF THE CONSULTATIVE COMMITTEE OF THE CONVENTION
FOR THE PROTECTION OF INDIVIDUALS
WITH REGARD TO AUTOMATIC PROCESSING OF PERSONAL DATA [ETS No. 108]**

(T-PD-BUR)

Modalities for the amendment of Council of Europe treaties

Secretariat document prepared by
the Directorate General of Human Rights and Legal Affairs

General considerations

1. Treaty revision is a matter where politics, diplomacy and law are interwoven.¹ Once a treaty has entered into force, the legal framework set by it is usually not susceptible to dynamic development unless provision is made in the treaty itself for its continual adaptation. The amendment of international treaties is governed by general treaty law, which is to a large extent embodied in the 1969 *Vienna Convention on the Law of Treaties* (VCLT). According to this Convention, the amendment of treaties depends on the consent of the Parties. Article 39 of the VCLT provides that “a treaty may be amended by agreement between the parties” without requiring any formality for the expression of this agreement. The modification of a treaty does not require the adoption of another treaty in written form. In its commentary to Article 39 of the VCLT, the International Law Commission stated that amendments may also be adopted by verbal or even tacit agreement.²
2. Within the context of the Council of Europe, it is usual practice to amend conventions through the adoption of **amending protocols**. Such protocols usually enter into force after acceptance or ratification by all the Parties to the Convention.³ To require the ratification by all Parties has the advantage that only one version of the treaty is in force at any given time, the initial text prior to the entry into force of the amending protocol and the amended text thereafter. All Parties are bound by the same international obligations. A plurality of treaty regimes is thus avoided.
3. Modifications of an existing treaty may also enter into force after acceptance or ratification by a limited number of Parties. After its entry into force, the protocol would only be binding for the Parties which have ratified it. The remaining Parties would still be bound by the original version of the treaty. This procedure is used for **additional protocols** which add provisions to the original treaty without necessarily affecting the scope of existing obligations.⁴
4. The distinction between amending and additional protocols is, however, not as clear-cut as it would seem. In Council of Europe practice, there have been “**hybrid**” protocols which both amended certain provisions of the original convention and added new provisions. The most recent example is the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters (CETS 208, 2010). This Protocol added and amended several substantial provisions and, moreover, opened the amended Convention to the signature and ratification of States worldwide. It entered into force on 1 June 2011, following ratification by only five Parties to the original Convention.

¹ Lord McNair, *Law of Treaties* (1961), p. 534 argued that “treaty revision is a matter for politics and diplomacy and has little, if any, place in this book”.

² R.G. Wetzel/D. Rauschnig, *The Vienna Convention on the Law of Treaties. Travaux Préparatoires* (1978), p. 297. See also W. Grewe, *Treaties, Revision*, in *Encyclopedia of Public International Law*, Instalment 7 (1984), pp. 499-505.

³ E.g. *Protocol amending the European Social Charter* (ETS 142, 1991); *Protocols No. 1 and 2 to the European Convention for the Prevention of Torture and Inhuman or Degrading Punishment* (ETS 151 and 152, 1993); *Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS 155, 1994).

⁴ E.g. *Protocols Nos. 1, 4, 6 and 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS 9, 1952; 46, 1963; 114, 1983 and 117, 1984); *Additional Protocol to the European Convention on Extradition* (ETS 86, 1975); *Second Additional Protocol to the European Convention on Extradition* (ETS 98, 1978); *Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters Extradition* (ETS 99, 1978); *Additional Protocol to the European Social Charter* (ETS 128, 1988); *Additional Protocol to the European Social Charter, providing for a system of collective complaints* (ETS 158, 1995).

5. Finally, it is possible to replace the original treaty in its entirety by a new one (“**revised convention**”). This procedure has been used where a fundamental change occurred in the conditions under which the original treaty had been concluded, for instance:
- The *Revised European Convention on the Protection of the Archaeological Heritage* (ETS 143, 1992) replaces the original Convention of 1969 (ETS 66). Major changes in the scientific and economic context of archaeology had made it necessary to revise the original Convention in order to make the text more coherent and comprehensive.⁵
 - The developments in labour law and social policies since the original *European Social Charter* (ETS 35) was drawn up in 1961 prompted the adoption of a *Revised European Social Charter* (ETS 163) which was opened for signature on 3 May 1996.⁶
 - The *Convention on the Recognition of Qualifications concerning Higher Education in the European Region* (ETS 165, 1997) was jointly drafted by the Council of Europe and UNESCO. It is designed to streamline the legal framework at European level and in the long run to replace six conventions adopted on this matter by the Council of Europe and UNESCO.⁷

Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS 108, 1981)

6. Article 21 of Convention 108 contains a standard clause which has been introduced in a number of Council of Europe treaties:

Article 21 – Amendments

1. *Amendments to this convention may be proposed by a Party, the Committee of Ministers of the Council of Europe or the Consultative Committee.*
2. *Any proposal for amendment shall be communicated by the Secretary General of the Council of Europe to the member States of the Council of Europe and to every non-member State which has acceded to or has been invited to accede to this convention in accordance with the provisions of Article 23.*

⁵ *Protection of archaeological heritage. Explanatory report on the revised Convention opened for signature on 16 January 1992* (1993), p. 4.

⁶ *Revised European Social Charter and Explanatory Report* (1996), §§ 8-10.

⁷ The following treaties are concerned:

- *European Convention on the Equivalence of Diplomas leading to Admission to Universities* (ETS 15, 1953) and its Protocol (ETS 49, 1964);
- *European Convention on the Equivalence of Periods of University Study* (ETS 21, 1956);
- *European Convention on the Academic Recognition of University Qualifications* (ETS 32, 1959);
- *International Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in the Arab and European States bordering on the Mediterranean* (1976);
- *Convention on the Recognition of Studies, Diplomas and Degrees concerning Higher Education in the States belonging to the Europe Region* (1979);
- *European Convention on the General Equivalence of Periods of University Study* (ETS 138, 1990).

3. *Moreover, any amendment proposed by a Party or the Committee of Ministers shall be communicated to the Consultative Committee, which shall submit to the Committee of Ministers its opinion on that proposed amendment.*
 4. *The Committee of Ministers shall consider the proposed amendment and any opinion submitted by the Consultative Committee and may approve the amendment.*
 5. *The text of any amendment approved by the Committee of Ministers in accordance with paragraph 4 of this article shall be forwarded to the Parties for acceptance.*
 6. *Any amendment approved in accordance with paragraph 4 of this article shall come into force on the thirtieth day after all Parties have informed the Secretary General of their acceptance thereof.*
7. Such a provision avoids the two-tier procedure for the conclusion of treaties (signature followed by ratification, acceptance or approval) which is normally required for the entry into force of an amending protocol. The provision was used in 1999 to introduce amendments allowing the European Union's accession. Despite regular reminders, these amendments have still not entered into force, because the condition for their entry into force (acceptance by all Parties to Convention 108) has not been fulfilled. Due to the enlargement of the Council of Europe, many new member States have ratified Convention 108, but have not systematically accepted these amendments immediately on becoming a Party.
 8. Finally, it must be emphasised that the existence of this provision does not prevent the Parties from using protocols in the traditional sense, open for signature and ratification of all Parties, for the purposes of amending Convention 108.