

Working Group III

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Subject : **Intervention of Prof. Bruno de Witte¹ at the meeting of the Working Group ‘Legal Personality’, 11 September 2002 on the merger and reorganisation of the Treaties**

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Issues raised by a merger and reorganisation of the European Treaties

1. Introduction: ‘simplification’ and ‘reorganisation’ in the Laeken Declaration

Among the aims of the current constitutional reform process in the European Union, there is one which everyone seems to support, namely the ‘clarification and simplification of what is a tangled web of treaties running to millions of words.’² Indeed, who could be against the plan to reduce these millions of complicated words to, say, one hundred Articles setting out in comprehensible language all that one really needs to know about the European Union? This has, rather suddenly, come to be felt as an urgent need. In the words of Giscard d’Estaing, the president of the Convention, there is ‘*un immense besoin de simplification et de lisibilité*’.³ Simplification has become a constitutional reform theme in its own right, separate from (though closely linked to) more traditional reform questions, such as the improvement of the effectiveness of decision-making and of democratic legitimacy, the extension or redefinition of the competences of the European Union, the enhancement of the protection of fundamental rights, the arrangements for differentiation and multi-speed integration, etc. But, even though it is now a theme of its own, simplification is not a self-standing value (except perhaps for those who work with Treaty texts on a daily basis); it is important because it serves other objectives, in particular that of eliciting more popular support for the integration process. The link between simplicity and legitimacy rings through most political statements calling for simplification. It was put as follows, a few years ago, by von Bogdandy and Ehlermann:

‘European integration lost support, and it is widely acknowledged that one reason is to be found in the lack of transparency of the political processes in Brussels. Not all, but some of this lack of transparency is due to the text of the original Treaties and of all those which have followed and amended them: provisions are cumbersome, hard to grasp in their meaning and generally difficult to understand in their relationship to one another.’⁴

As this citation shows, the simplification theme is on the political agenda of the European Union for slightly more than five years now. The Nice Declaration on the future of the Union, of

² Peter Hain, Europe minister of the UK government and member of the Convention on the future of the Union, as quoted in *The Guardian*, 28 February 2002, p.15.

³ V. Giscard d’Estaing, ‘La dernière chance de l’Europe unie’, *Le Monde* 23 July 2002, p.10.

⁴ A. von Bogdandy and C.-D. Ehlermann, ‘Guest editorial – Consolidation of the European Treaties: feasibility, costs, and benefits’, 33 *Common Market Law Review* (1996) 1107, at 1107.

December 2000 did not innovate when affirming the need for a ‘*deeper and wider debate*’, among other things, on the ‘*simplification of the treaties with a view to making them clearer and better understood without changing their meaning*’. Already in June 1996, the European Council in Florence had called on the post-Maastricht Intergovernmental Conference (which had just started then) ‘*to seek all possible ways of simplifying the Treaties so as to make the Union’s goals and operation easier for the public to understand*.’⁵ Two Intergovernmental Conferences have been concluded since then, and two Treaty revisions have been agreed, and the same exhortation was repeated in Nice almost word for word, which seems to indicate that no meaningful ‘simplification’ had happened so far.

When the heads of government and state referred to simplification in their Nice Declaration they also, and above all, referred to a *reorganisation* of the treaties. This would consist of regrouping the EC and EU Treaties (with their Protocols) into a single text and re-dividing the single text in two parts: one part with the most fundamental provisions and another part with the bulk of (less fundamental) primary law. An experimental reorganisation of this kind had been elaborated by a working group at the European University Institute and presented in a report to the European Commission in May 2000.⁶ The favourable political response to this report, from the side of the European Commission, the European Parliament and some of the member states, eventually led to the inclusion of the simplification theme in the Nice Declaration. It is probably correct, therefore, to assume that this is the kind of operation that the bland language of the Nice Declaration hinted at. However, the reluctance of some of the member states was shown by the addition of the words ‘without changing their meaning’, which expressed their clear preference for a reform of the Treaty *structure* that would not involve a reform of the *content* of the Treaties.

⁵ Conclusions of the European Council in Florence, 21-22 June 1996, *Bulletin of the European Union*, 6-1996, nr. I.7.

⁶ Robert Schuman Centre at the European University Institute, *A Basic Treaty for the European Union. A Study of the Reorganization of the Treaties* (co-ordinated by Y. Mény and C.-D. Ehlermann), May 2000. Available on europa.eu.int/comm/archives/igc2000/offdoc/discussiondocs.

The Laeken Declaration, one year later, spelled out the enigmatic phrase of the Nice Declaration. It also made clear, at least implicitly, that the earlier requirement that simplification and reorganisation should not affect the content of Treaty rules, was effectively being set aside, so that simplification and reorganisation can, from now on, go hand in hand with substantive constitutional reform. It may be helpful to cite the relevant paragraphs of the Declaration in full:

Towards a Constitution for European citizens

The European Union currently has four Treaties. The objectives, powers and policy instruments of the Union are currently spread across those Treaties. If we are to have greater transparency, simplification is essential.

Four sets of questions arise in this connection. The first concerns simplifying the existing Treaties without changing their content. Should the distinction between the Union and the Communities be reviewed? What of the division into three pillars?

Questions then arise as to the possible reorganisation of the Treaties. Should a distinction be made between a basic treaty and the other treaty provisions? Should this distinction involve separating the texts? Could this lead to a distinction between the amendment and ratification procedures for the basic treaty and for the other treaty provisions?

Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights.

The question ultimately arises as to whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in the Union. What might the basic features of such a constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union?

One may note that the European Council, in Laeken, elaborated the Nice phrase by operating a distinction between what it calls ‘simplification’ and what it calls ‘reorganisation’. Simplification is

defined as a reconsideration of the distinction between the EC and EU treaties. Reorganisation (in French: *réaménagement*) refers to the identification of a basic content within the treaties and its separation from other, non-basic treaty provisions.⁷ These two projects do not necessarily go hand in hand, as simplification could happen without reorganisation. The contrary (reorganisation without simplification) is not at all likely. The enactment of a basic treaty would not make much sense if it did not include the essential provisions of both the EC and EU Treaty and thus involved at least some degree of merger between the EC and EU Treaty.

In the following, I will briefly draw the attention to three issues among many others) that will arise if the Convention pursues the lines tentatively set out in the Laeken Declaration and proposes a merger of the Treaties as well as their reorganisation into a fundamental and a non-fundamental part. These three issues are the following: will a merger of the Treaties (essentially, of the EC Treaty and EU Treaty) allow for the preservation of the current distinction between the more supranational EC ‘pillar’ and the more intergovernmental second and third pillars? In which form can the distinction between a fundamental and a less-fundamental part of the Treaties be made operational? And what could be the regime for the entry into force and revision of the new Treaty system?

2. How to preserve the distinctiveness of the ‘pillars’ within a single Treaty?

A consensus seems to be emerging within this working group of the Convention that there should, in the future, be a single legal personality of the European Union, which would also replace the existing international legal personality of the European Community. A logical consequence of this approach is, then, to contemplate a merger of the EC and EU Treaty: it would be odd if the functioning of a single international organisation would continue to be described in two separate Treaty texts. The only reservation against a merger is that it would ineluctably lead to erasing the important differences that, today, exist between the three pillars. It is true that, immediately after Maastricht, the main goal of those advocating a merger was to bring the intergovernmental pillars back in ‘from the cold’, into the safe haven of the European Community, whereas the idea of a

⁷ This terminological distinction in the Laeken Declaration, between simplification and reorganisation, may not have been made deliberately and is not set in stone. In fact, the term ‘simplification’ is also often used, even today, to refer to the broader ‘reorganisation’ operation. Yet, I will adopt this terminological distinction in the remainder of this text, for the sake of clarity.

merger was resisted by the intergovernmentalists who feared that the distinctive institutional characteristics of the second and third pillar would be lost. Today, the prospect of a merger of the Treaties is probably much less controversial: on the one hand, the integrationists have little hope that the intergovernmental features of CFSP and PJCCM can entirely be eliminated; whereas on the other hand, the intergovernmentalists do not dispute that all three pillars are part of a single institutional framework and subject to a set of common legal principles, and they are aware of the practical complications caused by the separation into pillars.

Therefore, the time seems ripe for a merger of the EC and EU Treaties. If an agreement on this operation were reached, it would make sense to try to extend it to the other sources of primary law, namely the EAEC Treaty, the ‘non-EC or EU’ parts of the Single European Act, the Treaty of Amsterdam and (assuming it will enter into force at all) the Treaty of Nice, as well as the independent provisions of the Accession Treaties. There are basically three ways of effectuating such a merger, namely, in rising order of ambition and difficulty:

- (i) a simple merger of the existing Treaty texts while preserving their internal structures and without changing their provisions at all;
- (ii) a consolidated merger that would seek to integrate the texts of the Treaties according to a logical order which would require some reshuffling of Treaty articles and some minor textual amendments;
- (iii) a substantive merger seeking to reinforce the common elements of the three pillars and to eliminate the flagrant inconsistencies between them.

The third option is the most attractive. The merger could be used as the opportunity for a critical reconsideration of the need to preserve the present legal differences between the pillars. This review would take place in the light of the evolution of ideas and of political practice since Maastricht and, indeed, in the light of the new post-Nice context of global constitutional reform. In the latter context, it will have to be seen how much of the distinctiveness of the second and third pillar must be preserved. However, it should be emphasized that the *communitarisation* of the second and third pillar is not an absolute precondition for a merger. If the Convention, and later the member states in the IGC of 2002, insist on the preservation of the essentially intergovernmental character of the second and third pillar policy areas, that should not prevent the emergence of a unified picture of the European Union legal order. A number of policy areas could be marked by particular characteristics as regards the institutional balance, the use of legal instruments, the extent of judicial control and the domestic effect of their norms. On several of these points, there is already considerable variation inside the European Community today, if one considers, for example, economic and monetary policy, and employment policy. The institutional idiosyncrasies of foreign

policy and of police and criminal justice cooperation would be relatively more important than those of these other fields, but not incompatible with their presence within one common Treaty framework.

On a closer look, one can distinguish between two types of provisions. On the one hand, there are provisions of the EC Treaty that, today, do not apply to the other two pillars but could easily be extended to those pillars without causing political controversy. On the other hand, there are provisions of the EC Treaty whose extension to the other pillars would cause significant modifications of the existing system and would therefore require a substantial political debate. Examples of the first, uncontroversial, type are the Articles 5, 10 and 12 EC Treaty that respectively contain the principle of subsidiarity and proportionality, the duty of cooperation between the EC and its member states, and the right not to be discriminated on grounds of nationality. Each of these fundamental principles now applies solely within the scope of the EC Treaty and not, or at least not in the same way, in the second and third pillar. But who would be against extending these fundamental constitutional principles to the whole range of EU policies in a future single treaty?

Things are different for all those articles of the EC Treaty that describe the powers of the institutions. To take a rather minor example of this: Article 193 EC enables the European Parliament to set up committees of inquiry in cases of perceived ‘maladministration’. This power of the Parliament is expressly limited to the domain of *Community law* and does not extend, therefore, to maladministration in the second and third pillars. Extending this power of the Parliament to the whole range of EU policies, within a future single Treaty, would not be a neutral operation but would modify the institutional balance to the advantage of the European Parliament. The same is true for all other existing differences in the way the institutional balance is drawn between the first, second and third pillars, not to speak of the Court of Justice whose role is today significantly different from one pillar to the next. On all these matters, a merger of the Treaties would require a careful weighing of the reasons for maintaining or eliminating the existing institutional differences between the pillars. But such political controversies do not call into question the essential feasibility of the merger itself.

3. Reorganisation: how to articulate a basic treaty with the ‘rest’ of primary law?

The elaboration of a constitutional treaty, if accompanied (as inevitably it will) by substantive changes in its provisions, will raise difficult problems of adaptation of the lesser provisions of primary EU law. It will not be possible to neatly divide Treaty articles between those moving to the constitutional treaty and those that are not ‘promoted’ in this way. The latter will have to be carefully looked at, and their text will have to be harmonised with the text of the constitutional treaty, so as to prevent that reorganisation leads to inconsistencies or legal gaps.

Apart from this problem of consistency and compatibility, there is the question of the hierarchical relationship between both categories of provisions. The idea of a reorganisation of the Treaties conveys almost naturally the thought of a hierarchy of norms *within* primary EU law. This seems to be the approach adopted, for instance, in the Franco-German Declaration of Nantes of November 2001 in which the two governments declared that they agree on the idea of ‘*une division des traités en une partie constitutionnelle et une partie infra-constitutionnelle plus facile à faire évoluer.*’ If a large part of the existing Treaty text is made ‘infra-constitutional’, not just in a political sense but also in a technical-legal sense, this would not only have implications for the amendment procedures (to which the quoted passage refers), but also for the organisation of judicial control and for the institutional balance.

However, this is not the only available option. There seem to be essentially three ways of formalising the distinction between the fundamental and the lesser provisions of the Treaties:

- The softest form of distinction would be to divide the existing Treaties (or rather: the merged EC/EU Treaty – see above) into a first part containing the basic provisions, and a second part (of the same treaty), containing all the rest. The advantage of this option is that it would attain the objective of greater visibility (the first, basic, part could be distributed, read or studied separately as a coherent and largely self-contained document) without affecting the existing formal legal status of the rest of the Treaty provisions. The complete merged EU Treaty would be very long, amounting to some 350 articles perhaps, but that would not matter as long as its basic ‘citizen-oriented’ part could be contained within reasonable limits.
- A more far-reaching change would be the adoption of two or more separate Treaty texts: apart from the ‘basic treaty’, there would be one or more separate ‘complementary treaties’ or protocols

attached to the basic treaty, containing the other primary law provisions. The Florence ‘draft basic treaty’ (elaborated by the European University Institute in May 2000) took this approach. The attraction of choosing protocols rather than ‘complementary treaties’ is that they need not necessarily correspond to the present Treaties. One could also imagine a differently ordered set of protocols, for instance one with all the non-essential institutional provisions, another one with all EU policies and a third one containing the Charter of Rights (if the Charter were not to be entirely incorporated in the basic treaty). In all these cases, one would obviously have to adapt their text so as to make it compatible and non-redundant with the basic treaty. A disadvantage of this option, compared to the option of one single treaty in two parts, is that it would make the *ensemble* slightly less legible than if all provisions of primary law are contained within a single document.

- The third and most radical option would consist in transforming the second tier into *secondary* law, by incorporating the text of provisions that are now to be found in the Treaties into an act of EU law. This would have to be a not yet existing instrument, possibly called ‘organic law’,⁸ which would have the highest rank in the system of sources of EU law (thus introducing a formal hierarchy in the system of secondary sources of EU law which is not there now). The basic treaty would remain as the only written source of *primary* law. However, it must be noted that neither the Convention nor the IGC of 2004 have the power to adopt such organic laws themselves. A basic treaty could only create a competence and a procedure for accomplishing such a transformation of primary law into secondary law. Apart from this practical difficulty, I am not convinced of the intrinsic advantages of this radical third option, compared to the other two. It would create major new legal headaches. If the only reason is to allow for the flexible evolution of EU law by excluding a large part of what is now primary EU law from the scope of the cumbersome Treaty revision procedure of Article 48 EU, one does not need to downgrade that part of primary law. The objective of facilitating later evolutions can easily be achieved with the first and second option as well. Already now, the EC Treaty provides for some cases of simplified change in which the decision-making on amendment is left in the hands of the EU institutions rather than an intergovernmental conference. The Nice Treaty aims at increasing the number of such cases and

⁸ As suggested in the EP’s Draft Treaty on European Union of 1984 (see above), and also in the Herman Report of 1994 on a Constitution for the European Union. See discussion of this notion of organic law by J.V. Louis, ‘Les institutions dans le projet de constitution de l’Union européenne (rapport Herman 1994)’, in Louis (ed), *L’Union européenne et l’avenir de ses institutions* (1996) 11, at 23 ff., and by R. Bieber and B. Kahil, ‘Organic law in the European Union’, in G. Winter (ed), *Sources and Categories of European Union Law – A Comparative and Reform Perspective* (1996) 423.

this could easily be extended in the future, in more general terms, to modifications of the whole non-basic part of the treaties. If this were to happen, one would have to create a procedure, preferably involving the European Court of Justice, to prevent that an amendment of the non-basic treaty provisions would inadvertently, or surreptitiously, modify the basic part of the treaty. To this extent, but this extent only, a legal hierarchy between the basic treaty and the rest would necessarily exist.

4. Entry into force and subsequent revision of a basic treaty

The third and last theme of my intervention is that of the conditions for the entry into force and revision of the future treaty, whether that will be a single merged treaty, or a basic treaty accompanied by protocols or complementary treaties.

As far as *entry into force* is concerned, the basic principle is quite clear. The future treaty (whether it is called a constitutional treaty or not) will necessarily be an amendment of the existing EC and EU Treaties, and therefore the revision procedure described in Article 48 EU will apply. The new treaty will only enter into force if approved by all the member state governments and ratified by all states according to their constitutional requirements. So, what will happen if the Convention approves the text of a constitutional treaty, and 14 out of 15 member state governments approve it in the subsequent intergovernmental conference, but not the 15th?⁹ Or what if all 15 governments approve it, but in one country there is a popular referendum with a negative outcome? Could the constitutional treaty nevertheless go ahead? The question is not new, as it also arose for the Maastricht Treaty after the first Danish referendum, and for the Nice Treaty after the first, and possible also after the second, Irish referendum. The simple answer to the question is *no*. It is true that the Vienna Convention on the Law of Treaties allows that some of the parties to a treaty decide to modify that treaty among themselves without the participation of the other original state parties (a so-called *inter se* modification). However, this is only allowed if that modification does not affect the rights that the non-participating states have under the original treaty. This can never be the case for the treaty to be adopted by the IGC of 2004. The adoption of a single treaty and/or of a basic constitutional treaty will unavoidably affect and modify the existing rights of all the EU members and therefore, under the current rules of Article 48 EU, they must all give their agreement with the

⁹ The figures are only given for the sake of argument. It is likely that, by the time of the conclusion of the next IGC, there will be more than 15 member states of the Union.

changes. It does not help to say that the enactment of an ambitious constitutional treaty should not be seen as a continuation of the existing treaties, but as a wholly new beginning. Legally speaking, there can be no *tabula rasa* to the detriment of one or more of the existing member states. If the Convention and 13 or 14 states want to go ahead with the new treaty, but one or two states refuse to do so, the only thing that is legally possible is for the majority to press the minority into negotiating a further, complementary, treaty for organising (on a consensual basis) the ‘passive acceptance’ of the new Treaty regime by the reluctant states.

Even though, as argued above, the full rigour of the requirements of Article 48 EU will apply to the entry into force of the treaty that will emerge from the next IGC, this is no obstacle against adding *additional* requirements for the entry into force of a constitutional treaty. Thus, the Convention could propose that the treaty enter into force only after having been approved by the European Parliament, or by a body composed like the Convention itself, or by a Europe-wide popular referendum. Article 48 does not mention these conditions, but does not prohibit them either.

Finally, the future constitutional treaty may well change the revision rules for the future, by modifying what is now Article 48 EU. The Laeken Declaration poses the question whether there should be a ‘distinction between the amendment and ratification procedures for the basic treaty and for the other treaty provisions’. The question seems to imply a positive answer: this, after all, was one of the prime motives for undertaking the reorganisation project. However, this distinction need not be absolute. One could well imagine that some non-basic treaty provisions, because of their particular political sensitivity, would remain subject to a more rigid amendment procedure than others. However, in principle, the amendment of the non-basic provisions would have to be made less cumbersome than today. This can be done in two different ways (and possibly in both ways at the same time): by eliminating the need for ratification of amendments by the individual national parliaments (but this would presumably have to be compensated by involving national parliamentarians in the first stage, namely the adoption of the treaty changes) or by abandoning the requirement that all states should approve the changes and replace this by some sort of yet to be invented ‘superqualified majority’.

The elaboration of a new, and more flexible, amendment procedure for the non-basic Treaty provision does not imply, by contrast, that the amendment of the constitutional treaty should remain subject to the same rules as today. It is rather evident that, in view of the new Convention experience, the text of Article 48 EU cannot be kept as it stands today. The ‘Convention method’

will have to be incorporated into it (except if it proved to be a resounding failure). Perhaps one will also, sooner or later, have to take a critical look at the ‘taboo’ question of the common accord, and unanimous ratification requirement, for treaty changes – even for changes of a future constitutional treaty. In a future Union of 25 or more states, the rigidity of this rule may well become untenable.¹⁰

¹⁰ I will not develop these points any further here. See the reform proposals made in the ‘second’ report of the European University Institute of July 2000 (some of which have already become constitutional practice after Laeken): *Reforming the Treaties’ Amendment Procedures. Second Report on the Reorganisation of the European Union Treaties submitted to the European Commission on 31 July 2000*, <europa.eu.int/comm/igc2000/offdoc/discussiondocs/index-en.htm>.