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**Groupe de travail «Modification de la
procédure de révision de la COTIF »
Arbeitsgruppe „Änderung
Revisionsverfahren COTIF“
Working group to amend the
procedure for revising COTIF**

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WORKING GROUP TO AMEND THE PROCEDURE FOR REVISING COTIF

Feasibility of amending the procedure for revising COTIF

Position of Germany (provisional assessment)



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**Ref: Working group convened by the Secretary General
to amend the procedure for revising COTIF**

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Dear Secretary General,

With reference to the documents we received in preparation for the meeting of the working group on 3/4 May 2017, I am pleased to be able to send you our provisional assessment of the these documents:

An amendment to the system can only be supported if it is consistent with German constitutional law. In Germany, COTIF was implemented at national level by a so-called “approval act” (a federal law with which national approval to an international treaty is given), so accordingly, any amendment to COTIF and its Appendices must be implemented nationally by legislative changes. In terms of the time frame, implementation in Germany must take place before the amendment to the international law enters into force.

We have therefore assessed the options in OTIF’s document “LAW-17020-WGREVCOTIF 3-02” as follows:

1st option: Provisional entry into force of amendments (see also Professor Brölmann’s proposal 4)

For Germany, provisional application can only be agreed if it is predicated on a communication concerning compliance with the domestic prerequisites by the contracting states or is agreed in accordance with the “requirement of the domestic law in each case”.

This is because for Germany, amendments to COTIF and its Appendices must be implemented in domestic law (by amending the approval law) before the amendments to COTIF or its Appendices can enter into force according to international law.

2nd option: Amendment to Art. 33 and extending the competences of the Revision Committee to take a final decision (see also Professor Brölmann’s proposals 1, 2 and 8).

We have the following concerns about this approach. When COTIF 1999 was drafted, the procedure for amending COTIF and its Appendices was differentiated on the basis of whether the provisions to be amended were of a technical or implementing nature (in which case the Revision Committee had the final say) or whether the core substance of the COTIF regime was to be amended (in which case the General Assembly was competent). This subdivision into substantial and non-substantial rules is carried forward in German law, where amendments that fall within the Revision Committee’s competence can be implemented in Germany by decree (sometimes without the agreement of the Bundesrat (Federal Council); Article 2 of the COTIF Act of 24.08.2002 (Federal Official Journal 2002 II p. 2140)) and amendments that fall within the competence of the General Assembly require legislation. These different implementation procedures in national law cannot be cancelled out by amending the competences in the COTIF regime. In Germany, amendments to rules of substance are subject to the special reservation of statutory powers in accordance with Article 59, paragraph 2, first sentence of the constitution and in principle, must therefore be made by legislation. In the legislative process, the participatory rights of the Länder are sufficiently ensured via the Bundesrat. These requirements are therefore also a consequence of the federal state structure according to the constitution.

Consequently, Germany does not support the corresponding proposal by Professor Brölmann to have all amendments to Appendices decided in the Revision Committee, as the Appendices do not contain technical or implementing provisions alone. The proposal in Professor Brölmann’s study (No. 2, page 23) to give the General Assembly the possibility of additional approval without the possibility of making amendments actually reflects current practice, because normally, discussions concerning the substance of amendments to COTIF and its Appendices already take place in the Revision Committee, not in the General Assembly. Nevertheless, specifying explicitly that the General Assembly may not make any amendments would be a problematical curtailment of its competences. Moreover, if the General Assembly had to deal with all amendments, this would have to be considered as slowing down the procedure.

3rd option: Fixing a specific entry into force date (see also Professor Brölmann’s proposal 3)

We do not support a fixed date for entry into force irrespective of ratification by the Member States. This is because the unpredictable timetable linked to the national regulatory/legislative procedure makes it impossible to predict with certainty the domestic ratification of the amendments in Germany. In our view, giving the Member States the opportunity to enter reservations against an amendment if they are of the view that an amendment would enter into force “too quickly” for them adds nothing, as this only complicates the procedure.

4. Introducing compulsory rapportage for the Member States (Professor Brölmann’s proposal 6)

We have no concerns about regularly communicating the state of affairs of each domestic ratification procedure.

As a result, the assessment here is that the current differentiated procedure of COTIF 1999 should be maintained. For the amendment of non-essential provisions, the opportunities for speeding up the procedure by means of a final decision by the Revision Committee in accordance with Art. 33, para. 4, in conjunction with Art. 35, are already exhausted in COTIF 1999. It is conceivable that requiring the Member States to report on the state of affairs of domestic ratification procedures promotes the aim of entry into force at the earliest possible opportunity. Each of the other proposed possibilities for the amendment procedure runs the risk that Member States will enter far more reservations against

amendments than is currently the case. Reservations are an obstacle to legal uniformity, which is the overarching aim of COTIF.

In Germany's view, legal uniformity and legal clarity should be considered as being more important than the aspect of speeding things up, and revising the amendment procedures in COTIF should not be pursued.

Yours faithfully
pp.

Signed Christine Ehard