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Vedr.: Bidrag fra Peter Hain, medlem af konventet
– Forfatningstraktat for Den Europæiske Union

Generalsekretæren for konventet har modtaget vedlagte bidrag fra Peter Hain, medlem af konventet.

President Valéry Giscard d'Estaing
Chairman of the European Convention
Rue de la Loi, 175
B-1048 Brussels
Belgium

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Some months ago, the British Government asked a distinguished group of independent constitutional lawyers at Cambridge University, led by Professor Alan Dashwood, to offer their view of what a constitutional treaty might look like.

I would like to share the result with colleagues in the Convention. Like much work which Government commissions from universities, this “Cambridge Text” is not a statement of Government policy, but it is a serious, imaginative and valuable contribution to all our endeavours.

I have also **enclosed** a copy of an article by Jack Straw, published in “The Economist” last week, which sets out the Government’s ideas on some of the main policy questions.

Peter Hain

DRAFT

CONSTITUTIONAL TREATY

OF THE EUROPEAN UNION

AND

RELATED DOCUMENTS

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PROCLAMATION OF

THE CONSTITUTIONAL TREATY

OF THE EUROPEAN UNION

INTRODUCTION

The text that follows is designed to provide a short, clear and, it is hoped, inspiring answer to the questions: what is the European Union for, and – constitutionally speaking – what sort of animal is it?

Formally, the text is presented as a Proclamation of the Constitutional Treaty, which could be identified in the Amending Treaty as the event which, following ratification, will bring the new order into existence. This seems preferable to presentation as a Preamble to the Constitutional Treaty itself, which would be required to follow the traditional structure of a series of recitals constituting a single long sentence.

There is scope for adding other elements to the Proclamation, but it would be a pity to overload it. For the Proclamation to have an impact on public opinion, its content needs to be pithy and memorable.

PROCLAMATION

1. The process of European integration has brought together within the European Communities and the European Union ever more of the States of a Continent once divided by war, ideology and political oppression. Peaceful cooperation has replaced age-old rivalries.

2. Those achievements must be consolidated and taken forward, so as to ensure for all the peoples of the European Union:

- continuing peace;*
- respect for the basic principles of democratic governance, human rights and fundamental freedoms, and the rule of law;*
- social progress and sustainable prosperity;*
- high levels of internal and external security; and*
- in the international sphere, the ability more effectively to pursue common interests, while advancing the general well-being of humankind.*

3. To those ends, the Member States are resolved to set the relations between their peoples on a new foundation laid down by the Constitutional Treaty of the European Union.

4. As constituted under the Treaty, the European Union has these defining features:

- The Member States have chosen, in some measure, to exercise their sovereignties in common, through the institutions of the Union.*
- In so combining their sovereignties, for defined purposes and within defined limits, the Member States retain their national identities.*
- The Union has only those powers which have been conferred on it by the Member States. All*

powers which the Member States enjoy by virtue of their sovereignty, and which they have not conferred on the Union, remain theirs exclusively.

- *Decisions are to be taken as openly as possible and as closely as possible to the citizen. The powers conferred on the Union are to be exercised in ways that encroach as little as possible on the powers of the Member States.*

5. The European Union is thus a constitutional order of a new kind, uniting the peoples of the Member States, while preserving the diversity of political institutions and of cultural and linguistic traditions that enriches European civilisation.

[...]

Now, therefore, by this instrument, the Heads of State or Government of the Member States solemnly proclaim the Constitutional Treaty of the European Union.

DRAFT

**CONSTITUTIONAL TREATY
OF THE EUROPEAN UNION**

INTRODUCTION

The present draft is based on certain assumptions as to political decisions that may be taken, affecting the future structure of the European Union:

- The distinction between the Union and the Communities will be abolished. In other words, the European Community (EC) and the European Atomic Energy Community (EURATOM) will cease to exist as constitutional entities distinct from the Union. The institutions will be explicitly acknowledged as belonging to the Union, and there will be a single legal personality of the Union.
- The distinctive institutional and procedural arrangements presently found in Title VI TEU, which organise Union activity in respect of Police and Judicial Cooperation in Criminal Matters (the so-called “Third Pillar”) will be assimilated to the arrangements presently applicable under the EC Treaty (the so-called “First Pillar”) largely, if not entirely.
- On the other hand, the institutional arrangements presently found in Title V TEU, which organise Union activity in respect of Foreign, Security and Defence Policy (the so-called “Second Pillar”) will remain strongly differentiated.

The model which is here proposed for the simplification of the existing Treaties consists of a Constitutional Treaty, setting out the common and fundamental principles of the Union order, with ‘Acts’ annexed to it, laying down detailed substantive provisions.

Within the Constitutional Treaty itself, a distinction is proposed between a Part One, which is designed to present, in a clear and reasonably accessible fashion, the truly ‘constitutional’ elements of the order (such as the definition of the nature of the Union, citizenship, the limits of Union powers, the institutions and the instruments through which the Union acts, etc.); a Part Two, which would contain more detailed institutional, procedural and financial provisions (essentially incorporating the present Part Five of the EC Treaty, appropriately amended); and a Part Three on the general principles governing possible enhanced cooperation between certain Member States on

certain matters (essentially incorporating the present Title VII TEU, again as amended).

Part One of the Constitutional Treaty, entitled “Constitution of the European Union”, has been drafted out in full. On the other hand, for the purposes of the present drafting exercise, it seemed sufficient merely to indicate by chapter headings the subject-matter to be transferred from the existing Treaties into Parts Two and Three of the Constitutional Treaty.

It is proposed that the substantive provisions of the EC Treaty and of Title VI TEU (the First and Third Pillars), as amended, be incorporated into an Act annexed to the Constitutional Treaty and called “Act concerning Economic and Social Policy”; and those of Title V TEU (the Second Pillar), as amended, into a similarly annexed Act, called “Act concerning Foreign, Security and Defence Policy”. Those are provisional titles; for the Act concerning Economic and Social Policy, in particular, it may be possible to think of a title more descriptive of its diverse subject-matter. It was not thought necessary, at this stage in the drafting process, to set out the texts of the annexed Acts.

As regards the substantive provisions of the EURATOM Treaty, there are two available options: either they could be incorporated into the Act concerning Economic and Social Policy; or they could constitute a separate annexed Act, which could be called “Act concerning the peaceful use of Atomic Energy”.

The constitutional text has thus been conceived as a composite text. The new Part One of the Treaty will be “bolted onto” reorganised and amended elements of the existing Treaties. How can this be achieved is demonstrated by the Draft Amending Treaty.

It would be technically possible for the content of the proposed two (or more) Acts to be brought together in a single voluminous text. However, the proposed model appears better adapted to the aims, identified by the Nice and Laeken Declarations, of simplifying and making more transparent the instruments upon which the European Union is founded.

Text of the Draft Treaty

PART ONE

Constitution of the European Union

1. Nature of the Union

ARTICLE 1

By this Constitutional Treaty, the HIGH CONTRACTING PARTIES establish among themselves a European Union, hereinafter called “the Union”.

The Union shall be established as a constitutional order of sovereign States. The Member States have chosen in some measure to exercise their sovereignties in common, through the institutions of the Union, under the conditions laid down by this Treaty.

In so combining their sovereignties, for defined purposes and within defined limits, the Member States maintain their national identities. The institutions of the Union, when acting pursuant to powers conferred by this Treaty, shall respect the national identities of the Member States, their cultural and linguistic diversity and their traditions.

Commentary

This Article establishes the European Union as a “constitutional order of sovereign States”, and goes on to clarify what that description entails. The drafting is designed to convey the idea that, by adhering to the Union, the Member States have not divested themselves of their sovereignty in whole or in part; they have chosen rather to “pool” aspects of their respective sovereignties, by exercising those aspects in common, through the institutions of the Union.

The first sentence of the final paragraph asserts that the pooling, in some measure, of Member States’ sovereignties has not impaired their respective national identities. The indicative mood is

used since this is an explanatory statement, and not a consequence drawn from the Constitutional Treaty. The second sentence puts the institutions of the Union under an express obligation to respect Member States' national identities, and the elements that go to define such identity.

2. BASIC VALUES OF THE UNION

Article 2

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. The 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, as identified in the Charter of Fundamental Rights of the European Union, and as they result from the constitutional traditions common to the Member States, as general principles of Union law.

3. Decisions shall be taken as openly as possible and as closely as possible to the citizen.

4. Respect by the Member States for the principles referred to in paragraph (1) shall be ensured by the institutions of the Union in accordance with procedures which are laid down in Part Two of this Treaty and which enable steps to be taken to prevent or sanction breaches of those principles.

COMMENTARY

This text largely reproduces Articles 6(1) and (2) TEU, save for the reference to the Charter of Fundamental Rights. Regardless of its final legal status (perhaps becoming a legally enforceable Bill of Rights incorporated into the Treaties, or perhaps remaining a non-binding point of reference for the institutions), some explicit reference to the Charter is important in terms of enhancing the Union's legitimacy and transparency. It would certainly seem unsatisfactory for the Union to have promulgated a Charter of Fundamental Rights, which is then excluded altogether from the Constitutional Treaty's list of notional sources of inspiration for the protection of human rights. The phrasing "identified in" has been employed (in contrast to "guaranteed") on the assumption that the Charter will not be further incorporated into the Union's constitutional instruments.

Paragraph (3) of the Article picks up wording presently found in Article 1, second paragraph TEU.

Paragraph (4) of the Article cross-refers to Part Two of the Treaty, where the procedures of the present Article 7 TEU, as amended by the Treaty of Nice, properly belong.

The reference in the present Article 6(3) TEU to respecting the national identities of the Member States has been subsumed into Article 1, third paragraph, above.

The reference in the present Article 6(4) TEU to providing the Union with the necessary means of achieving its objectives, is to be found in Article 3, second paragraph, below.

3. OBJECTIVES AND ACTIVITIES OF THE UNION

Article 3

The objectives of the Union shall be achieved in accordance with the provisions set out in this Constitutional Treaty, and in the Act concerning Economic and Social Policy and the Act concerning Foreign, Security and Defence Policy which are annexed to it. These two Acts shall hereinafter collectively be called “the annexed Acts”.

The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

Commentary

This Article identifies the Constitutional Treaty and the two annexed Acts as the primary instruments of the Union order.

It might be desirable to give the Act concerning Economic and Social Policy a title which is more fully descriptive of its varied content (including Justice and Home Affairs); however, this should not be too cumbersome.

If it is decided that the EURATOM Treaty should not be integrated into the Act concerning Economic and Social Policy, it would have to be annexed to the Constitutional Treaty as an Act in its own right, which might be entitled “Act concerning the Peaceful Use of Nuclear Energy”.

As mentioned in the Introduction, it would be legally possible to combine the contents of the two (or three) proposed Acts in a single Act (“The Single Annexed Act” model), but this would be at the expense of the aims of transparency and simplification.

The second paragraph of Article 3 incorporates the text of the present Article 6(4) TEU.

Article 4

The Union shall have as its objectives:

- (a) to promote economic and social progress, and a high level of employment and of social protection; and to achieve throughout the Union a harmonious, balanced and sustainable development of economic activities, including non-inflationary growth, a high degree of competitiveness and convergence of economic performance; in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and solidarity between Member States, and through the establishment of economic and monetary union, including a single currency;*
- (b) to combat discrimination based on nationality, racial or ethnic origin, religion or belief, disability, age or sexual orientation, and to promote equality between men and women;*
- (c) to achieve a high level of protection and improvement of the quality of the environment and to raise the standard of living and quality of life across the Union;*
- (d) to strengthen the protection of the rights and interests of the nationals of its Member States through their citizenship of the Union;*
- (e) to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime;*
- (f) to assert its identity on the international scene, in particular through the implementation of a foreign, security and defence policy.*

Commentary

This text largely reproduces Article 2 TEU and Article 2 EC.

The choice of words (the Union “promotes equality” in case of discrimination based on gender, but “combats discrimination” in case of other forms of discrimination) is intended to reflect the status quo, whereby positive/affirmative action is expressly permitted under Article 141 EC in order to achieve substantive gender equality, but is not explicitly provided for under Article 13 EC as regards (for example) discrimination based on race or disability.

The reference in Article 2 (first paragraph, fifth indent) TEU to maintaining the *acquis communautaire* has been omitted. This seems an inappropriate place to include such a reference, as compared to the Act concerning Economic and Social Policy.

Article 5

1. For the purpose of attaining the objectives set out in Articles 4 (a) to (e), the activities of the Union shall, as provided for in the Act concerning Economic and Social Policy, consist of the following:

- a) maintenance of an internal market comprising an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured by the abolition of obstacles restricting such freedom and by the approximation, so far as may be necessary, of the laws of the Member States, and which has a system to prevent competition from being distorted;*
- b) adoption of an economic policy based on the close co-ordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principles of an open market economy with free competition; and, concurrently, the operation of a single currency, the euro, and of a monetary policy;*
- c) a common commercial policy;*

- d) *common policies in the spheres of agriculture, fisheries and transport;*
- e) *establishment of an area of freedom, security and justice, comprising visas, asylum and immigration policies, and other measures concerning the entry and movement of persons, as well as police and judicial cooperation in criminal matters;*
- f) *a policy in the social sphere, and the promotion of coordination between the employment policies of the Member States;*
- g) *a policy on the environment;*
- h) *the strengthening of economic and social cohesion;*
- i) *a contribution by the Union: to the strengthening of the competitiveness of industry; to the promotion of research and technological development; to the establishment and development of trans-European networks; to the attainment of a high level of health protection; to education and training of high quality and to the flowering of the cultures of the Member States; and to the strengthening of consumer protection;*
- j) *measures in the sphere of energy, civil protection and tourism;*
- k) *policies in the sphere of external relations, in particular, on development cooperation, and on economic, financial and technical cooperation with third countries, as well the association of the overseas countries and territories.*

2. For the purpose of attaining the objectives set out in Article 4 (f), the activities of the Union shall be designed, as provided for in the Act concerning Foreign, Security and Defence Policy:

- *to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter;*
- *to strengthen the security of the Union in all ways;*

- *to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders;*
- *to promote international cooperation;*
- *to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.*

Commentary

Paragraph 1 of Article 5 regroups the elements presently found in Article 3 and 4 EC, while paragraph 2 refers to the attainment of the objectives identified in the present Article 11(1) TEU. The proposal is that the list of activities in paragraph 1 be exhaustive, which it is not in the present Article 3 EC.

The horizontal integration and non-discrimination clauses presently contained in the EC Treaty (for example: Article 3(2) on equal treatment between men and women, and Article 6 on protection of the environment) may be thought to belong in the Act concerning Economic and Social Policy, rather than in the Constitutional Treaty.

4. Citizenship of the Union

Article 6

1. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights conferred by this Treaty, and by the Act concerning Economic and Social Policy, and shall be subject to the duties imposed thereby.

3. Every citizen of the Union residing in a Member State of which that person [he or she] is not a national shall have, in particular, the right:

- *to vote and stand as a candidate in elections to the European Parliament in the Member State where that person [he or she] resides, under the same conditions as nationals of that State; and*
- *to vote and to stand as a candidate at municipal elections in the Member State in which that person [he or she] resides, under the same conditions as nationals of that State.*

These rights shall be exercised subject to the detailed arrangements laid down by the Act concerning Economic and Social Policy.

4. Citizens of the Union shall enjoy the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down by the Act concerning Economic and Social Policy and by the measures adopted to give it effect.

Commentary

This text reproduces some of the provisions contained in the present Articles 17, 18 and 19 EC. However, it is thought appropriate to reverse the order of the present paragraph (1) and (2) of Article 19 EC.

Further, as regards the right to vote and stand in European Parliament and municipal elections, and the right to free movement, a general cross-reference to the Act concerning Economic and Social Policy has been preferred over any more detailed account of legislative competences to adopt secondary measures, in order to keep the text as “light” as possible. The right to consular protection, currently found in Article 20 EC, being a more “detailed” right, will be found only in the Act. Reference to the citizen’s right to petition the institutions as set out in Article 21 EC seems more appropriately placed either in Part II of the Constitutional Treaty (if it is intended to cover the Union’s activities as carried out under both Acts) or in the Act concerning Economic and Social Policy (if it is intended to cover only the Union’s activities carried out under that particular instrument).

5. ORGANISING PRINCIPLES OF THE CONSTITUTIONAL ORDER

Article 7

1. The following shall be general and fundamental principles of the constitutional order established pursuant to this Treaty:

- the principle of conferred powers;*
- the principle of subsidiarity;*
- the principle of proportionality; and*
- the principle of loyal cooperation.*

2. According to the principle of conferred powers, the Union shall have only those powers which have been conferred on it by the Member States pursuant to this Treaty. It shall have no inherent or residual powers.

All powers which the Member States enjoy by virtue of their sovereignty, and which they have not conferred on the Union pursuant to this Treaty, remain within the exclusive competence of the Member States.

The conferment of powers on the Union shall not in itself restrict the powers of the Member States in respect of the same subject-matter, except in the areas identified in Article 9 of this Treaty as falling within the exclusive competence of the Union.

3. The principle of subsidiarity requires that powers be located and exercised at the level of the Member States, except in areas identified in Article 9 of this Treaty as falling within the exclusive competence of the Union, or where a clear common advantage can be discerned in acting at the level of the Union.

The principle of subsidiarity shall serve as a guide when this Treaty is being amended.

The institutions of the Union shall, in accordance with the principle of subsidiarity, refrain from exercising a power which has been conferred on the Union pursuant to this Treaty, in any case

where the objective of the contemplated action is capable of being achieved by action at the level of the Member States, and there is no demonstrable common advantage in acting at the level of the Union.

4. As it applies to the relationship between the Union and the Member States, the principle of proportionality requires that the powers of the former be exercised so as to encroach as little as possible, consistently with the relevant Treaty objectives, on the powers of the latter.

The institutions of the Union shall respect the principle of proportionality when deciding on the form of action to be taken, and on any legal instrument to be used, in the course of exercising any power conferred on the Union by this Treaty. They shall, in particular, proceed by way of co-ordinated action, organised on the basis of a non-binding instrument, in any case where the relevant Treaty objectives can sufficiently be attained through such action.

5. The principle of loyal cooperation requires that the Member States support the actions and policies of the Union actively and unreservedly in a spirit of loyalty and mutual solidarity, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks as provided for in the Act on Economic and Social Policy and in the Act on Foreign, Security and Defence Policy. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness.

Commentary

Paragraph (1) identifies four principles, of conferred powers (sometimes referred to as the principle of the attribution of powers), of subsidiarity, of proportionality and of loyal cooperation. Those principles are further developed in respectively, paragraphs (2), (3), (4) and (5) of the Article.

Paragraph (2), first sub-paragraph contains a formulation of the principle of conferred powers which is presently found in Article 5, first paragraph EC. The wording refers explicitly to the fact that the Union's powers have been conferred by the Member States pursuant to the Constitutional Treaty.

It would be inappropriate to refer in the Constitutional Treaty to the related principle of specific

attribution, which is characteristic of the EC Treaty but not of Title V and VI TEU. That principle could be formulated, for the purposes of the appropriate Act, as follows:

Any action which is taken by the Institutions in the name of the Union must be specifically authorised by a power-conferring provision contained in, or adopted under, this Act.

The second sub-paragraph of paragraph (2) notes that action on any matter in respect of which the Union has not been empowered to act under the Treaty remains the exclusive prerogative of the Member States. The drafting (using the indicative mood) makes clear that the “residual” powers of the Member States belong to them independently of the Treaty.

Paragraph (2), third sub-paragraph establishes that, even where powers have been conferred on the Union, Member States remain free to act in respect of the matters in question, except in the rare cases where the Treaty expressly provides that the competence of the Union shall be exclusive. The only existing instances of exclusive EC powers are in respect of the common commercial policy, fisheries protection and, presumably, monetary policy (for those Member States participating in the Euro). Articles 9 to 11 of the Treaty draw a distinction between those instances of exclusive Union competence, and the areas of “complementary” and shared competence.

Paragraph (3), first sub-paragraph formulates the principle of subsidiarity in general terms, as a fundamental principle of the constitutional order.

Paragraph (3), second sub-paragraph refers to the role of the principle as a guide to the Union constitution-making authority.

Paragraph (3), third sub-paragraph refers to the role of the principle as a brake on the exercise of conferred powers. This is the sense of the present Article 5, second paragraph TEU. The obligation to respect the principle is explicitly imposed on the institutions when they exercise powers under the Treaty. The wording is designed to overcome the ambiguity of the paragraph as presently drafted. The principle applies under three conditions: the power in question must not be one of those which is stated by the Treaty to be exclusive to the Union; the objective of the contemplated action must be capable of being achieved by Member State action; and it cannot be demonstrated that there would be a common advantage in taking action at the level of the Union.

Paragraph (4), first sub-paragraph formulates, in harder terms, the principle of proportionality presently found in Article 5, third paragraph EC.

Paragraph (4), second sub-paragraph makes clear that the institutions of the Union are required to respect the principle when deciding on the form of action they could take, and on the type of instrument they should use, for the purpose of exercising a power of the Union in a given instance.

Paragraph (5) incorporates the principle of loyal cooperation which is imposed on the Member States. This is an organising principle of the constitutional order, on the same level as the principles of conferred powers, subsidiarity and proportionality, and balances those principles by underlining the obligation of the Member States to further the objectives of the Union. Different versions of the principle are currently found in Article 11(2) TEU and in Article 10 EC. The proposed text combines wording from those two Articles, in a way which is intended to conserve the principle, while avoiding any derogation from, or extension of, the *acquis communautaire* (as to this, see Article C of the Amending Treaty, below).

In paragraph (5), first sub-paragraph, the obligation to show loyalty and mutual solidarity is taken from Article 11(2) TEU, first sub-paragraph and the obligation of result concerning fulfilment of Treaty obligations is taken from the first sentence of Article 10 EC.

Paragraph (5), second sub-paragraph spells out the positive and negative obligations of the Member States resulting from the principle. The reference to facilitating the achievement of the Union's tasks, which comes from the second sentence of Article 10 EC, is specifically related to the tasks set, respectively, by the Act on Economic and Social Policy and the Act on Foreign, Security and Defence Policy. The negative obligation imposed by the final sentence comes from the second sub-paragraph of Article 11(2) TEU (though without the limitation to the sphere of international relations).

ARTICLE 8

Any proposal for a regulation or a directive of the European Parliament and the Council, or of the Council, shall, prior to its definitive adoption, be examined, in the form in which it is to be submitted for definitive adoption, under the arrangements that apply to the parliamentary scrutiny of Union measures in each Member State, in order specifically to determine whether the proposal complies with the principles of subsidiarity and proportionality as defined by Article 7 of this Treaty.

The conditions under which proposals shall be submitted for such examination, and the action, if any, to be taken in the light of the outcome, shall be as provided for by Article X [in Part Two] of this Treaty.

Commentary

This Article creates a mechanism to ensure compliance with the principles of subsidiarity and proportionality, based on national arrangements for the Parliamentary scrutiny of Union measures. The detailed provisions governing the operation of the mechanism belong in Title II of Part Two of the Constitutional Treaty.

6. COMPETENCE OF THE UNION

ARTICLE 9

The competence conferred on the Union shall be exclusive in the following areas falling within the scope of the Act concerning Economic and Social Policy:

- *common commercial policy;*
- *fisheries conservation;*
- *monetary policy for the Member States which adopt the euro as their currency.*

In areas of exclusive Union competence, the Member States may act only as trustees of the Union interest, and where they have been authorised to do so in accordance with the applicable Union procedure.

Action by the Union in areas of exclusive competence may be by way of any of the instruments available for the purposes of the Act concerning Economic and Social Policy.

COMMENTARY

This Article is concerned with exclusive competence which exists a priori, i.e. by the very nature of the field of Union activity in question.

Exclusive competence here refers to the idea that only the Union institutions are legally capable of carrying out independent action within the relevant policy field; any such action by the Member States is strictly precluded. Defining the areas of exclusive Union competence is important for two reasons: first, to identify the fields in which the Member States' independent regulatory competence has been curtailed; secondly, to delimit the scope of the principle of subsidiarity, which does not apply in areas of exclusive competence.

Within fields of exclusive competence, the Member States may still act where they have been authorised by the Union to do so. Such authorisation is usually express, i.e. contained in the relevant

Union secondary legislation. However, authorisation may in limited circumstances arise implicitly, i.e. where the Union has failed to exercise its exclusive powers and in order to protect the vital interests of the Union from the danger of a regulatory vacuum, the Court of Justice has recognised that the Member States may act as “trustees of the common interest” (the *Kramer* case, Cases 3, 4 and 6/76, [1976] ECR 1279). In both situations, the Member States of course remain subject to the obligations imposed under primary law, especially the duty of loyal cooperation contained in the present Article 10 EC.

Exclusive competence existing a priori has been recognised by the Court of Justice only as regards the areas of Union activity listed above. There are differences of opinion about whether other fields should be recognised as belonging also to the exclusive competence of the Union. For example, several Advocates General have argued that the internal market should be considered as an area of exclusive competence existing a priori, but this analysis has not so far been adopted by the Court of Justice. Nor, it is submitted, is the analysis correct: subject to the provisions on freedom of movement, the Member States are at liberty to regulate matters affecting the internal market unless and until approximation measures have been adopted by the Union.

Exclusivity may exist not only a priori, but also may arise through the adoption of secondary legislation which is pre-emptive in nature. This type of exclusivity is treated below under the Article on shared competence, i.e. where Member States must respect the obligations imposed upon them by measures adopted under the Act concerning Economic and Social Policy, including the creation of harmonised norms which exclude the exercise of derogating or supplementary national competence. Exclusivity arising by pre-emptive secondary legislation is reversible: repeal or amendment of the relevant Union measures may lead to the resurrection of independent Member State regulatory competence.

Article 10

The competence of the Union shall be complementary to that of the Member States under the legal bases provided for by the Act concerning Economic and Social Policy in the following areas:

- *economic policy;*
- *employment;*
- *education, vocational training and youth;*

- *culture;*
- *public health;*
- *consumer protection;*
- *trans-European networks;*
- *industry;*
- *research and technological development.*

In areas of complementary competence, action by the Union shall be limited to supporting, encouraging, and coordinating action taken by the Member States.

In such areas, except in respect of matters which shall be identified specifically in the applicable legal basis, action by the Union shall not entail the adoption of regulations or directives, or the harmonisation of the laws and regulations of the Member States.

The fact that the Union has exercised its complementary competence in respect of a certain matter shall not, except in the aforementioned cases where the adoption of regulations or directives is exceptionally authorised, prevent Member States from acting in respect of the same matter, subject to the obligations imposed on them by or under the Act concerning Economic and Social Policy.

COMMENTARY

In the areas listed in the first paragraph, the determination of policy remains the preserve of the Member States. The Union is given a supportive or coordinating role, to be performed, typically, through the adoption of broad guidelines or incentive measures, or by facilitating the exchange of information about “best practice”. The reference to “legal bases” should make it possible accurately to identify the matters that are subject to complementary competence. From the point of view of clearly demarcating the scope of the Union’s competences, it is preferable for the list of policy areas to be exhaustive.

The limited scope of the Union’s complementary competence is given concrete expression in the third and fourth paragraphs of this Article. In the policy areas in question, Union competence may not, in principle, be exercised by adopting legislative instruments (regulations or directives) or through the harmonisation of national legislation; exceptionally, however, such action by the Union

may be authorised in respect of specific matters identified in the applicable legal basis: see, e.g., as regards public health, the measures referred to in the present Article 152 (4) (a) and (b) EC. Subject to the same exception, the so-called *AETR* or *ERTA* principle, Case 22/70, [1971] ECR 263, which restricts action at the level of the Member States once the Union has acted, does not apply in areas of complementary competence.

The reference in the fourth paragraph to the “the obligations imposed on [the Member States] by or under the Act concerning Economic and Social Policy” is intended to make clear that “horizontal” principles, such as the principles of non-discrimination and of free movement, bind the Member States even in areas of complementary competence (as regards, e.g., access to higher education: see the *Gravier* line of authority of the Court of Justice, Case 293/83, [1985] ECR 593). If there were a desire to restrict the application of the horizontal principles in a given area (for instance, the possible impact of the freedom to provide/receive services on public health provision, as illustrated by the judgment of the Court in *Peerbooms*, Case C-157/99, [2001] ECR I-5473), this could best be achieved by amending the relevant substantive provisions of the Act concerning Economic and Social Policy (perhaps by giving a narrower meaning to the concept of “services”).

ARTICLE 11

The competences of the Union which are neither exclusive nor complementary shall be shared with the Member States.

In areas of shared competence, when the Union has acted in respect of a certain matter, the Member States shall respect the obligations imposed on them by the relevant Union measures, as well as by, as the case may be, the Act concerning Economic and Social Policy or the Act concerning Foreign, Security and Defence Policy.

Action by the Union in areas of shared competence may be:

- *as regards matters falling within the scope of the Act concerning Economic and Social Policy, by way of any of the instruments available for the purposes of that Act, and subject to the detailed provisions contained therein; and*
- *as regards matters falling within the scope of the Act concerning Foreign, Security and Defence Policy, by way of any of the instruments available for the purposes of that Act, and subject to the detailed provisions contained therein.*

COMMENTARY

Shared competence is the residual category of Union competences.

In areas of shared competence, unless and until the Union has adopted a measure, the Member States retain their freedom of action, subject to the horizontal obligations enshrined in the Constitutional Treaty and the annexed Acts. So, for example, national measures intended to protect the environment must respect the rules on free movement of goods.

Once the Union has acted in a certain matter, the legal framework of Member States' action changes. Where the Union legislation is found by the Court to be pre-emptive (as in the recent

Product Liability Directive cases – see *Commission v. Greece*, Case C-154/00, *Commission v. France*, Case C-54/00 and *González Sánchez*, Case C-183/00, all judgments of 25 April 2002), Member States are precluded from exercising any independent competence to derogate from or supplement the harmonised norms. Where the Union legislation provides for minimum harmonisation (as in the case of measures adopted under Article 137 EC on social policy), Member States are free to enact more stringent measures. In any case, Member States still remain subject to the relevant horizontal obligations.

Union competence under the Act concerning Foreign, Security and Defence Policy (the present Second Pillar) is thought to be shared – rather than complementary – in character, having regard to the legal effects more particularly of joint actions as defined by the present Article 14 TEU, and of common positions as defined by the present Article 15 TEU. Those legal effects, of course, differ fundamentally from the effects of Union measures in the domain of the Act concerning Economic and Social Policy.

The wording of the third paragraph is intended to ensure that, although the full range of instruments applicable to each Act is, in principle, available to the Union, the detailed provisions of any given legal basis within each Act can specify the particular instruments which may be adopted thereunder. For example, existing Article 137 EC permits the adoption only of directives (not regulations) for the attainment of the objectives of the Community social policy.

7. Instruments

ARTICLE 12

1. The instruments available to the Union for the purposes of the Act concerning Economic and Social Policy shall be:

(a) regulations, which shall have general application. They shall be binding in their entirety and directly applicable in all Member States;

(b) directives, which shall be binding, as to the result to be achieved, upon each Member State to which they are addressed, but shall leave to the national authorities the choice of form and

methods. In cases where the relevant Act so provides, directives shall not have direct effect;

(c) individual decisions, which shall be binding in their entirety upon those to whom they are addressed;

(d) general decisions: where a power of decision which has been conferred on the Union is exercised otherwise than by way of one of the instruments identified under (a) to (c) above, the instrument adopted by the competent institutions shall have the character of a general decision. A general decision shall have the binding effect intended by the competent institution.

(e) non-binding instruments, which shall include recommendations and opinions.

2. The instruments available to the Union for the purposes of the Act concerning Foreign, Security and Defence Policy shall be:

(a) common strategies, which shall be implemented by the Union in areas where the Member States have important interests in common. They shall set out their objectives, duration and the means to be made available by the Union and the Member States;

(b) joint actions, which shall address specific situations where operational action by the Union is deemed to be required. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation;

(c) common positions, which shall define the approach of the Union to a particular matter of a geographical or thematic nature.

(d) non-binding instruments, which shall include recommendations and opinions.

COMMENTARY

The definition of a regulation is taken from the present Article 249 EC, as also is the definition of a directive. It was felt unnecessary to specify that directives should contain only general principles for the harmonisation of national laws, rather than detailed provisions which the Member States must simply transpose into their domestic legal orders, thereby interfering with their implementation discretion. This is a job which is best left to the principles of subsidiarity and proportionality, combined with good institutional practice (e.g. the Commission's recent Action Plan on Simplifying and Improving the Regulatory Environment).

Third Pillar framework decisions, as defined by the present Article 34 (2) (b) TEU, differ from directives in the sense of Article 249 EC only in that they are stated not to entail direct effect. The drafting of the proposed Article 12 (1) (b) assumes that framework decisions will cease to exist as a separate category of Union instruments, but that the directives adopted under the Act concerning Economic and Social Policy which relate to matters presently within the scope of the Third Pillar will continue to be non-directly effective; hence the final sentence of the proposed point (b).

Points (c) and (d) of Article 12 (1) formalise the distinction, which has been developed in the practice of the institutions, between decisions having a specific addressee, and general decisions (sometimes referred to as "innominate decisions" or decisions *sui generis*). The latter are commonly used for the adoption of binding acts of general scope which are non-normative, e.g. Own Resources Decisions or the Decisions establishing the Erasmus and Socrates Programmes.

The definitions of the instruments referred to in points (a) to (c) of Article 12 (2) are taken, respectively, from the present Articles 13 (2), 14 (1) and 15 TEU.

8. Institutions of the Union

Article 13

The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives.

COMMENTARY

This formulation still seems relevant, even if the current pillar structure is collapsed into a single Union.

Article 14

1. The tasks entrusted to the Union shall be carried out by the following institutions:

- a EUROPEAN COUNCIL,*
- a EUROPEAN PARLIAMENT,*
- a COUNCIL OF MINISTERS,*
- a EUROPEAN COMMISSION,*
- a EUROPEAN COURT OF JUSTICE and a EUROPEAN COURT OF FIRST INSTANCE, and*
- a EUROPEAN COURT OF AUDITORS.*

2. Each institution shall act within the limits of the powers conferred upon it by this Treaty.

COMMENTARY

It is proposed that the name of the Council should revert to “Council of Ministers”, in order to distinguish it better from the European Council, and that the Commission be designated “European Commission”.

Article 15

In the constitutional order established pursuant to this Treaty, democratic accountability shall be ensured:

- through the responsibility, in accordance with their respective national constitutions, of the Heads of State or Government of the Member States for setting the policy objectives of the Union;*

- *through the responsibility of the Members of the European Parliament to their electors;*
- *through the responsibility, in accordance with their respective national constitutions, of the representatives of the Member States at ministerial level for decisions of the Council of Ministers.*

COMMENTARY

This Article spells out the ways of ensuring democratic accountability in the Union organised as a constitutional order of sovereign States: through democratically responsible Heads of State or Government in the European Council; through a directly elected European Parliament; and through democratically responsible Ministers in the Council. The wording is designed to avoid creating the impression that the different links of accountability need necessarily be present together whenever Union powers are exercised.

Article 16

1. The European Council shall bring together the Heads of State or Government of the Member States and the President of the Commission.

2. Under the guidance of its President, the European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines of the Union. It shall establish a programme of policy objectives to be achieved by the Union. The programme shall be implemented by the other institutions of the Union in accordance with their respective powers.

Commentary

The drafting of this Article partly reproduces elements of the present Article 4 TEU, the remainder of which belongs, together with the other detailed provisions relating to the European Council, in Chapter 1 of Title I of Part Two of this Treaty. The second sentence of paragraph (2) establishes a requirement for the European Council to adopt a programme setting policy objectives to be achieved by the Union. The third sentence of the paragraph requires the other institutions of the

Union to implement the programme, each according to its own competences. Where such a programme calls for legislative action, the Commission would be free to formulate any necessary proposals as it sees fit, or indeed to refrain from so doing.

Article 17

1. The European Parliament shall be composed of representatives of the people of the States brought together in the Union. They shall be elected by direct universal suffrage.

2. The European Parliament:

– shall participate in the legislative process of the Union, in particular as co-legislator with the Council as provided for by the Act concerning Economic and Social Policy; and

– shall hold the Commission to account by means of questions and debate and, if necessary and appropriate, through the adoption of a motion of censure and the consequent resignation of the Commission; it shall also participate in the appointment of the President and Members of the Commission, as provided for in Part Two of this Treaty.

COMMENTARY

Detailed provisions on the composition and organisation of the European Parliament, including the amendments agreed in the Treaty of Nice and its accompanying Protocol and Declaration, and as to the introduction of a uniform electoral procedure, belong in Part Two of this Treaty.

Article 18

1. The Council of Ministers (hereinafter called the “Council”) shall consist of a representative of each Member State at ministerial level, authorised to commit the government of that Member State.

2. The Council:

– shall prepare the work of the European Council and implement the policies and programmes which the European Council establishes;

– shall exercise the policy- and decision-making powers and the powers of co-ordination provided for by this Treaty and by the Acts concerning Economic and Social Policy and Foreign, Security and Defence Policy;

– SHALL HAVE POWER TO ADOPT THE INSTRUMENTS REFERRED TO IN ARTICLE 12, INCLUDING AS CO-LEGISLATOR WITH THE EUROPEAN PARLIAMENT IN THE CASES PROVIDED FOR UNDER THE ACT CONCERNING ECONOMIC AND SOCIAL POLICY.

COMMENTARY

In order to follow a consistent scheme in the presentation of the Union's institutions (first: composition, second: tasks) it is suggested that the first paragraph of Article 203 EC (dealing with the tasks of the Council) be transferred to the second paragraph and vice versa.

The description of the tasks of the Council in paragraph (2) replaces the unsatisfactory wording of the present Article 202 EC.

The provisions of the current Article 208 EC (see CELS Treaty Project (1997) 22 ELRev 365, proposed Article I.2.2.1 and commentary) are probably better placed in Part Two of the present Treaty, containing the detailed institutional provisions. It is thought that the provisions on the Council's voting rules in the present Article 205 EC should also be placed in Part Two.

ARTICLE 19

1. The European Commission (hereinafter called the "Commission") shall be a College composed of nationals of the Member States, appointed for a term of five years. It is charged with the duty of identifying and furthering, in complete independence of the governments and other authorities of the Member States, the general interest of the Union as a whole. In the performance of their duties,

Members of the Commission shall neither seek nor take instructions from any government or from any other body. Each Member State undertakes to respect this principle and not to seek to influence the Members of the Commission in the performance of their tasks.

2. Under the guidance of its President, the Commission shall, as provided for by this Treaty and by the annexed Acts:

- play a part in the implementation of policies and programmes established by the European Council;*
- ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;*
- formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary;*
- have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for by this Treaty;*
- exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.*

Commentary

Paragraph (1) of the Article brings out, with more precision than the present Article 213 EC, the role of the Commission in formulating and taking forward the general interest of the Union.

Paragraph (2), first indent links back to the Article on the European Council, while emphasising that the independence of the Commission must not be compromised. The remainder of paragraph (2) largely reproduces the present Article 211 EC.

The Treaty of Nice provides for new arrangements (see Article 4 of Protocol A): first, from 1 January 2005 (when the Commission ‘shall include one national of each of the Member States’) and, second, from the moment of the accession of the twenty-seventh Member State – ‘the number of Members of the Commission shall be less than the number of Member States’, with members to be chosen by a rotation system. Account should be taken of those changes in Part Two of the present Treaty concerning detailed provisions on the institutions.

One may wonder whether the general formulation of the Commission’s traditional role as ‘guardian of the Treaty’ means that it acquire this ‘watchdog’ role across the whole range of Union activities. It is suggested that in the detailed institutional provisions it would be possible to make more specific provisions to ring-fence its surveillance powers.

The rules on majority voting (the present Article 213 EC) and other organisational provisions belong in Part Two of this Treaty.

Article 20

1. The Court of Justice and the Court of First Instance shall collectively comprise the Union Judicature.

The Court of Justice shall be composed of one national from each Member State. Its Members shall be persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries.

The Court of First Instance shall be composed of at least one national from each Member State. Its Members shall be persons whose independence is beyond doubt and who possess the qualifications required for appointment to high judicial office in their respective countries.

The Members of the Union Judicature shall be appointed for a term of 6 years.

2. Judicial panels, and other jurisdictional bodies, may be attached to the Court of First Instance under the conditions laid down by Article X [in Part Two] of the Treaty.

3. The Union Judicature shall ensure that in the interpretation and application of this Treaty the law is observed.

4. The jurisdiction of the Union Judicature shall be subject to the detailed provisions set out in Part Two of this Treaty and in the Act concerning Economic and Social Policy.

5. The Union Judicature shall have no jurisdiction in matters falling within the scope of the Act concerning Foreign, Security and Defence Policy, and of this Treaty insofar as it relates to that Act.

Commentary

The designation ‘Union Judicature’ does not necessarily imply that the Courts have general jurisdiction over all aspects of Union activity. This designation also eases any difficulties that might be felt about the Court of First Instance’s institutional status.

Provisions on the organisation and jurisdiction of the Courts (as well as of the judicial panels provided for at Nice) belong in Part Two of this Treaty and in the Statute (which could be annexed to this Treaty, or perhaps given legislative form, with appropriate procedural safeguards).

Paragraph (3) of the Article reproduces the present Article 220 EC.

Paragraphs (4) and (5) qualify the general jurisdiction conferred by paragraph (3). The reference in Paragraph (4) to Part Two of the Treaty relates to the detailed provisions on the different heads of jurisdiction currently provided for by Articles 226 *et seq.* EC; the reference to the Act concerning Economic and Social Policy allows for special jurisdictional provisions, such as those contained in Title IV, Part Three of the EC Treaty. Paragraph (5) maintains the *status quo*, i.e. no jurisdiction, in respect of matters falling within the scope of the Act concerning Foreign, Security and

Article 21

1. The Members of the Court of Auditors shall be chosen from persons who belong or have belonged in their respective countries to external audit bodies or who are especially qualified for this office, and whose independence is beyond doubt.

2. The Court of Auditors shall carry out the audit, examining the accounts of all revenue and expenditure of the Union and bodies set up thereby, insofar as the relevant [constituent] instruments do not preclude such examination.

1. COMMENTARY

Other provisions relating to the Court of Auditors belong in Part Two of the Treaty.

Paragraph (2) is drawn from the present Articles 246 and 248(1) EC, including a potential exclusion to cover ‘bodies set up’ by the Union (as covered by the present Article 248(1) EC).⁹ The European System of Central Banks

ARTICLE 22

1. The European System of Central Banks shall be composed of the European Central Bank and the national central banks.

2. The European Central Bank shall ensure that the tasks conferred on the European System of Central Banks, in particular the definition and implementation of the monetary policy of the Union, are carried out as provided for by the Act concerning Economic and Social Policy.

COMMENTARY

The European Central Bank (ECB) is not included in the present list of institutions contained in Article 7 EC.

Other provisions relating to the European Central Bank and the European System of Central Banks belong in the Act concerning Economic and Social Policy and in the Statute (which could be annexed to this Treaty, or perhaps given legislative form, with appropriate procedural safeguards).

Since the European Investment Bank is essentially a technical body, it seems inappropriate that it be mentioned in Part One of the Constitutional Treaty.

10. Final Provisions

Article 23

The Union shall have legal personality.

In international relations, the Union shall enjoy, within the limits of the powers conferred on it by this Treaty, the legal capacity which it requires to perform its functions and to attain its objectives.

In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings.

The possession by the Member States of legal personality and capacity as subjects of international law in the fullest sense is not affected by the provisions of this Article.

Commentary

It is assumed for drafting purposes that a single Union personality will be created, replacing the separate personalities of the Communities.

The first paragraph corresponds to the present Article 281 EC (and the present Article 6, first paragraph ECSC), with the Union substituted for the relevant Community.

The second paragraph adopts the wording of Article 6, second paragraph ECSC, with the addition of a reference to the limits of the powers conferred by the Treaty. There is no corresponding provision in the EC Treaty. In its *ERTA* judgment, Case 22/70, [1971] ECR 263, the ECJ interpreted the present Article 281 EC (then Article 210) as implying that such capacity existed.

The third paragraph corresponds to the present Article 282 EC, except that the matter of representation is left to be dealt with in the annexed Acts.

THE FINAL PARAGRAPH NOTES THAT THE FOREGOING PROVISIONS ARE NOT INTENDED TO ALTER THE STATUS OF THE MEMBER STATES AS SUBJECTS OF INTERNATIONAL LAW IN THE FULLEST SENSE.

Article 24

Member States which intend to establish enhanced cooperation between themselves may make use of the Union's institutions, procedures and mechanisms, under the conditions provided for by Part Two of this Treaty and by the Act concerning Economic and Social Policy and the Act concerning Foreign, Security and Defence Policy.

COMMENTARY

The substantive and procedural provisions on enhanced cooperation belong in Part Three of this Treaty and in the relevant Acts.

ARTICLE 25

1. The government of any Member State or the Commission may submit to the Council proposals for the amendment of this Part 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 this Treaty. 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.

2. The amendment of the other Parts of this Treaty, and of the Acts and other instruments annexed to this Treaty, shall take place in accordance with the procedures there respectively laid down.

COMMENTARY

Paragraph (1) reproduces the text of the present Article 48 TEU, with the important caveat that this ‘heavily entrenched’ amendment procedure is only expressed to be applicable to Part One of the Constitutional Treaty. Whether or not the procedure should be confined to Part One is a matter of political choice.

Paragraph (2) makes explicit that the precise formulation of the amendment procedures to be followed with regard to the other Parts of the Constitutional Treaty, the annexed Acts, or other instruments annexed to the Treaty (such as the Statute of the Union Judicature or that of the European System of Central Banks and the European Central Bank) is to be found in those texts themselves. Such amendment procedures could be differentiated as between and within the various Acts and Statutes, as is presently the case under the EC Treaty.

Article 26

Any European State which respects the basic values of the Union as set out in Article 2 of this Treaty may apply to become a member of the European Union.

It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.

The conditions of admission, and the adjustments to the Treaties on which the Union is founded which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

Commentary

This article is based on existing Article 49 TEU. The first paragraph has been reformulated to take into account the provisions of the Constitutional Treaty on the “Basic values of the Union”.

Article 27

1. Any Member State may withdraw from the European Union. It shall address to the Council its notice of intention to withdraw.

2. The Council, meeting in the composition of Heads of State or Government and acting by unanimity, shall determine, after consulting the Commission and the European Parliament, the institutional adjustments to this Treaty that such withdrawal entails.

3. For the purpose of this Article, the Council, meeting in the composition of Heads of State or Government, and the Commission shall act without taking into account the vote of the nationals of the withdrawing Member State. The European Parliament shall act without taking into account the position of the Members of Parliament elected in that State.

Commentary

The wording of the proposed Article 27(1) makes it explicit that a Member State does not need “permission” to withdraw from the Union.

Given that the institutional rearrangements entailed by withdrawal of a Member State should not require ratification by the remaining Member States, it is felt that the political blessing of the Heads of State or Government of the latter might be appropriate.

The involvement of the European Parliament could take different forms. For instance, the assent of the Parliament might be required, as under the accession procedure. This would provide an additional element of democratic legitimacy, given the absence of ratification by the remaining Member States. Alternatively, as provided for in the proposed text of Article 27, the European Parliament could simply be consulted.

Article 28

Nothing in the remaining Parts of this Constitutional Treaty, nor in the Act concerning Economic and Social Policy or in the Act concerning Foreign, Security and Defence Policy, shall derogate from the provisions of the Constitution of the European Union as laid down by this Part of this Treaty.

Commentary

This provision is designed to ensure the primacy of the provisions of Part One of the Constitutional Treaty over the remainder of the Treaty and the Annexes thereto. It makes clear, in particular, that any powers conferred on the Union under the annexed Acts may not be used to extend the scope of Union competence as defined by the Constitution.

PART TWO

Institutions and Procedures

TITLE I

THE INSTITUTIONS

Chapter 1: The European Council

[Remainder of Article 4 TEU and possible new provisions]

Chapter 2: The European Parliament

[Articles 189 – 201 EC, as amended]

Chapter 3: The Council

[Articles 202 – 210 EC, as amended]

Chapter 4: The Commission

[Articles 211 – 219 EC, as amended]

Chapter 5: The Court of Justice

[Articles 220 – 245 EC, as amended]

Chapter 6: The Court of Auditors

[Articles 246 – 248 EC, as amended]

TITLE II

PROVISIONS COMMON TO SEVERAL INSTITUTIONS

[Including the co-decision procedure, presently found in Article 251 EC, and the procedure of Article 7 TEU; see, generally, Articles 249 – 256 EC, as amended; including also certain provisions presently found in Part Six of the EC Treaty (General and Final Provisions), e.g. Article 300 EC, as amended.]

TITLE III

OTHER UNION BODIES

Chapter 1: the Economic and Social Committee

[Articles 257 – 262 EC, as amended]

Chapter 2: The Committee of the Regions

[Articles 263 – 265 EC, as amended]

Chapter 3: The European Investment Bank

[Articles 266 – 267 EC, as amended]

Title IV

Financial Provisions

[ARTICLES 268 – 280 EC, AS AMENDED]

PART THREE

ENHANCED COOPERATION

[Title VII TEU, as amended]

DRAFT

AMENDING TREATY

INTRODUCTION

The European Union is currently founded upon a diverse collection of instruments. The principal texts are: 1) the EC Treaty (which has been substantially amended by the Single European Act, the Treaty on European Union, the Treaty of Amsterdam, and the Treaty of Nice); and 2) the Treaty on European Union (which has been substantially amended by the Treaty of Amsterdam, and the Treaty of Nice). Additional instruments include: the various Acts of Accession; other international agreements such as the Act on direct elections to the European Parliament; and the numerous protocols and declarations annexed to the EC and EU Treaties.

As here proposed, the primary legal instruments of the European Union would consist of a Constitutional Treaty with two annexed Acts (the first concerning Economic and Social Policy, the second concerning Foreign, Security and Defence Policy). This reorganisation exercise would, in particular, entail: a more transparent and accessible description of the Union's activities and competences; elimination of the distinction between the European Union and the European Community, thus creating a truly single institutional structure with a single legal personality; partial depillarisation, by subsuming the existing first and third pillars (and perhaps also the EURATOM Treaty) into the new Act concerning Economic and Social Policy, whilst retaining the separate identity and legal characteristics of the second pillar within the framework of the Act concerning Foreign, Security and Defence Policy.

The purpose of the Amending Treaty is to effect the necessary transition from the current to the new constitutional arrangements. The recommended method is as follows:

- establish the framework of the new arrangements, i.e. the basic template of a Constitutional Treaty and two annexed Acts;
- reorganise the existing Treaties, so that provisions which are being retained (with or without amendment) will be slotted into the appropriate section of the new framework, whilst others are repealed (with or without replacement); and

- bolt together the new sections of text and the reorganised elements of the existing Treaties.

The Constitutional Treaty and two annexed Acts which emerge from the transition process would thus be composite instruments – combining existing Treaty provisions (albeit reshuffled, and in some cases amended) with entirely new elements (the “Constitution of the European Union” in Part One). In some ways, the methodology is similar to that of the Maastricht Treaty on European Union, which both *amended* individual provisions of the pre-existing EC Treaty and *incorporated* the three Community Treaties into the broader legal architecture of the new European Union. However, the present recommendations are more far-reaching, since they would both *amend* provisions of the existing Treaties and *insert* them, in juxtaposition with new text, into the framework of the new Constitutional Treaty and its two annexed Acts.

Would it not be simpler to repeal the existing legal instruments and rewrite afresh the entire Constitutional Treaty and its Acts?

On its face, the proposed Amending Treaty might seem unnecessarily complicated: adding yet another layer of amendments, repeals, replacements and cross-references to an already complex body of legal instruments. It might thus seem more straightforward to start with a clean slate: ratifying a single unified text which would reproduce those sections of the existing Treaties to be retained, together with the new provisions; then repeal in their entirety the EC Treaty, the Treaty on European Union and all the other related agreements, protocols and declarations.

However, the proposed Amending Treaty is intended to address particular concerns liable to be raised about the reorganisation exercise itself, i.e. that it should avoid unnecessary re-negotiation of existing Treaty obligations at the Convention and Intergovernmental Conference.

Insofar as reorganisation will entail the introduction of new Treaty elements, these must of course figure in their entirety within the Amending Treaty, and full negotiation is to be expected. This is true, in particular, of the proposed Part One of the Constitutional Treaty comprising the “Constitution of the European Union”.

However, reorganisation will also leave substantial sections of the existing Treaties untouched, or subject to purely cosmetic alterations (such as replacing references to the “Community” with references to the “Union”). This is true, for example, of most of the substantive provisions contained in the EC Treaty, Title VI TEU (on police and judicial cooperation in criminal matters), and Title V TEU (on common foreign and security policy). In these cases, re-negotiation is legally unnecessary.

The proposed Amending Treaty, therefore, allows for incorporation by reference into the new constitutional architecture of all those provisions which are not either completely new or the subject of substantial amendment.

Does this mean that we compromise the concern for simplification expressed by the European Council in its Laeken Declaration?

No: the proposed Amending Treaty is designed also to address the Laeken concern for simplification. The latter objective will be achieved by providing an official consolidated text of the new constitutional arrangements.

A consolidated version of the Constitutional Treaty and its two Acts would be annexed to the Amending Treaty. Article D of the Amending Treaty provides that this consolidated text would have legal effect from the date of entry into force of the Amending Treaty. The result would be to fulfil the Laeken remit of simplification.

This also means that the Amending Treaty is essentially a “procedural” device which will effect the transition from the existing Treaties to the new constitutional arrangements. After this transition has taken place, the Amending Treaty should become of “historical” interest only – much like the Treaty of Amsterdam.

Tables and Commentary

Tables have been provided to help illustrate the process of transition envisaged by the Amending Treaty.

- Table I highlights the legal provenance of the different elements of the Constitutional Treaty.

- Table II demonstrates the treatment accorded to the elements of the existing EC Treaty and Treaty on European Union under the proposed reorganisation.

A commentary is provided only on the individual Articles of Title I of the draft Amending Treaty (Articles A to D), which relate to the reorganisation of the Treaties. The remaining Titles, respectively incorporating the new text of Part One of the Constitutional Treaty, and amending and incorporating relevant elements of the existing Treaties, are thought to be self-explanatory.

Table I - Elements of the Constitutional Treaty and their legal provenance

Constitutional Treaty	Legal Provenance
<i>Constitutional Treaty</i>	
Part One: Constitution of the European Union	Newly drafted. Will repeal and replace certain provisions of the EC Treaty and TEU.
Part Two: Institutions and Procedures	Part Five of the EC Treaty; subject to amendments or repeals, and certain provisions of Part Six of the EC Treaty.
Part Three: Enhanced Cooperation	Title VII TEU; subject to amendments or repeals.

<u>Act concerning Social and Economic Policy</u>	<p>EC Treaty: a) save for Part Five; and b) subject to amendments/revokes.</p> <p>Title VI TEU; subject to amendments or revokes.</p>
<u>Act concerning Foreign, Security and Defence Policy</u>	Title V TEU; subject to amendments or revokes.

Table II - Treatment accorded to the elements of the existing EC Treaty and Treaty on European Union under the proposed reorganisation

Current Treaty Provisions	Proposed Treatment
<p><u>EC Treaty (as amended)</u></p> <p>Part One: Principles</p> <p>Part Two: Union Citizenship</p> <p>Part Three: Community Policies</p> <p>Part Four: Association of Overseas Countries and Territories</p> <p>Part Five: Community Institutions</p>	<p>Certain provisions repealed and replaced with newly drafted provisions contained in Part One of the Constitutional Treaty.</p> <p>Otherwise incorporated (with amendments) into the Act concerning Economic and Social Policy.</p> <p>Certain provisions repealed and replaced with newly drafted provisions contained in Part One of the Constitutional Treaty.</p> <p>Otherwise incorporated (with amendments) into the Act concerning Social and Economic Policy.</p> <p>Incorporated (with amendments) into Act concerning Social and Economic Policy.</p> <p>Incorporated (with amendments) into Act concerning Social and Economic Policy.</p> <p>Incorporated (with amendments) into Part Two of the Constitutional Treaty.</p>

<p>Part Six: General and Final Provisions</p> <p>Final Provisions</p>	<p>Certain provisions repealed and replaced with newly drafted provisions contained in Constitutional Treaty.</p> <p>Otherwise incorporated (with amendments) into Act concerning Social and Economic Policy.</p>
<p><u>TEU (as amended)</u></p> <p>Title I: Common Provisions</p> <p>Title II: Amendments to EC Treaty</p> <p>Title III: Amendments to ECSC</p> <p>Title IV: Amendments to EURATOM</p> <p>Title V: CFSP</p> <p>Title VI: PJCCM</p>	<p>Repealed and replaced with newly drafted provisions contained in the Constitutional Treaty.</p> <p>Still in force – but “invisible”.</p> <p>Now defunct.</p> <p>Still in force – but “invisible”.</p> <p>Incorporated (with amendments) into the Act concerning Foreign, Security and Defence Policy.</p> <p>Incorporated (with amendments) into the Act concerning Social and Economic Policy.</p>

Title VII: Closer Cooperation	Incorporated (with amendments) into Part Three of the Constitutional Treaty.
Title VIII: Final Provisions	Repealed and replaced with newly drafted provisions contained in the Constitutional Treaty.

Text of the Draft Treaty

TITLE I

REORGANISATION OF THE TREATIES

ARTICLE A

The Treaties on which the European Union is founded shall be amended within the framework of a Constitutional Treaty of the European Union, hereinafter called “the Constitutional Treaty”, in accordance with the provisions of this Treaty.

Commentary

This provision sets out the basic idea of the Amending Treaty as described above: to establish the Constitutional Treaty as the new legal framework of the European Union, the contents of which is to be provided both by amending and reorganising provisions of the existing Treaties, and by introducing new provisions dealing (in particular) with the basic nature, values and competences of the Union.

ARTICLE B

The Constitutional Treaty shall be composed of the following elements:

(1) a Part One, as provided for by Title II of this Treaty;

(2) a Part Two, which shall comprise the provisions of Part Five of the Treaty establishing the European Community, as amended by Title IV of this Treaty;

(3) a Part Three, which shall comprise the provisions of Title VII of the Treaty on European Union, as amended by Title III of this Treaty;

(4) an Act concerning Economic and Social Policy, which shall be annexed to the Constitutional Treaty and which shall comprise:

- the provisions of the Treaty establishing the European Community and of the Protocols thereto, other than the provisions contained in Part Five of that Treaty or repealed by this Treaty, as amended by Title IV of this Treaty; and

- the provisions of Title VI of the Treaty on European Union, as amended by Title III of this Treaty;

(5) an Act concerning Foreign, Security and Defence Policy, which shall be annexed to the Constitutional Treaty and which shall comprise the provisions of Title V of the Treaty on European Union, other than those repealed by this Treaty, as amended by Title III of this Treaty;

[(6) An Act concerning the Peaceful Use of Nuclear Energy, which shall be annexed to the Constitutional Treaty and which shall comprise the provisions of the Treaty establishing the European Atomic Energy Community and of the Protocols thereto, other than the provisions repealed by this Treaty, as amended by Title V of this Treaty.]

Commentary

This provision describes the basic structure of the Constitutional Treaty, and indicates the sources from which the detailed contents of its individual Parts are to be constructed.

Part One of the Constitutional Treaty will be the “Constitution of the European Union”. This is made up of newly drafted provisions: some entirely novel; others derived from provisions contained in the existing Treaties which would have to be repealed. The provisions of Part One must be set out in the Amending Treaty in their entirety.

Part Two of the Constitutional Treaty will concern “Institutions and Procedures”. It will consist of Part V of the existing EC Treaty, incorporated into the Constitutional Treaty by reference, and subject to various amendments/repeals. Part Three of the Constitutional Treaty will contain the detailed provisions on Enhanced Cooperation. In similar fashion, it will consist of Title VII of the existing TEU, incorporated into the Constitutional Treaty, subject to various amendments/repeals.

The first Annex (Act concerning Economic and Social Policy) will consist of the reorganised provisions of the current EC Treaty – save for those sections (for example, on institutions and procedures) which have been transferred into main body of the Constitutional Treaty; and subject to appropriate amendments/repeals. Furthermore, the Act concerning Economic and Social Policy will also contain the current Title VI TEU on police and judicial cooperation in criminal matters; again subject to appropriate amendments/repeals.

The second Annex (Act concerning Foreign, Security and Defence Policy) will consist of the reorganised provisions of the current Title V TEU on common foreign and security policy; subject to appropriate amendments/repeals.

[EURATOM]

ARTICLE C

*The reorganisation pursuant to this Treaty of the Treaties on which the Union is founded shall maintain the *acquis communautaire* in full but shall not in itself extend the scope of application of the *acquis communautaire* more widely than resulted from those Treaties prior to their reorganisation.*

Commentary

The *acquis communautaire* is notoriously difficult to define with any precision. However, its core lies in those unwritten principles developed by the Court of Justice in its interpretation of Community law, such as direct effect, supremacy, effective judicial protection etc. This provision is

intended to address two issues concerning the *acquis communautaire* raised by the reorganisation exercise.

The first is to ensure that the reorganisation exercise will not *in itself* have the effect of diluting the *acquis communautaire*: for example, by calling into question the continuing application of the principles of direct effect and supremacy to those sections of the present EC Treaty which are to be incorporated into the new legal framework of the Constitutional Treaty and the Act concerning Economic and Social Policy.

The second is to ensure that the re-organisation exercise will not *in itself* be understood and/or perceived as having extended the *acquis communautaire*: for instance, by rendering the principles of direct effect and supremacy applicable to the Act concerning Foreign, Security and Defence Policy. Article C sends a clear signal that the mere fact of reorganising the Treaties must not be understood as allowing any implicit expansion of the scope of Union law.

Article D

The consolidated text of the Constitutional Treaty which is annexed to this Treaty shall have legal effect from the date of entry into force of this Treaty.

Commentary

As described above, this provision is intended to ensure that the reorganisation process will result in an official consolidated version of the Constitutional Treaty and its two annexed Acts.

TITLE II

PART ONE OF THE CONSTITUTIONAL TREATY

ARTICLE E

The title and provisions of Part One of the Constitutional Treaty shall be as follows:

“PART ONE

Constitution of the European Union”

etc.

TITLE III

PROVISIONS AMENDING THE TREATY ON EUROPEAN UNION

Article F

The Treaty on European Union shall be amended in accordance with the provisions of this Title.

Article G

The Preamble and Titles I, IV and VIII of the Treaty shall be repealed.

Article H

Title V of the Treaty shall be amended in accordance with the provisions of this Article and shall be annexed to the Constitutional Treaty.

1. The title of Title V shall be replaced by the following:

“ACT CONCERNING FOREIGN, SECURITY AND DEFENCE POLICY”.

2. The Articles of Title V shall be renumbered as Articles of the Act concerning Foreign, Security and Defence Policy, in accordance with the table of equivalence set out in Annex [-] to this Treaty, which shall form an integral part thereof.

etc.

Article I

Title VI of the Treaty shall be amended in accordance with the provisions of this Article and shall be incorporated into the Act concerning Economic and Social Policy annexed to the Constitutional Treaty.

etc.

Article J

Title VII of the Treaty shall be amended in accordance with the provisions of this Article and shall be incorporated into the Constitutional Treaty as Part Three of that Treaty.

1. The title of Title VII shall be replaced by the following:

**“PART THREE
Enhanced cooperation”**

2. The provisions of Title VII shall be renumbered as Articles of the Constitutional Treaty, in accordance with the table of equivalence set out in Annex [-] to this Treaty, which shall form an integral part thereof.

etc.

TITLE IV

PROVISIONS AMENDING THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY

Article K

The Treaty establishing the European Community shall be amended in accordance with the provisions of this Title.

Article L

Throughout the Treaty the terms “European Community” and “Community” shall be replaced, respectively, by the terms “European Union” and “Union”.

Article M

Part Five of the Treaty shall be amended in accordance with the provisions of this Article and shall be incorporated into the Constitutional Treaty as Part Two of that Treaty.

1. The title of Part Five shall be replaced by the following:

“PART TWO Institutions and Procedures”

2. The Articles of Part Five, as amended by this Article, shall be renumbered as Articles of the Constitutional Treaty, in accordance with the table of equivalence set out in Annex [-] to this Treaty, which shall form an integral part thereof.

3. The title of Title I of Part Five shall be replaced by the following:

“Title I
Institutions of the Union”

4. The title and provisions of Chapter I of Title I of Part Five shall be as follows:

“The European Council”

etc.

Article N

The Treaty, other than its Part Five, shall be amended in accordance with the provisions of this Article and shall be annexed to the Constitutional Treaty.

1. The title of the Treaty shall be replaced by the following:

“ACT CONCERNING ECONOMIC AND SOCIAL POLICY”.

2. The articles, titles and sections of the Treaty, as amended by this Article, shall be renumbered as articles, titles and sections of the Act concerning Economic and Social Policy in accordance with the table of equivalence set out in Annex [-] to this Treaty, which shall form an integral part thereof.

3. The Preamble of the Treaty shall be repealed.

4. Article 1 of the Treaty shall be repealed.

etc.

**[TITLE V
PROVISIONS AMENDING THE TREATY ESTABLISHING THE EUROPEAN ATOMIC
ENERGY COMMUNITY**

Article O

The Treaty establishing the European Atomic Energy Community shall be amended in accordance with the provisions of this Article and annexed to the Constitutional Treaty.

...]

**[TITLE VI
FINAL PROVISIONS**

Article P

Following the completion of the procedure laid down by Article 48 TEU, this Treaty shall be brought into force through the signature, by or on behalf of the Heads of State or Government of the Member States, of the Proclamation of the Constitutional Treaty.

...]